



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2149 OF 2014

WYCLIFFE MBAJA ANAMANDA.....CLAIMANT

VERSUS

BOC KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for wrongful and unfair termination of the claimant's employment contract by the respondent on 17.9.2012. The claimant prays for the following reliefs:-

- (a) A declaration that the termination of the Claimant's contract of employment by the Respondent was wrongful and unfair.
- (b) One month's salary in lieu of notice – Kshs.55,464.00
- (c) Salary 12 days worked in September 2012 (Kshs.55,646.00 x 12/30) – Kshs.22,258.40
- (d) Annual leave not taken (Kshs.55,646.00 x 27/30 x 8/12) – Kshs.33,387.60
- (e) Twelve (12) month's salary as compensation for unfair termination of employment (Kshs.55,646 x 12) – Kshs.667,752.00
- (f) Severance pay at the rate of 15 days per every year worked at current rates (Ksh.55,646.00x15/30x8/12) – Kshs.18,548.70.
- (g) Costs of this cause and interest at court rates.

2. The respondent denies the alleged unfair and wrongful termination of the claimant's contract. She avers that she fairly terminated the claimant for gross misconduct and after according him a disciplinary hearing. She therefore prayed for the suit to be dismissed with costs because the dismissal was justified and procedurally fair.

3. The main issues for determination arising from the pleadings are whether the dismissal of the claimant from service was unfair and whether the reliefs sought are merited.

4. The suit was heard on 9.5.2018 and 1.10.2018 when the claimant testified as Cw1 and the respondent called her HR Manager and Mr. Cyrus Muiruri Mukono (Taxi Driver) as Rw1 and Rw2 respectively. Thereafter both parties filed written submissions

Claimant's Case

5. Cw1 was employed by the respondent on 23.1.2012 as a Senior Vehicle Driver for a basic salary of Kshs.38,409, House Allowance of Kshs.5,752 and Transport allowance of Kshs.1,750 per month. He testified that he worked well until 12.9.2012 when he left respondents Nairobi depot at 5.40 a.m to deliver cargo to Kisumu depot. He went to fuel the lorry at Likoni Total station but found it under repair and went to fuel it at Total Petrol Station at Cabanas where he did so using company fuel card at 6.10 a.m.

6. After he started his journey to Kisumu and joined Mombasa road he heard a hoot from a small car. He then received a call from Mr. Masai the respondent's Distribution Supervisor who told him that the MD was calling to enquire where the truck was heading to carrying a passenger. Cw1 testified that he denied the alleged presence of passenger in the truck and asked for someone to verify the same. The

supervisor told him to return the truck to the depot which he did.

7. Cw1 further testified that after returning the truck to respondent's place, he was suspended and later invited for a disciplinary hearing on 17.9.2012. That the MD never testified at the disciplinary hearing. However, he (Cw1) was given a chance to defend himself and thereafter he was dismissed the same day after the panel consulted the MD. He contended that the termination was unfair because he did nothing wrong. He there prayed for the reliefs sought in the suit.

8. In cross examination, Cw1 confirmed that the respondent's Safety Maintenance and Distribution Supervisor confirmed that the Likoni fueling station where he was supposed to fuel the truck was undergoing renovation. He admitted that he never sought permission before going to fuel at Mombasa Road because the fueling card could fuel in any station.

9. He contended that he could not stop on the highway because it was wrong to do so and also dangerous as he did not know who was stopping him. He contended that he only stopped after receiving the call from Mr. Masai who told him that the MD was in the small car and had seen him carrying a passenger in the truck. He further contended that he stopped after half a kilometer away where he got a safe place to park the big truck. He admitted that the shortest route to Kisumu from the respondent's place is through Enterprise Road but contended that he went through City Cabanas to look for fuel. He denied that he was carrying a passenger in the truck.

Defence Case

10. Rw1 confirmed that the claimant was employed by the respondent in 2012. She testified that on 12.9.2012, she received a call at 8.20 a.m. from the respondent's MD telling her that she found vehicle No. KAU 581S parked alongside City Cabanas at 5.40 a.m when it was supposed to be on the way to Kisumu. Rw1 then asked the claimant to explain the circumstances of the incident but he declined to do so.

11. Rw1 further testified that she later served the claimant with a notice inviting him for a disciplinary hearing on 17.9.2012 when the matter fully heard and the claimant dismissed after being found guilty of gross misconduct. She contended that the dismissal was justified and lawful.

