



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 764 of 2012

PITUS OMERI.....CLAIMANT

VS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 2nd May and filed in Court on 7th May 2012, the Claimant sued the Respondent for unfair termination of employment.
2. The Respondent filed its Reply on 26th June 2012 and the matter was heard on 13th November and 11th December 2012. The Claimant and the Respondent's witnesses, Dennis Michieka Owino, Manyara Joel Dennis and Thomas Wandai gave sworn evidence. Counsel for the parties then filed written submissions.
3. At the hearing, Mr. Makokha instructed by Namada & Co Advocates appeared for the Claimant while Mr. Wambua instructed by Wainaina Ileri & Co Advocates appeared for the Respondent.

The Claimant's Case

4. The Claimant testified that he was employed by the Respondent on 18th July 2002 initially as a Security Guard and later by promotion as a Crew Commander effective 14th May 2010 (letter of promotion is marked Appendix 1 in the Claimant's documents). According to the Claimant's payslip for the month of August 2011, his gross salary was Kshs.17,164.82.
5. According to the Memorandum of Claim, the Claimant was summarily dismissed upon accusations of having stolen building materials from a work station he had been assigned to guard.
6. In his sworn evidence, the Claimant told the Court that on 2nd October 2011 he was summoned to the site where he found a Branch Manager by the name Wandai with a suspect in his custody.
7. Wandai told the Claimant in their common mother tongue that the suspect was from the same tribe as the Claimant and Wandai. Wandai then instructed the Claimant to enter the suspect's details in the Occurrence Book (OB) and thereafter to release the suspect.
8. The Claimant further told the Court that he had found an exhibit, being a small bag at the site which according to Wandai contained copper wire but which the Claimant stated contained scrap metal.

9. The Deployment Officer, a Mr. Onyango came to the site and asked the Claimant for the exhibit. Onyango drove away with the exhibit in the company of the Guard on duty. Wandai later claimed that the Claimant had stolen the exhibit. The Claimant wrote a 1st and 2nd statements which were rejected. A third statement was accepted. The statements were not produced in Court.

10. The Claimant also testified that he had Kshs. 7,100, being a personal loan he had secured which the Respondent's officers took from his pocket.

11. The Claimant went on to testify that he had been issued with a suspension letter on 3rd October 2011. He did not produce the suspension letter.

12. On 7th October 2011, the Claimant was issued with a summary dismissal letter (letter marked Appendix III in the Claimant's documents). The Claimant told the Court that prior to his dismissal, he was not given an opportunity to be heard. He did not appeal against his dismissal as offered in the letter of dismissal.

13. The Claimant claimed the following:

a) One month's salary in lieu of notice.....Kshs. 15,358

b) Unpaid salary for the month of September.....15,358

c) Compensation for unfair termination of Employment.....184,296

d) Costs of the suit plus interest

The Respondent's Case

14. According to the Respondent, the Claimant was employed on 17th July 2003 as a Security Guard and was serving as Response Crew Commander at the time of his dismissal.

15. On 2nd October 2011, the Claimant was dispatched to one of the Respondent's site where a Guard had colluded with a thief to steal various items from the site.

16. The stolen items were subsequently recovered and left under the Claimant's care who instead of securing and ferrying them to the Respondent's offices as instructed sold them off. Consequently, the Claimant was summarily dismissed by letter dated 7th October 2011.

17. It was the Respondent's case that prior to his dismissal, the Claimant was given an opportunity to make representations which were considered before his termination. The Respondent further stated that prior to this incident the Claimant had been issued with a warning letter on account of a similar offence.

18. Additionally, the Claimant had been issued with a warning letter on 8th July 2010 for failing to respond to alarm activation while on duty and a further warning letter on 15th March 2011 for sleeping while on duty.

19. The Respondent went on to state that upon the Claimant's termination, his dues had been calculated and a cheque in his favour prepared but he had failed to collect the said cheque. The Claimant had been paid his salary for the month of September.

Findings and Determination

20. The main issue for determination in this case is whether the termination of the Claimant's employment was undertaken within the law. It is common cause that the Claimant was summarily dismissed for gross misconduct on 7th October 2011, having been suspended on 3rd October 2011.

21. According to the letter of summary dismissal, thorough investigations had been undertaken, revealing that the Claimant was involved in the theft of building materials belonging to the Respondent's client. The letter went further to state that the management had approved the Claimant's dismissal and invited the Claimant to submit any valid grounds for appeal within the next seven days from the date of receipt of the letter.

22. The findings of the investigations aforementioned were contained in a Memorandum by one Kimesis Kirui dated 4th October 2011 on the basis of which the Respondent proceeded to summarily dismiss the Claimant.

23. Section 41 of the Employment Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

24.

pay statement for employees in regular employment while Section 10 of the Act requires employers to keep employee records. The Respondent failed to discharge this onus and the Court has therefore concluded that this salary was not paid and awards it to the Claimant.

31. The net effect of this award is as follows:

- a) 4 months' salary as compensation for unfair termination
- b) 1 month's salary in lieu of notice
- c) Salary for the month of September 2011

32. In computing this award, the applicable salary will be as per the Claimant's payslip for the month of August 2011. Any figures in the said payslip representing one off payments are to be discounted.

33. I award the costs of this case to the Claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF FEBRUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**