



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 263 OF 2013

(Formerly Cause No.1732 of 2011at Nairobi)

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

-VERSUS-

KENYA KAZI SERVICES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th October, 2014)

JUDGMENT

The memorandum of claim was filed on 13.10.2011 by the claimant union on behalf of its member one Patrick Nyakundi (the grievant). The claimant prayed for:

- a. Immediate unconditional reinstatement of the claimant to his job and grade.
- b. Payment of salaries obtaining currently for the entire period the grievant has been out of employment.
- c. A letter of apology from the top echelon of the respondents' remarks over the matter.
- d. After reinstatement there should be no intimidation witch hunts or any form of unfair labour practices.

The response to the memorandum of claim was filed on 05.12.2011 through Kantal & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

There is no dispute that grievant was employed by the respondent as a night guard with effect from 7.09.2008 and later promoted to a night supervisor. While serving at Molo the grievant testified that he recovered goods stolen by the respondent's field officer who was charged with a criminal offence. As a witness in the criminal case, the grievant testified that the respondent refused to provide him with the court attendance expenses with the consequence that the employment relationship was not smooth. That was sometimes in 2009.

In January 2010 the grievant was deployed to Eldoret and on 8.07.2010 the claimant was stationed at CPC as a night supervisor. After handing over on the morning of 9.07.2010, the grievant testified that he was given, by the staffing officer, the letter dated 8.07.2010 being acceptance of the resignation. The letter addressed to the grievant stated as follows:

“Acceptance of Resignation

We acknowledge receipt of your resignation letter dated July 7, 2010. As a company we have no objection in accepting your resignation. Your employment with the company has ceased with immediate effect.

You are required to return all the company equipments in your possession to facilitate computation of your final dues, less one month salary in lieu of notice.

The management would like to take this opportunity to thank you for the services you have rendered to the company, for the period you have served in the capacity of a Security Supervisor.

Lastly, we wish you the best in your future endeavours.

Sincerely,

Signed

Paul Githinji

Branch Manager”

The grievant testified that he did not write the letter of resignation as alleged and he was not shown any such letter by the respondent. At termination the claimant was earning Kshs. 17, 326.75 per month.

Respondent witness No. 1 was Hudson Nyasaka (RW1), the respondent’s logistics manager. RW1 testified that the grievant submitted a resignation letter on 7.07.2010 and after speaking to the claimant the claimant stated that he was resigning due to personal reasons. RW1 testified that as he drafted the letter of acceptance of resignation, he had seen the grievant’s resignation letter. RW1 testified that on 14.07.2010 he realised that he did not have the resignation letter.

RW2 was Paul Kithinji, the respondent’s regional manager at Eldoret who signed the letter of acceptance of resignation that had been drafted by RW1. RW2 testified that he signed the acceptance letter after seeing the letter of request for resignation signed by the grievant. RW2 further testified thus, **“On 14.07.2010 there was a staffing officer who has since left employment. The staffing officer told me the grievant was given the original letter of resignation to make a photocopy. Grievant never returned the original...”**

The conciliatory proceedings between the parties culminated into the certificate of disagreement dated 7.12.2010.

The **1st issue** for determination is whether the grievant resigned. There is an alleged resignation letter with ghostly characteristics. The claimant says he never wrote a resignation letter. The respondent’s witnesses say they saw the letter. It was the duty of the respondent to justify the grounds for termination of employment as provided for in section 47 (5) of the Employment Act, 2007. Under section 43 (1) of the Act, the respondent was required to prove the reason for the termination. In absence of the ghostly resignation letter, the court finds that the respondent has failed to establish the reason for the termination. The court finds that the claimant did not write a letter resigning from employment especially that, in the opinion of the court, the respondent could not reasonably have parted with the letter without evidence of the same and in circumstances whereby, the alleged letter had become the property of the respondent, and the grievant who is alleged to have taken the letter was no longer the respondent’s employee.

The **2nd issue** for determination is whether the termination was unfair and the court finds that it was unfair because there was not genuine reason and the termination was unfair under section 43 of the Act.

The **3rd issue** for determination is whether the claimant is entitled to remedies as prayed for. The court

finds that in circumstances whereby the respondent terminated employment in clear breach of the high confidence and trust expected between an employer and employee, reinstatement would not be the just remedy. The grievant was a good worker, he expected to continue in employment and he did not contribute to the termination in any manner. In the circumstances, the court awards the grievant 12 months salaries at Kshs. 17, 326.75 per month making **Kshs, 207, 921.00**.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. The declaration that the respondent's termination of the grievant's employment was unfair.
- b. The respondent to pay the grievant **Kshs, 207, 921.00** by 1.12.2014 failing interest at court rates to be payable from the date of the judgment till the date of full payment.
- c. The respondent to deliver to the grievant the certificate of service by 1.11.2014.
- d. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 17th October, 2014**.

BYRAM ONGAYA

JUDGE