



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 997 OF 2010

PIUS NGAO MWENGA.....CLAIMANT

VS

**KENYA TOURIST DEVELOPMENT
CORPORATION.....RESPONDENT**

AWARD

Introduction

1. This case was originally filed in the Chief Magistrate's Court at Nairobi on 22nd September 2006. By an order of the High Court at Nairobi issued on 6th May 2010, the matter was transferred to the Industrial Court. The Claimant then filed a Memorandum of Claim on 31st March 2011 to which the Respondent filed a Reply on 22nd July 2011. By consent, the parties agreed to proceed by way of written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 15th August 1989 as a Security Guard II at a gross salary of Kshs. 804 per month. On 26th April 1990, the Respondent confirmed the Claimant to permanent and pensionable terms of service with effect from 21st August 1989. The Claimant joined the Respondent's Staff Retirement Benefits Scheme effective 1st July 1995.
3. The Claimant rose through the ranks to Senior Guard I and his salary was progressively increased to Kshs. 23,220 as at June 2005. The Claimant was entitled to 21 days' annual leave.
4. On 6th May 2005, the Claimant was suspended and on 30th May 2005, he was dismissed from employment, on allegations of having stolen fluorescent tubes from the basement of Utalii House. Prior to his dismissal, the Claimant was arrested and detained by the Police. He was later released unconditionally. It was the Claimant's case that the allegations against him were untrue and unfounded. He pleaded that he was not afforded an opportunity to defend himself.
5. Upon dismissal, the Claimant was paid his contribution towards the Staff Retirement Benefits Scheme. He was not paid the employer's contribution. The Claimant was 46 years old when he was dismissed. He would therefore have worked for another nine years up to retirement at 55 years.
6. The Claimant's claim is as follows:
 - a. Service pay equivalent to 12 months' salary.....Kshs. 278,640.00
 - b. 3 months' salary in lieu of notice.....69,660.00

- c. Leave allowance (a month's salary).....23,220.00
- d. Unpaid retirement benefits.....254,985.31
- e. Gratuity for 16 years @ 15 days' salary per year.....201,760.00
- f. Reinstatement or re-engagement in a comparable position or in the alternative payment of equivalent of 9 years' salary up to retirement2,507,760
- g. Costs and interest

The Respondent's Case

7. In its Reply filed on 22nd July 2011, the Respondent stated that the Claimant's suspension and subsequent dismissal were undertaken with due regard to the law and fair procedure. In particular, the suspension was justified since it was based on reasonable suspicion of impropriety on the part of the Claimant and his colleague one Bernard Githitu. The Claimant was subsequently dismissed after being given an opportunity to defend himself.

8. The Respondent further pleaded that the circumstances leading to the Claimant's dismissal are recognised as a ground for summary dismissal under Section 44(4) (g) of the Employment Act, 2007. The Respondent's report to the Police and subsequent arrest of the Claimant was based on reasonable belief by the Respondent and its servants and/or agents that the Claimant had jointly with his colleague, Bernard Githitu committed a criminal offence. There was no conclusive proof that the investigations by the Police had absolved the Claimant from any wrong doing.

9. While admitting the Claimant's diligence which had earned him several promotions and salary increments, the Respondent maintained that the Claimant was guilty of theft of property belonging to the Government of Kenya which warranted his summary dismissal. The Claimant's defence was found inadequate to counter the allegations made against him leading to an inference of his guilt.

10. According to the Respondent, the Claimant was paid and duly acknowledged all his dues in full and final settlement and the Respondent was no longer liable to the Claimant.

Findings and Determination

11. The main issue for determination in this case is whether the termination of the Claimant's employment by the Respondent was lawful. Before proceeding any further on this point, I need to determine the applicable employment law in this case. The Claimant's employment was terminated on 30th May 2005 before enactment of the Employment Act, 2007. Since there is no provision for retrospective application of the current Employment Act to employment contracts terminated before the commencement date, the applicable law in this case would be the repealed Employment Act (Cap 226).

12. Section 17(g) of the repealed Act provides for summary dismissal:

17(g) if an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

13. This provision, which is reproduced in Section 44(4) (g) of the Employment Act, 2007 is what the Respondent relied on in terminating the Claimant's employment. The Claimant was accused of colluding with one Bernard Githitu to conceal a carton containing 21 fluorescent tubes belonging to the Government of Kenya with the intention of stealing them. The Claimant and his colleague were arrested and suspended pending investigations but they were never charged in Court.

14. In the written submission filed by the Respondent, it was stated that the Claimant was put through an internal disciplinary process after which he was terminated. There was however no documentation of this process.

15. Under the repealed Employment Act, an employer could terminate the employment of an employee by giving the requisite notice and without assigning any reason for the termination. There was no requirement for the right to be heard as is the case in the current law. Court decisions rendered prior to enactment of the new labour laws gave parties to employment contracts the right to terminate the said contracts upon giving the requisite notice or payment in lieu thereof.

16. Specifically, Section 14(5) of the Repealed Act provides as follows:

(5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be-

i.

(ii)

(iii) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminable by either party at the end of the period next following the giving of notice in writing.

17. This position was affirmed by the Court of Appeal in the case of **Barclays Bank of Kenya Ltd Vs Joseph Mwaura Njau [2006] eKLR**. In the case before me, the Respondent opted to advance a reason for termination of the Claimant's employment but in the assessment of the Court, there was no adequate evidence to prove the allegations made against the Claimant, even on a balance of probability

18. I therefore convert the Claimant's termination to a normal termination with the following benefits:

a) One month's salary in lieu of notice..... 23,220

b) Unpaid retirement benefits.....254,985

Total.....278,205

The Respondent will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF AUGUST 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*