



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1009 OF 2010

FRANCIS ODUORI MAKOKHA CLAIMANT

VERSUS

FIDELITY SECURITY LIMITED RESPONDENT

AMADA FOR CLAIMANT

MR. OGWANDO (OPERATIONS MANAGER) FOR RESPONDENT

JUDGMENT

1. This matter was partly heard by Hon. Justice Steward Madzayo wherein the Claimant testified in support of the averments in the memorandum of claim dated 26th August, 2010.
2. The Respondent filed a memorandum of Response dated 28th September, 2010.
3. The Claimant was in the employment of the Respondent as a Security Guard from 1st February 1997 and worked continuously until the 16th March, 2010 when he was summarily dismissed for alleged violation of ‘standing procedures’.
4. In terms of the letter of appointment dated 12th April 2007, the Claimant was employed effective 8th February 1997. He was entitled to 26 days annual leave and employment was terminable by either party giving one month notice.
5. The Rest of the terms and conditions of service are as contained in the *Employment Act* for protective security services and standing orders.
6. The letter of summary dismissal dated 16th March 2010 titled “**summary dismissal following Gross Misconduct**” partly reads:

“on the night of 11th – 12th March 2010 while deployed at one of our client’s property at Wilson Airport, you were found under compromised circumstances that clearly indicated you had violated the standard operating procedures but had also indulged in a reckless activity that clearly was prejudicial to safely to the detriment of the interests of our company.”

7. The Claimant was summarily dismissed. The exact facts of what the Claimant had done were not

disclosed in this letter.

8. In terms of a pay-slip attached as appendix iii to the claim, the Claimant had a gross monthly pay of Kshs.7,864/= as at February 2010 and was a member of NSSF and NHIF. He was also a member of the union. He was paid overtime for extra hours worked.

9. The Claimant seeks payment of;

- i. service gratuity for 13 years at the rate of 18 days salary for every completed year of service in the sum of Kshs.97,960/=;
- ii. unpaid leave days for the year 2009 and 2010 in the sum of Kshs.25,118.80/=;
- iii. one month's salary in lieu of notice in the sum of Ksh.12,559/=
- iv. arrear salary for 16 days worked in March 2010 in the sum of Ksh.6,698/= ($\frac{16}{30} \times 12,559$); and
- v. 12 months compensation for unlawful, unfair dismissal.

Statement of Response

10. The Respondent did not call any witness to testify in support of its case, but relies on the pleadings, including the annexures attached to the statement of Response and the final submissions.

11. The Respondent admits the contract of employment and the particulars thereof adding that the Claimant's salary was increased to Kshs.6,839/=. The Court notes that this amount does not include the house allowance of Kshs.1,025/= as per the payslip for February, 2010.

12. The Respondent avers that on the material night the Claimant was caught red handed siphoning fuel from a tank of an aircraft **5Y BLA** and was ejected from the premises at Wilson Airport where he was providing security services.

13. The Respondent's night manager was summoned to the scene and spearheaded investigations into the matter. He recovered exhibits and recorded statements.

14. By a letter dated 12th March 2010, the Claimant was suspended pending investigations of his conduct on the night of 11th March 2010. He was to appear before a disciplinary hearing on 16th March 2010 accompanied by a shopsteward. He was also to submit a written explanation in defence of the allegations made against him.

15. The Respondent did not produce any record of the disciplinary hearing.

16. The Claimant told the Court that he was falsely accused of siphoning fuel from an aeroplane. He told the Court that he did not siphon the fuel nor was any recovered from him. The matter was not reported to the police nor did any disciplinary hearing take place in respect thereof. He was instead summarily dismissed vide a letter dated 16th March 2010. The letter of dismissal does not indicate any disciplinary hearing took place before.

17. The Claimant therefore states that he was falsely accused and was denied a chance to defend himself in terms of **Section 41** of the **Employment Act**. That the employer has not led any evidence in Court in support of the alleged offence that led to his summary dismissal. The employer has therefore failed to show that the reason for the termination was valid and the termination was done in accordance with a fair procedure.

18. In **Donald Odeke V. Fidelity Security Ltd, Cause No. 1998 of 2011 Ndolo J.** held that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against him. It mattered not what offence the employee was faced with. If the employee is not heard, the termination is *ipsofacto* unfair.

19. To put it another way, by failing to give an employee a chance to defend himself or herself, the employer effectively denies himself an opportunity to know what actually happened and therefore cannot satisfy the requirements of Sections 43 as read with 45 and 47 of the Employment Act 2007.

20. It is about time, employers took the procedural requirements of disciplining employees very seriously to avoid otherwise unwarranted penalties from the Court.

21. It is the Court's considered view that the Respondent herein fell short of these statutory requirements rendering the summary dismissal of the Claimant substantively and unprocedurally unfair.

22. The Claimant had served the Respondent for a total of thirteen years. There is no evidence that he had a bad record at all at the work place. He lost means of livelihood in questionable circumstances and because of the nature of termination was denied terminal benefits to wit service gratuity, notice pay and was not even paid salary for 16 days worked in the month of March 2010 and for leave not taken in 2009 and 2010. The employer did not adduce any evidence to the contrary and the court finds that the Claimant has established these claims as per paragraph 6(i), (ii), (iii) and (iv) of the statement of claim.

23. The Court in the circumstances awards the Claimant six (6) months salary being compensation for the unlawful and unfair dismissal in the sum of Kshs.62,912.

In addition terminal benefits are awarded as follows;

- i. service gratuity in terms of the wages order for security services for 13 years at the rate of 18 days salary for every completed year of service in the sum of Kshs.51,116 ($7,864 \div 2 \times 13$)
- ii. one month salary in lieu of notice in the sum of Kshs.7,864/=. Court notes that the Claimant had only served two (2) months in the year 2010.

(iv) 16 days salary for days worked in March 2010 Kshs.4,194/=.

Total Award to the Claimant is Kshs.133,950/=.

The Award is to be paid with interest at Court rates from date of this judgment to payment in full.

The Respondent is also to pay the costs of the suit.

Furthermore, the Respondent is to provide a certificate of service to the Claimant within 30 days from date of this judgment.

Dated and Delivered at Nairobi this 20th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE