



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1149 OF 2013

RICHARD MACHANI LUKA.....CLAIMANT

VS

KULDEEP SINGH DEVGAN.....RESPONDENT

AWARD

Introduction

1. The Claimant's case brought by way of Memorandum of Claim dated 22nd July 2013 and filed in Court on even date is for unfair termination of employment. The Respondent filed a Response on 28th August 2013 and the matter was heard on 17th December 2013, 13th March 2014 and 17th November 2014.

The Claimant's Case

2. According to the Claimant, he was employed by the Respondent on 3rd February February, 2001 as a private security guard at a monthly salary of Kshs. 9,000 as at the time of leaving employment. The Claimant was housed by the Respondent.

3. The Claimant states that he worked for 26 days with four off days every month. His working hours stretched from 5.45 am to 6.30 pm. On 10th June 2013 the Respondent terminated the Claimant's employment on allegations of having been found with stolen goods in his living quarters. The Claimant states that the termination of his employment was unlawful and unfair.

4. The Claimant's claim is as follows:

- a. One month's salary in lieu of notice.....Kshs. 9,000
- b. Service pay for 12 years and 4 monthsKshs. 56,100
- c. Public holidays worked.....Kshs. 36,000
- d. 10 days worked in June 2013.....Kshs. 3,000
- e. Overtime compensation.....Kshs 514,800
- f. 12 months' salary in compensation for unlawful dismissal.....Kshs.108,000
- g. Costs and interest

The Respondent's Reply

5. In his Response filed on 28th August 2013, the Respondent states that the Claimant was lawfully dismissed for engaging in criminal activities and for bringing strangers to the Respondent's home.

Sometimes in June/July 2013, Police Officers from Amboseli Police Post came to the Respondent's home in search of stolen goods. Pursuant to this, several stolen items, including laptop computers and projectors were found in the Claimant's living quarters.

Findings and Determination

6. The issues for determination in this case are as follows:
- a. Whether the Respondent had a valid reason for terminating the Claimant's employment;
 - b. Whether in effecting the termination the Respondent observed due procedure;
 - c. Whether the Claimant is entitled to the reliefs sought.

Reason for the Termination

7. Section 43 of the Employment Act, 2007 provides as follows:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

8. The reason for the termination of the Claimant's employment as given by the Respondent was that the Claimant had engaged in criminal activities. Specifically, the Claimant had allowed his son, Paul Makunga to bring into his living quarters goods that were suspected to have been stolen. It was common cause that the Claimant initially lived with his son in his living quarters within the Respondent's home but by the time the goods in issue were brought in, Makunga had moved out.

9. In his testimony, Makunga denied having stolen the items in issue stating that he had lawfully received them from one Stephen Ifigwa who also testified for the Claimant. However, the accounts by Makunga and Ifigwa on the handling of the items, Makunga's arrest and eventual release differed in material respects and the Court therefore found their testimony to be of no probative value.

10. What is clear is that Makunga brought in some items into the Claimant's living quarters whose origin was suspect. In my estimation, it was not possible for the items to be brought in without the Claimant's knowledge and acquiescence. Consequently, the Claimant cannot disassociate himself from the suspicions surrounding the handling of these items.

11. Matters in this Court are decided on a balance of probability and in my view the burden placed on an employer by Section 43 of the Employment Act, 2007 is to show the existence of a reasonable cause that would lead a reasonable employer to terminate employment. Applying this standard, I am satisfied that the Respondent had a valid reason for terminating the Claimant's employment.

Termination Procedure

12. The reason for the termination of the Claimant's employment falls under what is commonly known as misconduct. Section 41 of the Employment Act, sets out the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c)That the employer has heard and considered any explanations by the employee or their representative.

13. In the case of ***Rebecca Ann Maina and Others Vs Jomo Kenyatta University of Agriculture and Technology [2014] EKLR***, this Court held that the practical application of the provisions of Section 41 at the work place will take different formats depending on the nature of the offence and the institutional sophistication of the employer and in determining compliance with Section 41, the Court is expected to examine each case on its own merit.

14. In my view, the nature of employment in this case did not call for a sophisticated disciplinary process but the Claimant was entitled to some form of hearing prior to termination of his employment. There was no evidence of any semblance of hearing afforded to the Claimant as contemplated under Section 41 and for this reason alone I find the termination unfair for want of procedural fairness.

Reliefs

15. Before pronouncing the final award in this case, I need to deal with the issue of the effective date of the Claimant's employment which is in contest as between the parties. According to the Claimant, his employment with the Respondent commenced on 3rd February 2001 and terminated on 10th June 2013. The Respondent on the other hand contends that the Claimant worked for him for a period of only six years and that for the rest of the period, the Claimant was employed by the community of residents within the Respondent's neighbourhood.

16. Under Section 9(2) of the Employment Act, the responsibility of documenting an employment relationship lies with the employer and an employer who fails in this primary duty cannot be heard to controvert the terms of employment as provided by the employee (see Section 10(7) of the Employment Act). The Court therefore adopts the period between 3rd February 2001 and 10th June 2013 as the Claimant's employment period for purposes of this claim.

17. Having found the termination of the Claimant's employment unfair on the ground of procedural unfairness, I award him six months' salary in compensation. In making this award, I have taken into account the Claimant's length of service but also my finding that the Respondent had a valid reason for effecting the termination. I further award the Claimant one month's salary in lieu of notice.

18. Since there was no evidence that the Respondent made National Social Security Fund (NSSF) contributions in favour of the Claimant, the claim for service pay succeeds and is allowed. The claim for salary for 10 days worked in June 2013 also succeeds. The claims for public holidays worked and overtime compensation were however not proved and are dismissed.

19. I therefore make a final award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation for unfair termination.....Kshs. 54,000
- b) 1 month's salary in lieu of notice.....Kshs. 9,000
- c) Service pay for 12 years (9,000/2x12).....Kshs. 54,000

Total.....Kshs.117,000

20. The Respondent shall meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF DECEMBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngatia (Union Representative) for the Claimant

Mr. Ouma for the Respondent