



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 171 OF 2012

GODFREY NJUNGE SAMUEL..... CLAIMANT

v

G4S SECURITY SERVICES LTD.....RESPONDENT

RULING

1. On 4 October 2013 this Court pronounced judgment and held that the termination of Godfrey Njunge Samuel (Claimant) by G4S Security Services Ltd (Respondent) was both procedurally and substantively unfair and awarded the Claimant compensation equivalent to 6 months gross wages assessed at Kshs 220,000/-.
2. On 14 October 2013 the Respondent filed an application under sections 3 and 12 of the Industrial Court Act and rule 32 of the Industrial Court (Procedure) Rules, 2010 seeking that the judgment be reviewed on the ground of an error apparent on the face of the record for being in breach of the Employment Act (repealed), which was the law applicable at the time of the Claimant's termination. The application also referred to Order 51 of the Civil Procedure Rules.
3. On the face of the motion, the Respondent contended that the Court had in an earlier ruling given on 16 May 2013 held that the Employment Act, 2007 was not applicable while the judgment pronounced on 4 October 2013 was based on the provisions of the Employment Act, 2007.
4. The Claimant was served with the review application and on 27 October 2013 he filed Grounds of Opposition asserting that there was no error on the face of the record, the judgment was not in breach of the Employment Act (repealed) and was in compliance with the Trade Disputes Act (repealed) and that the application was an abuse of the Court's process. Other grounds were also raised.
5. On 29 May 2014, the parties agreed that the Court could determine the application for review on the basis of the documents filed.
6. It is correct as suggested by the Respondent that the Cause was determined on the basis of section 41 of the Employment Act, 2007 which requires employers to comply with the procedural safeguards before terminating the services of employees, and section 45 of the same Act which oblige employers to prove the reason(s) for termination as both valid and fair.
7. The application by the Respondent therefore is within three of the conditions mentioned in rule 32(1)(b),(c) and (e), i.e., on account of some mistake or error apparent on the face of the record, being in breach of a written law and for any other sufficient reasons.
8. When the Claimant was terminated on 6 September 2007 the Employment Act, 2007 was not in operation. The applicable law was the Employment Act, cap. 226 (repealed). The other piece of legislation which was relevant was the Trade Disputes Act (repealed).
9. At the time of the Claimant's termination, an employer could terminate at will or without cause provided notice was given as required under any contract in place or appropriate damages in lieu

- thereof was paid. That is the import of decisions such as *Cyrus Nyaga Kabute v Kirinyaga County Council*, Civil Appeal No. 29 of 1985, *Rift Valley Textiles Ltd v Edward Onyango Oganda*, Nakuru Civil Appeal No. 27 of 1992.
10. In this sense, therefore the Court was in error in basing its decision on the procedural and substantive safeguards outlined in the Employment Act, 2007 to award 6 months gross wages as compensation.
 11. But that cannot be the end of the inquiry. Claims arising out of employment contracts could be filed in the normal Courts (Magistrate's Court or High Court) or before the Industrial Court established under the Trade Disputes Act, cap. 234 (repealed).
 12. If the Claimant had access to the Industrial Court, then under section 15 of the Trades Disputes Act (repealed) the Court could order reinstatement and grant damages up to a maximum of 12 months wages.
 13. This Court therefore needs to determine whether the Claimant could have approached/had access to the then Industrial Court.
 14. The Industrial Court at the material time could not take cognizance of a trade dispute unless the conditions set out in section 14(9) of the Trade Disputes Act (repealed) had been complied with. In other words, individual litigants did not have access to the Industrial Court unless the Minister agreed to refer such dispute to the Court.
 15. Trade disputes were reported to the Minister either by trade unions or employers (organisations). There was no suggestion that the Claimant was a member of a trade union which could competently report a trade dispute to the Minister in order to initiate the process under which the Industrial Court could take cognizance of the dispute.
 16. The Claimant's contract provided for termination through the giving of one month's notice or pay in lieu of notice. The termination letter informed the Claimant he would be paid one month wages in lieu of notice. The Respondent was acting within the terms of the contract agreed with the Claimant. It was not in breach.
 17. The upshot of the foregoing is that the application for review succeeds and the judgment delivered on 4 October 2013 is reviewed and the orders granted therein are set aside and substituted with an order dismissing the Memorandum of Claim filed on Court on 7 May 2012 with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 20th day of June 2014

Radido Stephen

Judge

Appearances

For Claimant Mr. Shimakha instructed by Marende Birir & Co. Advocates

For Respondent Mr. Wafula instructed by Cootow & Associates Advocates