



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 139 OF 2018

MOSES KIMULI KUMONGA.....CLAIMANT

VS

GRAIN BULK HANDLERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Moses Kimuli Kumonga and his former employer, Grain Bulk Handlers Ltd.
2. The claim is contained in a Statement of Claim dated 9th March 2018 and filed in court on 15th March 2018. The Respondent filed a Response on 12th April 2018, to which the Claimant responded on 3rd May 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Assistant, Raymond Pekeshe. The parties also filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed in the Respondent's Technical Department on 1st January 2012. He earned a monthly salary of Kshs. 53,111.
5. On 9th September 2017, the Claimant was issued with a suspension and show cause letter dated 8th September 2017. The letter accused the Claimant of being in illegal possession of a 20-kilogram bag of sugar which he had smuggled in the Respondent's van from the Kenya Ports Authority (KPA).
6. The Claimant was suspended from duty for seven (7) days from 8th September 2017 pending investigations.
7. The Claimant states that a disciplinary hearing was conducted by the Respondent's Disciplinary Committee on 14th September 2017. On 20th September 2017, the Claimant was issued with a letter of summary dismissal citing the following accusations:
 - a) That the Claimant was found in unauthorised possession of goods from KPA;
 - b) That the Claimant loaded and hid unauthorised goods in the company van with a view to taking the goods out of KPA without an exit permit or authority contrary to port user's regulations;
 - c) The Claimant's act/conduct brought disrepute to the Company and ruined the Company's reputation with KPA.
8. On 26th September 2017, the Claimant lodged an appeal against the dismissal and an appeal hearing was conducted on 31st October 2017. However, the Respondent had not informed the Claimant of the outcome of his appeal.
9. The Claimant avers that the decision by the Respondent to dismiss him was unlawful and unfair. He points out that the accusations that he was found in illegal possession of 20 kilograms of sugar were not substantiated before the Disciplinary Committee.
10. The Claimant adds that the Respondent did not carry out any investigations into the allegations. The Claimant therefore maintains that

the decision to dismiss him from employment was premised on baseless accusations. He was not given an opportunity to face his accusers before the Disciplinary Committee.

11. The Claimant's claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 53,111.00
- b) 12 months' salary in compensation.....637,332.00
- c) Employee's pension contributions.....111,571.75
- d) Employer's pension contributions.....111,571.75
- e) 10 unpaid leave days for 2017.....18,968.21
- f) 21 unpaid leave days for 2018.....39,833.25
- g) Salary for the month of September.....53,111.00
- h) Service pay for 5 years.....265,555.00
- i) Certificate of service
- j) Costs plus interest

The Respondent's Case

12. In its Response dated 12th April 2018, and filed in court on even date the Respondent states that the Claimant was engaged as a Technician at a consolidated monthly salary of Kshs. 24,194 from 1st January 2012. The Claimant's salary was progressively reviewed to Kshs. 41,500 as at 1st January 2016.

13. The Respondent accuses the Claimant of misconduct from the month of March 2016. The Respondent states that the Claimant was issued with warning letters dated 4th March 2016 and 28th November 2016.

14. Regarding the incident leading to the Claimant's dismissal, the Respondent states that on 6th September 2017, while leaving night shift at the Port, the Claimant was found in unauthorised possession of a 20-kg bag of sugar, against KPA regulations.

15. By letter dated 8th September 2017, the Claimant was suspended from duty for 7 days, pending investigations, with an option to show cause why disciplinary action should not be taken him.

16. Thereafter, the Claimant was invited to a disciplinary hearing vide letter dated 11th September 2017. The Respondent gives the following findings by the Disciplinary Committee:

- a) That the Claimant was found in unauthorised possession of goods from KPA;
- b) That the Claimant loaded and hid unauthorised goods in the company van with the intention of taking the goods out of KPA without an exit permit or authority contrary to KPA user regulations;
- c) That the Claimant's action brought disrepute to the Company.

17. The Respondent goes on to state that the Claimant was issued with a summary dismissal letter dated 20th September 2017, stating the reason for dismissal.

18. The Respondent avers that the Claimant was accorded a right of appeal and an appeal hearing was conducted on 14th October 2017 and 31st October 2017. The Respondent adds that the Claimant's dismissal was upheld on appeal.

19. The Respondent states that the outcome of the appeal was communicated to the Claimant by letter dated 21st December 2017.

Findings and Determination

20. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

21. The Claimant was dismissed by letter dated 20th September 2017 stating:

“Dear Moses,

RE: SUMMARY DISMISSAL

Reference is made to our suspension and show cause letter Ref. No. GM/HRD/ suspension/2017 dated 8th September 2017, Show Cause Response Statement and our disciplinary committee hearing invitation letter Ref:GBHL/HR/Hearing/2017 dated 11th September 2017.

In accordance with the Company’s Human Resource Regulations, you were given a chance to appear before the Disciplinary Committee on Thursday, 14th, September 2017. The committee having carefully evaluated your Show Cause Response Statement and heard your oral explanations noted the following: -

- 1. You were found in unauthorized possession of goods from Kenya Ports Authority (K.P.A).*
- 2. You loaded and hid unauthorized goods in the company van with the view of taking the goods out of K.P.A without an exit permit or authority contrary to K.P.A port user’s regulations.*
- 3. Your act/conduct brought disrepute to the company and ruined the reputation the company has with KPA.*

Considering the gravity of your actions, the management has decided to Summarily Dismiss you for gross misconduct with effect from 21st September 2017. Your final Dues will be paid as hereunder:

- 1. Days worked up to 21/09/2017*
- 2. Leave days accrued as at 21/09/2017*
- 3. Less applicable statutory deductions*

Please clear with the company and rerun all company properties in your possession.

However, you have a right to appeal against this decision to the HR office within Seven (7) from the date of issue of this letter.

Yours sincerely,

For: Grain Bulk Handlers Ltd

(signed)

JARED LOCKLEAR

GENERAL MANAGER”

22. This letter accuses the Claimant of taking goods from the Kenya Ports Authority without authorisation. The letter does not specify the goods in question. However, in a preceding suspension and show cause letter issued to the Claimant on 8th September 2017, the goods are identified as a 20-kgs bag of sugar.

23. On his part, the Claimant denied having carried any sugar from the Port. He told the Court that he was carrying food stuffs being 3 tins of canned beef, 2 tins of canned vegetables and 2 loaves of bread, which he had been given by ship crew. The Claimant testified that it was normal for him and his colleagues to exit the Port with foods stuffs without a permit. The Respondent did not provide any evidence to debunk the Claimant’s position in this regard.

24. Evidently, there was a sharp divergence between the Respondent’s and Claimant’s accounts of the incident of 6th September 2017, which eventually led to the Claimant’s summary dismissal. Of significance was the difference in identification of the goods the Claimant is said to have taken from the Port.

25. According to the record of the disciplinary proceedings of 14th September 2017, eyewitnesses testified against the Claimant in his absence. The Respondent states that this departure from normal practice was informed by the witnesses’ desire not to be identified.

26. The Respondent’s Human Resource Assistant, Raymond Pekeshe told the Court that Stephen Mutinda, Farefred Kioko and Boniface

Mwangangi were present when the incident of 6th September 2017 took place. Pekeshe added that Mutinda and Kioko appeared before the Disciplinary Committee in the Claimant's absence. Mwangangi recorded a statement but did not appear before the Disciplinary Committee; rather his statement was read to the Disciplinary Committee by the Respondent's Senior HR Officer, Winnie Chepkoech.

27. In the end, the Claimant had no chance to face any of the eye witnesses. The reason given was that the witnesses did not wish to be identified, a wish that the Respondent acceded to. In these circumstances, the word of the witnesses was not tested and the Court did not see the criteria used by the Disciplinary Committee to adopt the untested word of witnesses. What is more, the Disciplinary Committee did not demonstrate any consideration of the Claimant's account of the incident of 6th September 2017.

28. As held by the Court of Appeal in *Iyego Farmers Sacco v Kenya Union of Commercial Food and Allied Workers Union [2015] eKLR* in cases of wrongful or unfair dismissal, the Court is called upon to interrogate the validity and justifiability of the reasons for dismissal as well as the fairness of the procedure adopted in effecting the dismissal.

29. The allegations made against the Claimant were within the borders of gross misconduct and the Claimant was therefore entitled to the procedural fairness safeguards of Section 41 of the Employment Act. To my mind, where an employee is denied an opportunity to confront witnesses with adverse evidence, the dictates of Section 41 are violated.

30. This is what happened in the present case and I therefore find that the allegations against the Claimant were untested and unproved. The Claimant's dismissal was consequently substantively and procedurally unfair and he is entitled to compensation.

Remedies

31. In the result, I award the Claimant eight (8) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's failure to avail him a proper opportunity to be heard. I also award the Claimant one (1) month's salary in lieu of notice.

32. The Respondent provided the Claimant's leave records up to 2016. The claim for leave pay for 2017 was therefore undisputed. The claim for salary for September 2017 was also uncontroverted.

33. Having been a contributing member of a pension scheme, the Claimant is not entitled to service pay.

34. Finally, I enter judgment in favour of the Claimant as follows:

a) 8 months' salary in compensation.....	Kshs. 424,888
b) 1 month's salary in lieu of notice.....	53,111
c) Leave pay for 2017 (53,111/30x10).....	17,704
d) Salary for 21 days in September 2017 (53,111/30x21).....	<u>37,178</u>
Total.....	532,881

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. I further direct the Respondent to facilitate payment of the Claimant's pension and to issue him with a certificate of service.

37. The Claimant will have the costs of the case

38. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY FEBRUARY 2020

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JUDGE

Appearance:

Mr. Masese for the Claimant

Mr. Otieno for the Respondent