



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 672 OF 2016**

**PAUL NGEI KYOVE.....CLAIMANT**

**VERSUS**

**FREIGHT WINGS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> June, 2020)

**JUDGMENT**

The claimant filed the memorandum of claim on 22.04.2016 through Namada & Company Advocate. The claimant alleges that he was employed by the respondent from 01.11.2003 as a loader and on contract basis until 2006 when his employment was converted to permanent and pensionable service. Further he was promoted to Operations Supervisor on 01.01.2013 and his last monthly pay was Kshs. 28, 944.00. Further he was deducted NSSF but the same was not remitted and he was not accorded annual leave or paid in lieu of annual leave. He further alleges that he reported at work at 4.00pm and worked up to 6.00am being 11 hours of overtime per week He worked during public holidays but was not paid. The claimant further alleges as follows:

- a) On 19.02.2015 he reported at work and the respondent's manager asked him to explain why there had been delays in the shipments for Kenya Airways, British Airways and Etihad Airways. The claimant explained that the delay had been occasioned by the late receipt of the products at his office from the packaging department. The manager visited the claimant's office and found the claimant finalising with the dispatch of the shipment. The manager then summoned the claimant and instructed him to go home and to report to the human resource manager the following day. Upon reporting the following day, the claimant was sent on a 4 days' compulsory leave.
- b) The claimant reported back on 24.02.2015 and another manager asked him to go home and report back on 26.02.2015. On 26.05.2015 the claimant reported back and he was given a letter of summary dismissal by the human resource manager. The claimant's case is that the dismissal was unfair because he had done nothing wrong; due process was ignored; no notice or warning or charges were framed against him and notified to defend himself; no disciplinary hearing took place; no reasons for his dismissal were given; the dismissal was extremely harsh because he had a clean record of 12 years' service with the respondent.

The claimant therefore claimed for:

- a) One-month salary in lieu of termination notice Kshs. 28, 944.00.
- b) Pay in lieu of untaken annual leave for 2003 to 2015 Kshs. 28, 944.00 x 12 years making Kshs. 347, 328.00.
- c) 11 hours of overtime per week x52 weeks x Kshs.120.6 per hour x 584 weeks (11years 3 months worked) x 2 (at double pay rate of working day rate) Kshs.1, 549, 468.80.
- d) Pay for public holidays worked being 11 days per year Kshs. 233, 481.00
- e) Unpaid salary for 26 days worked in February 2015 Kshs. 23, 155.20.
- f) 12 months' pay for compensation for unfair termination Kshs. 347, 328.00.
- g) Total claim Kshs. 2, 529, 705.00.

The claimant prayed for judgment against the respondent for a declaration the dismissal was unfair, unlawful and inhumane; payment of Kshs. 2, 529, 705.00; interest; and costs of the suit.

The respondent filed the statement of defence on 15.05.2018 through Okweh Achiando & Company Advocates. The respondent admitted that it employed the claimant as pleaded for the claimant in the stated capacities and the claimant's last pay was Kshs. 28, 944.00. Further the claimant had confirmed to the respondent's operational team by telephone that the Airlines' cargo had not delayed and that all was well. The respondent admitted that the claimant was put on compulsory paid leave to allow for investigations. The respondent further pleaded as follows:

- a) The Airlines called the respondent's operational team to report that the actual weight statement of shipment had not been provided as per procedure and there had been delay in delivery of cargo as per the scheduled cut-off times.
- b) The claimant was the supervisor on site and was telephoned by the operations team to verify the allegations by the Airlines and the claimant assured the operations team that all was well and all cargo had been delivered in accordance with the scheduled cut-off times.
- c) The operational team visited the respondent's premises and found out that despite the claimant's assurance, the cargo had not been delivered in accordance with the scheduled cut-off times and was still in the respondent's premises. The respondent pleaded with the Airlines to accept the cargo belatedly and successfully so except for 1.3T that was off-loaded because it had delayed and in turn resulted in loss to the respondent of approximately Kshs. 5, 000, 000.00. the respondent also lost trust of the affected customer and therefore future orders by the customer. Etihad Airline particularly complained by email that about the respondent being uncooperative in handling shipment booked with the Airline. Further the documentation team formally complained to the respondent by email that the operations team in the night shift had caused a huge mess in delivering shipments on time.
- d) The claimant was dismissed but he had been given prior chance to defend himself. The disciplinary hearing was conducted after a written explanation by the claimant was received and a *viva voce* hearing was conducted wherein the charge was explained to the claimant who made his defence against the charge. The hearing informed the decision of summary dismissal.
- e) The respondent pleaded that charges were framed, the claimant was given opportunity to answer, the claimant responded in writing, a disciplinary hearing took place, and the claimant admitted in his written statement that one of the units was off-loaded from the plane due to late delivery.
- f) The claimant was summarily dismissed but he has declined to collect a cheque on his final dues.
- g) The claimant is only entitled to salary up to the date of dismissal and accrued leave which were calculated in final settlement.

