



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 293 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

DISMAS AMBOKO LUKANZA.....CLAIMANT

VERSUS

GENERAL FREIGHTERS LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Dismas Amboko Lukanza filed a Memorandum of Claim dated 28th November 2014 against the Respondent, General Freighters Limited for wrongful termination of employment. He avers that he was employed on 1st February 2002 as a Loader before being an Operation Porter until 15th January 2014 when he was summarily dismissed by the Respondent without giving any valid reasons. That the Respondent offered to pay him for 15 days worked in January 2014 but did not offer any terminal dues to him contrary to the law. That the Respondent contravened Articles 41(1)(2)(a), (b), (c) of the Constitution. He prays for this court to award/orders that:

1. The Respondent's action was oppressive, arbitrary, unilateral and unlawful as it was unconstitutional and in breach of Section 49 (c) of the Employment Act.
2. In the circumstances, the Court be pleased to order the Respondent to pay the Claimant a sum of Kshs.141,372/= being his basic salary (11,781 x 12 months).
3. In the alternative, the Court orders for general damages for lost years to be proved at the hearing hereof.
4. Costs of this claim be borne by the Respondent.

The Respondent filed its Memorandum of Reply on 5th May 2014 admitting that it had employed the Claimant and summarily dismissed him but avers that it was for the reasons of insubordination and gross misconduct i.e. altering/ recording wrong timings on the attendance sheet kept by the Respondent. That the Claimant acted contrary to the contract of service and the laid down procedures and rules whose mandate and services requires integrity and honesty. That on 19th July 2002, he unlawfully, without authority and valid reason retained the Respondent's cheque meant for Kenya Shipping Clearing and Warehouse Workers Union dues. It denies the claim for Kshs.141,372.00 and the calculation thereof stating that using a basic salary of Kshs.11,781.00 is frivolous and unmaintainable. The Respondent prays for the Claimant's claim to be dismissed and or struck out with costs.

The Respondent filed a Witness Statement dated 5th May 2014 by its Managing Director, Shital Bhandari who states that he issued the Claimant with a warning letter on 9th October 2002 for failing in his duties and not obeying orders. That on or about 12th October 2003, a customer's consignment of Miraa (Khat) disappeared in the cold room while under the care and control of the Claimant which prompted him to write to the Claimant a letter dated 13th October 2003. That the Claimant was good at times but was at times rude to his seniors and fellow employees and that the claimant refused to pick the cheque for his calculated dues.

Claimant's Submissions

The Claimant submits that the Respondent violated the mandatory procedure enshrined under Section 45 of the Employment Act by failing to determine the allegation of his insubordination and cheating on attendance reporting at work. That there was no clear evidence he altered or wrongly recorded on the attendance sheet and that it is the Respondent who acted ultra vires for not affording him a fair hearing or any

notice at all or carrying out investigations. That the Respondent also violated Section 43(1) and (2) of the Employment Act because the reasons it gave for terminating his employment were unfair within the meaning of Section 45 of the Act and were not valid. That the termination of his employment by the Respondent was therefore unlawful, unprocedural, unfair and arbitrary and has caused him special and general damages to date.

He submits that he was elected under Section 55 of the Labour Relations Act to handle all matters pertaining to the welfare of workers, to ensure the Respondent was complying with the CBA and was also a custodian of any union property at the work place including workers' union dues remittance to the union office after collecting the cheques. He contends that the collection of union dues cheques from the Respondent's office was therefore within his jurisdiction. As for the allegation of altering or wrong recording of time in the attendance book, he urges this court to note that the pen is repeated on the timings and that this was not done by him considering he is not the custodian of the book. That this court should have ordered expert verification of the owner of the repeated pen. That in the absence of such verification, the claim should fail. That since his contract was illegally terminated, he is entitled to damages for breach. He relied on Nairobi ELRC Case No. 294 of 2014 Swinstone Okumu Wasike & Another –v- General Motors East Africa Ltd.

In the final written submissions dated 5th October 2018, the Claimant submits that he was first employed in September 1999 as a casual labourer before he was confirmed as a permanent employee on 1st February 2002. His prayers are as follows:

- a).. 15 days worked in January 2014..... Kshs.5,891.00
 - b). One month notice..... Kshs.11,781.00
 - c).. Accrued leave from 1999-2002 (24 x 3 years x 11,781)/30..... Kshs.28,274.40
 - d). Accrued leave from 2012-2013 (24 x 2 years x 11,781)/30..... Kshs.18,849.60
 - e). Leave travelling allowance for 5 years (5 x 1000)..... .Kshs.5,000.00
 - f).. Severance pay (15 x 13 years x 11,781)/30..... Kshs.76,576.50
 - g).. Full compensation..... Kshs. 141,372.00
 - h). Certificate of service
- Total Kshs. 287,744.50

Respondent's Submissions

The Respondent submits that it complied with Section 41(1) of the Employment Act since it gave the Claimant an open opportunity evidenced by letters dated 9th October 2002, 18th October 2003 and 19th July 2012 and that it informed and explained to him his wrongdoing. That the Claimant prayed for Kshs.141,372/= in his Memorandum of Claim but went on to introduce other claims in his submissions to a total of Kshs.287,744.50 and that the claim for accrued leave was not subjected to proceedings and neither was it proved as the Claimant had been paid all his dues. That what is actually due to the Claimant is Kshs.5,891/= being the days he worked in January and which cheque the Claimant refused to collect. That the Respondent has not refused to issue a Certificate of Service to the Claimant.

It submits that the case relied upon by the Claimant in his submissions is not relevant to this case. It relies on ELRC Case No. 111 of 2018 Kericho: Naftali Ayot Okanja –v- Rai Plywoods Kenya Limited [2017] eKLR where Marete J dismissed the Claimant's claim due to his gross misconduct and the multiplicity of the employer's complaints against the Claimant.

Determination

The first issue for determination is whether the Claimant was wrongfully, unfairly and unlawfully terminated from his employment by the Respondent. The second issue for determination is whether Claimant is entitled to the reliefs sought in the Claim and including the prayers made in his submissions.

As per Section 47 (5) of the Employment Act, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer. While Section 44 provides for summary dismissal for gross misconduct, Section 41 provides that before an employee is summarily dismissed under Section 44(4), the employer must comply with the stipulated procedure thereof. The Claimant has demonstrated that there was no disciplinary meeting convened for him to defend himself against the allegations and no investigation report was produced in court by the Respondent to prove the said allegations. I find that the Respondent failed to comply with the procedure under Section 41 of the Employment Act thus rendering the termination unfair and illegal.

In *Donald Odeke –v- Fidelity Security Ltd, Cause No. 1998 of 2011*, the court observed at page 3 that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair.

The Claimant is entitled to the compensation of 10 months' salary having concluded that he was unfairly terminated and considering he worked for the Respondent for over 12 years.

I award him Kshs.5,891/= for the days he worked in January 2014 which is admitted to by the Respondent together with a Certificate of Service.

The Claimant is however not entitled to notice pay as he did not plead it in his claim. He also did not pray for leave and likewise is not entitled to the same.

In conclusion, I award the claimant –

1... 15 days worked in January 2014..... Kshs.5,891.00

2... 10 months' salary as compensation (11,781 x 10)..... Kshs.117,810.00

3... Certificate of service

Total Kshs.123,701.00

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE