



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 464 OF 2011

(Before D.K.N. Marete)

WILLY KOSGEI.....CLAIMANT

Versus

MOI TEACHING & REFERRAL HOSPITAL.....RESPONDENT

JUDGEMENT

This matter came to court vide a memorandum of claim dated 21st March, 2011. The issue in dispute is cited as;

Wrongful/unfair/Summary dismissal/and unlawful termination of the claimant WILLY KOSGEI being aggrieved by such wrongful, unfair and unlawful dismissal files the claim herein.

The respondent in a statement of defence denies the claim and prays that the same be dismissed and or struck out with costs to himself.

The claimant's case is that at all material times, the claimant was employed by the respondent as a security officer. He was employed and confirmed as a senior security guard on 3rd October, 2007, having worked on a casual basis for more than one year. He started at Ksh.14,415.00 per month and at the time of dismissal/termination earned Ksh.17,566.00. His term of service was to serve on permanent and pensionable basis alongside other allowances. By a letter dated 20th November, 2010, the respondent unlawfully and wrongfully terminated and or summarily dismissed the claimant from employment without justifiable cause or even affording him a hearing and the hearing, if at all was unprocedural and occasioned miscarriage of justice. This termination was back dated to 25th October, 2010.

On 29th November, 2010 the claimant appealed against his termination and he was informed of the decision to reaffirm the termination through a letter dated 25th October, 2011.

The claimant's case is that the purported disciplinary committee was constituted to rubber stamp the decision of the respondent and acted as a complaint, prosecution and judge. He also claims that in the

course of his employment he worked overtime but was not paid for the same. He prays for;

- a. *A declaration that the Claimant's employment services with the Respondent were wrongfully terminated, unlawfully summarily dismissed and/or unfairly.*
- b. *Award of Twelve Months salary in lieu of Notice of termination of Employment.*
- c. *Three months' salary in lieu of notice of termination of Employment.*
- d. *Service pay.*
- e. *In the alternative, the Claimant be reinstated in his former employment without any loss of benefits and or seniority.*
- f. *Costs of this cause and interest.*

The respondent denies the claim and pins the claimant on gross indiscipline and flouting of terms and conditions of services as follows;

Further the Respondent denies the entire contents of paragraph 8 of the statement of claim and adds that whatever action it took against the claimant was justified pursuant to breach of gross discipline committed by the claimant.

Particulars of gross discipline

- a. *Flouting hospital terms and conditions of service*
- b. *Flouting security department's procedure for enhancing safe custody of the institution and its assets at Moi Teaching and Referral Hospital*
- c. *Failing to perform property and carefully work that you have been assigned*
- d. *Committing a criminal offence against or to the substantial detriment of employer's property*
- e. *Absenting himself from the place of work*
- f. *Not taking reasonable precautions*
- g. *Stealing from the employee*
- h. *Failing to hand over*

The termination of employment of the claimant was proper. After careful perusal and scrutiny of the record of the claimant, that a properly constituted disciplinary committee was constituted and deliberated the issue, therefore validating the decision of the committee. The dismissal being valid, the claimant is not entitled to any terminal dues.

The matter variously came for *inter parties* hearing until the 11th June, 2013 when the parties agreed to dispose of the matter by way of written submissions and come back for a mention on 12th September, 2013 to confirm compliance on the date of mention. The claimant was compliant whereas the respondent was not and pleaded for further time to file the submission. The court declined the application and set the matter for judgement and or determination.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant unlawful and wrongful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the suit?

It would appear that in the course of the claimant's duty, a theft occurred at the ECN-offices and materials worth about Ksh.313,400.00 were lost. This led to the issue of a letter to the claimant dated 14th July, 2010 fashioned: **Interdiction: Show cause**. The Claimant was charged as follows;

- a. *Failing to perform and carefully work that I had been assigned.*
- b. *Committing a Criminal Offence against or do the substantial detriment of your employer's property and;*
- c. *Absenting myself from the place properly appointed for the performance of my work.*

The Claimant rightly argues that this was anomalous in that an interdiction and a show cause would never flow together. Moreover, the letter of interdiction was received on 25th July, 2010 but dated 14th July, 2010.

The claimant was invited to a disciplinary panel on 25th October, 2010 but submits that this did not award him an open opportunity to present his case. His guilt was preconceived in the minds of the panelists of the disciplinary committee. He also faults the procedural aspects. The reasons for the committee finding was not communicated neither was evidence of their decision. He was not heard on his appeal and the results communicated to him later. He denies gross misconduct as a ground for dismissal as he had had permission and skipped duty with the permission/authority and knowledge of his supervisor.

The letter of interdiction/show cause was issued to the claimant thus enabling him to do his case. He posits that he was out of work to attend to his ailing child but falls short of adducing evidence of authority to be away from work on the night of theft and loss of materials belonging to the respondent. This would justify a case for disciplinary process and consequent dismissal by the respondent.

The respondent's witnesses, in their witness statements by Anne Chemworsio, DW1 indicate a properly constituted and handled case of indiscipline. The appeal against dismissal was appropriately addressed and results communicated. DW2, Francis Ntaba Mose, the claimant's supervisor's evidence is that the claimant did not comply with the terms and conditions relating to handing over of his duties. This was not properly documented and even signed for. He failed to comply with processes well known to himself. The other witness, Kennedy Kipkogei Kosgei narrates an internal relationship where he and one, David Too were requested by the claimant to cover him. They did as from 2200 hours but on the following day he learnt that keys to the ECN were missing from the radio room and that a theft had occurred. He was warned for leaving his work station and unprocedurally taking over duties in the radio room.

All the evidence points to a case of carelessness and negligence on the part of the claimant. I would agree with the defence that this being the case, the claimant was lawfully terminated from employment. He therefore has no legitimate claim against the respondent. I therefore dismiss the claimant with costs to the respondent. And this satisfactorily answers all the issues in dispute.

Dated, delivered and signed the 20th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances

1.Claimant in person.

2.Mr. Serion instructed by Onyinkwa & Company Advocates for the Respondent.

