



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 675 of 2011

Peter Ochieng Muholo Claimant

Trade Winds Agencies Ltd also t/a

Trade Winds Limited..... Respondent

AWARD

1. Peter Ochieng Muholo (the Claimant) was employed by Trade Wind Agencies Ltd (the Respondent) as a welder and general fitter on 2 May 2002.
2. On 9 February 2011, the Respondent wrote to him terminating his services for gross misconduct. The termination letter indicated that the Claimant had absented himself from duty for 6 days in January 2011 and on 2 days occasions reported for duty but left the Respondent's premises without permission. The letter further stated that the Claimant had deserted employment from 1 February 2011 to 7 February 2011.
3. The Claimant relied on his pleadings and oral submissions while the Respondent called one witness in support of its case.

Claimant's case

4. According to the Claimant he sought and got leave on 31 January 2011 from the Respondents officer in charge of personnel Mr. Charles Maina Muthigani to attend to personal business. He sought to attend to an issue at Ruaraka High School as a guardian and also go to his rural home.
5. When he resumed duty on 7 February 2011, the Respondent's Managing Director terminated his services allegedly because of his absence. The Managing Director refused to listen to his plea that he had been granted leave by Mr. Maina and that he was advised by the Managing Director to return later for his dues. The Respondent eventually refused to pay his terminal benefits.
6. The Claimant case is that the real reason for the termination of his services was his union activities. He pleaded and submitted that he served as a shop steward and that in this role he had fought for the increase of employees' salaries and better terms of service and the Respondent was uncomfortable with this role and thus a plot was hatched to unlawfully terminate his services.

7. The Claimant pleaded that at the time of termination he was earning a monthly salary of Kshs 13,500/-

8. The Claimant therefore seeks 2 months payment in lieu of notice, leave for 2003/2004, travelling allowance, gratuity, 12 months' salary as compensation for wrongful loss of employment and a certificate of service.

Respondent's case

9. The Respondent on its part asserted that the termination of the Claimant was fair and lawful. The reason for the termination was that the Claimant was absent from work without permission in January and February 2011. The Respondent annexed to its Memorandum in Reply Attendance Forms from 8 January 2011 to 13 January 2011, 17 January 2011, 19 January 2011 and from 1 February 2011 to 8 February 2011. The attendance forms show the Claimant was variously marked as absent.

10. The Respondent also argued that it had leave application forms which in the instant case were not used by the Claimant.

11. It was the further case of the Respondent that the Claimant was given an opportunity to explain himself before the Managing Director on 7 February 2011 before the decision to terminate his services was made. And that he failed to turn up. The dismissal, it was pleaded was in conformity with sections 41(1) and 44(4) (a) of the Employment Act and Clause 15 of the Collective Bargaining Agreement between the Respondent and the Tailors and Textile Workers Union, which expired in April 2007.

12. Further the Respondent pleaded that the Claimant's work attitude was one of insubordination and refusal to obey lawful commands which had led to his being dismissed in October 2009.

13. Regarding the heads of claim by the Claimant, the Respondent had this to say. On leave, no employee was owed any leave and the Claimant had not given sufficient particulars to support the claim. Concerning travelling allowance, the case for the Respondent was that the Claimant had not stated for what period the allowance was sought and that in any case dismissed employees were not entitled to the allowance. It was also argued that gratuity was not payable because the Claimant had been dismissed and in any case the Claimant was a member of the National Social Security Fund and therefore did not qualify by virtue of section 35 (5) and (6) of the Employment Act.

14. The Respondent also urged that 12 months compensation was not payable because the termination of the Claimant was lawful and fair and that it was prepared to issue a certificate of service to the Claimant.

Issues for determination

15. From the pleadings, evidence and submissions of the parties there is one central issue which emerges for determination and it is whether the termination of the services of the Claimant was lawful and fair and if the answer is in the negative what would be the appropriate remedy.

Whether the termination of the Claimant was lawful and fair

16. In addressing this issue I must consider the substantive decision/reasons made to terminate the services of the Claimant and the process which was used to arrive at the decision. The process and outcome must be dealt with separately. I will start with the process.

17. The relevant statutory provision dealing with the process of termination of an employment contract is section 41 of the Employment Act. The section requires that in cases of summary dismissal the employee being considered for dismissal should be heard and any representations made by him should be considered. The employee is also entitled to have another employee or shop steward present.

18. The Claimant in his Reply to Respondent's Memorandum and submissions made extensive arguments

regarding the process leading to the termination and I have duly considered the same.

19. On the part of the Respondent, Charles Maina Muthigani testified that he gave the Claimant an opportunity to explain why he had been absent and that this opportunity was given in the presence of one Edwin Kiira who was the Graphics Manager and Leonard Odundo, a colleague of the Claimant.

20. According to the Respondent pleadings, the Claimant was given an opportunity before and by the Respondent's Managing Director on 7 February 2011. However, the Managing Director was not called as a witness to testify on exactly what happened and whether Mr. Muthigani made any report to him about the meeting with the Claimant and the two other persons.

21. The Respondent's only witness Mr. Muthigani stated that he also gave the Claimant a hearing in the presence of some two other persons. But it was not even suggested that the two persons, Mr. Kiira and Mr. Odundo were present as the choice of the Claimant. The presence of these two persons was not explained. Further it was common cause that there was union presence and no mention was made of the role they played in the events leading to the termination. And in any case the Respondent's Response did not refer to any opportunity being granted to the Claimant by Mr. Muthigani.

22. After considering the pleadings and evidence on record I am not satisfied that the Respondent gave the Claimant an opportunity to make any representations before the decision to terminate was taken as required by section 41 of the Employment Act.

23. I therefore do hold that the termination of the Claimant was procedurally unfair. Having reached this conclusion it is my view that it is not necessary to consider the aspect of substantive fairness of the termination. Before I turn to consider appropriate relief, I need to state in my view the terms of a collective agreement are legally incorporated into an employment contract and whether the collective agreement has expired is not a material consideration in a case such as this one.

Two months pay in lieu of Notice

24. The Claimant sought Kshs 27,000/- being two months pay in lieu of notice. This head of claim was based on clause 15 of the Collective Bargaining Agreement signed by the Respondent and the Tailors and Textile Workers Union. It was not in dispute that the Claimant was employed on 2 May 2002 and was terminated on 9 February 2011, a period of about 9 years. The Claimant would therefore be entitled to two months pay in lieu of Notice in the sum of Kshs 27,000/-.

Leave for 2003-2004

25. Section 74 of the Employment Act requires an employer to keep certain records. Information pertaining to leave is part of the records. It was the case of the Respondent that due to a fire at its premises in 2010 most of its records were burnt down in a fire and therefore it was not possible to produce proper records.

26. The Claimant produced a document marked as Appendix 7 indicated to be a list of pending leave days/balance for 2003-2004. The Respondent did not challenge the authenticity of this document. But the question which arises in my mind is why leave for 2003/4 would be outstanding/remain pending over six years later. Would it be logical for the Claimant to take leave for 2005 onwards while he had accrued and pending leave days for 2003-2004? I don't think so and therefore the Claimant has made a case on this aspect of the Claim.

27. And if I were wrong on this I do find that this head of claim is statute barred. The claim was brought over 6 years after and is caught up by the provisions of section 4(1) of the Limitation of Actions Act and section 90 of the Employment Act.

Travelling Allowance

TOTAL

Kshs 97,092/-

37.The Respondent to issue the Claimant with a certificate of service.

38.The Claims in respect to leave for 2003/2004, travelling allowance and 12 months compensation are declined.

39.There will be no order as to costs

Dated and delivered in open Court in Nairobi on this 23rd day of November 2012.

Justice Radido Stephen

Judge

Appearances

Peter Ochieng Muholo

Mr. Webale instructed by E.N. Omotii

& Co. Advocates

Claimant in person

For Respondent