



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1035B OF 2015

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DAVID MAIBEI KIMETTO TANGUT.....CLAIMANT

VERSUS

PELICAN HAULAGE CONTRACTORS LIMITED.RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant brought his claim vide the memorandum of claim dated 12th June, 2015.

The Respondent filed his response to the claim dated 9th November, 2015.

CLAIMANT'S EVIDENCE

2. The Claimant says in his memorandum of claim that he was employed by the Respondent as a driver sometime in June, 2012. He says his last salary was Kshs.25,000/= per month.

3. He says he used to work from 0500 hours to 2100 hours every day and was not paid off days or public holidays.

4. He attests that on 20th February, 2015 he reported to work and was summoned by madam Joyce Kiregia who handed him a summary dismissal letter dated the same date.

5. He says the summary dismissal was based on false allegations of high consumption of fuel allocated to him.

6. He further says on 28th November, 2014 he had been issued a suspension letter based on the same allegations which he denied.

He says his dismissal was against provisions of the Kenya Constitution and the Employment Act and fair labour practices.

7. He says he had done nothing wrong to warrant the summary dismissal and further due process was thrown out of the window in the haste to dismiss him.

8. He says no hearing took place before the alleged decisions to dismiss him.

He says that arising from the unlawful dismissal he is entitled to payment of terminal benefits and compensatory damages enumerated on paragraph 9 of his claim totalling Kshs.903,627/=.

He also prays for interest from date of filing suit till full payment and costs of the suit.

RESPONDENTS EVIDENCE

9. The Respondent in his response avers that the Claimant was dismissed for gross misconduct and was given a warning letter on 24th September, 2014 as to high consumption of fuel. He was also given a suspension letter dated 20th November, 2014 over the same issue.

10. He says that claimant was given an opportunity to be heard on 9th January, 2015. In the meeting the issues to be discussed were about tyres, insufficient use of fuel, mechanical problems and brake lining. The Claimant attended the meeting and appended his signature.

There was another meeting on 26th January, 2016 and minutes are attached and he attended and signed the minutes.

11. The Respondent says the Claimant and his fellow drivers were given a chance to respond to the issues raised but he decided not to.

The respondent says the warning letters and meetings show the Claimant's dismissal was within the law and principles of natural justice.

12. The Respondent says the Claimant is not entitled to salary in lieu of notice as he was summarily dismissed.

13. He also says that Claimant used to work for eight hours per day and in the event of any overtime he would be paid.

14. The Respondent also says the Claimant was entitled to 21 days leave after one year.

He says Claimant worked for Nine months and so was not entitled to 36 days leave.

15. The Respondent says the Claimant has inflated the public holiday days and in any case he would be paid if he worked during public holidays.

16. The claim for loss of income and trauma is denied as the Claimant was dismissed for gross misconduct.

17. The Respondent says that in view of the foregoing the Claimants dismissal was lawful. He prays the claim be dismissed with costs.

ISSUES OF DETERMINATION

18. The two issues for determination in this case are;-

(a) Did the Claimant make a case for unlawful termination?

(b) Is he entitled to the remedies sought.

DETERMINATION

The Claimant says on 28th November 2014, he had been issued a suspension letter being accused of stealing fuel. He says he denied the allegation.

19. He was then given a warning letter on 24th September, 2014 and a suspension letter on 28th November, 2014.

A meeting was held on 9th January, 2015 and also on 26th January, 2015 but both days apparently the Claimant did not defend himself.

20. Looking at the documents produced in court which are the warning letters and minutes of the two meetings the court finds the Claimant was served with warning letters alright.

He was however not given notice that he needed to present his explanation and to take a witness who would be a fellow employee or a shop floor steward representation to be present during his explanation.

21. Actually the two meetings, the Respondent is alluding to and has produced the minutes were general meetings with several drivers who were informed of the matters that were not going on well in the organization.

There is no explanation that this was a disciplinary meeting and Claimant was not notified of his specific wrong doing and he was not asked to give his explanation in the presence of his witness.

22. It is correct the Respondent had given the Claimant a warning letter and suspension letter before the two office disciplinary meetings but the procedure used to terminate his employment was not followed as provided in Section 41 of the Employment Act.

23. Section 41 (1) provide that an employer shall before terminating the employment of an employee on 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 representation of his choice present during the explanation.

24. Several authorities have also in compliance with Section 41 of the Employment Act 2007 held that summary dismissal even in the face of fundamental breach of employment contract/obligation or gross misconduct must not be resorted to without complying with procedural fairness and natural justice. In the case of **LOICE OTIENO VS KENYA COMMERCIAL BANK LIMITED CAUSE NO.1050 OF 2011** the court held that an employer who summarily dismisses an employee without a hearing will be failing afoul of Section 41 (2) of the

Employment Act.

25. The case of **KENFREIGHT E.A LIMITED VS BENSON NGULI (2016) eKLR** it was held that apart from issuing notice according to the contract or payment in lieu of notice as provided) an employer was duty bound to explain to the employee in the presence of another employee or union representative in a language the employee understands the reason or reasons for which the employer was considering termination of the contract. In addition the employee was entitled to be heard and his representation if any considered by an employer before the decision to terminate his contract of service was taken.

26. The court has carefully considered the pleadings as presented and submissions. The Respondent in particular has presented a number of case laws to try to persuade the court that the Respondent gave the Claimant a chance to be heard. The court is not objecting to the fact that a warning letter had been given to the Claimant but the same was not connected to a disciplinary hearing.

Actually there was no disciplinary hearing specifically convened to hear the Claimant in the presence of his witness.

27. In the case of **WALTER OGAL VS TEACHERS SERVICE COMMISSION CAUSE N0.955 OF 2011** it was held that for termination to pass the fairness test, it ought to be shown that there was not only substantive justification for termination but also procedural fairness.

28. In the present case even the Respondent had given the Claimant notice dated 24th September 2014 referring to unacceptable consumption of fuel. He was sent on suspension on 28th November, 2014 for the same reason and was finally dismissed summarily on 20th February, 2015.

That notwithstanding the court is persuaded there was flaw in the procedure followed by the Respondent in terminating the Claimant's employment. The inescapable conclusion is that the termination of the Claimant's employment was procedurally unfair and is entitled to some of the reliefs claimed.

REMEDIES

29. I have hence entered Judgement in favour of the claimant and proceed to give him the following remedies:-

- (a) one month salary in lieu of notice Kshs.25,000/=
- (b) 20 days worked in February, 2015 Kshs.16,667/=
- (c) overtime worked is not proved and no proof from Claimant.

Rather the Respondent by his induction manual has established maximum hours Claimant covered per day and if the same exceeded the hours allocated, an allowance was paid. So court declines this prayer.

- (d) untaken off days – This is not established what off days he is referring and in the absence of clear data the same is declined.
- (f) As for the public holidays the same are not specified and is not the clear what it is based on. It is also declined.
- (g) The court notes the Claimant worked for 9 months and is fair to award him two months for general damages Kshs.50,000/=.
- (h) Costs follow event and so Claimant is awarded costs.
- (i) He is also awarded interest at court rates from date of Judgment till full payment.

CONCLUSION

The effect of my final award to the Claimant is Kshs.91,667/= plus costs and interest.

30. If he owes company any money or has been paid it should be deducted.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE