



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 352 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 20th August, 2015)

ABDI HALAKE GARAMBODA.....CLAIMANT

VERSUS

FIDELITY SECURITY SERVICES LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Abdi Halake Garamboda filed his Memorandum of Claim on 2/4/2012 through the firm of Namada and Company Advocates alleging unfair termination and non-payment of terminal dues which he now seeks.
2. The Claimant's case is that he was employed by the Respondent as a guard from 28/8/1993 till 24/4/2011 wherein he worked satisfactorily earning a salary of 9,585/= per month. He avers that on 13/1/2011, he was dismissed from employment without any explanation when he raised question about his service after the Respondents Manager had asked him to sign a new contract without addressing the issue of service for the entire period that he had worked for the Respondent.
3. The Claimant therefore avers that his dismissal was unlawful, unfair and inhumane since the Respondent did not comply with the mandatory provisions of Labour Laws and principles of natural justice. He also avers that the Respondent refused to pay him his terminal dues amounting to 15,728/= plus compensation for unlawful termination being 12 months salary.
4. The Claimant prays this court for a declaration that the termination was unfair and unlawful and that the court orders the Respondent to compensate him as prayed.
5. The Claimant exhibited his payslip for March 2010 as exhibit II showing his gross pay as 12,377/= inclusive of overtime of 4,573/=.
6. In cross examination by Counsel for Respondent, the Claimant told court that he was sacked 2 times – 1st on 24/4/2010 and then in June. This was after the Respondent alleged that he had absconded duty. He worked again until he was sacked in March 2011 and this was after he questioned the Respondents decision to allocate him a new number without taking into consideration the length of time he had previously worked. He denies absconding duty.
7. The Respondent filed their reply to the Memorandum of Claim on 3/10/2012 through their Operations Manager. The Respondent also called witness, their Operations Manager who stated that the Claimant worked with Respondent from 1993 and the relationship became sore in 2010.

The Claimant was then dismissed after he absconded duty when he had been deployed at Giro Bank.

8. He then underwent the disciplinary process of the company and was dismissed. He then appealed and was reinstated but on new terms. He continued to work for 1 year. In March 2011, he was dismissed against after being absent from duty for over 14 days.
9. In cross examination, the RW1 told court that he was not present when Claimant underwent disciplinary processes. He says that the Claimant was not given a hearing as he was absent. He also stated that they don't have records of handover before the 1st dismissal. He also stated that he didn't have evidence to contradict the Claimant's evidence. He stated that he has no evidence that the termination letter was served on the Claimant.
10. Upon hearing the evidence of both parties and upon considering the submissions presented before court, the issues for determination are as follows:
 1. ***Whether the Claimant was dismissed or absconded duty.***
 2. ***Whether the termination (dismissal) was fair and justified.***
 3. ***If the Claimant is entitled to any remedies sought.***
11. There is no denial that the Claimant was employed by the Respondent. This is evidenced from the payslip displayed by the Claimant. The period of engagement is however not clear as no appointment letter was issued to him.
12. The Claimant avers that he was employed from 1993 to March 2011. This period of work is acknowledged by the Respondents who have displayed 2 appointment letters covering the said period. The 1st appointment letter is dated 28/8/1993. The mode of termination of this engagement is not clear. The 2nd appointment letter is dated 21/6/2010 and talked of re-engagement and it is this one that the Claimant avers was not proper as he had been working since 1993 and that period was ignored by the Respondent.
13. The termination letter sent to the Claimant avers that he absconded duty but the Respondent in paragraph 5 of their reply to the claim avers that he was summarily dismissed for leaving his duty station unattended. The same letter alleges he absconded work for 7 days. The Claimant on his part has averred that he was dismissed when he raised the issue of new contract terms without consideration of his years of service.
14. The Respondents in their evidence in court were not able to display the work attendance book to show that the Claimant was away from his duty station. The Claimant also stated that he was given a dismissal letter at time of dismissal stating he had absconded duty which was not true. Without any evidence emanating from the work attendance sheet that the Claimant absconded duty, it is apparent that he was dismissed from duty by the Respondents.
15. The next question is whether this dismissal was fair and justified. The Claimant has averred that the dismissal was unfair as he was not given any hearing. The Respondents agreed that there was no hearing as the Claimant had absconded duty.
16. The Claimant was indeed entitled to a hearing before being served with a letter of dismissal. the hearing envisaged is that set out in Section 41 of Employment Act 2007 which states as follows:
 - “(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***
 - (2) Notwithstanding any other provision of this Part, an employer shall, before***

terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

17. The Claimant was also a member of a trade union and his union was also not involved. I therefore find that the termination of Claimant was unfair in terms of Section 45 (1) and (2) of Employment Act 2007 which states:

1. *No employer shall terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove:*
 - a. *that the reason for the termination is valid;*
 - b. *that the reason for the termination is a fair reason:-*
 - i. *related to the employee’s conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
 - c. *that the employment was terminated in accordance with fair procedure.*

18. In terms of remedies sought, I find that Claimant is not entitled to service pay as he was a member of and contributor to NSSF and Section 35 of Employment Act 2007 forbids payment of service pay to members of NSSF.

19. I however find for Claimant and award him:

1. *1 month salary in lieu of notice being = 9,585/=*
 2. *12 months compensation for unlawful termination being = 12 x 9,585/= = 115,020/=*
- TOTAL = 124,605/=**
3. *Claimant be issued with a Certificate of Service.*
 4. *Respondent to pay costs of this suit.*

It is so ordered.

Read in open Court this 20th day of August, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

Mulaku holding brief for Namada for Claimant