



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 319 OF 2013

Before Hon. Lady Justice Maureen Onyango

HASSAN MUSOLO SHIBANDA.....CLAIMANT

VERSUS

IMA HAULIERS LIMITED.....RESPONDENT

JUDGMENT

The facts of this claim are not contested. The claimant was employed by the respondent in October 1996 as a mechanic. He was promoted to tractor driver, then to driver. At the time material to this claim he was driving a Fuso Mitsubishi Lorry. He was dismissed from employment by letter dated 10th May 2013 on grounds that he had been blacklisted by Mumias Sugar Company limited where he transported Sugarcane to, on behalf of the respondent.

At the time of termination of his employment the claimant's salary was Kshs.25,702 per payslip of March 2013.

In his memorandum of claim dated 12th November 2013 and amended in 2017 he avers that the termination of his employment was without notice and without compliance with the procedure in the Collective Bargaining Agreement (CBA). He prays for the following remedies –

- a) A declaration that the claimant's termination was unlawful and illegal and unfair.
- b) An order compelling the respondent to pay the claimant exemplary damages
- c) A declaration that the claimant was entitled to terminal dues and an order compelling the respondent to pay the claimant terminal dues.
- d) A declaration that the claimant was entitled to two months' salary in lieu of the termination notice.
- e) Costs of this suit.
- f) Any other relief this court may deem fit and just to grant.

In the defence the respondent admits summarily dismissing the claimant

“due to his persistent and consistent transgressions and conduct which are in writing and have been documented which indicated he had fundamentally breached his obligations arising from the contract of service. The respondent further avers that the summary dismissal of the claimant was done on reasonable grounds and in strict compliance with the law as well as strict observance of procedural fairness and the rules of natural justice.”

The respondent avers that the claim is vexatious, malicious and an abuse of court process. The respondent proceeds to cite instances when the claimant was issued with warning letters from 2005 to June 2012. Copies of the 14 warning letters are annexed to the memorandum of claim, the last one is dated 12th June 2012.

In view of the circumstances under which the claimant's employment was terminated not being contested, the issues for determination are whether the termination was unfair and if the claimant is entitled to the remedies sought.

Under Section 43 of the Employment Act an employer is required to prove the grounds for termination. In this case the ground for termination is set out in the letter of summary dismissal as follows –

“TO:

Date: May 10, 2013

MR. HASSAN MUSOLO SHIBANDA Employee No. 024

RE: SUMMARY DISMISSAL

Investigations by Mumias Sugar Company Limited point to you participating in ferrying, with the help of others, various kinds of property belonging to Mumias Sugar Company Limited out of their premises without authority. Take note that this constitutes theft.

The management has been left with no other alternative other than summarily dismiss your services with immediate effect.

Please arrange to collect your dues, if any, and vacate the company premises with immediate effect.

SIGNED

Director

Cc The Branch Secretary

Kenya Union of Sugar Plantation Workers,

TRANSPORTERS BRANCH SHIBALE

The District Labour Officer

KAKAMEGA”

The letter does not state what the claimant helped others ferry out of the premises, when or who the others were. There is no evidence of the allegations of Mumias Sugar. There is therefore no evidence that Mumias Sugar even carried out any investigations at all, or that Mumias Sugar ever raised any complaints against the claimant.

The respondent’s witness merely repeated what is stated in the letter of dismissal.

In the responses to claim the respondent dwells on warning letters which are not mentioned in the letter of termination and were therefore not the basis for termination.

I find that the respondent has failed to prove the reasons for dismissal of the claimant as required under Section 43 of the Employment Act.

Section 41 of the Act further requires an employer to give a hearing to an employee in the presence of either a fellow colleague or a union official of the employee’s choice. The employer is further required to hear representations from the employee and the person accompanying him before deciding whether or not to terminate employment. The claimant was not given a hearing at all. He was thus condemned unheard.

Under Section 45(1) an employer is prohibited from terminating the employment of an employee unfairly and under Section 45(2) termination is unfair if the employer fails to prove that the employee was given a hearing or that there was valid reason for the termination.

In the instant case the respondent failed to prove both and the summary dismissal of the claimant was therefore unfair both procedurally and substantively. I declare the summary dismissal of the claimant unfair.

The claimant is entitled to 2 months’ salary in lieu of notice as provided in Clause 9(b) of the CBA having worked for more than 6 years.

The claimant prayed for exemplary damages. He is not entitled to the same as this is a simple breach of employment contract claim. What the claimant is entitled to under the Employment Act is damages in the form of compensation as provided for under Section 49 of the Employment Act. The authority cited by the respondent, *Konig -V- Kanjee Narangee Properties Limited (1968) E.A 233* is not applicable to the present case as it was decided before the Employment Act, 2007 was enacted.

The claimant having worked for the respondent for more than 17 years and having been unfairly terminated, further taking into account that the claimant’s terms of employment do not provide for terminal benefits other than earned leave and notice, I award the claimant maximum compensation of 12 months’ salary being Kshs.308,424.

In sum therefore I declare the summary dismissal of the claimant unfair and award him the following –

i) 2 months’ salary in lieu of notice-----Kshs.51,404

ii) Damages (compensation)-----Kshs.308,424

Total Kshs.359,828

The respondent shall pay claimant's costs of the suit.

The decretal sum shall attract interest at court rates from date of judgment till payment in full.

DATED AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 7TH DAY OF FEBRUARY 2019

MATHEWS NDERI NDUMA

JUDGE