



REPUBLIC OF KENYA



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Ogao v Camigen Multi-Cargo Services Ltd (Employment and Labour Relations Cause 56 of 2018) [2024] KEELRC 47 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 47 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 56 OF 2018**

**MN NDUMA, J
JANUARY 25, 2024**

BETWEEN

JAMES OKOTH OGAO CLAIMANT

AND

CAMIGEN MULTI-CARGO SERVICES LTD RESPONDENT

JUDGMENT

1. The claimant filed suit on January 23, 2018 seeking compensation from the respondent for unlawful and unfair dismissal and payment of terminal benefits including:
 - a. One month salary in lieu of notice Kshs 25,080/=.
 - b. Payment in lieu of untaken leave for 5 years Kshs 88,095/=
 - c. Service pay for 105 days Kshs 88,095
 - d. Refund for safety boots for 5 years Kshs 12,500/=
 - e. Refund for overall Kshs 10,000/=
 - f. Refund for medical certificate Ksh. 10,000/=
 - g. Refund for unremitted NSSF contributions Kshs. 24,000/=
 - h. Payment of house allowance for 5 years and 8 months Kshs. 255,810/=
 - i. Underpayments for 5 years Kshs 1,089,912 and
 - j. Provision of certificate of service.



2. CW1 testified that on January 4, 2012 he was employed by the respondent as a machine operator at a daily wage of Kshs 703/= during the day shift and Kshs. 1692 for the night shift totaling Kshs 25,080/= per month.
3. That no letter of appointment was given to the claimant nor was he given payslips. That he had a good record and had no warning letters or show cause letters.
4. That he worked diligently until the 7/9/2017 when he was summarily dismissed from work without any payment.
5. That throughout his employment the claimant did not go on leave; was not paid house allowance, was not refunded medical certificates fees paid by the claimant at Kshs 1,000/= every six months; Purchase price for safety boots at the rate of Kshs 2500/= each year and overall at Kshs 2,000/= each year. That this money was refundable.
6. That upon being terminated, he was paid Kshs 40,340/= less tax in respect of days worked; service pay and accrued leave days.
7. That the respondent did not remit NSSF dues for five years and 8 months.
8. That the dismissal was not for a valid reason and the respondent did not follow a fair procedure in that no disciplinary hearing was held before the dismissal. No notice or notice to show cause was issued to the claimant and terminal benefits were not paid to the claimant including certificate of service was not given.
9. That the claimant was issued with a notice to attend a disciplinary hearing on the date he was summarily dismissed and so no disciplinary hearing took place.
10. That on 6/9/2017, the day before the dismissal, a supervisor had instructed the claimant to roll a tank. That the claimant had a sick hand at the time and so could not do it. This was the reason for the summary dismissal. That money paid to the claimant was not sufficient.
11. That the claimant prays to be awarded as prayed. That the supervisor was aware of the sickness of the claimant when he demanded that the claimant roll a tank.
12. The claimant under cross-examination stated that he had started work as a perennial worker before he became a machine operator.
13. The claimant told the court that he was made to sign a discharge voucher before receiving final dues. That he did not read the same before he was made to sign it. The claimant said he got a certificate of service. The claimant said he was paid in lieu of 105 leave days and is not satisfied with the terminal dues paid. That he was forced to sign documents not knowing that he was being dismissed. That NSSF was not remitted. The claimant insisted that he be paid as prayed.
14. RW1 Victor Mwamuti Chitimba testified for the respondent replying in a witness statement dated 27/8/2018 which he adopted as his evidence in chief. RW1 stated that the incident that led to the dismissal of the claimant happened on 4/9/2017 when the claimant was asked to roll drums, which was a normal task at the work place but he refused to do so. That the matter was reported to RW1 on 5/9/2017 and RW1 held a meeting between the supervisor and the claimant. RW1 stated that he issued a notice to show cause to the claimant to explain further. That the claimant refused to acknowledge receipt of the NTSC.
15. RW1 stated that he reported the matter to his senior, one Mr Muhanji who instructed RW1 to direct the claimant to report to the head office the next day on 6/9/2017.



16. That the claimant was issued with a letter of dismissal on 7/9/2017. That the letter was mailed to the claimant the same day he attended a hearing. RW1 said he is not the one who mailed a notice of hearing to the claimant dated 7/9/2017. That the head office was at Pioneer House at the City Centre while the claimant worked at Industrial Area. RW1 did not know how and where the claimant was served with the notice to attend hearing however RW1 had issued NTSC to the claimant.
17. RW1 denied that the NTSC was manipulated. RW1 said he was not aware of the disciplinary hearing.
18. RW1 said he had no documents to show payment of NSSF for the claimant by the respondent. RW1 said the daily wages paid to the claimant includes house allowance. That claimant was paid Kshs. 703/= during the day shift and Kshs. 1692/= for the night shift. That the claimant had not reported that he was sick until the date of the incident. That the dismissal was lawful and fair.

Determination

19. The parties filed submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:-
 - a. Whether the summary dismissal of the claimant was for a valid reason following a fair procedure.
 - b. Whether the claimant is entitled to the reliefs sought.
21. In terms of section 43(1) and (2) of the *Employment Act* 2007, the employer has the onus to prove the dismissal of the claimant was for a valid reason and that the respondent followed fair procedure in determining that there was a valid reason to summarily dismiss the claimant from employment.
22. RW1 did not provide any evidence to the court that a disciplinary hearing was held by the respondent before summarily dismissing the claimant for insubordination. RW1 told the court that his supervisor directed the claimant to report to the head office on 7/9/2017 but he was not aware of what took place at the head office. RW1 said he had no record of any disciplinary hearing held before the claimant was summarily dismissed from employment. RW1 was unable to rebut the credible evidence by the claimant that he was unable to roll the drums as directed by his supervisor because his hand was injured. The claimant demonstrated that the supervisor was aware of this injury at the time but he unreasonably insisted that the claimant proceed to roll the drums at work.
23. It is the court's decision that the conduct by the claimant did not amount to insubordination. The court finds that the respondent has failed to prove that it had a valid reason for summarily dismissing the claimant from employment. The court further finds that no disciplinary hearing was held before the summary dismissal took place. The respondent therefore did not follow a fair procedure before summarily dismissing the claimant from work.
24. In sum the respondent violated sections 36, 41, 43 and 45 of the *Employment Act*, 2007 in that it had no valid reason to summarily dismiss the claimant from work and the respondent did not follow a fair procedure before doing so.
25. The court relies on the case of *David Gichene Owinye v Mombasa Maize Millers Limited* [2014] eKLR in this regard.
26. The case of *Nicholas Otuyu Muruke v Equity Bank Limited* [2013] eKLR is also on point in support of the finding by the court.
27. The claimant is entitled to compensation in terms of section 49(1)(c) and 4 of the *Employment Act*, 2007.



28. In this regard the claimant had served for 5 years and 8 months without any blemish. The claimant did not contribute to the summary dismissal. The claimant was not subjected to fair procedure before the dismissal and was unprepared for the sudden job loss. It was fair and just for the claimant to decline to roll drums while his hand was sick and the fact that this resulted in the dismissal was an aggravating circumstance. The claimant was not compensated for the job loss and has suffered loss and damage.
29. The claimant in the circumstances is entitled to compensation equivalent to six (6) months' salary for the unlawful and unfair summary dismissal in the sum of (Kshs 25,080 x 6) Kshs. 150,480/=.

Terminal benefits

a. Notice pay

30. The claimant was summarily dismissed without notice and without payment in lieu of notice. The court awards him Kshs. 25,080/= in lieu of one month notice.

b. NSSF dues:

31. The claimant failed to prove that the respondent did not remit NSSF dues on his behalf. In any event the claimant was paid service pay in terms of section 35(5) of the *Employment Act*, 2007. The claim lacks merit and is dismissed.

c. Leave pay

32. The claimant admitted that he was paid in lieu of 105 leave days not taken in the sum of Kshs. 65,310/=. This claim lacks merit and is dismissed.

d. Service pay

33. The claimant also admits that he was paid service pay for five years worked in the sum of Kshs. 46,650/=. There is no justification for the extra service pay claimed. This claim lacks merit and is dismissed.

e. Refund for money paid in respect of boots, overall and medial certificates

34. The court awards the claimant Kshs. 12,500/= in respect of boots; Kshs. 10,000/= in respect of overalls and Kshs. 10,000/= in respect of annual medical certificates. The respondent was obligated to produce records of payment, if it had duly refunded its claimant as required. Total award Kshs. 32,500/=

f. House allowance

35. The claimant failed to prove that he was entitled to payment of additional house allowance on top of the daily wages he received. The court is satisfied by the testimony by RW1 that the day and night shift payments included house allowance. The claim lacks merit and is dismissed.

g. Underpayments

36. The claimant has equally failed to prove satisfactorily that he was under paid for the period worked. The claim for under payments lack merit and is dismissed.

h. Certificate of service

37. The claimant admitted that he received certificate of service. This claim lacks merit and is dismissed.
38. In the final analysis judgement is entered in favour of the claimant against the respondent as follows:=-



- a. Kshs 150,480/= in compensation
- b. Kshs 25,080 in lieu of one month notice.
- c. Kshs 32,500/= refund
Total award Kshs. 208,060/=
- d. Interest at court rates from date of judgement till payment in full
- e. Costs of the suit.

MATHEWS N. NDUMA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

Appearances

Ms. Wavinya for claimant

Mr Namasake for respondent

Ekale: Court Assistant

