



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2361 OF 2012

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

BARRACK OTIENO ANYIKOCLAIMANT

VERSUS

TELKOM KENYA LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Barrack Anyiko Otieno filed his Memorandum of Claim on 21/11/2012 through the firm of Langat & Company Advocates claiming damages for unfair termination. It is the claimant's case that on 5/3/2004, he was employed by the Respondent as a Technician (Air Plant), as per his employment letter Appendix 1. His salary was 53,268/= at the time of his termination.
2. It is the Claimant's case that on 22/2/2012 he had access to the 3rd floor of Ex Telecoms House by use of a key and a pass. He got the key from a Security Officer and signed for it. The purpose was to look for a monitor (computer screen). He wanted to use it for testing purposes. He went and checked the monitor on 3rd floor and didn't find it and then returned the key to the Security Officer and left.
3. On 27/2/2012 he was on duty at the Respondents Headquarters. He then went back to this duty station at 6 pm and went upto his office on 4th floor and took away his fan which he had been using and had brought it for repair. He says he had signed in this fan at the security officer in mid-January. A security officer escorted him upto his office and he picked the fan and on exiting, he signed out.
4. On 6/3/2012 however he was served with a letter of gross misconduct by the Secretary of the Chief IT Officer. He made a reply to this letter and gave it to the Secretary on 7/3/2012. On the same day, he was called by the said Secretary and told to go to 1st floor for a disciplinary committee hearing. He went as directed. On this day he met the Company Secretary and a representative of the HR Team – a Mrs. Ndirangu. In the room, the Company Secretary informed him that the Management had decided to terminate his services and she gave him a letter of termination. He signed for this letter.
5. He appealed this decision through his Union. The appeal was dismissed.
6. He then came to court seeking remedies as enumerated in his Memorandum of Claim. In cross examination, the Claimant avers that he worked for the Respondent for 8 years. He admits he accessed the 2nd floor on 22/2/2012 where his office was and that he had authority to do so.

7. He was in the IT Support System then. He also indicated that they were moving furniture to other offices and he suspected that the monitor was on 3rd floor. The Claimant also avers that he had authority to store his personal items in his office. He indicates that he took less than 1 minute to pick his fan in the office. He also indicated that he was not given 48 hours to respond to the allegations against him as per staff rules.
8. The Respondents filed their Response to the claim on 27/2/2013 through the firm of Mbabu & Company Advocates. They also called 2 witnesses in court. The base of their response is that the Claimant worked for Respondents but was dismissed after investigations found him guilty of cutting some data outlets from the offices on 3rd and 4th floor of Ex Telecoms building. That after the findings of the investigations he was given a show cause letter to which he responded to in writing. A review of his defence was found to be unsatisfactory. That a disciplinary meeting was convened and he was called and heard and the case reviewed. A decision was then made to terminate him.
9. It is the Respondents position that the computerized locks showed that the Claimant accessed the 2 floors and he explained why he went to the said floors but his explanation was not consistent with facts on the ground as the floors did not store computers but furniture.
10. The Respondents annexed minutes of the alleged disciplinary hearing at page 37 of their response but they aver that the Claimant was to come with his witness but he stated that his witness was out of the country.
11. In cross examination, the witness No. 1 stated that a decision to terminate the Claimant was made soon after the meeting. The witness also stated that the Claimant did not confess to have cut the data cables. The witness also explained that another person Abraham Wata also entered the office on 28/2/2012 but his name is not indicated on the schedule.
12. The second witness is the Security Officer who discovered the data cables were missing and he reported the matter to the CID officers at the building. The witness however avers that he didn't attend the disciplinary meeting.
13. Having considered the evidence of both parties and having considered the submissions thereto, the issues for consideration are as follows:
 1. ***Whether there were valid reasons to terminate the Claimant's services.***
 2. ***Whether due process was considered before the Claimant was terminated.***
 3. ***Whether the Claimant is entitled to the remedies sought.***
14. On the 1st issue, the reason given by the Respondent for terminating the Claimant's services as per the termination letter is gross misconduct, being that he had cut some data outlets from 3rd and 4th floors of the Respondents premises. This, the Respondents were saying is theft of their cables. This reason if proved, would amount to gross misconduct as stipulated under Section 44 (4) of Employment Act 2007 which lists acts which amount to gross misconduct. Some investigations were done including investigations by the police. No criminal charges were preferred against the Claimant. The witness who gave evidence for the Respondent also admitted that another person one Abraham Wata had accessed the said floors during the same period.
15. The Security officers who were present when the Claimant accessed the floors where the data cables were cut did not state that they saw him do the act nor did they see him carry away the data cables.
16. The Respondents assertion that the Claimant committed the act alleged is therefore based on suspicion and is not a reason established that could warrant termination of the Claimant.
17. Other than the lack of proper reason to terminate the Claimant, the Claimant was subjected to

some form of disciplinary hearing as per the minutes annexed by the Respondent as Annex 4. The meeting took place on 7/3/2012 and took a record of 15 minutes. They are signed by 2 people who apparently attended but the Claimant never signed them.

18. The Claimant's position is that they are a sham as no hearing ever took place. The Claimant had been summoned the previous evening to attend this meeting the next morning. He avers that this is contrary to the Respondents HR Policy which requires 48 hours for such a hearing. The Respondents did not deny this fact in their response.

19. The hearing took place if at all on 7/3/2012 and the minutes indicate that the Claimant didn't appear with his witness as the witness was out of the country. This was a good reason to postpone the hearing but the Respondents opted to proceed with it.

20. It is apparent that the disciplinary hearing if any was flawed. Due process was not followed as expected under 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.”

21. It is therefore this court's finding that the Claimant's termination was unfair and unjustified in terms of Section 45 (1) & (2) of Employment Act 2007 which states as follows:

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.*

22. Having found as above, I find for Claimant and award him:

1. *1 month salary in lieu of notice being = 53,268/=*
2. *12 months salary as compensation for unlawful termination being = 53,268 x 12 = 639,216*

TOTAL = 692,484/=

3. *Claimant shall also be issued with a Certificate of Service.*
4. *Respondent will meet costs of this suit.*

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Ngunjiri holding brief for Mbabu for Respondent

Mabonga holding brief for Khasiani for Claimant