



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 737 OF 2010

JOHN ONGERI OCHOKICLAIMANT

VERSUS

KENYA KAZI SERVICESRESPONDENT

Mr. Mbaya for Claimant

Mr. Kamau for Respondent

JUDGMENT

1. Claimant was employed by the Respondent on 8th May 1995 as a Security Guard and 8th May 1995 as a Security Guard and worked continuously until 31st May 2009.
2. At the time he left the employment of the Respondent he earned a monthly salary of Kshs 11,882.90.
3. The Claimant was stationed at Kenya Women Finance Trust where he worked from 6.30 a.m. to 8.30 a.m.
4. On the material day, he reported to the supervisor Joseph Opaka that he was sick. The supervisor promised to bring a replacement. The Claimant waited until 4.30 p.m. in vain. The Claimant went to a nearby kiosk to buy medicine. At the time the client arrived at the gate and hooted.
5. Mr Kariuki then called the employer and asked them to remove the Claimant from the gate. A K.K. response motor vehicle was sent with a Guard. The Claimant showed them the milk and medicine he had bought. The Claimant handed over the new Guard.
6. On 2nd June 2009 the Claimant was called to explain what happened. He was then given a letter of summary dismissal by the Human Resource Officer.
7. The Claimant told the Court that Mr. Kariuki had a grudge against him because he had asked him for a gepass to take out a Laptop. The incident was recorded in the Occurrence Book.

8. The Claimant says that Mr. Kariuki victimized him for this reason. He denied that he had any warning letter because he had not signed for any as per the company procedures.
9. The evidence that the Claimant was sick on the material day was corroborated by his wife in her testimony before Court.
10. The Claimant claims;
 1. Notice pay of Kshs.11,882.90
 2. Severance pay of Kshs.123,883.80 for sixteen (16) years at eighteen (18) days salary for each completed year of service; and
 3. Compensation for the wrongful dismissal.
11. The Respondent filed a memorandum of Reply dated 20th August 2010 in which it admits that it had employed the Claimant as a security Guard as contained in the particulars of claim.
12. The Respondent however denies all the particulars of claim stating that the Claimant was dismissed from service for gross misconduct for unprofessional and dishonest activities.
13. That on 31st May 2009, while the Claimant was assigned duties at the Kenya Women Finance Trust premises on Muchai road, he abandoned the post and absconded duty leaving the property unguarded.
14. That the client had to call the Respondent for help following which an Emergency Response vehicle found the Claimant loitering out of uniform, away from his post.
15. The Respondent produced 17 warning letters given to the Claimant for various transgressions but told the Court the Claimant did not reform hence the termination.
16. The Respondent called one Henry Bwire to testify in support of the Respondent case.
17. The witness told the Court that he was the Corporate Affairs / Manager of the Respondent but at the material time he was the Human Resource manager and is therefore familiar with the facts of the case.
18. The witness wrote the letter of summary dismissal which he tendered to the Court.
19. The letter titled, summary dismissal explains the reason for the dismissal of the Claimant.
20. The Claimant's summary dismissal was in terms of **Section 44(4)c** of the Employment Act which provides for summary dismissal of an employee if;

“an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly.”

Determination on Facts

21. The evidence by the Claimant and that by RWI for the Respondent regarding what happened on 31st May 2009 is mutually destructive.
22. The Claimant on the one hand alleges that he was sick and had that morning asked the supervisor to provide a relief Guard but that did not materialize. That at around 4.30 p.m. he went to the nearest kiosk to buy milk and medicine.
23. The Respondent on the other hand accuses the Claimant for absconding duty and leaving a station unmanned.

24. With regard to the previous conduct by the Claimant, the Respondent says that it had warned the Claimant seventeen (17) times whereas the Claimant denies ever having received any of the alleged warning letters. Claimant states that employees usually sign for warning letters and none of those produced by the Respondent have been signed by him. The Claimant urges the Court to reject the warning letters as they are a fabrication.

25. The Respondent did not frame charges against the Claimant nor was a disciplinary hearing convened to give an opportunity to the Claimant to give an explanation to a committee as to why his employment ought not to be terminated.

26. **Section 41** of the **Employment Act**, obliges an employer to accord an employee a hearing. The employee is also allowed to bring a colleague or a union member (where applicable) to the disciplinary hearing for support.

27. Failure by an employer to comply with **Article 41** denies an employee opportunity to get a fair hearing and the employer, opportunity to validate the reason for the intended dismissal.

28. In terms of **Section 47(5)**, the employee has the burden of showing that the dismissal was wrongful while the employer has the burden of justifying the grounds for the dismissal.

29. In the present case, the Claimant has shown that he was not accorded a fair hearing and therefore the dismissal was procedurally unfair contrary to **Section 45(1)** and **2(c)** of the **Employment Act**.

30. In the circumstances the Court finds it fit to reduce the summary dismissal to a normal termination.

Therefore the Claimant is entitled to;

- (i) payment of one (1) month's salary in lieu of notice in the sum of Kshs.11,882.90.
- (ii) the Claimant is also entitled to severance pay for the sixteen (16) years of service as provided under Security Sector Wage Order at the rate of eighteen (18) days salary for every completed year of service in the sum of Kshs.113,883.80.

The total Award of the Court to the Claimant is Kshs.125,766/=.

The Award is payable 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.

Dated and Delivered at Nairobi this 17th day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE