



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO. 1042 OF 2014

MOSES GACIHI WATHIRA.....CLAIMANT

VERSUS

SGS KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent as a vehicle inspector at the weighbridge in Isinya vide a contract dated 15th January 2015 earning a gross salary of KShs. 40,000.00. On 2nd May 2013, the Claimant was verbally suspended and on 23rd May 2013, he received a letter requiring him to show cause why some trucks were by passing the weighbridge without being weighed. He responded to the letter on the same day explaining the reason for such occurrences. However, the Claimant was issued with a termination letter on 7th June 2013. Consequently, the Claimant filed the suit contending that the termination was unfair and seeking the following reliefs:

- a) One months' salary in lieu of notice for KShs. 40,000.00.
- b) Salary for 8 days worked in June 2013, KShs. 5,000.00.
- c) Leave days in the sum of KShs.20,000.00.
- d) Salary for the remainder of the contract term at KShs. 269,334.00.
- e) An equivalent of 12 months salary for unfair termination in the sum of KShs. 480,000.00.
- f) Compensation for the sum of KShs. 2,850.00 which the Claimant's wife used on medication for lack of NHIF cover yet it was deducted from his salary.
- g) NHIF and NSSF paid directly to the relevant government department.
- h) Certificate of Service.
- i) Any other appropriate relief the Honourable Court thinks fit to grant.

2. The Respondent filed her Response on 15th August 2015 contending that the Claimant's termination was done lawfully and procedurally.

The Respondent avers that it was the Claimant's duty to carry out the Respondent's mandate pursuant to her contract with Kenya National Highways Authority. However, he failed to diligently discharge his duties by allowing motor vehicles to transgress the weigh bridge. The Respondent also contends that the Claimant's reply was unsatisfactory as it contained denials, after thoughts and finger pointing.

3. The suit was initially heard *ex parte* on 17th December 2015 where the Claimant testified as CW1. However, on 25th January 2016, the Respondent filed a Notice of Motion Application seeking orders to have the proceedings of 17th December 2015 set aside and the matter heard *de novo*. On 27th May 2016, the court issued a ruling allowing the recall of the Claimant for cross examination only, which was done on 21st November 2018. The Respondent did not call any witnesses but only filed written submissions after the close of hearing.

The Claimant's Case

4. The Claimant testified that he was employed by the Respondent on 17th January 2013 under a fixed term contract lapsing on 31.12.2013 and his salary was Kshs.40,000 per month. He was stationed at Isinya, Kitengela Weighbridge. It was his testimony that his duties at the Respondent's company were motor vehicle and mechanical inspection.

5. He further testified that on 2.5.2013 he was verbally suspended by the weighbridge manager Mr. Lincoln Okari for the reason that some trucks had passed the weighbridge without being weighed. The details of the trucks were not given and the suspension period was not indicated.

6. He further testified that on 23.5.2013, he received a show cause letter dated 20.5.2013 from the respondent citing the same reason as the ones cited for the suspension. It was the Claimant's evidence that he responded to the letter despite the fact that he did not have sufficient time since he was required to respond by 5:00 pm.

7. He further testified that on 7.6.2013, his contract of service was prematurely terminated and he was paid salary for May 2013 but nothing for June. That he was also not issued with a certificate of service or paid for the leave days earned in the year 2013. He contended that he had expectation of working up to the end of his contract term but it was unfairly terminated. He therefore prayed for the reliefs sought in his claim.

8. He admitted that on 25.4.2013, the respondent's Auditor came to the Weighbridge and found him doing his usual duties of taking record of vehicles by passing the Weighbridge, counting the number of trucks and guiding the to them weighbridge. He however contended that he was given extra work by the management without formal communication.

9. During cross examination, the Claimant testified that he had worked for 6 months before his termination. It was his evidence that he had been issued with a show cause letter which specified the queried vehicles as motor vehicles registration numbers KBT 886G, KBM 773G and KAE 0773 E but his response to the letter never addressed the queries raised on the said vehicles. That after his response a decision was made to dismiss him on 7.6.2013. He further stated that the termination letter indicated that his certificate of service had been enclosed but on checking it he found that it was a letter without a company logo or stamp.

10. He stated that during the subsistence of his employment, he was performing two roles and reporting to 3 people. However, he did not have any written evidence of the two roles he was performing and could only recall two of his three supervisors, Korir and Ouma. He admitted that the extra role of a clerk was communicated verbally and he never declined since as he had indicated in his response to the show cause letter, he had no problem multi-tasking.

