



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 105 of 2012

KENYA UNION OF DOMESTIC HOTELS, EDUCATION

INSTITUTION, HOSPITALS AND ALLIED WORKERSCLAIMANTS

VERSUS

PWANI UNIVERSITY COLLEGE.....RESPONDENT

JUDGMENT

The suit before me is brought by the claimant on behalf of Mr. Simon Tsuma Mwasinga (grievant) alleging unfair termination of employment by the Respondent. The suit basically prays for unconditional reinstatement of the grievant without any loss of salary and other benefits.

The respondent has strongly opposed the claim alleging that the termination of the grievant employment was justified and was through fair procedure. She prays for dismissal of claim with costs.

The suit was heard on 22nd March 2013 when the grievant testified as CW1 and Ravasco Mwasambu as RW1 for the claimant and Respondent respectively.

CW1 told the court that he was employed by the Respondent on 30th December 2008 as a Plumber until 4th May 2010. His basic salary was Kshs.11055/ plus house allowance of Kshs 8778/ and medical allowance of Kshs 495/ per month.

That on 13th May 2009 he was given suspension letter by the Respondent's Principal and told not to ask any questions but just go home and not to be seen in the Respondent's compound again.

The suspension letter stated that he was to be called to a disciplinary hearing in due cause. That the disciplinary Committee called him for hearing on 15th April 2010 after one year of waiting.

That he was not told to come with a person of his choice and he did not choose to come alone. The panel comprised the principal and his committee plus the claimant's Shop Steward. That the Shop Steward was chosen by the grievant and he did not represent him in the hearing.

According to him the charges were read by the Principal accusing him of being lazy and having closed water from flowing to the Guest House which he denied as false. That he was forced to admit and apologise but he refused. Finally his employment was terminated. He admitted that during the suspension he was paid half his salary.

On cross examination by the counsel for the Respondent he said that he started working for the

Respondent when it was Kilifi Institute of Agriculture before changing to a University College. That during the disciplinary hearing, he was explained the charges and given an opportunity to defend himself before a decision was made.

That the Respondent offered to pay his terminal benefits but he first reported to the Claimant to seek justice in court in terms of reinstatement.

In defence, RW1 told the court that he was the Respondent's Administrative officer in charge of general maintenance and supervision of a group of Artisan's including the grievant. That in April or May 2009, the grievant locked the power house which houses the water pump and disappeared at around 10.00 a.m. Before locking the power house he left water flowing to irrelevant areas and denied water flow to the guest house which was the most crucial area due to guests including senior TSC Managers and other leaders in a seminar.

That effort to trace the grievant through his phone was in vain. That the respondent's driver was also sent to the grievant's home but also could not get him forcing the Respondent to buy water elsewhere to mitigate the water problem in the guest house.

According to the RW1 the closing of water from flowing to the guest house and the disappearance by the grievant with the pump house key was deliberate. That the grievant only reappeared the following day and showed no remorse. That RW1 was present when the principal gave the suspension letter to the grievant and he heard him explain to the grievant the reason for termination but the grievant gave no response.

On the delayed disciplinary hearing, the RW1 explained that it was due to the fact that respondent was new and the necessary Institutions had not been set up in addition to the fact that there was no recognition agreement between the parties herein to pave way to election of a Shop Steward.

That he confirmed having attended the disciplinary hearing before the Disciplinary Committee which is statutory. That Alex Toya from the claimant union represented the grievant. That the principal was the chairman during the hearing and also read the charges to the grievant. That the charges were that

a) The grievant closed water valve from main water pipe to the guest house.

b) He then locked the power house making it inaccessible by other workers.

c) He absented himself from workplace until the next morning

According to RW1 the grievant admitted the charges and refused to apologise after being advised to do so by the union official who represented him and pleaded for his job. Consequently the grievant's employment was terminated and he was offered his terminal dues as per Appendix 3 of the Respondent. In his view the Respondent complied with the law in terminating the grievant's employment.

As regard the service of the grievant, RW1 contented that it was not a continuation of the contract between the grievant and the defunct Kilifi Institute of Agriculture. On cross examination he said that he discovered the lack of water at 11.00 a.m.. That the driver who went to look for the grievant did not record statement. That the grievant acted in sabotage because he had added another padlock over and above the one for which the Respondent had a spare key.

After the close of the testimonies, the parties filed written submissions urging me to find in their favour. I have carefully perused the pleadings filed by the parties. I have also considered the evidence and the closing submissions filed. There is no doubt that the court has jurisdiction to entertain the dispute before me by virtue of the Constitution and Statutory Labour Law in Kenya. It is also not in dispute that there was employee – employer relationship between the grievant and the respondent. There is also no dispute about the terms of the relationship between the said parties.

The issues for determination in my view are:

- a) Whether the termination of the grievant's employment by the Respondent on 15th April 2010 was unfair.
- b) Whether reliefs sought ought to issue.

To answer the first issue, I have considered Section 41,43 and 45 of the Employment Act (the Act). The question in my mind is whether the termination was based on a valid reason and fair procedure. The reason for termination of employment was misconduct in the form of negligence of duty and sabotage as per the termination letter.

The terms of service produced by the respondent and the appointment letter do not outline the procedure for dealing with disciplinary hearing, like the one before the court. As such I have invoked Section 41 of the Act which bars an employer from terminating the services of employee without according him a hearing as prescribed thereunder.

Section 41 aforesaid, requires that the employer invites the employee in the company of a person of his choice for explanation of the reason for the intended termination. After the explanation, the employer hears any representations from the employee and the person he chooses to accompany him and then considers such representations in the decisions to terminate failure to adhere to such a procedure renders the termination unfair.

In the present case the grievant was suspended on 13th May 2009 and given a letter dated the same date. The letter indicated the reasons for the suspension and promised a hearing before the Junior Disciplinary committee at a later date. This came after one year when the grievant was summoned to the hearing on 15th April 2010. The summoning letter did not however explain to the grievant that he was entitled to call a person of his choice to accompany at the hearing.

On the day of hearing, it is alleged by the defence that the grievant was represented by Mr. Alex a union representative. The grievant has however denied that he called the said Alex as his companion to the hearing as required under the law. In my view, the grievant was given a fair hearing before termination. He had a whole year of preparation and even to consult with the claimant. The reason for termination was clearly stated in the suspension letter and the grievant has not told the court that he did not understand them during the hearing. The right to call a colleague of his choice to accompany him to the hearing was violated but I doubt whether it was fatal. Section 41 does not seem to place the burden of telling the employee to bring a colleague of choice to the hearing on the employer. The employee in my view should also have demanded for that right to be accorded. Nothing in the pleadings or the evidence by the grievant show that he suffered any prejudice as a result of lack of a colleague to accompany him during the hearing. My findings would have been different if the grievant had said that he was denied opportunity to call a colleague who could have given vital evidence to support his innocence.

On the validity of the reason for termination, the respondent gave evidence accusing the grievant of absenting himself from work place without permission. I wonder why he was not terminated for that reason. Instead the employer terminated him on ground of negligence of duty and sabotage. Whatever the reason for the choice of the latter grounds, I am convinced that the grievant misconducted himself and the employer was right in taking disciplinary action against him.

The circumstances of the case were such that a reasonable employer would have believed that the employee was acting to sabotage her business. Turning off water flow from sensitive area like a guest house with customers and locking the pump house to deny the respondent access and then switching off his phone and disappearing until the following day was in bad faith.

I will therefore uphold the termination of employment by the respondent. I will however direct that it shall be a normal termination and not summary dismissal for purposes of calculating terminal benefits. The claimant prayed for reinstatement with benefits as the only relief.

I will not order for his reinstatement as prayed because it seems the relationship between the grievant and the employer has irretrievably broken down. Secondly, it's over 3 years after the termination of the employment. I will however, award monetary compensation to the grievant. I have the submissions by the defence that parties bound by their own pleadings. However Section 12(3) (viii) of the Industrial Court Act allows the court to make appropriate relief as the court may consider just.

Consequently, I direct the Respondent to pay to the grievant service pay for the years served from 30th December 2008 to 15th April 2010. There is no evidence of membership to NSSF or reason to bar me from making the foregoing order. The service pay or pension for the period served under the Ministry of Agriculture shall be paid by the said Ministry forthwith. The Respondent will also pay 3 months salary in lieu of notice in accordance with clause 3.1 of the terms of service for staff in grade I-IV. In awarding the 3 months notice pay, I have considered that the grievant has served the respondent for more than 5 years. It would be unfair for the respondent to insist that the grievant only served for less than 3 years. The names and the management of the institution may have changed but not the grievant's job or grade. The grievant will also be paid his passage and baggage allowance of ksh.3800/.

The grievant will also be paid the salary arrears for the period under suspension to the time of termination. He will also be entitled to any leave days not taken.

In summary the suit is dismissed with no orders as to costs save for the following monetary compensation based on his monthly salary of

- a) Kshs.20328/- three months salary in lieu of notice
.....**Ksh.60984/-**
 - b) Service pay for 15 days per year of service for 2 years
.....**Ksh.20328/-**
 - c) Half salary in arrears for the suspension period between
13th May 2009 and 10th April 2010 (11 months X ksh.10,164)
.....**Ksh.111804/-**
 - d) Passage and baggage allowance.....**Ksh.3800/-**
- TOTAL Ksh. 196,916/-**

e) The grievant to pursue his benefits from Ministry of Agriculture for the period he served under the said Ministry.

Signed Dated and delivered this 10th day of May 2013

ONESMUS N. MAKAU
JUDGE