



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 834 OF 2015

KENNETH KAMAU WANJIKU

CLAIMANT

v

DHL WORLDWIDE (K) EXPRESS LTD

RESPONDENT

JUDGMENT

1. On or around 19 May 2009, DHL Worldwide (K) Express Ltd (Respondent) offered Kenneth Kamau Wanjiku (Claimant) an industrial attachment for 3 months.
2. On 21 March 2012, the Respondent offered the Claimant employment as a Brokerage Agent in the Imports Department based at the airport office.
3. A year later, on 23 May 2013, the Respondent suspended the Claimant on allegations of being involved in fraudulent clearance of shipments/falsification of entries consigned to an entity called Tracking Plus Ltd. The suspension was to enable the carrying out of investigations.
4. The same day, the Respondent notified the Claimant that investigations had been completed and that his employment had been terminated effective 27 May 2013.
5. The reasons given for the termination were *falsification of records* and *being intoxicated at the workplace*.
6. The Claimant appealed against the decision but on 6 June 2013, the Respondent upheld the dismissal.
7. The Claimant made another appeal which was also rejected on 28 June 2013.
8. On 19 May 2015, the Claimant sued the Respondent and he stated the Issue in Dispute as Unlawful termination of Mr. Kenneth Kama Wanjiku.
9. The Respondent filed a *Statement of Response* on 22 July 2015, and the Cause was heard on 16 December 2019 and 25 February 2020.
10. The Claimant, the Respondent's Customer Regulatory Affairs Manager, Security Manager and Human Resources Manager testified. The witnesses also adopted their filed witness statements and also produced exhibits.
11. The Claimant's submissions were not on file by 20 March 2020 as directed. The Respondent should have filed its submissions by 24 April 2020. The same was only filed on 13 May 2020.
12. The Court has considered the pleadings, evidence and submissions on record.

Unfair termination of employment

Procedural fairness

13. Unless it is a case of *summary dismissal*, section 35(1)(c) of the Employment Act, 2007 envisages *written notice of termination of employment* of at least 28 days. In cases of *summary dismissal*, an oral hearing is mandatory by dint of section 41(2) of the Employment Act, 2007.

14. The Claimant was not issued with such a notice, or offered pay in lieu of notice. And he asserted that due process was not followed before the termination of his employment. He testified that it was only during the appeal hearing after dismissal that he was heard.

15. The Respondent's Human Resources Manager testified that the Claimant was afforded an opportunity to be heard by a Panel composed of the Security Manager, Imports Manager and 2 others and that the Claimant attended the hearing though he was not accompanied by a witness during the disciplinary hearing.

16. The witness admitted that minutes of the disciplinary hearing was not filed in Court.

17. Apart from stating that investigations were conducted, the Imports Manager and the Security Manager did not make any reference either during testimony or in the witness statements to have been part of a disciplinary panel.

18. The Claimant was suspended to facilitate investigations and on the same day, he was notified of the termination of employment. The termination letter did not make any reference to an appearance before a Panel for a disciplinary hearing.

19. From the evidence before the Court, the Court finds that although an investigation was conducted, the Claimant was not issued with a written notice as envisaged by section 35(1)(c) of the Employment Act, 2007 nor put through a disciplinary hearing before dismissal as envisaged by section 41(1) & (2) of the Act. A hearing after dismissal or as part of a disciplinary appeal process cannot substitute the hearing as envisaged by section 41 of the Employment Act, 2007.

20. It is the further view of the Court that an investigation cannot and is not a substitute of the disciplinary process contemplated by section 41 of the Employment Act, 2007 and more so where an employer has structured units to handle human resource function, like in this case where there was a Human Resource Manager.

Substantive fairness

21. With the conclusion, the Court does not need to examine whether the Respondent discharged the burden of proving, and proving as valid and fair, the two reasons for terminating the Claimant's employment save to state that the medical report from Aga Khan Hospital established that the Claimant had no impairment suggestive of intoxication.

Compensation

22. The Claimant served the Respondent for about 1-year and in consideration of the length of service, the Court is of the view that the equivalent of 2-months' salary as compensation would be fair (gross salary was Kshs 49,500/-).

Pay in lieu of notice

23. The Claimant was not issued with a notice, and the Court will allow 1-month salary in lieu of notice (basic salary was Kshs 48,000/-) as prayed for in the Statement of Claim, by dint of section 35(1)(c) of the Employment Act, 2007.

Annual leave allowance

24. The Claimant sought Kshs 5,000/- on account of annual leave allowance.

25. The contract produced in Court did not provide for an *annual leave allowance*. If there was any other legal foundation for this head of the claim, it was not proved/disclosed and relief is declined.

Overtime (public holidays)

26. The Claimant made a plea for Kshs 51,150/- allegedly for work during public holidays. He did not disclose the public holidays during which he worked or the formula used to arrive at the claimed sum.

27. This head of the claim was not proved.

Terminal benefits

28. The Claimant's contract provided for eligibility to a Retirement Benefit Program. However, no evidence was led as to whether the Claimant joined the program.

29. The copy of payslip produced by the Claimant show that he was contributing to the National Social Security Fund, and pursuant to section 35(5) & (6) of the Employment Act, 2007, he would not be entitled to *service pay*.

30. Relief is declined.

Counterclaim

31. The Respondent counterclaimed against the Claimant for Kshs 47,329/- said to have been the value of loses occasioned to it and Kenya

Revenue Authority by the Claimant altering customs entry values.

32. The Counterclaim was in the nature of special damages but in its submissions, the Respondent urged that it should be allowed because the Claimant did not file a Response to the Counterclaim.

33. The Respondent did not provide any evidence on the amounts paid by the consignees or consignors of the goods in contention or any assessment by Kenya Revenue Authority to establish under-declaration.

34. Despite the Claimant not filing a Response, the Court finds that the Respondent did not prove the Counterclaim to the required standard, and it is for dismissal.

Conclusion and Orders

35. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(i) Compensation Kshs 99,000/-

(ii) Pay in lieu of notice Kshs 48,000/-

TOTAL Kshs 147,000/-

36. The Counterclaim is dismissed.

37. The Claimant is denied costs for failing to file/serve submissions without offering any explanation.

Delivered through video/email, dated and signed in Nairobi on this 15th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nganga instructed by Nganga Kimani B. & Associates

For Respondent Mr. K' Bahati instructed by K' Bahati & Co. Advocates

Court Assistant Judy Maina