11. It was his testimony that he had indicated in his response to the show cause letter that it was possible for vehicles to transgress since he was performing two roles at a time. He insisted that his termination was unfair since he was only given 3 hours to respond to the show cause letter and as such too short for him to organize his defence. In addition he contended that, the alleged offence that led to his termination emanated from his second role as a census clerk and not his original role of Motor vehicle Inspector.

12. In re-examination, he maintained that his duty was to inspect vehicles and that he was not given a fair hearing before the termination.

The Claimant's Submissions

13. In his written submissions dated 3rd December 2018, the Claimant contended that the mandatory provisions in **sections 41 and 43 (1) of the Employment Act** were not complied with. That he was not invited for a hearing nor did the Respondent prove her reasons for termination. He relies on the case of ***Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR*** where the court held that an employee must be informed of the charges against them, given a chance to submit a defence and thereafter accorded a fair hearing.

14. The Claimant also submits that the period within which he was required to respond to the allegations raised in the letter to show cause was too short.

15. The Claimant also submitted that the Respondent's failure to call the witness who made allegations against the claimant and decision to terminate him means that his evidence remains uncontroverted. That the Weighbridge Manager, Mr. Gitari who gave the show cause letter was not called to give evidence of the details of the trucks which passed the weighbridge without being weighed.

16. He urged the court to award him the reliefs set out in his pleadings.

The Respondent's Submissions

17. In her submissions dated 6th December 2018, the Respondent submitted that the Claimant had not proved his case as required by section 47(5) of the Employment Act. The standard of proof was not lowered by the mere fact that the Respondent did not adduce any evidence.

18. The Respondent further submitted that the Claimant's termination was justified by a valid reason. That he never denied the breaches cited in the show cause letter and instead blamed it on multitasking. That the claimant never proved that he was asked to multitask by the respondent.

19. The Respondent also submitted that the Claimant was heard as is required by **section 41 (2) of the Employment Act** and contended that hearing did not need to be oral. That the claimant was issued with a notice to show cause which indicated the charges against him and he responded. That in his response, the claimant failed to address the issues raised therein including a list of 10 vehicles and their registration numbers. It maintained that it dismissed the Claimant after granting him a hearing through the show cause letter.

20. The Respondent submits that the Claimant was issued with a certificate of service, which fact he admitted during cross examination. She submits that if the court grants the Claim for the unremitted statutory deductions, the same should be remitted to statutory bodies.

The Analysis

21. After carefully considering the pleadings, evidence and the submissions presented by the parties and their respective counsels, it is undisputed that the Claimant was employed by the Respondent as a Motor Vehicle Inspector but later assigned the extra role of a Census Clerk until 7th June 2013 when his contract was terminated. The issues for determination are:

- a. Whether the termination of the Claimant's employment was unfair and unlawful.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the termination of the Claimant's employment was unfair and unlawful

22. Under section 45(2) of the Employment Act, termination of employees' contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

Reasons for Termination

23. The termination letter dated 7.6.2013 stated as follows:

"Dear Sir,

We refer to our show cause letter to you of 20th May, 2013 and your reply of 23rd May, 2013.

We regret to advise that your response is unacceptable to the management.

You conspired to allow vehicles to proceed without being weighed, which is against company policy. This jeopardizes our contract with the client, and severely compromises the company's integrity.

This is unacceptable, and the company has no option but to terminate your contract with immediate effect.

You will be paid one month's pay in lieu of notice in accordance with the terms of your contract.

You are hereby advised to handover all company property in your possession to your Manager, upon which your terminal dues will be paid.

A certificate of service is enclosed.

Your faithfully,

Weighbridge Manager.

24. The show cause letter dated 20.5.2013 stated as follows:

"Dear Sir,

Show cause letter

During an internal audit carried out at the Isinya weighbridge on 25th April, 2013 it emerged that service delivery at this weighbridge is highly compromised by our staff and the police as suspicious activities were noted by the auditor.

Trucks were noted to be stopping at the diversion, then proceeding without being diverted to the weighbridge for weighing. Of the trucks in question observed by the auditor Nos. T227BBD; T981BYA; KBL 708Z; T712CAX; KBR556K; KBU375J; KBD463J; UAS039F; KBH940V; KBT886G; KBM773G; KAE077E; UAQ428T and KBP179B, only 2 had been mentioned in the records at the weighbridge. Of these, trucks Nos. KBT 886G, KBM773G and KAE 077E were observed to have stopped on the highway, the turnboys going to the police and coming back and the trucks continuing on the journey without weighing.

This implies conspiracy with others to aid the trucks to pass through without being weighed and throws suspicion on your performance, particularly as our obligation to our clients is the delivery of professional and ethical services.

This is a serious breach of the company's procedures which the management will not tolerate particularly if it casts doubt to the client of our professionalism and integrity.