12. In cross examination Rw1 maintained that she was informed by the MD vis phone that while on her way to the Airport she saw the Company truck parked along City Cabanas Rw1 admitted that the claimant wrote letter (Annexure 3) explaining what happened. She revealed that she served the claimant with notice of disciplinary inquiry inviting him to disciplinary hearing, stating the charges.

13. She however admitted that the MD never attended the disciplinary hearing as a witness nor did she record any statement. She further admitted that the committee proceeded on the basis of what the MD reported. She contended that the claimant was charged with using the wrong route, carrying unauthorized passengers and failure to stop. She further contended that the claimant was given opportunity to defend himself. She explained that the cargo was dangerous and that is why the company policy barred drivers from carrying passengers in the trucks.

14. Rw2 is a Taxi Driver who operates from Fair View Hotel. He testified that on 12.9.2012 he drove the respondent MD from Royal Apartment to JKIA. That on reaching City Cabanas he overtook the respondent's truck and the MD told him to stop the truck because it was carrying a passenger.

15. Rw2 then waved at the truck to stop and it slowed down. He then stopped and parked the car a head of the truck. He came out with the MD. The truck tried to stop but on noticing the MD, the truck driver zoomed passed them and took the lane to town. Rw1 testified that he saw a passenger in the truck when it slowed down before zooming passed them.

16. In cross examination, Rw2 admitted that he had a 5 year contract with the MD. He admitted that in his written witness statement, he stated that they found the company's truck parked along the road. He however contended that the written statement was incorrect and maintained that the truck was moving when he saw it and he overtook. He stated that he did not know why the MD told him to stop the truck but when he came out the car, he saw a female passenger in the truck. He admitted that he could not see the passenger while inside the car and that after coming out he could not see the faces clearly because it was still dark.

17. He further admitted that his taxi did not have a yellow band. He however contended that there was enough space to park the truck along the road where he parked his car.

Analysis and Determination

18. After careful consideration of the pleadings evidence and submissions, there is no dispute that the claimant was employed by the respondent as a driver until 17.9.2012 when he was summarily dismissed. The issued for determination therefore as framed herein above.

(a) Whether the dismissal was unfair and unlawful

19. 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.

(b) Procedure followed

20. The respondent contended that she followed a fair procedure before dismissing the claimant by according him a hearing. That she invited him to the hearing by serving him with a Notice of Disciplinary Enquiry dated 14th September 2012 setting out the charges against him, and notifying him of his right to be represented by another employee at the hearing. The said procedure, in my view, met the threshold of a fair procedure as provided by section 41 (1) of the Employment Act. The said section provides that:

“(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.”

(c) Reason for the termination

21. The summary dismissal letter stated that the reasons for the Claimant’s termination were fully discussed with him at the disciplinary hearing on 17th September 2012. According to the Notice of Disciplinary Enquiry dated 14.9.2012 produced by the claimant as exhibit, the charges against the claimant during the disciplinary hearing on 17.9.2012 were:

“1) On 12th September 2012 at 5.40 am, you left the company premises while driving BOC truck registration KAU 581 J destined for Kisumu branch as recorded on the vehicle movement register number 09777. On the same day, at around 7.10 am, you were sported along Mombasa road near City Cabanas while driving the said company truck. You failed to stop after a request to pull off the road.

2) You were carrying two unauthorized passengers against the Driver Safety Policy.

3) You misused the said company truck between 5.40 am to 7.40 am (the time you returned the truck to the company premises). The truck had to be allocated to another driver at around 10 am. This caused delay in delivery of company products to customers.”

22. The record of the proceedings of the disciplinary hearing was not produced as exhibit to prove that the said charges were prosecuted against the claimant and the responses he made. However, Rw1 admitted during cross-examination that the respondent’s MD, the complainant in the disciplinary case, never attended the disciplinary hearing to give evidence and never tendered a recorded statement. Rw1 further admitted that, the disciplinary hearing proceeded on the basis of what the MD reported via phone and called no other witness or produced any other form of evidence like photos. Rw1 further admitted that the claimant denied the alleged transgressions from the beginning by his letter.

23. The claimant has contended herein that there was no valid reason to justify his dismissal. Under section 43 of the Employment Act, the reason for the dismissal must have existed as at the time when the decision to dismiss an employee was made and the burden of proof lies with the employer. The section provides thus:

“ 43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) the reason for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

24. After careful consideration of the evidence by the claimant and the respondent’s witnesses, it clear that the disciplinary committee was treated with evidence from the claimant only. In the circumstances, the committee could not have reached any other finding other than the innocence of the claimant. There was no evidence to support the charges set out in the notice of inquiry dated 14.9.2012 because there was no evidence or at least written statements from the MD and his Taxi driver or at least some other form of evidence like photographs of the claimant committing the transgressions. In *Menginya Salim Murgani v Kenya Revenue Authority [2005] eKLR* Ojwang J (as he then was) held:

“It is clear too that the suspicions which led to the suspensions and to termination of employment, were not set out in a document availed to the plaintiff, so he could respond. For the most part, the plaintiff did not share a forum with his accusers, so that the differing views could be resolved through an informed process.

I have considered the foregoing facts, and come to the conclusion that they were not consistent with the requirements of a fair hearing.”

25. Even in this case, the defence witnesses did not prove that the claimant committed the said transgressions. They never proved that the claimant misused the company truck by carrying unauthorized passengers and going to fuel the truck at the Total fueling station near City Cabanas. The respondent’s MD also did not tender any evidence in this case but her taxi driver, Rw2 testified. However, his testimony sharply contradicted with his earlier written statement. He testified that he saw the company truck moving at 5.40 am and overtook it near City Cabanas while in his written witness statement he stated that he found the truck parked along the road. In the said statement he stated

that they spoke to the claimant and asked who were the passengers in the truck but in his testimony he stated that the claimant never stopped when he hooted and waved him to stop.

26. As regards the alleged refusal to stop, Rw2 did not rebut the claimant's averments that he could not just stop on the high speed highway, or get enough space to park the dangerous cargo truck, and that he could take the risk of stopping after being stopped by a stranger. As regards the unauthorized passengers, Rw2 did not prove that indeed there were

passengers in the truck. He admitted in his testimony that it was still dark and he could not see the passengers while in his car but only saw a female passenger after coming out of the car. That contradicted with the written statement where he stated that there was more than one passenger in the truck. What is more important is that Rw2 did not prove that after overtaking the truck, he was able to pull off the road, jump out the car and still be able to make observations on the truck to see the occupants. In my view, Rw2 is not being truthful because he admitted that he had not known why the MD wanted the truck stopped and it was still dark and the truck must have had its headlights on and thereby blinding him from clearly seeing the persons in the oncoming truck.

27. In view of the foregoing observations that there was no basis upon which to justify the dismissal of the claimant by the disciplinary committee, and the fact the evidence tendered herein is contradictory, I find that the respondent has not tendered sufficient evidence to prove that there existed a valid and fair reason on 17.9.2012, which made her terminate the contract of service for the claimant. Consequently, in the absence of evidence proving, on a balance of probability, that the claimant had had misused the company truck by going to fuel it along Mombasa road and carrying unauthorised persons, I return that the respondent has failed to discharge her burden of proving the reason for dismissing the claimant as required by section 43 of the Employment Act and the dismissal of the claimant on 17.9.2012 was unfair and unjustified within the meaning of section 45 of the Act.

Whether the Claimant is entitled to the reliefs sought

28. In view of the foregoing holding, I make a declaration that the termination of the claimant's contract of service by the respondent was wrongful and unfair.

29. Flowing from the foregoing declaration, I award the claimant under section 49(1) of the Employment Act, one month salary in lieu of notice plus 3 months' salary compensation for the unfair dismissal. In awarding the said remedy, I have considered the short period of service by the claimant and also the fact that the respondent did not prove any misconduct against him.

30. The Claimant's summary dismissal letter stated that all remuneration due and owing would be paid to him and that a certificate of service would be issued to him. He prayed for salary for 12 days worked in September 2012 being Kshs.22,258.40 based on a gross pay of Kshs.55,646 per month. The same was not contested in evidence or submissions and I therefore grant the same as prayed. I further grant the claim for the annual leave earned on pro rata basis. The appointment letter provided for 27 leave days and the claimant worked for 8 months. He therefore earned 18 leave days equalling to $Kshs.46,475 \times 18/26 = Kshs.32,175$.

31. The claim for severance pay is dismissed because the termination was not through redundancy.

Conclusion and disposition

32. I have found that the dismissal of the claimant was unfair and unjustified because it was not grounded on a valid and fair reason. I therefore enter judgment for the claimant in the following terms:

Notice Kshs. 55,646

CompensationKshs.166,938

Leave Kshs. 32,175

Total Kshs.254,759

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The award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of May 2019

ONESMUS N. MAKAU

JUDGE