



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO.323 OF 2020 [E289/2020]

ELIUD NYAENGA GWARO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent under the Customs and Border Control Department, Kenya Revenue Authority and worked until 31st August, 2018 when he was issued with letter terminating his employment. there were unfounded allegations. The claimant defended himself in writing and also appeared before the disciplinary committee.

The claim is that the claimant was discriminated against and the procedure leading to termination of employment was unfair and unlawful. The respondent was extremely harsh in the circumstances and contrary to the law. that he was never provided with all documents in relation to his case before he appeared before the disciplinary committee and after termination of employment to help him in the appeal.

The claimant is seeking the following;

- a) *A declaration that termination of the claimant by the respondent was unfair thus unlawful.*
- b) *An order that the respondent immediately reinstates the claimant to work.*
- c) *an order that the claimant be adequately compensated for time lost out of employment.*
- d) *costs of the suit.*
- e) *any other relief.*

In the alternative, the claimant is seeking that;

- a) payment of damages for unlawful termination of employment.
- b) costs of the suit.
- c) any other relief.

The claimant testified in support of his claim that upon employment by the respondent he worked diligently until the respondent alleged that he had inputted fraudulent online account and cited 15 units of motor vehicles on transit to Uganda exiting though Busia boarder station but were later found to have been registered in kenya. He was accused of having endorsed entries used to release the units to Uganda whereas filing and custody documents was done by clerical staff.

The claimant also testified that the ECTS maps produced as evidence by the investigating officer confirmed actual exit of the subject vehicles. The transit period stated was within stipulated time under Regulation 104(4) of the customs regulations which required for 30 days or more if an extension was granted.

The checking and analysis of journey maps was not the claimant's duty as a verification officer at OSBP was responsible. His supervisor failed to point out any errors in his work, if any, and he had processed over 30,000 consignments while at his station and where he may have

failed due to inadvertence it cannot be attributed to fraud or forgery. The volume of work was immense due to understaffing and constant systems failure.

The claimant also testified that the issuance of rotation numbers was not in full control of verification officers. The process involved registry clerks receiving documents by stamping and then returning back to the clearing agents and who in turn would return them to the verification officer for confirmation.

With regard to the allegations made against the claimant, he testified that the Uganda Revenue Authority (URA) and KRA officers worked in one office but upon the implementation of OSBP, the clearance procedures were not harmonised. The claimant's role was to site goods and upon confirmation on the documents, the clearing agents processed the entries. Upon investigations, it was discovered that 6 different cases were intercepted and the clearing agents were noted to have conspired with URA to divert transit units by issuing C32 which is temporary importation document procedurally.

Termination of journeys required access to the vendor systems and training but at the time the officers were not trained nor had they access to the systems. The accusation made against the claimant he facilitated a smuggling ring that brings unaccustomed goods into the country after they had been marked exited at the border was without evidence. The owners of the subject motor vehicles are indicated and were not pursued by the investigations officer who chose to implicate him as a cover up. There was no case of gross misconduct as alleged and the claims made should be allowed.

Defence

The respondent's case is that the claimant was an employee whose employment terminated for gross misconduct. These followed internal investigations on possible involvement of staff in the diversion of transit motor vehicles intended to exit through Busia Border station were conducted with a view of taking appropriate disciplinary action against those found culpable. The respondent through its agents compiled an investigation report dated 11th May, 2017 which found the claimant culpable of collusion with dishonest clearing agents to divert transit motor vehicles that were allegedly exited to Uganda. The report gave details of 15 custom entries involving diverted vehicles and the clearing agents involved and hence recommended disciplinary action.

The claimant was issued with a show cause notice dated 26th February, 2018 for negligence of duty and he responded by letter dated 7th March, 2018 and requested for documents and by letter dated 9th March, 2018 the respondent forwarded the investigations report with all annexure and the claimant filed his reply.

On 26th April, 2018 the disciplinary committee convened and heard the claimant upon invitation and outlining his rights and where he was given an oral hearing. He confirmed working on the 15 vehicles and that he would provide additional documents in support of his defence and which he failed to do. A follow up demand notice was issued but he failed to oblige.

The defence is also that there was termination of employment on the grounds that the claimant had neglected his duties and the Code of Conduct on 31st August, 2018. This followed fair procedure and due process. The claimant was allowed written and oral hearing. More time was allowed for the claimant to submit more evidence and he failed to oblige. The claims made should be dismissed with costs.

Patrick Mugambi the investigating officer testified that he investigated the claimant's case and submitted his report to the human resource and which was used during the disciplinary hearing. He conducted investigation prompted by a report to the respondent internal audit department with regard to vehicles on transit but which were diverted back to the country for home use the staff at Busia Border station were investigated with regard to dumping of goods into the country.

Mr Mugambi also testified that he found out that there were 15 vehicles declared by different customs officer and upon entries were not exited from the country contrary to what the claimant stated. The claimant's role at the Busia border station was to site goods and then exit them where the due process was followed. He was ensuring the process of entry and exit. At entry point a motor vehicle was sited, verified and released. Each vehicle would be fitted with a device from Mombasa to Busia to monitor movement to port of exit at Busia where the claimant worked. When the vehicle arrived at Busia the claimant was to verify, see the goods and compare with the documents and then input these into his *simba* account/computer system and to ensure exit to Uganda and which he failed to do.

The claimant was found to have failed to follow procedures. The vehicles did not exit. The electronic cargo tracking system established he vehicles did not reach the border point. The signal ended at Mombasa and Nakuru.

The investigation got information from URA and who confirmed the goods did not enter.

Mr Mugambi also testified that he looked at some of the vehicle journeys from Mombasa to Busia and established that upon release at Mombasa, they took 20 to 27 days to reach Busia which was not logical as this is journey of 24 hours.

The claimant failed to give satisfactory answers with regard to the signal and his entries. He was found to be negligent and the report was placed with the human resource office for disciplinary action.

Grace Mwangi the human resource manager testified that following the intelligence report where the claimant was implicated and based on the findings, he was issued with a notice to show cause why disciplinary action should not be taken against him and to which he replied and requested for documents and more time to respond. This was allowed and upon which he was invited to a disciplinary hearing for negligence and violation of the Code of Conduct.

The claimant was served with the investigations report and other records for his defence. He was invited for the disciplinary hearing vide notice

dated 18th April, 2018 and his rights spelt out. On the 26th April, 2018 there were many cases being heard and hearing was adjourned to 27th April, 2018 when the claimant was given an oral hearing. He requested to submit more documents and despite a remainder, he failed to do so and leading to termination of employment on 31st August, 2018.

The claimant lodged an appeal but he had no new grounds or evidence and this was dismissed.

At the close of the hearing both parties filed written submissions. The court has considered the pleadings, the evidence and these written submissions and the issues for determination can be summarised as follows;

Whether there was unfair termination of employment;

Whether there is a case of discrimination against the claimant;

Whether the remedies sought should be granted; and

Who should pay costs.

It is common cause that by letter dated 31st August, 2018 the respondent terminated the claimant's employment on the grounds of negligence of duty and upon which he had been issued with a notice to show cause why disciplinary action should not be taken against him and to which he made written responses and was invited to a disciplinary hearing which took place on 27th April, 2018. After the hearing the claimant asked for time to present more documents, he was issued with a remainder to submit these documents but failed to oblige.

Section 44(4)(c) of the Employment Act, 2007 (the Act) an employee may be dismissed summarily for gross misconduct for wilful neglect to perform work which was his duty to perform or if he is careless and improperly performs any work which from its nature it was his duty to have performed carefully and properly as held in the case of **Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital [2019] eKLR**.

An employer is also allowed to dismiss an employee from its employment if the employee commits the offence outlined under section 44(4) (g) of the Act;

(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.

The claimant was issued with notice to show cause dated 26th February, 2018 and on the grounds that;

Negligence of duty

... the investigation report indicates that you colluded with dishonest clearing agents of Alpha Impex Logistics International Limited, Juss Freighters Limited and Mrs Agencies Limited firms to divert transit motor vehicles that were allegedly exited to Uganda through Busia Boarder Station. ...

Collusion with dishonest clearing agents to divert transit motor vehicles which led to their exit to Uganda through Busia Border is a serious offence which if confirmed can lead to summary dismissal of the offender as per the provisions of the KRA Code of Conduct as well as the Employment Act 2007 section 44.4(c), (g).

The claimant made his written responses on 15th March, 2018 and noted that;

(i) allegation ... that all transit units (vehicle) investigated were exited by me... on examination of accounts, I wish to be as honest as possible. Due to volume of work; it's the tradition of the station/officers to capote important details of a report which can be confirmed from station examination report.

The claimant pleaded for leniency noting the issues raised related to weaknesses in the respondent's procedures in clearing goods for entry and exit at border points.

At the disciplinary hearing, the claimant charged that he had failed to adduce endorsed entries used to release vehicles to Uganda, he requested to more time to adduce evidence in this regard. He was allowed to produce the following;

- a) rotational numbers/forms for the 15 vehicles;
- b) entry records that he had endorsed for the units to be released to Uganda;
- c) verification/inspection accounts for the 15 vehicles;
- d) electronic cargo tracking system journey maps; and
- e) any other document which could prove that the 15 vehicles exited to Uganda.

These were not produced.

The claimant had been issued with the investigations report, the allegations made against him and allowed time to make written submissions and oral hearing and further more time to adduce more evidence. he failed to address.

The claimant failed to give satisfactory responses to the charges made against him. he was found culpable of negligence of duty and which warranted summary dismissal save, the respondent opted for termination of employment. the court finds termination of employment was with good foundation, there existed grounds and valid reasons to justify the same in accordance with section 43 of the Act as held in **CFC Stanbic Bank Limited v Danson Mwashiko Mwakuwon [2015] eKLR** that where there were reasonable grounds and sufficient reasons to suspect that the employee had committed gross misconduct in his employment and had done acts which were substantially detrimental to the employer, such constituted genuine grounds for termination of employment.

With regard to procedural fairness, the claimant was issued with notice setting out matters he was required to respond to and which he did in writing. He requested to the documents and was supplied with the investigations report and other records. He received invitation to attend before the disciplinary hearing and which he did and made oral submissions and upon which he requested for more time to submit various documents and evidence and was allowed.

Section 41 of the Act requires such notification, invitation for hearing and provisions of evidence as required. There was procedural fairness in this case and termination of employment was justified.

The claimant alleged there was discrimination against him. save to plead such matter, there was no evidence in this regard. The damages pleaded cannot issue for lack of evidence.

On the remedies sought, termination of employment found justified, reinstatement cannot issue. Further without a good case of discrimination against the claimant, no damages are due.

As the claims made have failed, the claimant should pay costs.

Accordingly, the claims made are found without merit and are hereby dismissed. the claimant shall pay the respondent 50% of its costs.

Delivered at Nairobi this 29th March, 2021.

M. MBARU

JUDGE

In the presence of: