



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

AT NAIROBI

ELRC. CAUSE NO. 1662 OF 2016

OBED M. PIUS.....CLAIMANT

-VERSUS-

KOPPERT BIOLOGICAL SYSTEMS.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Logistics Assistant on 25.3.2008 and worked until 20.3.2015 when allegedly, he was dismissed from service by the respondent for no legitimate reason and without being given a fair hearing or prior notice. Therefore he brought this suit on 27.7.2016 contending that the dismissal was wrongful and sought the following reliefs:

- a. Declaration that the termination of his employment was unlawful and wrongful;
- b. An order directing the respondent to pay the claimant the following
 - i. 12 months' salary as compensation for wrongful termination;
 - ii. Pay in lieu of notice;
 - iii. Unpaid leave for 7 years;
 - iv. Overtime money due;
 - v. Unpaid house allowance for 84 months;
 - vi. Certificate of service;
 - vii. Costs of the suit.

2. The Respondent filed defence on 26.9.2016 admitting that it employed the claimant from 26.3.2008 and worked until 20.3.2015 when he deserted work to evade disciplinary action for gross misconduct. It averred that the claimant was involved in illegal activities and fraud in the course of his employment and was invited for disciplinary proceeding on 20.3.2015 but he never returned the following day to finalize the hearing as directed. Instead he deserted work without prior notice until a demand letter was received from his Advocate alleging that he was dismissed. The respondent denied the alleged wrongful termination and prayed for the suit to be dismissed with costs.

3. The suit went to full hearing, both parties gave evidence and thereafter filed written submissions.

Claimant's Evidence

4. The Claimant testified as CW1 and basically adopted his written statement on 18.8.2016. He reiterated that he was employed by the respondent on 25.3.2008 as a Logistics Officer and he was given a written contract; that he was working for 12 hours daily starting from 8.00 am to 8.00pm daily and was never paid for the overtime worked; that he was never paid any house allowance and he never went for annual leave or paid in lieu.

5. He further testified that he worked diligently and honestly for 7 years until 20.3.2015 when the respondent terminated his employment wrongfully and unlawfully without prior notice, legitimate reason or fair hearing. He explained that on the said day, he was summoned to an

afternoon meeting with the respondent's General Manager Mr. Macharia, Mr. Geoffrey Ongoya and Collins where the GM raised questions concerning his duties as Logistics Manager and payment of transport. The GM further claimed that the company stocks were not tallying as per the system.

6. After answering the questions raised, he was verbally dismissed. He tried to defend himself but he was not given the opportunity. He contended that there was no prior notice of the hearing and there was also no investigations done before the termination. He further contended that after the dismissal a notice was put at the gate denying him access.

7. He described as false, the alleged falsification of documents pleaded in the defence and contended that report of the alleged fraud was made anywhere. Therefore he maintained that his dismissal was unlawful.

8. On cross examination, he admitted that no termination letter was issued to him but maintained that he attended a meeting before the dismissal. He denied the allegation that he was told to report back the following day for further hearing. He denied ever being issued with warning letters in respect of the allegations levelled against him and contended that the alleged warning letters were given to him in 2013.

9. He admitted that clause 5 of the appointment letter was clear that his salary was consolidated and therefore he abandoned the claim for house allowance. He stated that he was unaware that as a manager he was not entitled to overtime allowance. However he denied that he was a manager and contended that he was just a Logistics Assistant. He maintained his claim for leave for 7 years.

Defence evidence

10. The Respondent's General Manager Mr. Charles Macharia testified as RW1 and like the Claimant he also adopted his written statements dated 22.10.2019 as his evidence in chief. He confirmed that the Claimant was employed by the Respondent as a Logistics Assistant and he last reported to work on 20.3.2015 when he attended disciplinary meeting.

11. Rw1 stated that the claimant's work included taking and keeping proper record of stock of the company but he constantly made false financial statements regarding transportation of respondent's products most of the time colluding with other staff to use cheaper transport but demand exorbitant price for alleged use of external transport.

12. Rw1 further stated that the claimant used to unofficially visit the company after weekly stock taking on Fridays and Saturdays and manipulate the entire stock taking system leading to discrepancies in the stocks. Rw1 further stated that the claimant was responsible for stock shrinkages through stealing of products like Trianum which he used to sell his customers.

13. Again Rw1 accused the claimant of forging signature of Mr. Geoffrey Ongoya to obtain a loan from Sunripe Sacco without his knowledge. Rw1 contended that the claimant had been warned severally before but he disregarded the said warnings and the respondent's regulations to continue misconducting himself and hence the decision to call him for disciplinary meeting on 20.3.2015.

