



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 1/2013

(Before Hon. Justice Hellen Wasilwa on 30th April, 2014)

KENNEDY SHILAHO SHIBEKA
CLAIMANT

-VERSUS-

CHAIRMAN, BOG, SIGALAGALA TECHNICAL TRAINING INSTITUTE
RESPONDENTS

JUDGMENT

The claimant herein Kennedy Shilaho Shibeka filed his memo of claim on 16.1.2013 through the firm of M/s K. S. Ombaye & Co. Advocates. The respondents were subsequently served with summons to enter appearance and a copy of the memo of claim. On 1.3.2013 the firm of Ojienda & Co. Advocates filed a memo of appearance on behalf of the respondents herein. Subsequently on 11.3.2013 the same firm of Ojienda & Co. Advocates filed the respondents statement of response.

The case was then set for hearing subsequently. On 1.4.2014 when the case was to be heard, the respondents though served, failed to attend court. The case then proceeded *ex parte* in the absence of the respondents.

The claimant's case is that he was employed by the respondents herein as from 1.10.2007 as a bursar as per his appointment letter **App 1**. He was later confirmed in employment as per **App 2** and upgraded twice in 2011 as per **App 3** and 2012 as per **App 4**.

In October 2012 he was in town when he was called to pick a letter. It was a dismissal letter **App 5**. At the time his salary was Ksh 32,613 as per his payslip though he stated that his salary scale is per **App 4**.

He told court that he was suspended for the reason that he had allowed a vehicle of a former driver to the institute who was on suspension to be driven into the institute which was not true.

In August 2012 the claimant had received the suspension letter which gave the above reasons. In October 2012, however the dismissal letter he was given indicated that he was a prime suspect to items stolen from a vehicle registration KBJ 403U. It was alleged he stole 2 starters, alternator and power steering. Next reason was the alleged authorization of Calistus Shihemi to be driven into the Polytechnic compound.

Before the dismissal, he was never given any hearing and neither did he agree to the reasons for the dismissal. He told court that he was employed on permanent and pensionable basis. He was never given any letter of interdiction and neither was he paid any benefits when he was dismissed. He also stated that he was not given any notice before dismissal. He stated that he had worked for respondents for 5 years since 2007 and never went for any annual leave for the said years. He stated that he also worked from 7.30 am to 7 pm and was therefore overworked but was never paid overtime. He wants this court to order that he be reinstated to work.

Having heard evidence of the claimant and upon consideration of the submissions filed herein, the issues for determination are as follows:-

1. **Whether the respondents' decision to terminate the claimant was lawful.**
2. **Whether the claimant is entitled to remedies he has sought.**

On the first issue, the claimant told court that he was a permanent and pensionable employee of the respondents. He told court that he was initially suspended in August 2012 for reasons that he had allowed a vehicle driven by a driver on suspension into the school compound. As to whether this is true or not and illegal, stems from the duties of a bursar. It is not stated that he was also manning the school gate and it is not indicated that it was illegal for a vehicle to be driven into the school compound. The claimant appeared before the board on 14.8.2012 when the decision to suspend him was made. This was based on the fact of him allowing a suspended driver in the school compound. However the decision to dismiss him was made in a meeting held on 5.10.2012.

The claimant was not called upon to defend himself in this meeting. It was also stated that he was a prime suspect in stolen items of motor vehicle KAY 098V and KBJ 403U. The fact of him being a prime suspect was never put to him in any meeting whatsoever. Other suspects had already been arrested and charged before court. To purport to dismiss the claimant as a theft suspect without any hearing is an unlawful decision. Under Section 43 of the Employment Act states that:-

“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

The reason given by respondents in terminating the claimant was not proved because the letter clearly states that he was a **“suspect”**. The suspicion would have led to him being arrested and charged as others but he was not arrested nor charged by police. To purport, to rely on the same **“suspicion”** and dismiss the claimant was therefore unfair.

Section 41 of Employment Act also states that:-

“(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 reasons 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 sub – section (1) make.”

It is also clear that the claimant never appeared before the board to answer to these charges. In the board meeting held on 14.8.2012, the issue being determined was one of allowing a driver in the school compound. The issues of his involvement in theft were never discussed. It is therefore clear that his rights under Section 41 of Employment Act were infringed upon. The same is right is guaranteed under Article 50(1) of the Constitution.

From the above analysis, it is apparent that the decision by the respondents to terminate claimant's services were unlawful and unfair and amounts to an unfair termination as explained under Section 45 of Employment Act. What remedies then is the claimant entitled to? Section 49 of Employment Act gives a raft of remedies including reinstatement as prayed by the claimant. However, in considering the provisions of Sections 49(4) of Employment Act, I would find it impracticable to recommend reinstatement except in exceptional circumstances which have not been pointed out to this court. I therefore award the claimant as follows:-

1 month salary in lieu of notice = Ksh 32,613

12 months salary as damages for unlawful termination = 32,613 X 12 = Ksh 391,356

15 days salary for each year worked = 32,613 X ½ X 5 = Ksh 81,532.50

TOTAL = KSH 505,501.50

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Less statutory deductions.

The claim for overtime and holiday work is not proved and so nothing is awarded in this limb. The issue of leave is also not proved as there is no proof that the claimant applied for and was denied leave.

The claimant will also be issued with a certificate of service.

Respondents will pay costs of this suit.

HELLEN WASILWA

JUDGE

30/4/2014

Appearances:-

Ombaye for claimant present

Ojienda for respondent present

CC. Wamache