



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1998 of 2011

DONALD ODEKE.....CLAIMANT

VS

FIDELITY SECURITY LIMITED.....RESPONDENT

AWARD

By a Memorandum of Claim dated 22nd November 2011, the Claimant sued the Respondent for unlawful and unfair termination of employment as well as failure to pay full terminal benefits. The Respondent was served but did not file any Reply nor did they attend the hearing. The matter therefore proceeded ex parte on 17th October 2012, with Mr. Makokha appearing for the Claimant.

The Claimant gave sworn testimony. He told the Court that he was employed by the Respondent on 1st September 1998 in the position of Security Guard (the letter of appointment is marked Appendix A in the Claimant's documents). The Claimant added that in 2001, he was deployed as a Messenger at Akiba Bank, which was later taken over by the East African Building Society which in turn was taken over by Eco Bank. The Claimant remained an employee of the Respondent and on 17th November 2010, he was issued with a termination letter (the termination letter is marked Appendix D in the Claimant's documents).

The Claimant's last salary was Kshs. 8,652 (Appendices B & C of the Claimant's documents). According to the termination letter, the Claimant's performance had been reviewed and found to be below the Respondent's service delivery expectation. Further, the Claimant was accused of insulting a senior manager, being violent and unruly. The Claimant told the Court that he was not aware of any review of his performance having been undertaken as alleged in his termination letter. He further denied having insulted any one or being violent or unruly.

The Claimant averred that prior to termination of his employment by the Respondent, he was not given an opportunity to be heard. He claimed that the real reason why the Respondent had terminated his employment was because he had submitted a medical certificate confirming that he was HIV positive. As a result, the Respondent had subjected him to stigmatisation and discrimination. The Claimant went on to state that after termination of his employment, the Respondent deposited the sum of Kshs. 49,183 in his bank account but that the Respondent had not provided any particulars of the said deposit.

The Claimant's claim was tabulated as follows:

- a) One month's salary in lieu of notice.....Kshs. 8,652
- b) Compensation for wrongful and unlawful termination calculated

at 12 months of the last gross pay of Kshs. 12,413x12

months.....148,944

c) Aggravated damages for discriminatory termination

on the basis of the Claimant's HIV positive status to be assessed

by the Court

Section 43(1) of the Employment Act, 2007 provides that:

(43)(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45

Section 45 (2) provides that:

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

(a).....

(b).....

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

Section 41 of the Act 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

In the case of **Isaac Matongo Mogoi Vs. Municipal Council of Nakuru and Another (HC Misc Case No. 810 of 2005)** Koome J (as she then was) held that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.

I agree with the learned Judge and add that it does not matter what offence the employee is accused of. If the employee is not heard the termination is *ipso facto* unfair.

From the record, there is no evidence of the Claimant having been given any opportunity to defend himself against the allegations leveled against him. I therefore find that the termination of the Claimant's employment by the Respondent was unfair within the meaning of Section 45 of the Employment Act, 2007 and award him the equivalent of 11 months salary based on his last gross salary being Kshs. 8,652. The sum of Kshs. 1,129 for overtime is to be discounted since overtime could only be earned if the Claimant was in actual employment. The sum of Kshs. 49,183 paid to the Claimant by the Respondent will also be discounted from this award. The Claimant's termination letter indicates that the Claimant was served with 1 month's notice. He is therefore not entitled to 1 month's salary in lieu of notice.

On the claim for aggravated damages for discrimination on the basis of his HIV status, the Claimant did

not produce any medical reports to confirm his status. Moreover, there was no clear evidence to support the Claimant's allegation that his termination was actually actuated by his HIV status. This claim has therefore not been proved and is hereby dismissed.

The Claimant will have the costs of this suit.

DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2012

LINNET NDOLO

JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**