



0REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 553 OF 2017

JACKSON LEPARMARAI.....CLAIMANT

VS

L.A.B INTERNATIONAL KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 10th July 2017 and filed in court on 12th July 2017, the Claimant has sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent's defence is contained in a Memorandum of Response dated 25th September 2017 and filed in court on 27th September 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called John Wanyama Barasa, a Senior Security Officer at Ufanisi Freighters Limited and its own Managing Director, Champaka Weragoda. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Warehouse Supervisor from 15th April 1998 until 8th June 2017 when his employment was terminated. At the time of leaving employment he earned a monthly salary of Kshs. 89,000.

4. The Claimant avers that the termination of his employment was without justifiable cause and in violation of due procedure. He therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 89,000
- b) 14 days' leave pay for the year 2016.....42,000
- c) 12 days prorata leave for the year 2017.....36,000
- d) 8 days' salary for the month of June 2017.....24,000
- e) 12 months' salary in compensation.....1,259,000
- f) Certificate of service
- g) Costs

The Respondent's Case

5. In its Memorandum of Response dated 25th September 2017 and filed in court on 27th September 2017, the Respondent admits having employed the Claimant in the position of Warehouse Supervisor.

6. The Claimant was charged with the responsibility of supervising collection and blending of tea. On 5th February 2017, the Respondent was informed that the Police had arrested several people at Ufanisi Warehouse in connection with theft of 5 bags of tea valued at Kshs. 70,000 belonging to the Respondent.

7. Following this incident, the Claimant was issued with a show cause letter requiring him to explain why disciplinary action should not be taken against him for negligence. The Claimant responded on 16th February 2017, stating that he was not on duty 5th February 2017 which was a Sunday. However, internal investigations conducted by the Respondent revealed that the Claimant was indeed on duty on the subject day.

8. The Claimant was issued with a fresh show cause letter on 3rd May 2017 and in his response he made reference to his earlier letter dated 16th February 2017. The Claimant alleged that all persons involved in the theft were arrested whereas the show cause letter required him to respond to allegations of negligence in his duties as a Warehouse Supervisor.

9. The Claimant was invited to a disciplinary hearing on 5th May 2017 and was notified of his right to be accompanied by a colleague of his choice. He however chose not to be accompanied. Following the disciplinary hearing, a decision was made to terminate the Claimant's employment. The decision was formally communicated to the Claimant on 8th June 2017.

10. The Respondent adds that the Claimant was paid his final dues totalling to Kshs. 32,699 net of statutory deductions.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. The Claimant's employment was terminated by letter dated 8th June 2017 stating as follows:

"Dear Sir,

Letter of Termination

Further to our disciplinary hearing we had in our offices in Chai street on Friday, 5th May, 2017 and as per the recorded statement I hereby would like to inform you that after a lot of thought the Directors of the Company have taken a unanimous decision to dismiss you from employment with L.A.B International Kenya Ltd with immediate effect due to gross misconduct at the work place.

As per the employment contract issued to you on Thursday, 25th February, 2000 you are entitled to be paid the following upon clearing with the Company.

- 1. Leave entitled up to and until Thursday, 8th June, 2017*
- 2. Days worked up to and until Thursday, 8th June, 2017*
- 3. Less any monies owed to the Company*

Yours sincerely,

(Signed)

C. Weragoda

Managing Director"

13. The termination letter accuses the Claimant of gross misconduct whose details were not provided. Testifying before the Court, the Respondent's Managing Director, Champaka Weragoda stated that the Claimant was dismissed because he was behind theft of tea. This averment was consistent with the first show cause letter issued to the Claimant on 15th February 2017.

14. However, in the second show cause letter dated 3rd May 2017, the Respondent introduced an element of negligence on the part of the Claimant. Although this particular letter required the Claimant to respond within 2 days, it also served as an invitation to a disciplinary hearing on 5th May 2017 which would curiously coincide with the deadline for the Claimant's written response.

15. It would appear that at the time the Respondent was issuing the second show cause letter to the Claimant, a decision had been made that his case was due for escalation from the show cause level to personal disciplinary hearing.

16. In his responses both at the show cause level and at the disciplinary hearing, the Claimant was consistent that he knew nothing about the

theft of tea on 5th February 2017, as he was not on duty on the said date.

17. After the Claimant's response to the first show cause letter, the Respondent suspended the disciplinary process to investigate the Claimant's assertion that he was not on duty on 5th February 2017. It would appear that the Respondent was emboldened by the statement of John Wanyama Barasa to the effect that the Claimant was at the Warehouse on the material day. The Respondent therefore issued a second show cause letter to the Claimant on 5th May 2017.

18. In his testimony before the Court, Barasa stated that the Claimant showed up at the Warehouse on 5th February 2017 at 9.00 am but left soon thereafter. As he was leaving, the Claimant informed Barasa that he had told his colleague Duncan to dispose of the tea sweepings from the blending floor. From this piece of evidence, the Court arrived at the conclusion that the Claimant was not present when the sweeping was done.

19. The Respondent did not adduce any evidence to show that by asking Duncan to take charge of the disposal of the tea sweepings, the Claimant did anything wrong. What then was the Claimant's error that made him lose his job? First he was accused of outright involvement in theft of tea and when that did not work, he was accused of negligence of duty.

20. In light of the finding that the Claimant was not present during the sweeping and disposal of the sweepings and in the absence of any evidence that he abdicated his duty to Duncan, the Court was unable to assign any wrongdoing on the Claimant.

21. Moreover, by inviting the Claimant to show cause and to attend a disciplinary hearing by the same letter of 5th May 2017, the Respondent showed its hand too early. This led the Court to reach the finding that the decision to terminate the Claimant's employment was a *fait accompli* and the disciplinary process was mechanical, if only to tick the boxes required by law.

22. The Court saw through this and reached the conclusion that the Respondent not only failed to demonstrate a reason for terminating the Claimant's employment as required under Section 43 of the Employment Act but also failed the procedural fairness test set under Section 41 of the Act.

Remedies

23. For the foregoing reasons, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service spanning over a period of 19 years as well as the Respondent's conduct in handling the Claimant's case. I further award the Claimant one (1) month's salary in lieu of notice.

24. From the evidence on record, the Claimant was paid salary for 8 days in June 2017 as well as leave pay for his pending leave days. These claims are therefore without basis and are dismissed.

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

a) 12 months' salary in compensation.....Kshs. 1,068,000

b) 1 month's salary in lieu of notice.....89,000

Total.....1,157,000

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

27. The Claimant is also entitled to a certificate of service plus costs of the case.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

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JUDGE

Appearance:

Mr. Nyange Sharia for the Claimant

Miss Opolo for the Respondent