



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1337 OF 2010

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2015)

BETHWEL HOPKINS MUKOLOWE ORIKO.....CLAIMANT

VERSUS

K.K. SECURITY COMPANY LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed his Amended Memorandum of Claim on 13/4/2012 through the firm of Gakoi Maina and Company Advocates claiming unlawful termination by the Respondents.
2. It is the Claimant's case that on 1/11/2008, he was employed by the Respondent as a Dog Handler as per annexed Appendix 1 – his payslip. He worked for Respondent for 2 years. On 17/5/2009, he was arrested with 2 others at 3 am and told to go and write a statement at Runda police station. He was taken to police station and released after a day and then charged before Kibera Court with the offence of stealing and in the alternative being negligent causing theft to occur. This was a Friday and he was released on bond by the Court.
3. He reported to work on Monday and was now suspended from work and told to report back on 8/6/2009. While on suspension he kept reporting to work. The criminal case was heard and he was acquitted under Section 202 of CPC.
4. The charges were dropped. He then reported back to his employer seeking to have the suspension lifted but his file could not be traced so he presumed he had been dismissed. The case had ended on 10/7/2010. While on suspension the Claimant stated that he was not paid ½ salary as expected. He was not heard at all so he assumed he was contractually terminated without given a chance to explain himself. At the time he was earning 12,314/= gross. He now filed this case seeking to be paid his terminal dues.
5. In cross examination the Claimant stated that he has not been issued with a termination letter.
6. The Respondents filed a Memorandum of Reply to this claim on 24/4/2012 through the firm of M/s Kantai & Company Advocates. They denied all the allegations by the Claimant and is their position that the position the Claimant occupied required utmost trust. However after Claimant was implicated in criminal activities and charged in court, they suspended him for a specific period. That the Claimant reported back to them. In their position, the Claimant has never been terminated to date.
7. I have considered all evidence from both parties and their respective submissions, the issues for

determination are as follows:

1. ***Whether Claimant was terminated by Respondent.***
 2. ***If so whether due process was followed.***
 3. ***Whether the Claimant is entitled to remedies sought.***
8. On 1st issue, the only communication that Respondent gave to Claimant was the suspension letter after he was charged in court. There is no other letter lifting this suspension. During the suspension, the Claimant was not paid any money. The Respondent insists they never terminated the Claimant. However, there is Appendix E the demand notice from the Claimant's advocate dated 6/9/2010 addressed to Respondents demanding payment of Claimant's accrued dues.
9. This was an opportunity for Respondent to reply and say that the Claimant has not been terminated and should report back to work. The Respondents never replied to this letter and the Claimant filed his claim on 29/3/2011 6 months later. Because of their inaction and not responding to this demand letter, it can safely be assumed that the Respondent had actually contractually terminated the Claimant during the time of his suspension and then claim that he was their employee does not hold much and is therefore rejected.
10. On 2nd issue, given the way Claimant was treated, there was no due process involved. He was not given notice before termination and neither was he given a chance to be heard as envisaged under Section 41 of Employment Act 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.”

11. It is therefore the finding of this court that Claimant was unlawfully and unfairly terminated in terms of Section 45 of Employment Act 2007 and I award him as follows:
1. ***1 months salary in lieu of notice = 7,451/=***
 2. ***Salary for May 2009 = 7,451/=.***
 3. ***Salary not paid during the time of suspension with effect from June 2009 to July 2010 = 9 months x 7,451/= 67,059/=***
 4. ***Prorated service pay for 2 years = 15 days x 2 years = 7,451/=***
 5. ***12 months salary compensation for unlawful termination = 7,451 x 12 = 89,412/=***

Total payable = 178,824/=

Plus costs and interest

Read in open Court this 8th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musya holding brief for Mrs. Gakoi for Claimant

No appearance for Respondent