



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1508 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ALPHONCE SHIHALO NGAIRA.....CLAIMANT

VERSUS

KENYA STATIONERS LIMITED (KENSTA GROUP).....RESPONDENT

JUDGMENT

The Claimant herein filed a Statement of Claim on 29th August 2014. He avers that he was employed by the Respondent from 1993 to 2010 when the Respondent unprocedurally terminated his employment. He further avers that the Respondent has continuously failed to pay him his terminal dues. He prays for the following remedies against the Respondent:

- a) An order compelling the Respondent to pay the claimant his terminal dues and benefits.
- b) General damages for mental torture, stress and anguish as a result of loss of employment.
- c) Costs of suit and interest on (a) and (b) above at commercial rates.

The Respondent filed its Statement of Response on 6th March 2015 in which it denies the averments in the Statement of Claim and prays that the Claim be dismissed with costs.

By consent of parties, the Claim was heard by way of pleadings, documents on record and written submissions. Each party filed its respective submissions.

Claimant's Case

The Claimant avers that he served the Respondent for 17 years until his termination on the allegation that some zinc scrap blocks belonging to Insteel Kenya Limited were found loaded onto the respondent's lorry which was under his care without its knowledge. He avers that as a result of this incident he was charged in Criminal Case No. 3743 of 2010 at Makadara Law Court and upon the determination of the case he was discharged. It is his averment that after conclusion of the criminal case he pleaded with the Respondent for reinstatement but the Respondent declined. It is his case that the Respondent has failed to pay him his termination dues calculated as:

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|---|-----------------|
| a) One month's salary in lieu of notice | Kshs.19,000.00 |
| b) Service pay for 17 years | Kshs.161,500.00 |
| c) Salary for the month of October 2010 | Kshs.19,000.00 |
| d) House allowance for 17 years | Kshs.48,450.00 |

In his written submissions, the Claimant reiterated the averments in his claim. He submitted that at the time of termination he earned a sum of Kshs.21,285 and that the issues in dispute were his salary for days worked at Kshs.11,328.00, Leave for 17 years at Kshs.361,845.00, Service for 17 years worked Kshs.180,922.50 and House allowance for 17 years Kshs.54,276.75. He further submitted that he did not receive any money as stated in the respondent's letter dated 12th October 2010.

Respondent's Case

The Respondent avers it leased a warehouse located at Insteel Company Limited. That on or about 1st October 2010, the Claimant in the company of his colleague Donald Mutisya were instructed to have one of the Respondent's lorries loaded with goods. Upon security check before the claimant and Mutisya left the warehouse zinc blocks belonging to Insteel were found loaded in the lorry which was under the sole custody of the claimant and his colleague, Mutisya. The claimant was the driver of the lorry.

It avers that the Claimant was negligent in undertaking his duties and responsibilities thereby occasioning it shame and embarrassment. It further avers that the decision to terminate the Claimant's employment was made on account of his negligence and not as a result of the criminal case against him. It denies having caused the Claimant to be charged in the criminal case. Its case is therefore that the Claimant's termination was lawful, procedural and compliant with the law.

The Respondent submitted that in compliance with sections 43 and 45 of the Employment Act. That gave the Claimant an opportunity to be heard and present his case before his services were terminated. The Respondent urged the Court to rely on the decision in *Maina Kimani v Mwalimu Co-operative Society Cause 603 (N) of 2009* where the Court held that negligent performance of duty is a valid ground for termination of employment.

It submitted that the reason for termination of the Claimant's employment was valid. That the prosecution in exercise of its independent professional judgment and independent investigations into the incident was satisfied that the evidence met the threshold to sustain criminal charges that could result in a conviction against the Claimant and his colleague.

It is the respondent's submission that the stolen blocks were evidence of the Claimant's lack of diligence, responsibility and negligence in performing his duties, which was in breach of clause 4 of his employment contract. It relied on the case of *Kenya Plantation and Agricultural Workers Union v Delmonte Kenya Limited Cause 44 of 2016* and submitted that it had lost faith in the integrity and diligence of the Claimant due to his negligence and dereliction of duty.

It submitted that fair procedure was followed prior to the Claimant's termination as required under clause 17 of the claimant's employment contract and in compliance with sections 41 and 44 of the Employment Act. That it further submitted that Claimant did not lead any evidence or submissions to prove that the termination was unfair as required under section 47(5) of the Employment Act. It argued that the Claimant was paid all his terminal dues in full and final settlement of his employment hence it does not owe the Claimant any terminal dues and benefits.

It argued that the compensatory reliefs are outside the limits of the Claimant's employment and urged the Court to rely on the decision in *Simon Patrice Matianyi v G4S Security Services (K) Ltd [2013] eKLR*. It further submitted that except for damages under unlawful termination of employment all other damages sought have no relevance to the claimant's contract of employment.

Determination

It is not contested that –

- (i) The Claimant was employed by the Respondent until 11th October 2010 when his employment was terminated for reason that he had negligently carried out his duties which according to the Respondent, caused it great embarrassment and loss
- (ii) He was charged in Makadara CM Criminal Case No. 3743 of 2010 and subsequently discharged.

