



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 253(N) OF 2009

KENYA HOTELS & ALLIED WORKERS UNION

CLAIMANT

v

NAIROBI HILTON HOTEL

RESPONDENT

JUDGMENT

1. The Claimant Union filed a Claim against Hilton Hotel on 27 May 2009 and the issue in dispute was stated as the *wrongful dismissal of Mr. Moses Ole Mokombo*. The Union filed a Supplementary Memorandum of Claim on 15 June 2009. The Hotel filed its Response through the Federation of Kenya Employers on 17 November 2009. On 1 April 2010, the Claimant Union filed a Response to the Respondent's Memorandum.
2. The Cause was heard by Justice Chemmutut on 16 April 2010 (as he then was before ceasing to hold office) and after hearing the parties he informed them that he would deliver an award on notice. That was never to be and the reasons are in the public domain and I don't need to restate them here.
3. When the new Industrial Court was constituted, the file was allocated to me to prepare and deliver an award but I thought that under the prevailing legal framework, I could only do so with the agreement of both parties.
4. After several notifications, Mr. Ambita for Claimant Union and Mr. Nduna for the Respondent appeared before Justice Makau on 4 June 2013 and signaled their agreement to me preparing and delivering an award based on the record of the pleadings, proceedings and submission taken before Justice Chemmutut.

Claimant Union's case

5. The grievant, Mr. Moses Ole Mokombo was employed by Hilton Hotel in 1985 as a cleaner at a wage of Kshs 600/- per month which rose to Kshs 8081/- at time of dismissal. On or about 10 September 2008 he was summarily dismissed through letter of even date (Union's Appendix 1). The reasons stated in the letter were that he had appeared at work on 6 September 2008 apparently intoxicated and failing to report to the Human Resources Manager as requested. An appeal by the grievant was rejected as were interventions by the Union. Conciliation through the Ministry of Labour also failed because Hilton Hotel did not attend.
6. The Union submitted that because the grievant was paying agency fees he was entitled to enjoy the benefits agreed to in the Collective Bargaining Agreement. It was further submitted that the grievant was not subjected to medical tests to confirm intoxication and the disciplinary procedures

were not followed.

7. The Union sought the reinstatement of the grievant and terminal dues totaling Kshs 699,857.40 made up of salary arrears, house allowance arrears, accrued service charge, 12 months' compensation, service gratuity for 23 years and notice pay in lieu.

Hilton Hotels' case

8. For the hotel, it was submitted that the grievant was an undisciplined employee who was expelled from the Union on 18 July 2006 (Respondent's Appendix 1), who had a record of warnings/suspensions/prior dismissal (Respondent's Appendices 2, 3, 4, 5,6 and 7) and dislike for women.
9. According to the Respondent, the reasons for dismissal were those stated in the dismissal letter, intoxication and failing to report to the Human Resources Manager as instructed and that the dismissal was lawful and in accord with section 44 of the Employment Act and further that the grievant had a bad history and could not be reinstated and that in any case he had reached retirement age.
10. On remedies, it was submitted that the grievant was not entitled to compensation or gratuity because he had not availed himself of the opportunity granted to him and therefore the case should be dismissed.

Analysis

11. At the time of the dismissal of the grievant on 10 September 2008, the Employment Act, 2007 was already in operation having commenced on 2 June 2008.
12. Section 41 of the Employment Act has laid out explicit procedures to be taken by an employer who is contemplating dismissing an employee. In employment law language, this is what is called procedural fairness, which is the equivalent of natural justice or right to a hearing in administrative/public law domain. Even a summary dismissal must be carried out in compliance within the section.
13. Even where an employer has very good and solid grounds, the employer must still comply with the procedural requirements of section 41 of the Act. To demonstrate that it has complied with the procedural requirements, an employer must show that it
 - i. explained to the employee in a language the employee understood the reasons why it was considering the termination.
 - ii. allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.
 - iii. heard and considered any explanations by employee or his representative.
 - iv. Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and had complied with its own internal disciplinary rules.
14. There was no suggestion or evidence that the Respondent complied with the requirements of section 41 of the Employment Act and I do therefore find and hold that the summary dismissal of the grievant was procedurally unfair.
15. Sections 43 and 45 of the Employment Act on the other hand deal with substantive fairness in that an employer is expected to prove the reasons for termination and further that the reasons are valid and fair reasons. In the instant case the Respondent annexed to its Response a chain of documentary evidence to prove the reasons, validity and fairness of the termination.
16. To my mind, however, it is not enough for an employer to prove the reasons for termination and that the reasons were valid and fair, it must also demonstrate that it complied with the procedural requirements in section 41 of the Act.

Appropriate relief

Reinstatement

17. Due to the time lapse and the fact that the grievant had reached retirement age reinstatement would not be a just and appropriate remedy in this case.

Salary arrears, service gratuity and service charge

18. The Union did not make any reference or lay either a statutory or contractual foundation to these reliefs and therefore I decline to make any award in respect thereto in favour of the grievant.

Salary in lieu of Notice

19. Having found and held that the summary dismissal of the grievant lacked procedural fairness, he is entitled to at least one month salary in lieu of notice and I award him Kshs 8081/-, which was submitted as his salary at time of separation.

Compensation

20. Compensation is one of the primary remedies for unfair termination/wrongful dismissal and therefore because the grievant has succeeded in his main case, he is entitled to an award of compensation. Taking into consideration the thirteen factors set out in section 49(4) of the Employment Act, I award the grievant the equivalent of three months' salary as compensation in the sum of Kshs 24,243/-.

Conclusion and Orders

21. I do find, hold and declare that the summary dismissal of the grievant was procedurally unfair and award him

a. One month salary in lieu of Notice	Kshs 8081/-
b. Three months salary in compensation	Kshs 24,243/-
TOTAL	Kshs 32,324/-

22. There will be no order as to costs due to the ongoing relationship between the Union and the Respondent.

Delivered, dated and signed in Mombasa on this 23rd day of August 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Ambita instructed by Kenya Hotels & Allied Workers Union for Grievant

Mr. Nduna instructed by Federation of Kenya Employers for Respondent