Under the circumstances, due to the concern by the management following suspicion around the execution of your duties in this instance, you are required to show cause why disciplinary action should not be taken against you for this doubtful performance.

Your reply should reach me by 5.00 pm on 23rd

May 2013.

Yours faithfully

Weighbridge Manager.

25. The claimant responded by his letter dated 23.5.2013 as follows:

“I acknowledge receipt of your show cause letter and would like to state that since March I have been conducting two roles, vehicle inspection and census without any assistance. Sometimes I even go a step further in diverting the trucks to the weighbridge.

On 25/4/13, the police officers had received their transfer letters therefore unreliable so at one point I had to divert the vehicles to the weighbridge. That same afternoon I was inspecting two exempted trucks (wide loads) registration nos. KAR 669Z and KBH 630S and two other impounded trucks registration nos. KZV968 and T168 AHP. Its[sic] possible there could have been transgressing vehicles as I engaged in inspection. On this issue were[sic] stopped on the highway and their turnboys approached the police officers before embarking on their journey this must have happened while carrying out inspection. The challenge is that the bumps are far away and there was roadblock facility to assist in slowing down the speeding vehicles so as to catch their registration numbers.

I have no problem with multitasking; it's very clear from the records that since I took over the role of a census clerk there has been dramatic improvement in terms of recording. I believe you will give me another opportunity to continue working with you and I hereby apologize for any mistakes.

Your sincerely,

Moses Gachihi Wathira

26. From the foregoing correspondences, the claimant was discharged on allegation that he evaded the issues asked to answer by the show cause letter and especially trucks Nos. KBT 886G, KBM773G and KAE O77E which were observed to have stopped on the highway, the turnboys going to the police and coming back and the trucks continuing on the journey without weighing. That, according to the respondent in the termination letter, the claimant had made conspiracy to allow the vehicles to pass through without being weighed. Those allegations have, however not been substantiated by evidence since the respondent never tendered any evidence. In my view, the auditor who alleged that vehicles and especially the ones listed in the show cause letter, actually by passed the weighbridge due to the claimant's conspiracy or negligence, should have testified to prove that the allegation were true.

27. The Claimant contended that his employment was unfairly terminated because there was no valid reason because the reason cited related to role which was not part of his job description and as per his response to the show cause letter, there was no assistance from anyone since March 2013. His letter of employment was to the following effect:

“... we are pleased to inform you that we are prepared to offer you contract of employment as a vehicle inspector at the weighbridge ... but your duties, duty station and functions may be altered at the discretion of the management...” (emphasis added)

28. The respondent did not adduce any evidence to explain the claimant's job description as a motor vehicle inspector and especially whether it included census of the vehicles on the highway and diverting them to the weighbridge. It also did not rebut the evidence by the claimant that he was given a second role which made it difficult perform without affecting each other. Also the respondent never adduced evidence to prove that the claimant was capable of inspecting vehicles at the weigh bridge at the same time ensure that the trucks did not by pass the weighbridge.

29. A few questions arise from the facts of this case including; how many employees of the respondent are stationed at the Isinya weighbridge and what were their roles; what was the job description for Motor Vehicle Inspector and Census Clerk; what was the role of the police at the weighbridge and who was instructing them; who was supervising the claimant and where was he/she when the alleged breaches were committed; who else other than the claimant did the auditors find at the weighbridge on 25.4.2013; are there bumps nearby to slow down vehicles for purposes of census; and whether or not the vehicles mentioned in the claimant's response to the show cause letter were inspected at the weighbridge on that day.

30. The foregoing questions were not answered by the respondent because no witnesses testified. Without answers to the said questions I am left with no option but to return that the claimant's evidence that he was dismissed for matters not related to his job description is un rebutted. That means the respondent has failed to discharge the burden of proving and justifying the reason for terminating the claimant's contract of service as required by section 43, 45(2) and 47(5) of the Employment Act.

31. I am of the view that the respondent's submission that the claimant evaded to respond to the charges touching on trucks Nos. KBT 886G,

KBM773G and KAE O77E whose turnboys went to speak to the police officers and then by passed the weighbridge, are incorrect. The said question was answered in paragraph 2 of the response letter dated 23.5.2013 in the following terms:

***“On this issue were[sic] stopped on the highway and their turnboys approached the police officers before embarking on their journey this must have happened while carrying out inspection.*”**

32. Having considered all the evidence and submissions presented to the court, I am satisfied on a preponderance of evidence that a reasonable employer in the circumstances of this case would not have dismissed the claimant. The test of what constitutes a valid or fair reason for terminating an employee’s services was discussed in ***Sarah Wanyaga Muchiri v Henry Kathii & Another [2014] eKLR***, where this Court while referring to the English case of ***British Leyland UK Ltd v. Swift [INFRA]***, observed as follows:

***“In order to elaborate on the understanding of what unfair termination of employment as stated by statute means Lord Denning in the case of *British Leyland UK Ltd v. Swift [1981] IRLR 91* stated as follows:*”**

‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him’”

Procedure followed

33. Section 41 of ***the Employment Act*** provides as follows:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make.

34. The Claimant has submitted that he was not given the opportunity of being heard in terms of the foregoing mandatory provision of the law, a fact which the Respondent has failed to controvert. All what the court was treated was submissions from the bar that a hearing can either be by appearance before a disciplinary panel or vide a notice to show cause both of which give an employee the chance to present their case. In ***Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR*** this court made the following interpretation of section 41 of Act: an employee must be informed of the charges against them, given a chance to submit a defence and thereafter accorded a fair hearing.

35. Flowing from the express provision of the procedure for oral hearing set out by section 41 of the Act and the cited precedent, I return that granting the Claimant an opportunity to show cause is not be equal to according him a fair hearing. The Respondent must accord the employee an oral hearing in the presence of another employee or shop floor union official of his choice unless the employee has expressly admitted the offence in his reply to the show cause letter or he has waived the right to be heard in terms of the said mandatory statutory procedure.

36. In view of the finding herein above that, the Respondent has failed to discharge his burden of proving substantive and procedural fairness in terminating Claimant’s contract of service, I return that the termination was unfair and unjustified within the meaning of section45 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

37. Having found that the termination of the claimant’s services was unfair and unjustified, I award him damages under section49 (1) of the Act being one-month salary in lieu of notice (Kshs.40000) plus 3 months’ gross salary (Kshs.120,000)compensation for the unfair and unjustified termination. In awarding the said compensation I have considered the short period served before termination and of course the reasonable expectation that he was to work for the remainder of the contract term.

38. The Claimant further seeks an awarded of KShs.5,000.00. Being salary for the 8 days worked in June. In my view based on salary of Kshs.40,000 per month, 8 days’ pay equals to Kshs.12,307.70. I however award him what he has pleaded.

39. The claimant has also prayed for Kshs.20,000.00 as the value of his outstanding leave. The contract of service never provided for any leave. The clamant was therefore entitled to the minimum statutory annual leave of 21 day or 1.75 leave days per month on pro rata basis. He worked for 6 months and as he earned 10.5 leave days. Hence $Kshs.40,000 \times 10.5/26 = Kshs.16,153.85$ which I award to him in the absence of any leave records to disprove the claim for leave earned and not taken.

40. The Claim for Kshs.269,334.00 being salary for the remainder of the contract term is dismissed because the contract provided that either party could terminate it by notice.

41. The Claimant's claim for KShs. 2,850.00 compensation being the costs the Claimant's wife incurred on medication due to lack of a NHIF cover yet it was deducted from his salary, fails. This being a claim for special damages, the same ought to have been specifically proven. The receipt annexed as document number 10 in the claimant's list of documents is not legible. I therefore dismiss that claim.

42. The claim for payment of NHIF and NSSF directly to the relevant government department is allowed. The Claimant provided a provisional member statement of account indicating that his employer never remitted NSSF and NHIF contributions during the period of his employment. The payslip produced shows that he was deducted Kshs.200 for NSSF and Kshs.320 for NHIF. The employer was supposed to add Kshs.200 to the NSSF contribution to make it kshs.400 per month. I therefore find it reasonable that the said withheld contributions be remitted to the NSSF and NHIF offices forthwith.

43. The Claimant alleges that he was issued with a certificate of service which did not bear the respondent's Letter Head or Official Stamp. I agree with the claimant that a certificate should strictly in accordance with the provisions of section 51 of the Employment Act. Consequently, I direct the respondent to issue a proper certificate of service under its Letter Head or bearing its Official Stamp.

Conclusion and disposition

44. I have found that the contract of service herein was unfairly and unjustifiably terminated because the respondent has failed to prove that there was a valid and fair reason for the termination and that a fair procedure was followed. Consequently, I enter judgment for the claimant as follow:

Notice Kshs. 40,000.00
Compensation Kshs. 120,000.00
Salary due.....Kshs. 5,000.00
Leave earned.....Kshs. 16,153.85
Total.....Kshs 181,153.85

The award is subject to statutory deductions but in addition costs and interest at court rates from the date hereof. He will also be issued with a proper Certificate of Service.

Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019

ONESMUS N. MAKAU

JUDGE