



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1610 OF 2015

JONAH RAMOGI ODUYA.....CLAIMANT

VERSUS

TRADEWINDS AVIATION SERVICES LIMITED.....RESPONDENT

JUDGEMENT

The claimant was issued with letter of appointed dated 9th September, 2014 where the respondent employed him as a ramp agent for a term of two (2) years. He was under the supervisor of the station manager. The monthly wage was Ksh.14, 953.08.

The claim is that on 4th December, 2014 the claimant was issued with letter suspending him from duty up to 15th December, 2014 when he was to report for disciplinary action but instead he was issued with letter terminating his employment. the claim is that such action was unlawful, unfair and unreasonable as it was in breach of the employment contract on the grounds that there was summary termination of employment without a hearing, the claimant felt selectively targeted by the respondent and considering that on the material date the he was part of the group of 8 employees working on KQ 523 plane whereupon there was theft and one employee, David Okana Wanjala was identified as having stolen 2 mobile phones from a passenger's luggage. The team leader without lawful cause singled out the claimant and 2 others, Washington Ochore and Sammy Nthei were suspended but only the claimant and Mr Ochore were dismissed and Nthei reinstated.

The circumstances leading to termination of employment were unfair and devoid of any reasonable cause. The claimant was not allowed to serve under his term contract. This has caused him loss and damage and claims the following;

- a) Salary and allowances for the reminder term contract Ksh.366,009;
- b) Caution money Ksh.12,000;
- c) Unfair salary deductions during suspension Ksh.8,995;
- d) General and exemplary damages for discrimination Ksh.3,000,000;

In the alternative, the claimant is seeking the following;

- a) 12 months compensation for unfair termination Ksh.209,148;
- b) Caution money Ksh.12,000;
- c) Unfair salary deduction while on suspension Ksh.8,995;
- d) General and exemplary damages for discrimination Ksh.3, 000,000.

The claimant testified in support of his case that upon employment by the respondent he worked diligently in offloading and loading luggage from and into aeroplanes at the airport. On 4th December, 2014 he was suspended from duty by the human resource manager and directed to report back on 15th December, 2015 for disciplinary action and when he was issued with letter of summary dismissal without being given a hearing and on the grounds that KQ had blacklisted him from its operations. That he was not given a hearing as the cause of the suspension elated to theft of passenger phones by one David Okana Wanjala and the claimant was not involved. The claimant had remained on duty on the material day and when KQ 528 was being loaded he was called to assist the team and he was allocated cleaning outside and what was stolen was from the inside. Later he was assigned other duties only to be issued with letter of suspension.

The claimant also testified that the respondent was able to establish the person who had stolen passenger goods as Mr Wanjala and to

terminate his employment was discriminatory and unfair. The security team supervising the employees did not find the claimant culpable and the respondent did not allow him to state his defence. The employees suspended were returned to work save for the claimant and Mr Ochoe.

The claimant also testified that he had a contract of 2 years and only worked for 3 months. He was not on probations and had been confirmed. He had been assigned work at the KQ on secondment and when theft occurred he had only worked for 2 months.

Defence

The defence is that the claimant was employed vide letter of appointment dated 9th September, 2014 subject to probation of 3 months. The claimant was a ramp agent assigned duties at Kenya Airways but he failed to discharge his duties honestly and with diligence.

Under clause 12 of the letter of employment the claimant was employed subject to the respondent keeping its contract with the client, Kenya Airways and on 1st December, 2014 the respondent received an email from the client that the claimant had been blacklisted among others on the grounds that he worked on KQ 528 on 21st November, 2014 where 2 phones were stolen by Okana David and the claimant was present and he never reported to security. As a result the claimant was an unwanted persona on the client's premises and as he was still on probation, employment could terminate in accordance with clause 2 of the contract.

The defence is also that the respondent was left with no option but to dismiss the claimant summarily pursuant to clause 12 of the letter of appointment as it had no other department to redeploy him and which fact the claimant was aware of. The claimant was paid for days worked up to 15th December, 2014; 8 leave days earned and one month in lieu of notice.

The claims made are not justified and should be dismissed with costs.

Despite the court allowing the respondent an adjournment so as to call its witness (es) none was called. The witness statements were filed out of time.

At the close of the hearing parties were allowed to file written submissions.

Determination

The court has analysed the pleadings, the evidence and written submissions filed by the parties and the issues which arise for determination can be summarised as follows;

Whether employment terminated unlawfully, unfairly and wrongfully;

Whether there was discrimination against the claimant;

Whether the remedies sought should issue; and

Who should pay costs.

The claim is that the respondent suspended the claimant and then dismissed him from employment without a hearing and without any reasonable cause. That after the suspension he was not given a hearing to defend himself following claims of theft and the subject person who stole was identified yet the claimant was targeted discriminated against and his employment terminated.

The defence is that the claimant was employed and deployed with a client, Kenya Airways and following theft by a fellow colleague, he failed to report and hence was blacklisted and there was no other department for his redeployment. Pursuant to the contract of employment and where the claimant was still on probation and there was no other area of redeployment, he was paid his dues and notice and employment terminated lawfully.

By letter dated 4th December, 2014 the respondent suspended the claimant from duty on the grounds that;

We refer to the incident on 21st November 2014 where two phones were reported stolen by David Okana Wanjala whom you were working with on KQ 528. As a result of the incident, KQ has blacklisted you from its operations.

Consequently, we are hereby suspending you from duty effective today until 15th December 2014 when you will report for disciplinary action. ...

On the 15th December, 2014 the respondent issued the claimant with letter of summary dismissal and on the grounds that;

... following this ban, we therefore regret to advise you that we do not have any other department you can be deployed to, hence this termination, which takes effect from 15th December, 2014.

Your last working day will be 15th December 2014 up to which your terminal dues will be paid as follows;

- Days worked up to and including 15th December 2014.
- (08) Leave days earned but not taken by 15th December 2014.
- One month pay in lieu of notice.

The letter terminating employment is referenced *summary dismissal*. The details thereof relates to termination of employment while the claimant was on probation and for the reasons that he had been blacklisted and denied access to the premises of the client where he had been deployed and also that there was theft at the client premises and he had failed to report.

Before the respondent made a decision to *summarily dismiss* the claimant from his employment, he was sent on suspension and was required to report back to disciplinary action.

A suspension in its nature is just but an administrative requirement removing the employee from the shop floor to allow for investigations or as the case maybe save, at the end of the suspension, the employee may be recalled back to work or issued with notice requiring him to respond to any matter necessitating his removal from the shop floor. Such is what is required in labour relations and in accordance with section 41(1) of the Employment Act, 2007 that;

(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.

Even where a case is serious and relates to alleged gross misconduct and a sanction of summary dismissal is found appropriate, substantive and procedural justice and fairness demands that the employee be given a hearing pursuant to section 41(2) of the Employment Act, 2007;

(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.

The right to a hearing is secured both ways. In a case of alleged misconduct and a case of alleged gross misconduct unless there are special and exceptional circumstances which do not allow the hearing to proceed and which circumstances must be demonstrated by the employer.

In this case, the defence that the claimant was serving under probation is that there was no department where he could be redeployed is not sufficient cause to justify the *summary dismissal*. Even where the respondent paid in lieu of notice, the sanction of *summary dismissal* and before the claimant was allowed to give his defences after his suspension failed the mandatory provisions of the law pursuant to section 41 of the Employment Act, 2007. Such is unlawful and without justification and the claimant is entitled to compensation.

The claimant worked from 9th September, to 15th December, 2014 a period of 3 months and 6 days. Clause 4 of the letter of employment with regard to probation did not apply at the time employment terminated. Clause 7 on termination of employment provided for notice of one month or payment in lieu thereof and which was done save the reference relating to a *summary dismissal*.

The claimant had anticipated to work for the respondent for the term of his 2 years contract and which was frustrated by the unlawful, unfair and unjustified *summary dismissal*. A compensation of 3 months is hereby found appropriate to address the same.

The claimant was last earning a total gross of Ksh.14,953.08 and total compensation is ksh.44,859.24.

On whether there was discrimination against the claimant, the claimant submitted that in the case of **Geeta Joshi v Pandya Memorial Hospital [2019] eKLR** the employee was awarded damages since she could not secure alternative employment for over 3 years and in the case of **G M V v Bank of Africa Kenya Limited [2013] eKLR** the court held that the burden of proof in a claim that there is discrimination rests on the employee since the employee is only required to establish a *prima facie* case.

