



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 578 OF 2014

BENSON ROLLANO WEMALI.....

.....CLAIMANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [NEMA]

.....RESPONDENT

J U D G M E N T

Introduction

1. The claimant was dismissed from employment by the respondent on 30.10.2014 for Gross misconduct. Aggrieved by the said dismissal, he brought this Suit on 14.11.2014 contending that the dismissal was unfair and urging the court to reinstate him to his employment and award him damages. According to him, the dismissal was not founded on any valid reason and it was unfair within the meaning of the Employment Act.

2. The respondent has denied liability for unfair termination of the claimant's employment and averred that the dismissal was justified because the claimant committed an offence that warranted dismissal. That the dismissal is fair because the claimant was charged before the respondent's Disciplinary Advisory Committee (DAC) and after being given a chance to defend himself, he was found guilty of misconduct namely willful disobedience to orders and absconding duty which warranted summary dismissal under the respondent's HR Policies and Procedure Manual (HR Manual)

3. The Suit was heard on 14.7.2014 when the claimant testified as Cw1 while the respondent called Esther Chege as RW1. Thereafter counsel for the two parties filed written submissions.

Analysis and Determination

4. There is no dispute that Cw1 was employed by the respondent from 17.9.2009 until 30.10.2014 when he was summarily dismissed. The issues for determination are whether the termination of the claimant's employment was unfair and whether the reliefs sought should be granted.

Unfair Termination

5. Under section 47(5) of the Employment Act, the burden of proving unfair termination is on the

employee who alleges that he was unfairly dismissed. In this case, the claimant pleaded in paragraph 8 and 9 of his Claim that

“8. That on 30th October 2014, the claimant whilst awaiting the Disciplinary Advisory Committee findings and recommendation, the respondent’s Director General decided to dismiss the claimant from employment by a letter dated 30th October 2014.

9. That the claimant opted to exercise his right by filing the present Suit due to the turn of events of having been summarily dismissed unprocedurally without communication from the Disciplinary Committee and his right to appear for review of the decision to the Board of Management could have been an exercise in futility since it appeared like the claimant’s goose had been cooked.”

6. The insinuations one gets from the pleadings above is that the Director General unprocedurally dismissed the claimant before the DAC made its decision on Cw1’s disciplinary case. That pleading was however was not supported by evidence. On the contrary, Cw1’s evidence is a mere chronology of the events that lead to his disciplinary hearing before the DAC on 23.9.2014 and culminating into his summary dismissal which was communicated by the Director General of the respondent vide letter dated 30.9.2014.

7. On the other hand, the respondent has pleaded and adduced evidence to show that the dismissal of the claimant was founded on a valid and fair reason and that it was done after giving the claimant a chance to defend himself. Rw1 proved in evidence that Cw1 refused to go on transfer to Bomet office and absconded duty for many days. That Cw1 was charged before the DAC to defend himself of the said offence of refusing to go on a lawful transfer and absconding work. That Cw1 appeared before the DAC on 23.9.2014 and after his defence a decision to dismiss him summarily was reached and communicated to him through the Director General vide letter dated 30.10.2014. In the subjective opinion of the DAC, the medical condition Cw1 was suffering from, family problems and university education for Cw1, was not a good defence to the charges he was facing and consequently, he was fired.

8. After considering the material before the court and section 45 of the EA, the court finds on a balance of probability that the claimant did not discharge his burden under section 47(5) of the EA, of proving unfair termination. However the court is satisfied that the respondent has discharged her burden, of proving that the termination of claimant’s services was fair. Under section 45(2) of the EA, termination of employment is unfair if the employer fails to prove that the termination was founded on a valid and fair reason and that it was done after following a fair procedure. In this case, the respondent has proved in evidence that the dismissal of the claimant was founded on a valid and fair reason and that a fair procedure was followed before the dismissal was done. Consequently, the court finds and holds that the summary dismissal of the claimant on 30.10.2014 was fair within the meaning of section 45 of the EA.

Reliefs

9. In view of the foregoing finding that CW1 was fairly dismissed, the court declines to order his reinstatement to employment as prayed. Likewise and for the same reason, the Claim for 12 month’s salary as compensation for unfair termination is dismissed. However, the claimant will forthwith be paid salary arrears plus any other benefit due to him under his contract of employment for the period between April 2014 and October 2014. He will also be paid his pension as per the dismissal letter dated 30.10.2014.

Disposition

10. For the reasons stated above the Suit is dismissed save for the direction given above that the respondent forthwith pays to the claimant his gross salary arrears for April 2014 to October 2014 plus the pension due to him. The said sum will not attract interest if paid within 30 days from today but thereafter the sum will attract interest at court rate until payment in full. The sum awarded herein will be subject to statutory deductions. Each party will bear his or her own costs. It is so ordered.

Dated, Signed and delivered this 13th day of November 2015.

O. N. MAKAU

Judge