The respondent prayed that the claimant's suit against the respondent is dismissed with costs.

The claimant testified to support his case and the respondent's witness (RW) was one John Matanyi, the respondent's Human Resource Manager. The Court has considered all the material on record. The Court's findings are as follows.

**First** there is no dispute that parties were in a contract of service as pleaded for the claimant and admitted by the respondent.

**Second** there is no dispute that the respondent summarily dismissed the claimant from employment and the claimant's last monthly pay was Kshs. 28, 944.00.

**Third**, was the summary dismissal unfair or unlawful? The letter of summary dismissal dated 26.02.2015 stated that the claimant was being summarily dismissed from employment under section 44 (c) and (e) upon the following grounds:

- a) On 19.02.2015 he was assigned duties of ensuring that the packed and cooled products is palletized and dispatched to airlines on time. Instead the claimant did the vice versa and when his senior asked for reasons he adamantly chose not to accept the mistakes but gave lies to him.
- b) The claimant gave contradicting statements in the disciplinary meeting and not remorseful of what he had done meaning that his actions were malicious.
- c) There was poor communication between the claimant and both to the airlines and his seniors to curb the menace on time.
- d) The claimant had been trained and he understood the repercussions of delayed flights which led to offloads causing big losses to the respondent.

The claimant testified that he attended the disciplinary hearing and he signed the minutes of the disciplinary hearing. He admitted in his evidence that on 19.02.2015 there were delays in delivery of the respondent's produce to the airlines. RW testified that the claimant was notified the charges verbally. He replied in writing but his reply had not been filed. RW testified that he verbally informed the claimant the charges and when the claimant attended the meeting of 20.02.2015 he knew that it was a disciplinary hearing. The evidence is that the claimant was in charge of the delivery of the produce to the airlines. He admitted in Court that there had been delays. To that extent the Court returns that the respondent has established that in terms of sections 43 and 45 of the Employment Act, 2007 it had a valid reason to summarily dismiss the claimant from employment. It could be that the respondent was not elaborate in issuing a notice in terms of section 41 of the Act but taking all the evidence into account, the claimant fully contributed to his termination in view of the delays in delivery of cargo to the airlines on the material day and despite that procedural failure of an elaborate notice, the claimant is not entitled to compensation under section 49 of the Act. The reason for termination has been shown to have existed as at termination and it related to the claimant's conduct, compatibility and was based on the respondent's operational requirements. The Court finds accordingly.

**Fourth**, is the claimant entitled to the other remedies as prayed for? The termination was by the letter dated 26.02.2015. The Court considers that the prayers for overtime, pay in lieu of annual leave, and pay for work on public holidays were all continuing injuries and the time of limitation was 12 months from the date of cessation thereof as per section 90 of the Act. The Court finds that the claims were time barred when the suit was filed on 22.04.2016. Further while denying that he ever took leave, the claimant as well admitted that sometimes he took leave. Further parties agreed on a monthly pay and there appears not to have been any dispute or grievance about pay throughout the service. The claims will therefore fail. While the claimant filed submissions on time, the respondent did so belatedly and each party shall bear own costs of the suit.

In conclusion the claimant's memorandum of claim is hereby dismissed with orders each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday, 12<sup>th</sup> June, 2020.**

**BYRAM ONGAYA**

**JUDGE**