The respondent failed to make any form of defence, evidence and or submissions on this aspect of the claimant's claims.

The claim was that the claimant was working in a team of 8 other employees. Upon theft in KQ 528 he was suspended together with others and particularly Mr Ochore and Nthei. Upon return to work as directed on 15th December, 2014 the claimant and Ochore were dismissed but Nthei was reinstated.

In this regard, discrimination against a person is well defined in the Court of Appeal in **Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others [2018] eKLR** as follows;

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description....

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

The Supreme Court further in addressing the same question in the case of **Law Society of Kenya v the Attorney General and Central Organisation of Trade Unions Petition No.4 of 2019** held that;

[discrimination is] a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society.

Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances and in the present matter, the claimant contends that while working in a team of 8 in KQ 528 he was cleaning outside the aircraft while others were cleaning inside. Two phones belonging to a passenger were stolen. The theft was established as having been committed by David Okana Wanjala. The claimant was accused of not reporting the theft. He was therefore suspended together with 2 others, Ochore and Nthei. After the suspension, he was dismissed together with Ochore but Nthei was reinstated.

The defence that the claimant was blacklisted by the client and that there was no other department for redeployment is left bare. On the face of the claims made and particularly that there was discrimination against the claimant, the respondent should have done more. Where the claimant was at work with 8 others and there was reported misconduct, he was suspended and upon return, the culprit who had stolen was known and the respondent proceeded to reinstate Nthei back to work but opted to dismiss the claimant together with Ochore. What were the special circumstances leading to the reinstatement of one employee and the dismissal of another? This we will never know save, the respondent has failed in its burden with regard to disapproving the claims of discrimination against the claimant.

The lapses by the respondent in adhering to the provisions of section 41 of the Employment Act, 2007 therefore go beyond such provisions. Where the claimant was placed in similar circumstances with 8 others and was singled out among 2 others and eventually dismissed from his employment yet one other was reinstated must be accounted for. The arithmetic equals to discriminatory treatment as there was differential treatment of employees similarly situated but treated different without any justification.

The practice of discrimination against any person is outlawed pursuant to Article 27 of the Constitution and read together with section 5 of the Employment Act, 2007. Such conduct should further be reported to the Commissioner for Labour for inspection and interrogation. This the court shall not dwell on.

In this case, the court finds there was discrimination against the claimant. He has claimed an award of Ksh.3 million. On the analysis above, an award of ksh.50, 000 is found appropriate. See similar awards in **Ruth Nyabio v Beverly Schools of Kenya Limited Cause No.432 of 2016** and **Stellamaris Wanjiku Macharia v Hardware Trading Store Limited & another Cause No.26 of 2019 (Nakuru)**

On the remedies sought, the primary remedy was in payment for the full term of the contract. This is addressed and redressed with a compensatory award as set out above. There was also no claim that the claimant has not secured other employment. A good mitigation for any employee is that he puts his skills into good use by sourcing new employment upon termination of employment unless there are prevailing hardships making such endeavours impossible. These circumstances must be demonstrated.

On the claim for unfair caution money at Ksh.12, 000 the basis of this claim is not addressed. The court reading of the letter of employment does not address such an amount and there is no record of how and why the claimant paid for such a sum so as to claim the same.

Unfair salary deductions during suspension of Ksh.8, 995, the claimant attached his December, 2014 payment statement and therein a deduction for *lost time* is deducted at Ksh.8, 995. This is not addressed in the defence as to how the deduction arose and the justification for it. Such amount is due to the claimant part of his terminal dues all at ksh.8, 995.

As the claimant has succeeded in his claims and a finding there was unlawful and unfair termination of employment, the circumstances of the summary dismissal put into account, costs shall be awarded.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) A declaration that the respondent terminated the claimant's employment unlawfully and unfairly;**
- b) Compensation awarded at ksh.44,859.24;**
- c) Damages for discrimination against the claimant Ksh.50,000;**
- d) Deduction of wages ksh.8,995; and**
- e) Costs of the suit.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF MARCH, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and