



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 95 OF 2016

THOMAS MASEA MOGIRE.....CLAIMANT

VERSUS

FREIGHT WINGS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim, brought by a Memorandum of Claim filed in court on 25th January 2016, is for compensation for wrongful dismissal and payment of terminal dues. The Respondent filed a Statement of Response on 15th May 2018.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, John Matanyi. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent from 10th December 2012. He started off as a Porter and rose through the ranks to the position of Operations Supervisor as at 1st February 2014. His salary at the time he left employment stood at Kshs. 20,853.
4. On 19th January 2015, the Claimant was at work and at around 7.00 pm, he was called by the Manager, Prince Thomas Mathews, who enquired why the Claimant had not dispatched shipments for Kenya Airways (KQ), British Airways and Etihad Airlines. The Claimant explained that the delay was due to the fact that he had received the shipments late and that he was still processing them.
5. The Claimant was later summoned and asked to explain the reasons for the delay in dispatch, which he did. The Claimant states that Mathews advised him to go home and report to the Human Resource Manager the following day.
6. Upon reporting to the Human Resource Manager on 20th February 2015, the Claimant was asked to give a written explanation of the events of the previous night, after which he was sent on four (4) days compulsory leave running from 20th February 2015 to 24th February 2015.
7. On reporting back to work on 24th February 2015, the Claimant was told by the Manager, one Mr. Matanyi to go back home and report on 26th February 2015, since his matter was still under deliberation. When the Claimant reported back on 26th February 2015, he was handed a summary dismissal letter dated the same day, by the Human Resource Manager.
8. The Claimant avers that the Respondent's action of sending him away from duty amounted to wrongful dismissal. He states that in doing so, the Respondent breached mandatory provisions of the Employment Act and the principles of natural justice and the constitutional right to fair labour practices in that:
 - a) The Claimant had done nothing wrong to warrant the dismissal;
 - b) No notice or warning was issued to the Claimant before the decision to dismiss him was reached;
 - c) No hearing ever took place before the decision to dismiss the Claimant was reached;

- d) No reasons were given for the decision to dismiss him;
- e) Due process was ignored in the haste to summarily dismiss him.

9. It is the Claimant's position that the Respondent's action amounted to wrongful and unfair dismissal. He adds that the dismissal was further aggravated by the fact that the Respondent declined to pay him his terminal dues.

10. The Claimant therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 20,853
- b) Salary for the month of February 2015.....20,853
- c) Leave pay for 2014/2015.....20,853
- d) 12 months' salary in compensation.....250,236
- e) Costs plus interest

The Respondent's Case

11. In its Statement of Response dated 14th May 2018 and filed in court on 15th May 2018, the Respondent admits having employed the Claimant and confirmed him to the position of Operations Supervisor.

12. The Respondent states that the Claimant was contacted on phone to verify complaints from the Airlines but brushed off the said complaints assuring the airline representatives that all was well, while in actual fact there were delays in the delivery of shipments to the said Airlines, past the cut-off times.

13. The Respondent further states that the Claimant was asked to explain the delay and he denied the occurrence of any delays, maintaining that all was well. The Respondent avers that the Claimant was not remorseful for the huge loss of about Kshs. 5,000,000 that resulted from the negligent performance of his duties.

14. The Respondent admits that the Claimant was put on compulsory paid leave to allow for investigation into the incident. The Respondent states that the Claimant was given an opportunity to respond to the charge in writing, thus giving him an opportunity to be heard, in line with the rules of natural justice.

15. The Respondent avers that there was a delay in delivery of cargo and weight statements as was the procedure that the Claimant had been following since his employment. When the Claimant was contacted to verify the allegations of delay by the Airlines, he gave an assurance that all was well and that all cargo had been delivered.

16. The Respondent further avers that the Operational Team decided to visit the Freight Wings Limited premises where they discovered that contrary to the Claimant's assurance, the cargo was still at the Respondent's premises.

17. The Respondent goes on to state that the Operational Team tried to plead with the Airlines to accept the shipments in spite of the delay but were unsuccessful with one unit of 1.3T that was offloaded because it had delayed, which in turn resulted in loss to the Respondent of approximately Kshs. 5,000,000. The Respondent also claims to have lost trust from its customers.

18. The Respondent avers that a disciplinary hearing was conducted, wherein on top of a written explanation in the form of a statement by the Claimant, there was *viva voce* hearing. The Respondent states that the Claimant admitted his mistake during the disciplinary hearing.

19. The Respondent states that the Claimant was summarily dismissed and all his dues paid. He was also issued with a Certificate of Service.

Findings and Determination

20. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

21. The Claimant was dismissed by letter dated 26th February 2015 stating:

"Dear Thomas,

RE: SUMMERY (SIC) DISMISSAL

On behalf of the management, I regret to inform you that you are hereby summarily dismissed from employment in compliance with the employment act 2007 section 44(c & e).

This decision has been reached based on the following

1. On 19th February 2015 you were assigned duties of ensuring that the packed and cooled products is (sic) palletized and dispatched to airlines on time. Instead, you did the vice versa and when your senior asked for the reason, you adamantly chose not to accept the mistake but gave lies to him.
2. You gave contradicting statements in the disciplinary meeting and not remorseful (sic) of what you did meaning that your actions were malicious.
3. There was poor communication both to airlines and your seniors to curb the menace on time.
4. You have been trained and you understand the repercussions of delayed flights which led to offloads causing big losses to the company.

Please note that your behaviour amounts to summary dismissal as per the Employment Act 2007 Laws of Kenya section 44(c & e) below:

44(c) an employee wilfully 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.

44(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.

By copy of this letter, the Accounts Department is advised to pay as below

1. Days worked and not paid
2. Leave days earned and not paid
3. Pension as per RBA

Yours Faithfully,

(signed)

John Matanyi

Human Resources Officer

22. Section 43 of the Employment Act provides as follows:

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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

23. The burden placed on the employer by this provision is measured against what is commonly referred to as the 'reasonable responses test.' In a nutshell, the employer is required to demonstrate a valid reason that would cause a reasonable employer to terminate employment. In assessing the employer's action therefore, the the Court does not ask what action it would have taken had it been in the employer's place but rather, whether in the circumstances of the case, the employer acted reasonably.

24. This basic principle was affirmed by the Court of Appeal in its decision in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** where the following except, from the Halsburys Laws of England, 4th Edition was cited with approval:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses within which one employer might take

one view and another quite reasonably take another, the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

25. According to the Respondent, the Claimant was issued with a show cause letter dated 19th February 2015, prior to the dismissal. The Claimant denies having received the show cause letter. There is however evidence that he submitted a written response to the allegations made against him by his statement dated 20th February 2015. In his response, the Claimant admits that there was delay in delivery of shipments to departing aircrafts leading to one unit being offloaded. The Claimant told the Court that he was in charge of the subject shipment.

26. In his witness statement dated 11th May 2018, the Respondents’ Human Resource Manager, John Matanyi states that the Respondent is a logistics company engaged in export of produce on behalf of its clients to the clients’ customers overseas.

27. From this description, it is evident that the Respondent’s business requires meticulous attention to detail and strict observance of deadlines. The Claimant was accused of failing to deliver shipments and accompanying weight statements to several aircrafts leaving Nairobi for various destinations overseas.

28. The Claimant admitted that there was delay, which he assigned to late receipt of the shipments. There was no evidence that the Claimant escalated this issue to his superiors. He appears to have taken it casually and thereby exposed his employer to actual loss and reputational risk.

29. In the circumstances, I find and hold that the Respondent had a valid reason for dismissing the Claimant, as required under Section 43 of the Employment Act.

30. The next question before the Court is whether the procedure adopted by the Respondent in effecting the dismissal met the threshold of Section 41 of the Employment Act. The said provision reads 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 this 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.

31. The Claimant admitted having been given an opportunity to explain the delay both in writing and orally and there was no evidence of any objection raised by him regarding any part of the disciplinary process. The Court is therefore satisfied that the procedural fairness dictates of Section 41 of the Employment Act were met.

32. Pursuant to the foregoing findings I find and hold that the Claimant’s dismissal was substantively and procedurally fair. The claims for compensation and notice pay are therefore without basis and are disallowed.

Other Claims

33. The Respondent did not adduce any evidence to counter the Claimant’s claims for leave pay and salary for the month of February 2015 which therefore succeed and are allowed.

34. In the end, I enter judgment in favour of the Claimant as follows:

a) Leave pay for 2014/2015.....Kshs. 20,853

b) Salary for the month of February 2015.....20,853

Total.....41,706

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. The Claimant will have the costs of the case.

37. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2022

LINNET NDOLO

JUDGE

APPEARANCE:

MR. UPENDO FOR THE CLAIMANT

MISS ODUOR FOR THE RESPONDENT