



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 619 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 22nd January, 2020)

PAUL GAKURE WANGARE.....CLAIMANT

VERSUS

ALDONAI ENTERPRISES LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Statement of Claim on 17th April, 2018 alleging his unfair termination by the Respondent and its refusal to pay him his terminal dues.

2. The Claimant, who was employed by the Respondent as a truck driver, avers that he recruited 40 out of 46 employees of the Respondent to join the Kenya Long Distance Truck Drivers and Allied Workers Union. He contends that the Respondent then coerced those employees to revoke their Union membership.

3. He avers that as a result of being an active union member, he was verbally terminated on allegation that he was influencing other employees to join the Union. He seeks the following prayers in his Claim:

1. The sum of Kshs. 300,000 as payment of all terminal dues with full compensation for wrongful termination together with interest from the date of filing this suit.

2. Costs of this suit.

3. Interest on (a) and (b) above.

4. Any other or further relief that this court may deem fit and just to grant.

4. The Respondent filed a Response to the Statement of Claim on 26th June 2015. It avers that its employees voluntarily withdrew from the Union. It avers that the Claimant absconded duty when he was asked to explain his failure to adhere to the company regulations and terms and conditions of work. It contends that contrary to its rules, the Claimant carried unauthorised passengers and refused to stop at designated company checkpoints.

5. It contends that the Claimant and his co-worker were asked to show cause why disciplinary action should not be taken against them but the Claimant chose to report his purported termination to the Union. It therefore denies having terminated the Claimant's employment unfairly.

Claimant's case

6. The Claimant, Cw1, testified that he was not issued with a termination letter. He denied being sacked for carrying unauthorised passengers. He further denied that he refused to sign checkpoint work tickets. He contended that he was never issued with a warning letter regarding his failure to sign the checkpoint work ticket.

7. He testified that he was terminated because he was an active member of the Union. He contended that he had recruited 40 out of 46 union members. He further contended that he reported the dispute to the labour officer who recommended that he be paid his dues.

8. In cross-examination, he testified that he was sacked by the Respondent's Managing Director (MD) while offloading goods. He testified that the Managing Director never served him with a Notice to Show Cause. He testified that he never discussed any issue regarding his misconduct. He testified that he could not have refused to sign the checkpoint work ticket when everything was in order.

9. Nicholas Mbugua, the Union's Secretary General testified as Cw2. He testified that the Claimant was working for the Respondent in 2014. He testified that they started recruiting workers at the Respondent's but he handed over the matter to the management after the Respondent refused to recognise the union.

10. He testified that the Respondent started harassing the Claimant on allegations that he was assisting in the recruitment of members. He testified that the matter was referred to Conciliation and the Respondent participated in the conciliation meeting.

11. He testified that the Conciliator recommended that the Claimant be paid 12 months compensation and the Respondent was to remit his Union dues. He testified that the Claimant was never invited to a disciplinary hearing.

12. Upon cross-examination, he testified that the Claimant was a Union member. He testified that he did not know that the Claimant was to stop at the checkpoint or that he carried unauthorised passengers. He testified that he never saw any letter from the Respondent indicating that the Claimant was not sacked or that he absconded work.

Respondent's submissions

13. Mwangi Mburu, RW1, the Respondent's Director testified as RW1. He adopted his Witness Statement dated 2nd July 2019 as his evidence in chief, in which he reiterated that the Claimant had a habit of carrying passengers in his truck and he did not stop despite being warned. He stated that the Claimant was never dismissed but he left work and never responded to the issues raised by the Company.

14. In cross-examination, he testified that the Claimant was not dismissed. It was his testimony that the Claimant absconded duty after wrongdoing. He testified that the Claimant never stopped at various checkpoints for inspection and signing. He testified that the Respondent had a Code of Conduct and that the employees were inducted on the regulations.

15. He testified that there was no disciplinary process in respect of the Respondent between April and June 2014. He testified that the Claimant had illegal stoppages. He testified that disciplinary action was taken against the Claimant.

