



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE 15 OF 2014

THOMAS SHIKUKU WANYONYICLAIMANT

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

JUDGMENT

1. Thomas Shikuku Wanyonyi (Claimant) was employed by K.K. Security Ltd (Respondent) in 2009 as a guard.

3. Being aggrieved, the Claimant commenced legal action against the Respondent on 23 January 2014 alleging wrongful/unfair dismissal.

5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies including entitlements accruing from the employment relationship.*

6. The Claimant was issued with a Notice to Attend Disciplinary Hearing dated 1 July 2013. The notice stated the alleged offence as carelessly and improperly performing duties at the premises of Raiplywoods Ltd Eldoret. The particulars were that the Claimant had been found sleeping in the workstation on the night of 30 June 2013.

8. The hearing was conducted and a written summary of the proceedings was taken and was produced in Court. The Claimant signed the summary of the proceedings. His representative, Michael Sore also signed the summary.

10. Section 41 of the Employment Act, 2007 requires an employer to comply with procedural fairness before taking a decision to terminate the services of an employee.

12. The Claimant had notice of the charges to confront. He was called to an oral hearing. He had shop floor union representatives present. He also had a colleague who signed a summary of the proceedings.

14. In the instant case, the Supervisor had prepared an incident report.

Substantive fairness

17. That is the burden the Respondent was expected to discharge in the present case.

19. The Respondent's first witness was the Supervisor who found the Claimant asleep. He stated that he had previously found the Claimant asleep. He issued to the Claimant a *Summons Note* and prepared an

incident report.

21. The Respondent's second witness gave a history of the disciplinary conduct of the Claimant. Earlier warning letters were cited.

23. The starting point would be a glimpse of section 44 of the Employment Act, 2007. The section sets out the reasons which would merit summary dismissal. All the reasons set out there in fall under the category of what would be a fundamental breach of an employee's contractual obligations.

25. Within the sector the Respondent operates in, there is an expectation from its clients of guards deployed at night to be alert at work. The Claimant also knew his duties and expectations. By falling asleep, he failed.

Appropriate remedies

27. The Claimant sought a declaration that clause 6B in his contract was unconstitutional/in breach of the Employment Act, 2007 because it provided for termination of employment on notice.

29. Flowing from the statutory requirement, no employer to whom the Employment Act, 2007 applies may terminate the services of an employee without reasons. Such a provision would be invalid for not meeting the statutory standard.

30. With the conclusion reached on the fairness of the termination, reinstatement does not lie.

31. The Claimant pleaded for earnings he would have earned for 19 years left to his retirement. However, he did not lay any contractual or statutory foundation for this head of relief and it stands to be dismissed.

32. The Claimant's pay slips show he was a contributor to the National Social Security Fund and pursuant to section 35(5) and (6) of the Employment Act, 2007, he is not entitled to service pay.

33. The documents produced show that the Claimant was paid wages in lieu of notice. The contract also provided for 1 month notice. The basis for 3 months wages in lieu of notice was not disclosed to Court.

34. The Court finds and holds that the termination of the Claimant's employment was fair and orders that the Memorandum of Claim filed in Court on 23 January 2014 be dismissed.

Delivered, dated and signed in Nakuru on this 17th day of December 2015.

Radido Stephen

Appearances

For Respondent Ms. Kimaru instructed by Waruhiu, Kowade & Nganga Advocates

Court Assistant Kosgey & Nixon