14. Rw1 testified that the claimant was directed to return the following day to finalize the hearing but he deserted until a demand letter was received from his lawyer. He maintained that the claimant defrauded the company through giving false reports to conceal theft and failing to follow the laid down procedures.

15. He contended that the terminal due for the claimant were computed after his desertion and he is free to collect the same. He prayed for the suit to be dismissed with costs because the reliefs sought are undeserving.

16. On cross examination, Rw1 admitted that there was no letter inviting the claimant to the disciplinary hearing. He further admitted that there was no documented performance review for the claimant. He also admitted that the fraud by the claimant was never reported to the police

17. He explained that page 25 of the respondent's bundle was evidence of fraudulent claim for transport Advance paid to external transport but the vehicle used was for respondent's sister company or by hand delivery by the staff. He maintained that although the payment was approved, the money was not used for the intended purpose.

18. He confirmed that he did not produce the email responses by the claimant to all the queries raised. He further confirmed that the meeting on 20.3.2015 was not about termination but to seek clarification on fraudulent claims and shrinkage of stock.

19. Mr. Stephen Kabogoro Kimani testified as Rw2 and stated that he works for the respondent as a Logistics Assistant with the duties of packing and delivering stocks to clients. He confirmed that he was reporting to the claimant. He contended that the delivery was supposed to be done using vehicles but the claimant insisted that they use trollies.

20. He stated that after work they used to do stock summary to see if there was need to add more stock, however they used to find some stock missing and report to the claimant who always told them to record only what was physically present and forget what was missing.

21. On cross examination, Rw1 admitted that he did not know where the missing stock went. He further admitted that he did not know whether it is the claimant who stole the missing stock. Finally he admitted that he had no evidence that it was the claimant who stole the stock.

22. Mr. Enos Simbili testified as Rw3 and told the court that he was also a Logistics Assistant at the respondent company and his duties included packing and stock reconciliation. He stated that they were taking physical stock in the morning and compare with the stock in the system. They repeated the same exercises in the evening but whenever they found a short fall and reported to the claimant, he always told

them to record the physical stock and forget the missing ones. Finally, he contended that they were supposed to use vehicles to deliver the stocks but they were using trollies.

23. On cross examination, he confirmed that he knew Rw1 and Rw2. He further confirmed that the disciplinary cases were dealt with at the head office in Westland. He further confirmed that the claimant was summoned to the said office and he went alone and thereafter he never reported back to work again.

24. He further contended that the claimant was using vehicles from another company and thereby caused delays. He stated that the claimant was given money to hire vehicles but he never did that. However, he admitted that he did not know whether the claimant was paying the transport from the other company.

25. He admitted that he did not know who was stealing the missing stock. Finally he admitted that he had no evidence that the claimant is the one who stole the lost stock.

Issues for determination

26. I have carefully considered the pleadings, evidence and the submissions presented by both sides. There is no dispute that the Claimant was employed by the Respondent from 2008 upto 20.3.2015 when he was invited to a disciplinary meeting by the Rw1 at the respondent's Head Office for alleged fraud, theft and shrinkage of stock. It is also a fact that after the hearing the claimant did not report back to his work station again.

27. The issues for determination herein are:

- a. Whether the claimant was dismissed or he deserted;
- b. If he was dismissed, whether there was valid and fair reason for the dismissal.
- c. Whether a fair procedure was followed before the dismissal.
- d. Whether he is entitled to the reliefs sought.

Dismissal or desertion

28. The claimant contended that he was dismissed verbally on 20.3.2015 after attending a meeting with Rw1, Mr. Ongoya and Mr. Collins. However Rw1 contended that on the said date he told the claimant to return the following day for finalization of the hearing but he failed to return and Rw1 never heard from him again until his lawyer served a demand letter. Rw2 confirmed that the claimant never reported back to work again after being summoned for a meeting at the Head Office.

29. I have carefully considered the rival contentions between the claimant and RW1. They are the only ones among the witness herein who attended the disciplinary meeting on 20.3.2015. Rw1 alleges that the claimant deserted work before the conclusion of the disciplinary proceedings. In the written submissions the respondent contends that the claimant deserted work after the meeting of 20.3.2015 and efforts to reach him failed and therefore he was dismissed.