The issues for determination are therefore –

- a) Whether the Claimant was unfairly terminated
- b) Whether the Claimant is entitled to the reliefs sought.

a) Whether the Claimant was unfairly terminated.

The Respondent avers that as a result of the missing blocks there was loss of trust in it by Insteel Limited in whose premises it operated. Without a doubt, the loss of the blocks would likely compromise the lessor – lessee relationship between the Respondent and Insteel Kenya Limited. This loss prompted the suspension of the Claimant to allow the Respondent conduct investigations into the incident and consequently terminate his employment. Section 44(g) of the Employment Act provides that an employee may be summarily dismissed on lawful grounds if the employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. The loss of the blocks occasioned distress to the Respondent as the lost property belonged to its lessor. I find that there was a justifiable reason for the termination of the Claimant's employment.

The Claimant avers that having been acquitted of the criminal charges he is entitled to reinstatement by the Respondent. The Respondent however submitted that it did not terminate the claimant as a result of the criminal case against him. Though the proceedings and judgment from the criminal proceedings were listed in the Claimant's List of Documents filed on 29th August 2014, the documents were missing from the Claimant's documents. The respondent however did not deny that the claimant was acquitted.

It is now settled that criminal proceedings are distinct from disciplinary proceedings and that an employer is not bound by the outcome of a

criminal case. The Court of Appeal in *Teachers Service Commission v Joseph Wambugu Nderitu [2016] eKLR* held:

“The Mathew Kipchumba case (supra) was preferred amongst many others from the Industrial Court stating the contrary view. No reason was given by the learned Judge as to why he preferred the proposition in the Mathew Kipchumba Koskei case (Supra) over those of Daniel Kamei (Supra) Clement Mutiso Muiinde (Supra) and Joseph Wambugu Kimanju (Supra) among numerous others on the same point all of which re-echoed the principle that professional disciplinary proceedings are distinct from the criminal proceedings even if they emanate from the same set of circumstances. This Court has crystalized the above position in a number of its own pronouncements. Waki JA in the case of the Hon. The Attorney General and another versus Maina Githinji & Another Nyeri Court of Appeal No. 21 of 2015 (UR) approved the reasoning of Okwengu JA in Judicial Service Commission versus Gladys Boss Shollei & Another (2014) eKLR, and the decision of the court in Kibe versus Attorney General Civil Appeal no. 164 of 2000...The above being the position, it is our view that this Court has made itself clear on the issue as to whether a successful outcome of a criminal process against an employee has primacy over an internal disciplinary process against such an employee arising from the same set of circumstances. The two processes are distinct from each other.”

With respect to procedure, the Claimant avers that he was unprocedurally terminated. The Respondent on its parts submitted that the Claimant was subjected to a disciplinary hearing. However, the Respondent did not produce the minutes of the disciplinary proceedings. In addition, the termination letter dated 11th October 2010 does not refer to a disciplinary hearing but only refers to the suspension letter dated 6th October 2010. I therefore find that based on the evidence on record, the Claimant was not given an opportunity to be heard prior to the termination of his employment as provided under Section 41 of the Employment Act. As a result of there being no fair procedure, I find that the termination of the claimant’s employment was procedurally unfair.

b) Whether the Claimant is entitled to the reliefs sought

The Claimant submitted that he is entitled to salary for the days worked, leave, service pay and house allowance for 17 years. However, in his Claim he prayed for one month’s salary in lieu of notice, service pay, October salary and house allowance. The claimant submitted that he earned a monthly salary of Kshs.21,285 which is the amount stated in his June 2010 payslip that he produced. The parties are bound by their pleadings and submissions are not pleadings hence the prayers in the submissions will be ignored.

The Respondent submitted that the Claimant was paid all his terminal dues as stated in the letter dated 12th October 2010 and as itemised in the payslip for the month of October 2010, which indicates that the Claimant received leave pay of Kshs.12,358.00, Service Kshs.247,154.00 and salary for the days worked in October at Kshs.11,328.00. Consequently, I find that for Service pay and salary for October 2010 were paid and are not due. The prayers for the same are dismissed.

One month’s salary in lieu of notice

Having found that fair procedure was not followed prior to the Claimant’s termination, the Court finds that the Claimant is entitled to payment in lieu of notice pursuant to Section 36 of the Employment Act. He is therefore entitled to Kshs.25,285/= based on the gross pay as per claimant’s payslip for the month of June 2010.

House Allowance

The Claimant sought house allowance for 17 years. However the payslip for the month of June 2010 indicates that he was paid a house allowance of Kshs.3,500.00. The prayer for house allowance thus fails and is dismissed.

General Damages for mental torture, stress and anguish

The Claimant did not adduce any evidence to prove that he underwent any mental torture. The claim therefore fails. The same

is accordingly dismissed.

Orders

The court finds the termination of employment of the claimant’s employment procedurally unfair and awards him the following –

1. One month’s salary in lieu of notice Kshs.25,285/=
2. The respondent shall pay claimant’s costs for the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE