



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 341 OF 2013

JOSEPH NGALACLAIMANT

VERSUS

1. K K SECURITY

2. K K GROUP OF COMPANIESRESPONDENTS

J U D G M E N T

INTRODUCTION

1. The claimant brings this suit against the respondents seeking damages for wrongful termination plus Kshs. 176520.85 for his employment terminal benefits. He accused the respondents for unfair dismissal for alleged gross misconduct of stealing property which was under his watch. According to him, the offence was not proved and due process was not followed before his dismissal.
2. The respondent has denied liability for the dues sought and averred that the dismissal was founded on a valid reason and after due process. According to the respondent the claimant Vandalled and stole 6 electric sockets from a clients premises he was assigned to him to guard. Consequently the respondents avers that the dismissal of the claimant was fair and lawful.
3. The hearing was done on 30/7/2014 when the claimant testified as Cw1 and Richard Moronge Makori testified for the defence as RW1.

CLAIMANTS CASE

4. CW1 was employed by the respondents in August 1996 under a verbal contract, before the respondent had not changed name from Kenya kazi services Ltd which is a subsidiary of the 2nd respondent. He was employed as a Day Guard although he could also work as night guard. As at march 2011 his salary was ksh.11,220. He went for all his annual leave days except the last year of service. He was also not paid his salary for May 2011.
5. on 6/5/2011, Cw1 was on duty as usual at Bamburi Airstrip after taking over from the night guard. There were police officers also on guard with him as usual. At around 9.00 am his senior Mr. Zekiah Orwa who was the respondent's Bamburi Project Manager came to the Airstrip accompanied by Henry Kwena also an employee of the respondent. They went into a nearby deserted building and returned to the CW1 accusing him of theft. They searched his personal bag that was on his bicycle and found pliers, screw driver, peacock hair dye and mobile charge. CW1

- explained that the pliers was a tool for bicycle repairs whereas the electric sockets were his property bought from Kongowea market for installation in his house at Bombolulu. He denied ever vandalizing the clients premises or stealing any socket therefrom. According to CW1, the building was an abandoned office premises at the airstrip.
6. CW1 was taken to the office where he was given a suspension letter and later called for a disciplinary hearing. The hearing culminated in his dismissal. He appealed against the dismissal but the appeal was dismissed without being heard. Thereafter he reported to the labour officer and instructed his lawyer to file suit. He prayed for award of the reliefs sought in his suit.
 7. On cross examination by the defence counsel, CW1 stated that he reported to work at 6.00am on 6/5/2011. He denied stealing sockets from the client's house and maintained that he bought the 6 used sockets at Kongowea the previous day, Saturday when he was off duty. CW1 stated that 10 sockets were found missing from the clients house. He confirmed that he did not record in the register that he had personal items in his possession.
 8. CW1 admitted that he was given a show cause letter but he never got any statement from the person who sold the sockets to him. He admitted that he was accorded a disciplinary hearing attended by manager, 2 union representatives and himself. He admitted that he did not call any witness to confirm that he bought the socket at Kongowea. He maintained that for the 4 months he was assigned to guard Bamburi airstrip, there were no sockets in the premises. He could not however remember whether he indicated in statement/defence that the sockets were not there when he started guarding the premises. He admitted that he received letter telling him that his appeal had been dismissed.
 9. He confirmed that his basic salary according to payslip 2011 was ksh.7522.90 and house allowance was 1127.50 and overtime of ksh.4522.75. He confirmed that overtime for March 2011 was ksh.3517. He maintained that he was employed in 1996 and not 1998.
 10. He admitted that he was served with warning letters for sleeping while on duty and another one for failure to follow procedures. He confirmed that his claim for leave was only for the last year of service.

DEFENCE CASE

11. RW1 is the respondent's HR officer from the last 16 years. He stated that CW1 was dismissed after he failed to prove ownership of electric sockets he was found in possession of while on duty. RW1 was co-chair of the disciplinary committee which heard the CW1's case. According to RW1, CW1 admitted that he was found with the used electric sockets in his possession. According to RW1 it was a fundamental breach to vandalize what was being guarded.
12. RW1 dismissed the allegation that 6/5/2011 was a Sunday and maintained that the day was a Friday and CW1 had not been off duty the previous day. He further contended that on 6/5/2011, CW1 reported to work at 5.45 am before the Kongowea market had opened. RW1 further contended that the night guard Mr. Muli who handed over to CW1 on 6/5/2011 reported that he left the premises intact. He relied on proceedings of the committee (appendix 9 of the defence) to prove that CW1 was accorded a fair hearing.
13. RW1 told the court that the dismissal letter (defence appendix 3) clearly cited the reason for the dismissal of the claimant and the respondents willingness to pay terminal dues. According to RW1, CW1 was not entitled to payment of dues under the Protective Security Order [sic] Act because the Act excludes guards who are summarily dismissed.
14. On cross examination by the claimant's counsel, RW1 admitted that CW1 worked for 12 days in May 2011 before dismissal. He however contended that CW1 had taken excess leave before as per the record in his office. He admitted that CW1 was never charged with any criminal case for the stolen sockets.
15. On being shown an internal memo dated 6/5/2011 (defence appendix 4), RW1 admitted that it referred to 7 sockets and not 6 sockets as alleged. He further admitted that all the other disciplinary committee members did not sign the proceedings except himself.
16. On the relationship between the respondents, RW1 explained that K K security ltd is only a business name used by Kenya Kazi Services Ltd which is part of K K Group of Companies.
17. After the close of the hearing the parties filed written submissions of which the court has carefully considered in making the decision herein below.

ANALYSIS AND DETERMINATION

18. There is no dispute that CW1 was employed by the respondent as a security guard. There is also no dispute that CW1 was dismissed on 12/5/2011 for theft and vandalism of the premises he was assigned to guard. There is also no dispute that CW1 was found in possession of 6 used electric sockets in his personal bag at the place of work. There is also no dispute that CW1 was accorded a hearing before the respondent's disciplinary committee on 12/5/2011 which he attended and heard in the presence of his union officials. There is also no dispute that the dismissal letter offered to pay terminal dues to the CW1.
19. The issues for determination are whether CW1 was unfairly dismissed and whether the reliefs sought ought to be granted.

Unfair termination

20. Under Section 45 of the Employment Act dismissal of employee is unfair unless the employer proves that the dismissal was founded on a valid and fair reason and after following a fair procedure. The procedure is fair if the employee is afforded a hearing within the meaning of Section 41 of the said Act. Section 41 requires that before dismissing an employee for misconduct, poor performance and incapacity the employer must explain to the employee the reason for the intended dismissal after which the employee shall be given a chance to defend himself. The said hearing must be oral and in a language of the employees understanding and in the presence of a co-worker of the employee's choice.
21. In the present case the court is satisfied by the defence evidence that CW1 was accorded a fair hearing. It was an oral hearing attended by his union shop steward. CW1 was able to explain himself in defence before dismissal letter was given. He exercised his right of appeal but unsuccessfully.
22. As regards the reason for his dismissal the court is not satisfied that the respondents have proved that the claimant did vandalize or steal the alleged electric sockets. Firstly CW1 was not the only person present or guarding the airstrip. Secondly the defence did not produce any occurrence book or register to prove that when CW1 took over from the night guard the alleged vandalized sockets were left intact. Thirdly no evidence was adduced to prove that the sockets found in the possession of CW1 were actually not his but belonging to the client. Indeed the defence never called any witness from Bamburi cement to say that sockets had been vandalized and stolen from the premises or that the sockets in the possession of the CW1 belonged to Bamburi cement (client).
23. Consequently the court finds that the burden of proof was at all material time upon the respondent to prove that the 6 sockets found in possession of the CW1 were stolen by CW1 from the premises he was guarding. The burden was not to shift to the CW1 to prove his innocence. Consequently the court finds that the evidence adduced by CW1 in this case fell short discharging the burden of proof required under Section 43 of the Employment Act. The said provision provides that in a dispute like this the burden of proving the reason for the dismissal shall be upon the employer failure of which the termination shall be deemed unfair within the meaning of Section 45 of the said Act.

Reliefs sought

24. Under Section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. CW1 is awarded one month salary in lieu of notice. According to his payslips for April 2011, his basic pay was ksh.7522.90, house allowance of 1127 plus soap allowance of ksh.80 making the gross pay of ksh.8,729.90 and the court awards the same.
25. He will get gratuity at the rate of $ksh.8729.90 \times 15 / 30 \times 15$ years served as per the Regulation 17 of Regulation of Wage (Protective Security Service) Order being ksh.57974.25. He will also get his salary for the 12 days worked in May 2011 being Ksh.3491.96. CW1 is also awarded pay in lieu of leave days not utilized being $1 \frac{3}{4}$ leave day per month for 6 months from the last leave in November 2010 less 1 excess leave day taken in 2010. This sums to ksh.2764. The claim for salary

for June 2011 is dismissed for lack of legal basis. The prayer for certificate of service is also granted.

26.The claimant has prayed for damages for wrongful termination under Section 49 of the employment Act 2007. He did not plead how much and even in his evidence and written submission did not state any figure. The same is dismissed for want of particulars and evidence. A counsel should not make generalized pleadings and leave gaps for the court to fill in through guesswork.

DISPOSITION

27.For the reasons stated above, the court enters judgment for the claimant against the respondents jointly and severally for ksh.72,960.60 plus interest from 12/5/2011 at courts rates. He will also be issued with a certificate of service plus costs and interest.

Orders accordingly.

Dated, signed and delivered this 24th October 2014

O. N. Makau

Judge