



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1216 of 2012

ZADOCK LIYOSI MMBERA.....CLAIMANT

VS

ST. MARK'S CHURCH WESTLANDS.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 17th July and filed in Court on 18th July 2012, the Claimant sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Response on 24th October 2012. The Claimant presented his case on 22nd November 2012, with Mr. Ongicho instructed by Ongicho-Ongicho & Co Advocates appearing for the Claimant and Mr. Kariuki instructed by P.K. Njiiri & Co Advocates appearing for the Respondent.
2. At the close of the Claimant's case, hearing of the Respondent's case was set for 30th November 2012 on which date Counsel applied for an adjournment because the defence witnesses were not available. The Court granted the adjournment and set the case for further hearing on 8th February 2013 on which date there was no appearance for the Respondent, prompting the Court to close the viva voce hearing. The Claimant's Advocate then filed written submissions on 13th February 2013.

The Claimant's Case

3. The Claimant told the Court that he was employed by the Respondent on 1st February 2002 in the position of Security Guard at an initial salary of Kshs. 9,000. He worked as such until 14th June 2011 when he was summarily dismissed (dismissal letter is marked Appendix 2 in the Claimant's documents). At the time of termination, the Claimant earned a monthly salary of Kshs. 24,675 (payslip for the month of May 2011 is marked Appendix 1 in the Claimant's documents).
4. On 8th June 2011 when the Claimant was on duty, two LCD screens went missing from the Church. The Claimant was subsequently arrested and charged jointly with another with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code with an alternative charge of neglect to prevent a felony contrary to Section 392 of the Penal Code. The Claimant was acquitted of both charges but the Respondent declined to reinstate him or pay him his dues.
5. In his sworn evidence, the Claimant testified that for the entire period of employment with the Respondent, he had taken leave for only 2 years; 2009 and 2011. He further testified that after his acquittal, he went back to the Church to ask for his dues which were not paid to him.
6. The Claimant therefore claimed the following:

- a) A declaration that his termination was unlawful
- b) Salary for 14 days worked in June 2011..... Kshs. 11,515.00
- c) 1 month's pay in lieu of notice.....24,675.00
- d) Reinstatement or in the alternative
 - 12 month's compensation for unfair termination.....296,100.00
- e) Leave days for 9 years.....155,452.50
- f) Prorata leave for 4 months.....14,393.75
- g) Service pay for 10 years.....625,511.25
- h) Costs and interest
- i) Certificate of Service

The Respondent's Case

7. In its Response to the Claimant's Memorandum of Claim, the Respondent admitted that it had employed the Claimant and that he was earning a salary of Kshs. 24,675. The Respondent however denied that the Claimant had worked for 9 years. It was the Respondent's contention that the Claimant was summarily dismissed due to gross negligence of his duty leading to theft of the Respondent's 2 LCD screens.

8. According to the Respondent, the Claimant was given an opportunity to respond to the allegations against him and his explanation having been found unreasonable, he was dismissed. The Respondent denied that the Claimant was entitled to any of the reliefs sought.

Findings and Determination

9. The main issue for determination in this case is whether the termination of the Claimant's employment by way of summary dismissal was justifiable. The Claimant testified that he was arrested on 11th June 2011 and was arraigned in court on 13th June 2011. On 14th June 2011, he was issued with a letter of summary dismissal which backdated his dismissal to 9th June 2011.

10. According to the dismissal letter, the Claimant was terminated for gross negligence. Ordinarily negligence of duty is an issue of performance and/or conduct. Section 41 of the Employment Act, 2007 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.***

Section 45 (2) of the Act provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason -

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure

11. From the evidence on record, there was no proof of any internal process through which the Claimant presented his case to the Respondent. I therefore find that the Claimant's termination was unfair within the meaning of Section 45 of the Employment Act for want of due process.

12. The Claimant asked for reinstatement or in the alternative 12 months' salary in compensation. Sections 49 and 50 of the Employment Act, 2007 empower the Court to grant the remedy of reinstatement. However, Section 49(4)(d) of the Act requires the Court to take into account:

(d) the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

In the case of Muleya Vs. COMESA and Another (East Africa Law Reports 2003 2 EA 623) the Court held that:

the general rule that damages are the generally accepted remedy for redressing breaches of contracts of service is too established to be overthrown by side wind

13. Having examined the circumstances of this case, I have arrived at the conclusion that it does not merit an order for specific performance. I therefore decline to grant the prayer for reinstatement. I however award the Claimant the equivalent of 5 months' salary based on his last gross salary as compensation for unfair termination. I also award him 1 month's salary in lieu of notice. The Court has adopted 14th June 2011, the date of the dismissal letter, as the effective date of the termination. The Claimant is therefore entitled to salary up to and including the said date.

14. With regard to the claim for annual leave, the Court scrutinised 2 leave application and information forms dated 2nd April 2009 and 3rd March 2011 submitted by the Respondent. On both forms, there was no indication of any leave days carried forward from previous years. The Court has therefore rejected the Claimant's testimony that he only took 2 years leave. The claim for leave thus fails and is hereby dismissed.

15. From the Claimant's payslip for the month of May 2011 which was produced in Court, it is evident that the Claimant was a contributing member of the National Social Security Fund (NSSF). The Respondent also produced the Claimant's membership application form to the Anglican Church of Kenya Staff Provident Fund. This renders the Claimant ineligible for service pay by virtue of Section 35(6) (a)&(d) of the Employment Act.

16. The net effect of this Award is as follows:

- a) 5 months' salary as compensation for unfair termination.....Kshs.123,375
- b) 1 month's pay in lieu of notice.....24,675
- c) Salary for 14 days worked in June 2011.....11,515
- Total.....159,565**

17. I further direct the Respondent to issue the Claimant with a Certificate of Service and pay the costs of this case.

DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF MARCH 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**