16. It was his testimony that the Claimant absconded duty. He contended that the outcome of the Conciliation meeting was that the Claimant was unfairly terminated and that they appealed the finding.

Claimant's submissions

17. The Claimant submitted that his termination on account of his union affiliation was contrary to Article 36 of the Constitution of Kenya, 2010 and Section 46 (c) of the Employment Act. He submitted that his termination of employment was unfair, as the Respondent has failed to prove that it had a valid reason to terminate him contrary to Section 45 of the Employment Act, 2007.

18. He further submitted that the procedure laid down under Section 41 of the Employment Act was not followed. He also submitted that RW1 had no proof that he had breached the company's regulations. In support of this, he relied on the case of **Joseph Ouko Lwambe v Royal Industries EPZ Limited [2018] eKLR**.

19. He submitted that the Respondent did not show that it made any efforts to get in touch with him to seek explanation for his alleged absence from work. He relied on the case of **Joseph Nzioka v Smart Coatings Limited [2017] eKLR**.

20. He submitted that the Conciliator exercised his powers under Section 47 (1) of the Employment Act and that there must have been reason why the Conciliator made his recommendation.

21. He argued that since he had proved he did not abscond duty but was unfairly terminated, he is entitled to the reliefs sought. He urged the Court to award him 12 months' salary as he had been awarded by the Conciliator in addition to one month's salary in lieu of notice, costs and interest.

Respondent's submissions

22. The Respondent submitted that no complaint was made to the Conciliator by the complainant or the union that the Claimant's services were terminated because he was a member of the union. He testified that what seemed to the issue before the Conciliator was that some of its employees were withdrawing membership from the Union.

23. The Respondent further submitted that the Claimant was asked to show cause why disciplinary action should not be taken against him but instead of doing so the claimant reported the dispute to the Union.

24. The Respondent argued that in the Joseph Ouko Lwambe case and Joseph Nzioka case both cited by the Claimant, the Courts held that the onus is upon the employer to show the ground of dismissal and that it must prove the ground by evidence.

25. The Claimant submitted that the termination was unfair to the extent he was not issued a written show cause letter to the Claimant before termination and it has not discharged the burden cast on it to prove reasons for dismissal.

26. The Respondent further submitted that the Claimant had only worked for them for one year and that there were justified grounds upon which his employment could have been terminated but the correct procedure was not followed. According to it, the compensation payable to the Claimant was to be one month's salary in lieu of notice and one month's compensation for unfair dismissal amounting to Kshs. 50,000/=.

27. I have examined all evidence and submissions from both Parties. The Respondents contend that the Claimant was guilty of ferrying unauthorised passengers and failing to stop at designated checkpoints.

28. They aver that they asked the Claimant to show cause why disciplinary action should not be taken against him and he instead chose to report to his Union that he had been terminated.

29. The Claimant on the other hand denied ever ferrying unauthorised passengers nor failing to stop at checkpoints. He contended that he was sacked due to his union affiliation.

30. From the records and evidence herein, there is no letter issued to the Claimant to show cause why he should not be terminated for ferrying passengers illegally nor failing to stop at check off points.

31. CW2 also told Court that the Claimant was their union member and there was no complaint levelled against him as alleged by the Respondents.

32. The Respondents have failed also to show that they invited the Claimant for any disciplinary hearing as alleged.

33. Section 41 of Employment Act states 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".

34. Even if Respondent had the view that the Claimant was involved in misconduct, he was still entitled to a hearing. This was never done and so the Claimant was unfairly terminated as per Section 45(2) of Employment Act 2007 which states as follows:-

2) "A termination of employment by an employer is unfair if the employer fails to prove:

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure".

35. On remedies, I find for the Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 25,000/=

2. 10 months' salary as compensation for unfair and unjustified termination = 25,000 x 10 = 250,000/=

TOTAL = 275,000/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 22nd day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Chepngeno holding brief for Kimani for Claimant – Present

No appearance for Respondent