



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 940 OF 2016

BETWEEN

STEPHEN MUNYAO KINI.....CLAIMANT

VERSUS

GULF STREAM INVESTMENTS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

Mulwa Nduya & Company, Advocates for the Claimant

Kaplan & Stratton, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th December 2016. He states, he was employed by the Respondent Company, as its Operations Superintendent, commencing 17th January 2005. He subsequently rose to become the Deputy Terminal Manager, earning an annual salary of Kshs. 3,072,672 as of the date of termination – 13th June 2016.

2. Termination he states, was not based on valid reason or reasons, and was lacking in fairness of procedure. He prays for Judgment against the Respondent for:-

(a) Severance pay for 11 years at Kshs. 1,408,231.

(b) Unpaid annual leave of 50 days at Kshs. 492,400.

(c) Overtime of 1,170.5 hours, at Kshs. 1,729, 413.

(d) Compensation for unfair termination at Kshs. 19,602,412.

Total...Kshs. 23,602,412.

- (e) Declaration that termination was unfair and unlawful.
- (f) Interest.
- (g) Costs.

3. The Respondent filed its Statement of Response on 7th February 2017. Its position is that the Claimant was employed as an Operations Superintendent in 2005, and became Deputy Terminal Manager in 2014. His role included monitoring of critical operational activities, and ensuring compliance to safe working procedures, quality management, development and implementation of terminal operation procedures and housekeeping activities. His contract was terminated on 13th June 2016 on the ground of gross misconduct. He did not perform his role properly, resulting in a fire at the workplace. This resulted in substantial loss to the Respondent. He was suspended on 18th May 2016. The Respondent carried out investigations. He was given an opportunity to be heard. He was found to have breached Respondent's General Rules and Regulations and dismissed on 13th June 2016. His position was not declared redundant to warrant severance pay. He had 19.75 pending annual leave days which were duly paid. He does not merit overtime. He was paid all his dues on termination. Termination was lawful and fair. The Respondent prays the Court to dismiss the Claim.

4. The Claimant gave evidence on 25th September 2018 and 20th March 2019. Respondent's Human Resource Manager Winny Chepkemai gave evidence on 17th July 2019 when the hearing closed.

5. The Claimant confirmed particulars, terms and conditions of his employment, in his oral evidence, as outlined in his Pleadings and Statement of Witness. The Respondent deals in bulk oil storage. The Claimant rose through various ranks to become Deputy Terminal Manager. He oversaw Respondent's ISO certification. He was diligent and used to receive bonuses.

6. On 5th May 2016, there was a spark on the boiler during the night. It was reported to the Claimant in the morning. He took steps to ensure the boiler was repaired. The Respondent normally contracted experts for the work. He called Respondent's Service Provider, Precor Place Products. The Provider sent its personnel to do the repair. There were pressing outstanding oil orders. These could not wait until the boiler was repaired. The Claimant asked Precor to do a stop-gap repair, and full repair later. Towards the morning, the boiler sparked again. The Claimant advised the system is overhauled, to accommodate delivery of more orders.

7. The Regional Manager called the Claimant on 18th May 2016 and informed the Claimant investigations would be carried out, on the allegation that the Claimant was involved in unauthorized repair of the boiler. The Claimant was not heard. There was no disciplinary hearing and opportunity to respond. He was issued a letter of termination on 10th June 2016. It was alleged that by calling Precor, the Claimant facilitated unauthorized maintenance of the boiler.

8. Management Employees were not eligible for overtime pay. The Claimant was 53 years on the date of termination with 7 more years left to work. Compensation claimed is based on the number of years of work left. There was no fire in the boiler; it was just sparks. Repair of the boiler was the responsibility of the Respondent.

9. On cross-examination, the Claimant told the Court there was no fire, just some sparks. He advised the Service Provider to repair a power fault, to avoid the terminal being paralyzed. It would take time to revert to the original circuit. Sparks were reported after this repair. It did not result in a fire which damaged cables. The Claimant was not aware of investigations carried out by the Respondent on the incident. He conceded he advised the Service Provider to carry out repair. He claims compensation in the region of Kshs. 23 million based on remaining years of service. He seeks severance pay over a period of 11 years. He seeks 50 days of annual leave. There is no document to support this prayer. Management

Officers were eligible for overtime.

10. Redirected, the Claimant told the Court anything happening at the boiler was his responsibility. He claims overtime from 2005 to 2008. There is no document discounting his prayer for overtime. Suspension was not a disciplinary measure, but meant to pave way for investigations. He was not asked to show cause, why disciplinary action should not issue. He was not heard at a disciplinary forum. The Respondent had a contract with Precor. The Claimant called Precor when the machine broke down. Precor said it could repair. The Claimant acted within his job description. The Claimant could not be blamed for the technical hitch in the boiler.

11. Winny Chepkemoi confirmed that the Claimant was an Employee of the Respondent. He oversaw operations. He was a key person. The Service Provider discovered the boiler had a fault. The spare part was not available. The Respondent put repair on hold. The Claimant gave approval nonetheless. This resulted in a fire and damage to the boiler. The Claimant was suspended. The matter was investigated. His contract was terminated. He was paid his terminal dues. His Claim has no basis.

12. Winny told the Court on cross-examination that there was a fire. It was not a big fire. There were sparks. The Witness could not recall if the County Authorities were called in. The Claimant was suspended. The matter was investigated. The Claimant was asked to give his views. It was within the Claimant's mandate to make judgment in the intermediate. The problem was that he deliberately authorized repair, bypassing the instructions issued by the Respondent. Claimant's actions occasioned loss to the Respondent. Redirected, the Witness told the Court there is no difference between a spark and a fire. The Claimant disregarded Respondent's decision to put on hold repair, and gave his go-ahead, resulting in fire and damage to the boiler. His mandate had to be exercised in consultation with management. He was paid all terminal dues including 3 months' salary in lieu of notice.

The Court Finds:-

13. The Claimant was employed by the Respondent Company as Deputy Terminal Manager. He executed a contract of employment with Andrew Jones, Respondent's CEO, on 14th May 2014. He had been working as Operations Superintendent earlier, from 17th January 2005.

14. The Respondent terminated Claimant's contract on 13th June 2016. The Respondent relied on Section 44 [4] [c] [not g] which states, it is an act of gross misconduct warranting summary dismissal: *if an Employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature, it was his duty under his contract to have performed carefully and properly.*'

15. The Claimant was first suspended on 18th May 2016. The allegation contained in the letter of suspension and the letter of termination, is that he was involved in unauthorized repairs/maintenance work on Respondent's boiler. Owing to the unauthorized repairs/maintenance, a fire broke out, damaging supply cables. Upon suspension, investigation was carried out. It was concluded that the Claimant was at fault.

16. The letter of termination states that bypassing of safety circuits was strictly forbidden. The Claimant did not respect Management's decision to defer repair on the boiler. He proceeded with the repairs with the External Contractor. Ignition circuit was replaced, bypassing the faulty autoflame panel circuit. This was done by running the electrical wiring from one panel to another- which was unsafe and not according to standards. This led to the fire and damage to the boiler.

17. The following issues arise from this dispute:-

- Whether the reason given above, in justifying termination was a valid reason.
- Whether termination decision was executed fairly.
- Whether the Claimant merits the prayers sought.

18. The Claimant did not deny in his evidence, that he engaged contractor Precor Place Products, to repair the boiler. He justified this on the ground that there were pressing oil orders placed by Respondent's Customers, which could not wait for full repair of the boiler, with proper spare parts, as was desired by Management.

19. It is not contested that the Management, of which the Claimant was part of, had taken the position that the repair of the boiler is put on hold, until the Respondent sourced proper spare parts. It is not contested also, that as a result of the work undertaken by the Contractor with the instructions of the Claimant, the boiler sparked.

20. The Claimant was not able to persuade the Court why he disregarded the common position of the Management, and made a unilateral decision, which contradicted what the decision-makers at the Respondent business had determined. His lone decision placed the entire business at the risk of greater damage to its boiler. There was a fire. The Court does not agree with the Claimant that sparks did not constitute a fire, and that it was within his discretion to act the way he did. All big fires have a small beginning. It cannot be right for one Manager to disregard the corporate decision of his fellow Managers, and act rogue, endangering the plant and machinery of the business which he served. It was plainly wrong for the Claimant to bypass the cautious approach of the Management, and place the business at risk of fire.

21. The Court is satisfied that the Respondent had valid reason in terminating the Claimant's contract. He was correctly found to have been involved in an employment offence under Section 44 [4] [c] of the Employment Act. He probably was involved also, in failure to obey a lawful and proper command of the Management. Termination was based on valid reason under Sections 43, 44 and 45 of the Employment Act, and to this extent, was fair.

22. Was the procedure fair? The Claimant was suspended. The incident was investigated. The letter of suspension is dated 18th May 2016. It unfortunately did not draw a line between investigation and disciplinary hearing. It indicates that *" during the course of **investigation**, you will be provided with details of the allegations and given an opportunity to respond to them. You must ensure you are available for interviews during this period. If you do not make yourself available, we will proceed with the investigation and make a determination based on the information have available to us. You have the right to an Employee representative at any such interview, and you will be given 48 hours' notice prior to any interviews taking place,"*

23. The letter of termination does not refer to any disciplinary hearing, but reiterates that investigation had been carried out, and the Claimant found culpable. It is stated: *"following suspension and completed SHE investigation, it has been found that you are guilty of the charges of gross misconduct."* SHE above stands for Safety, Health and Environmental.

24. The letter of termination does not refer to any disciplinary hearing. An investigation must be distinguished from a disciplinary hearing. The hearing follows investigation. Once investigation was complete, there was an obligation on the part of the Respondent to communicate formal charges against the Claimant, and convene a disciplinary forum to hear the Claimant, as required under Section 41 and 45 of the Employment Act. The Safety Investigation Report at page 31-36 of Respondent's Documents filed on 14th February 2017, is not a disciplinary report. It is an Incident Investigation Report, required under the Safety, Health and Environmental Manual of the Respondent business. The Report indicates that boilers are regulated by Legislation and certain occurrences must be formally investigated. The Report was therefore related to investigation not the disciplining of the Claimant. ***To this extent, termination was unfair under Section 41 and 45 of the Employment Act.***

25. The Claimant's position was not declared redundant. There is no basis for claiming severance pay, which is paid on redundancy, under Section 40 of the Employment Act. The prayer is declined.

26. Clause 5.1.4 of Respondent's Terms and Conditions of Service states that an Employee could be required to work in excess hours. Any overtime would be compensated in accordance with the Regulation

of Wages and Conditions of Employment Act, Cap 229 the Laws of Kenya [repealed under Section 63 of the Labour Institutions Act, 2007].

27. The Court does not think that it was intended Management Employees are paid overtime, under the Respondent's Terms and Conditions of Service. Clause 5.1.5 specifically allows the Respondent to require Management Employees to work beyond normal working hours. The clause does not provide for overtime pay for Management Employees. The Court does not think clause 5.1.4, applies to Management Employees. It alludes to Wage Orders. Wage Orders made under Section 63 of the Labour Institutions Act do not apply to Managers in undertakings. Overtime provisions do not apply to Managers. It is deemed that Managers do not need the protection of Legislation in regulating their hours of work, and are in a position to negotiate their hours of work, and compensation for any excess hours done, with their Employers. If it was intended to pay the Claimant for excess hours worked, it would have been stated under clause 5.1.5 of his contract. The Wage Orders are there to protect Employees who do not have sufficient bargaining strength, in negotiating with their Employers. The Claimant as a Manager, must have taken into account that under clause 5.1.5 of his contract, the Respondent had the discretion in requiring him to work excess hours. Compensation for such excess hours, must have been factored in his salary of Kshs. 256,042 monthly. The prayer for overtime pay is rejected.

28. The Claimant was paid 19.75 annual leave days with regard to the year 2016. He did not establish where 50 days of annual leave claimed, stems from. He alleges leave for the year 2011 is unpaid. Why 50 days and why was it not claimed during employment? The prayer lacks clarity and is declined.

29. The Claimant bases his prayer for compensation on anticipatory salaries, payable till his hypothetical date of retirement at the age of 60 years. The contract allowed him to retire at the age of 55 years, with discretion extended to the Respondent, to add any number of years to this age of retirement. The Claimant therefore argues, that he could have worked until he turned 60. There is no reason why he thinks the Respondent would have added 5 more years, not 2 or 10, or any other number of years, to his retirement age.

30. There are a number of decisions from our Superior Courts, which have held that compensation for unfair loss of employment, is not to be assessed based on the expected age of retirement. It is recognized that the Employee does not render any work to the Employer for the anticipated period of service. It is expected that the Employee mitigates loss of employment by looking for alternative sources of income. It would be inequitable to require the Respondent to pay the Claimant Kshs. 256,042 for the rest of the Claimant's productive life, while he no longer has any role in production, at the Respondent's business. Courts have ruled that employment remedies must be equitable and proportionate, not aimed at unjust enrichment of Employees. The compensatory route suggested by the Claimant is way in excess of what the law recommends.

31. The Respondent similarly adopts an extremist position. Citing a decision which espouses employment law as it was before the coming into force the Employment Act 2007, the Respondent urges the Court to find persuasion in this thinking:-

“In our view, since the contract of employment was terminable by one month's notice, we believe an award of one month's salary in lieu of notice would have been reasonable compensation”

This is a throwback into the era of termination-at-will, where the Employer could terminate an Employee's contract for no cause, just cause or unjust cause. It makes nonsense of the reform in the law, contained in the Employment Act 2007. Should we revert to one month salary in lieu of notice, as the totality of compensation for unfair termination, because contracts have provision for termination by notice?

32. Encountered with these extremist positions advanced by the Parties, the Court must be guided by Section 49 of the Employment Act, as read with Section 12 of the Employment and Labour Relations Court Act, allowing the Court to make an award of up to 12 months' salary in compensation for unfair termination. This law leaves it entirely at the discretion of the Court, in determining what a suitable

remedy is.

33. The Court has taken into account that the Respondent had a valid reason in terminating the Claimant's contract. The manner of executing termination was manifestly faulty. The Claimant had worked for 11 years. He had a fairly good record, and enjoyed raise in rank and salary over the years. He oversaw Respondent's ISO certification, a no mean achievement. He was 53 years at the time of termination. He states his contract allowed him to work up to the age of 55, but that the Respondent had the discretion to extend his contract. Clause 7.1.3 supports this, but it does not mention the age of 60 preferred by the Claimant as his retirement age. Going by the age of 55 mentioned in the contract, the Claimant would have expected to work for 2 more years before retirement. He contributed in no small way, to the circumstances leading to termination.

34. ***He is allowed equivalent of 5 ½ months' salary in compensation for unfair termination at Kshs. 1,408,231.***

35. ***Certificate of Service to issue.***

36. No order on the costs and interest.

IN SUM, IT IS ORDERED: -

(a) It is declared that termination was unfair on account of the manner of its execution.

(b) The Respondent shall pay to the Claimant equivalent of 5½ months' salary in compensation for unfair termination at Kshs. 1,408,231.

(c) Certificate of Service to issue.

(d) No order on the costs and interest.

Dated and delivered at Mombasa this 13th day of December 2019.

James Rika

Judge