30. The foregoing submission is unsupported by pleadings and evidence because nowhere in the defence, Rw1's written statement, or oral testimony did the respondent state that efforts were made to reach the claimant after the desertion but in vain.

31. In addition the allegation that the disciplinary hearing did not end on 20.3.2015 and that the claimant was told to report back for finalization the following day has not been proved because the other two persons in attendance did not give evidence herein to support that allegation. One wonders why Mr. Ongoya and Collins were not called to give evidence to rebut the claimant's assertion that he was dismissed on 20.3.2015.

32. The allegation of desertion was by the respondent and it bears the burden of proving the same but it has failed to discharge the same and that allegation is rejected. Consequently, I find and that the reason why the claimant never reported back to work after the disciplinary meeting on 20.3.2015, is because he was dismissed from employment by the respondent.

The reason for dismissal

33. The claimant contended that he was not informed the reason for his dismissal by the employer. Rw1 contended that the claimant was summoned for hearing following reports of fraud, theft and shrinkage of stock. He contended that the claimant had been warned severally but continued to ignore the said warnings and breached company regulations.

34. However, he denied that the claimant was dismissed and therefore he never made effort to prove the validity of the reason for the termination. Rw2 and Rw3 did not help matters because they admitted that they had no evidence to link the claimant with theft.

35. During submissions, the respondent changed the story and stated that it indeed dismissed the claimant for desertion. The respondent further submitted that it has demonstrated to this court that it took steps, to no avail, to reach the claimant after he deserted. However, no such demonstration was made by evidence nor was the same pleaded in the defence. The said allegation is therefore new, an afterthought and not well founded.

36. Having considered the foregoing matters, I find that since the claimant was dismissed during the disciplinary meeting of 20.3.2015, the only reasonable inference to draw is that the reason for the dismissal was in relation to the matters discussed during the meeting namely fraud, theft and shrinkage of stock. Under section 43 and 45 of the Employment Act, the employer has the burden of proving the reason for terminating employment contract of an employee in any legal proceedings challenging the termination. However, as observed above, the employer did not prove the validity of the said offences and capriciously maintained that the claimant deserted work.

Procedure followed

37. The Claimant contended that he was not accorded a fair hearing before the dismissal. The respondent contended that the meeting of 20.3.2015 was not for termination but only intended to have the claimant shed light on the alleged fraud, theft and shrinkage of stock. However, I have already made a finding of fact that the claimant was dismissed after the meeting.

38. Section 41 of the Employment Act provides that:

“41(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 shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions 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.”

39. Having considered the facts of the case and the above mandatory provision, I find and hold that fair procedure was not followed before the dismissing the claimant. He was not only summoned to a meeting without notice that he was attending a disciplinary hearing, but also he was not informed of his right to be accompanied by a fellow employee of his choice.

40. In **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, the Court of Appeal held that:-

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...”

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

Reliefs

41. In view of the finding that the reason for dismissing the claimant was not valid and fair and that that a fair procedure was not followed before the dismissal of the claimant, I make a declaration that the dismissal was unfair, wrongful and unlawful within the meaning of Section 45 of the Employment Act.

42. Having found that the dismissal was unfair and wrongful, the claimant is entitled to damages under section 49 (1) of the Act. I allow the prayer for one month salary in lieu of notice being Kshs 52,703. I further award her 3 months gross pay equalling to Kshs.158,109 as damages for the unfair termination of his employment contract considering that he had worked for the company from 2008 to 2016, about 7 years. I have also considered that he had several discipline issues that earned him warning letters.

43. The claim for accrued leave for 7 years lack particulars and it is exaggerated going by the appointment letter which provided for 21 leave days per year. However, I award him the 44 leave days admitted by the respondent equalling to Kshs52,703 x 44/26 = Kshs. 89,189.69.

44. The Claim for house allowance was withdrawn during hearing.

45. The Claim for overtime also lacks proper particulars and supporting evidence. Consequently, I dismiss it.

46. Finally, the claim for certificate of service is allowed as prayed since it is a right under section 51 of the Employment Act.

Conclusion and disposition

47. I have found that the dismissal of the Claimant was unfair, wrongful and unlawful within the meaning of section 45 of the Employment Act because it was not grounded on a valid reason and fair procedure was not followed. I have further found that the claimant is entitled to damages as a result of the breaches by the respondent. Consequently, I enter judgment for the Claimant in the sum of Kshs.300,001.70 less statutory deductions. The Claimant will have certificate of service, costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED IN NAKURU THIS 15TH DAY OF OCTOBER, 2021

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE