



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 397 OF 2013

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

v

AGRICULTURAL SOCIETY OF KENYA ELDORET.....RESPONDENT

JUDGMENT

1. The Kenya National Private Security Workers Union (Union) sued the Agricultural Society of Kenya Eldoret (Respondent) on 14 November 2013 alleging that the Respondent had refused to pay Michael Etapar Erika (Grievant) his terminal benefits.
2. The Union sought several orders among them that the Grievant's dismissal be reduced to normal termination with payment of terminal benefits, salary arrears and compensation.
3. The Respondent filed a Response on 20 November 2013, and witness statements and further documents on 7 January 2014.
4. The Cause was heard on 5 May 2015, and the Union filed its submissions on 12 May 2015 while the Respondent filed its submissions on 28 May 2015.
5. The Court has considered the submissions and identified issues arising for determination as, *whether the dismissal of the Claimant was unfair and whether the Grievant is entitled to the remedies sought.*

Whether dismissal was unfair

Procedural fairness

6. The Grievant was dismissed through a letter dated 7 September 2006. The dismissal letter gave the reason for dismissal as negligence/complicity in theft and being charged with a criminal offence.
7. In testimony, the Grievant stated that he was suspended for about 6 months before dismissal and that he was not heard before the decision to dismiss him was taken.
8. The primary statutory framework governing employment at the time of the Grievant's dismissal were the Employment Act, cap. 226 (repealed) and the Trade Disputes Act (repealed).
9. The Employment Act, cap. 226 (repealed) did not provide for a right to a hearing before dismissal and it is of no assistance to the Grievant.

10. The Trade Disputes Act (repealed) was huge on reporting and resolution of trade disputes where Unions were involved. My reading of it has not revealed any right to a hearing granted to an employee before dismissal, and the Union did not draw my attention to any such provision.

11. However, the Act provided for Unions and employers to enter into recognition agreements and collective bargaining agreements. The rights or protections accruing to employees would therefore be encapsulated in either of these documents as contractual entitlements.

12. The Union did not produce any contractual document (recognition agreement or collective bargaining agreement) requiring a hearing before dismissal. But the Respondent produced a collective bargaining agreement with the Kenya Union of Commercial Food and Allied Workers. This collective bargaining agreement did not grant an employee a right to a hearing at the material time.

13. The Union produced the Grievant's letter of appointment. It did not provide for a hearing.

14. The Court therefore finds that the Grievant's testimony that he was not granted a hearing before dismissal is not supported by contract or statute.

Substantive fairness

15. It was open to Unions under the regime established by the Trade Disputes Act (repealed) to report trade disputes to the Minister. In the case at hand, the Union reported a dispute but the parties could not agree and a Certificate of Disagreement was issued on 17 November 2010.

16. Under the Employment Act, cap. 226 and Trade Disputes Act (both repealed), an employee could challenge the lawfulness or justifiability of a dismissal.

17. The reason given for the Grievant's dismissal has already been referred to.

18. According to Grievant, he was not negligent or complicit in the theft because he was charged and thereafter acquitted under section 215 of the Criminal Procedure Code. He therefore sought reinstatement.

19. He also stated that he was stationed at the gates of the showground and not the offices which were a distance away. The compound, he stated, was on about 300 acres.

20. The Respondent's witness, a gardener stated that on the material night, he locked the offices after a delivery had been made and that at about 3.00 am, the Grievant woke him up to report breakage into the offices. When they went to check, they found the padlock cut and some items stolen.

21. According to the witness, there were 2 guards on night duty and one was to man the gate and the other to patrol the compound. There were 5 gates in total.

22. In cross examination, the witness admitted that the compound was huge and that he stayed about 4kms away from the offices and that the security officer at the time disappeared after the theft and did not testify during the criminal trial.

23. From the testimony of the Grievant and Respondent's witness, it is not disputed that there were only 2 guards on duty at night and that the showground covered a vast area. It is also not disputed that there were 5 gates and only 1 was manned at night and it is the Grievant who raised the alarm at about 3.00am.

24. It also emerged that the security officer who was in charge of the guards disappeared after the theft. These pieces of evidence are telling and suggest that other people could have had easy access to (broken) the offices without being noticed at night.

25. It is also probable that the security officer who disappeared after the theft may have been involved.

26. The Court was not informed whether he stayed within the grounds or not.

27. The Court therefore reaches the conclusion that the Respondent had no justifiable reasons to summarily dismiss the Grievant.

Remedies/entitlements on dismissal

28. The Union did not particularize or give details of the terminal benefits sought in the pleadings. The details were only given in the submissions.

29. This is a practice which must be discouraged especially where Union officials are representing their members. A lay person may be forgiven.

30. Because some of the benefits flow either out of contractual or statutory provisions, the Court will consider them.

6 months wages during suspension

31. It is not disputed that the Grievant was on suspension for 6 months. He computed the wages as Kshs 18,000/-.

32. The Respondent produced a copy of the Code of Regulations. Regulation 6.1(b)(ii) gave authority for suspension without pay where an employee is convicted of a criminal offence.

33. The Grievant was acquitted and the Court finds he is entitled to withheld wages during the suspension.

House allowance

34. Clause 2 of the Grievant's appointment letter provided that he would be given housing or paid 30% of basic wage as house allowance. The collective bargaining agreement with the Kenya Union of Commercial Food & Allied Workers provided for 34% of basic wage as house allowance.

35. The Grievant's testimony that he was not getting house allowance was not challenged at all. But he did not disclose his wage progression to enable the Court determine the unpaid house allowance.

36. The Court cannot therefore grant this relief.

Compensation

37. Compensation equivalent upto 12 months wages was an appropriate remedy under the Trade Disputes Act (repealed). The Grievant stated that he was earning Kshs 6,500/- at time of dismissal.

38. The Grievant served the Respondent for about 7 years and considering this factor, the Court would award him the equivalent of 7 months wages assessed as Kshs 45,500/- as compensation.

Normal Overtime/and for public holidays

39. No evidential foundation for these heads of claim was laid and they are therefore untenable.

Conclusion and Orders

40. The Court finds and holds that the dismissal of the Grievant was not justified and awards him and orders the Respondent to pay him

a. 6 months wages(suspension) Kshs 18,000/

