



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 39 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th October, 2016)

CHARLES NJAGI NYAGA CLAIMANT

VERSUS

AIR CONNECTION LIMITEDRESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim is dated 14th January 2012 where the Claimant prays for an award against the Respondent for:

- a) A declaration that the Claimant's dismissal was unfair, irregular and in breach of Employment Act 2007.*
- b) The Claimant reinstated to his previous employment under Section 49 (3) of the Employment Act 2007.*
- c) Kshs 9,163/= being in balance of untaken leave days.*
- d) Kshs 25,000/= equivalent to the wages corresponding with the notice period.*
- e) Service pay for nine (9) years.*
- f) Damages for unfair dismissal.*
- g) Interest on (c), (d), (e) and (f) at commercial rates until payment in full.*
- h) A Certificate of Service under Section 51 Employment Act 2007.*
- i) Costs of the cause.*
- j) Any other relief that this Honourable Court may deem fit to grant in the interest of justice.*

Facts of the Claim

2. The Claimant was employed by the Respondent as an Export Clerk stationed at Jomo Kenyatta

International Airport, at a salary of Kshs 7,000.00. He carried out duties professionally and diligently earning him various salary increments, that by the time of his termination he was then earning Kshs 25,000.00.

3. Between the 9th and 10th October 2012 he was tasked with clearing sensitive cargo belonging to British Army Training Unit Kenya (BATUK) a task he completed well to the delight of the customer.

4. Shortly after he completed his duties, the Claimant was served with a suspension letter where he was requested to stay away from the Respondent's premises to allow them to carry out confidential investigations in respect of fraud at the Respondent's premises. No attempt was made to explain to him the reason for his suspension.

5. The Claimant was later served with a show cause letter why disciplinary action should not be taken against him because of claims of theft of the BATUK shipment that he cleared on the 10th of October 2012, as well as falsification of petty cash for bond cancellation relating to clearances he left unfinished when he was abruptly suspended. He was taken through biased disciplinary hearings on the 7th of November 2012, and shortly after, was served with his summary dismissal letter, where no reasons were given for his suspension.

6. The Claimant claims that he was not given his one month notice as was due and that the procedure that was applied in his termination was flawed. He says that his nine (9) years of service were done superbly and that he would have worked for a further 15 years had his services not been terminated.

7. The Respondents have filed a Statement of Defence to the Claim. In it they admit that the Claimant was in their employment at the stated time. They state that the accounts department put in new procedures around October 2012, which would check payments made out to various bodies.

8. From the data collected via the new procedures, a few anomalies were noted such as money for bond cancellation was not used as stated, non-existent entry numbers or duplicated entry numbers for cash required. This led to the Claimant being suspended from employment pending investigations of the misconduct unveiled including theft of customer shipment and falsification of petty cash for bond cancellation.

9. The Respondent states that on the 23rd of October 2012, he was asked to show cause why action should not be taken against him which he was to respond to by 24th of October 2012. He responded on the 28th of October 2012 refuting all allegations. He was on the 2nd of November 2012, invited to appear before a disciplinary committee which was to take place on the 7th of November 2012. He was informed of his right to be accompanied by a fellow employee of his choice.

10. The Claimant was found guilty of all the allegations and he was not able to exonerate himself against the misconducts, he was dismissed on the same day after failing to give plausible explanation to the charges of theft and falsification of petty cash.

11. The Respondent states that the Claimant collected his terminal benefits and signed a voucher discharging the Respondent against any claim that may arise after separation.

12. In their submissions, the Claimants submit that the requirement for procedural fairness in terminating an employees' contract under Section 41 of the Employment Act was set out in **Anthony Mkala Chivati Vs. Malindi Water & Sewerage Company Ltd (2013) eKLR** Radido J set out three elements of procedural fairness:

i) That the Employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee;

ii) Secondly, it will follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence / state his case in person, writing or through a representative or shop floor union representative if possible;

iii) Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representation by the employee before making the decision to dismiss or give other sanction.

13. They also submit that the hearing should be in line with the rules of natural justice and equity. It has to have both procedural and substantive fairness, which was not met in this instant.

14. The Claimant submits that it is a requirement under Section 12 of the Employment Act 2007, that employer who have more than 50 employees should document internal disciplinary procedures. In this instant, none have been laid out and the Claimant reiterates that the conditions and procedure laid out in Section 41 of the Employment Act was not met.

15. As to substantive fairness, the Claimant submits that the condition laid out in Section 43 (1) of the Employment Act was not met. They submit that the employer is to provide proof and or reasons for terminating an employee which reasons must be then assessed by the Court to establish validity.

16. They submit that no such evidence was provided by the Respondent. They failed to provide document or witnesses to prove that the allegations against the Claimant held any water.

17. The Claimant submits that he is entitled to the damages sought. He had not taken any leave and the Respondent did not provide record to counteract the claim, he was not paid his one month's salary in lieu of notice, there was no evidence that the Claimant was a member of NSSF or a registered pension or provident fund and as such is entitled to service pay.

18. As to the claim for damages for wrongful dismissal, Section 49(1) of the Employment Act provides that the Court finds that a termination of an employment contract or summary dismissal is unjustified, then it may award compensation not exceeding twelve months gross salary of the employee at the time of dismissal.

19. Further, under Section 12 (3) (v) of the Industrial Court Act, the Court may under its own discretion choose to exercise its discretionary jurisdiction to ward exemplary or punitive damages.

20. They submit that the principles that govern the award of exemplary damages in dispute of employment are the general principles that govern such awards generally and they include:

a) The reprehensibility of the conduct being punished, that is the conduct must be such that it must be condemned or censured;

b) The reasonableness between the harm and the award to be made;

c) And the difference between the award and the civil penalties in comparable cases.

21. They submit that the Claimant was a long standing and honest employee who has suffered due to the injustice meted against him and the Court should therefore award a sum of Kshs 1,000,000.00 on account of exemplary damages.

22. They rely on the case of Industrial Court Cause No 953 of 2011 between **Patrick Njuguna Kariuki vs. Del Monte Kenya Limited** in urging the Court to grant exemplary damages for wrongful dismissal where the Claimant was awarded of Kshs. 5,000,000.

23. As to interest the Claimant submits that Section 26 of the Civil Procedure Act provides that the Courts

may award interest on decree from the date the suit filed.

24. They rely on the case of Nalinkumar M Shah v Mumias Sugar Company Ltd [2010] eKLR where F. Azangalala J referred to the case of Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited (no 2) 1970 EA in which Sprey V P cited the decision in Kawako Estate Coffee Factory Limited v Zassa (Civil Appeal 32 of 1969) UR that:

“.....undue delay in bringing an action may be a good ground for refusing interest on money wrongly withheld. I think that failure to prosecute a suit with diligence might as well have the same result.”

25. Additionally they submit that Rule 27(1) (f) of the Industrial Court (procedure) Rules 2010 provides that this Honourable Court may award interest.

26. They submit that they are deserving of all their prayer and ask the Court to award as claimed.

27. The Respondent submitted that there was sufficient ground to summarily dismiss the Claimant as provided under Section 44 (4) (g) of the Employment Act. The said provision states:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause... and constitute justifiable grounds for the dismissal if:

(g) 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.

28. They submit that the charge for theft of BATUK shipment and falsification of petty cash money for bond cancellation provided such ground.

29. The Respondent in compliance with the provisions of Section 44 (3) had sufficient grounds for dismissal of the claimant for breach of contractual duty. It was an express and implied term of the employment contract that the claimant was to work diligently and safeguard the interest of the Respondent.

30. They submit that the Claimant has consequently failed to prove on a balance of probability that the summary dismissal was wrongful and has not justified his conduct as an employee of the Respondent.

31. They submit that the proper procedure was followed, to the letter, he was explained to in a language he understands & further invited to show cause why disciplinary action should not be taken against him. They submit that the Claimant demonstrated that he understood the charges levelled against him, further, when he was invited for a disciplinary hearing, he was requested to invite a fellow employee if he so wished.

32. They submit that there has been a breach of trust between the employer and employee and the relationship has irretrievably broken down, reinstatement is not practical.

33. They submit that the Claimant was summarily dismissed and is therefore not entitled to notice pay. NSSF and NHIF deductions were made on his behalf and as such he is not entitled to service pay.

34. They submit that he did not provide any evidence on the leave days not taken, and that his certificate of service has been available and is ready for collection.

35. The Respondent further submits that damages for unfair dismissal are also not due as his termination was fair and within the law, they state that compensation if any is not to punish the employer but to make good the employees loss but the loss has to be proven and grounds for awarding justified.

36. In view of the above, the Claimant is not entitled to pay any payment or compensation of damages. The terminal benefits of the Claimant were paid in full and hence the issue of costs and interest do not arise.

37. They submit that the cause should be dismissed with costs.

38. Having considered all the evidence and submissions of both parties, issues for determination by this Court are as follows:

- 1. Whether there were valid reasons to terminate the Claimant.**
- 2. Whether due process was followed before Claimant was terminated.**
- 3. What remedies if any the Claimant is entitled to.**

39. On the 1st issue, the Respondents summarily dismissed the Claimant following alleged theft. The Claimant had previously been suspended from work for misconduct in:

- 1. Theft of Batuk Shipments.**
- 2. Falsification of petty cash money for bond cancellation.**

40. The Claimant was asked to provide a written explanation on these allegations he wrote on 28.10.2016. He denied stealing any cargo. He also denied falsifying petty cash but stated he did not manage to cancel them due to the prolonged customs procedures and the work he was doing which he could not leave undone.

41. The Claimant stated that he didn't commit offences in question. It is apparent that the Respondents didn't have any disciplinary manual but from Section 44(4) of Employment Act 2007:

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not

***within fourteen days either released on bail or on bond or otherwise lawfully set at liberty;
or***

(g) 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.

42. If indeed the Claimant was involved in such misconduct as under (g) above, then he was bound to be summarily dismissed.

43. From the proceedings of the disciplinary hearing (Respondent's Appendix 5) held on 7.11.2012 there was reasonable suspicion that the Claimant was involved in some misconduct and he didn't answer some questions put to him like which the shipment was not screened.

44. It is my finding that the Respondents had a valid reason to terminate the Claimant in the circumstances as provided for under Section 43 of Employment Act.

45. On the 2nd issue, due process, the Claimant told Court that he was invited for a disciplinary hearing but was not accorded an opportunity to defend himself properly as he was not given details of the charges against him.

46. This is not the true position as the disciplinary proceedings show that there was proper hearing and before that the Claimant was heard. He was invited for a hearing scheduled on 7.11.2012 vide a letter dated 5.11.2012. The letter referred to the suspension letter which detailed out the charges against the Claimant.

47. I therefore find that the Claimant was taken through proper disciplinary process as envisaged under Section 41 of Employment Act.

48. The Claimant was paid some termination dues by the Respondents and I do not find him entitled to any other awards/order. I dismiss the Claimant's case accordingly with costs.

Read in open Court this 18th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngonde holding brief for Wachira for Claimant – Present

No appearance for Respondent