



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 416 OF 2017

(Before Hon. Justice Mathews N. Nduma)

DENNIS WAMALWA MADU.....CLAIMANT

VERSUS

EQUATOR BOTTLERS LIMITED....RESPONDENT

JUDGMENT

1. The suit was filed on 7th November 2017 the claimant seeking maximum compensation for unlawful termination of employment and payment of terminal benefits set out under paragraph 44 of the memorandum of claim to wit:

- a. Two months salary in lieu of notice Kshs. 37,908
- b. Arrear salary for the period March to June 2017 Kshs. 28,140.
- c. Accrued leave days and leave travelling allowance Kshs. 25,000.
- d. Pension due Kshs. 105,961.90
- e. Various fines for statutory infringement
- f. Certificate of service.

Claimant's case

2. The claimant testified under oath as CW1 that he was employed by the respondent as a checker on 25th July 2013 at a monthly salary of Kshs. 14,000 whilst he was on contract but it was subsequently reduced to Kshs. 12,460 when he was appointed on permanent basis.

3. As a checker, the claimant did stock rotation on a first in first out basis. Secondly, the claimant ensured that all products loaded in the trucks were clean and orders loaded in the correct trucks. That he got letter of appointment which he produced as exhibit 1 without any code of conduct attached.

4. That CW1 worked until 7th June 2017 when his employment was unlawfully terminated. The claimant was accused of allowing a truck to be loaded with an excess of 120 soda cases on 7th June 2017.

5. CW1 testified that whilst he was on duty, a truck KAU 206 was loaded by two loaders. That he assigned the two to load 550 cases of 300 ML sodas. That upon loading, they proceeded for verification to a clerk, named Juma Mtutu. The verification was done by two clerks. One was pallitised clerk and the other was unpallitised clerk. CW1 stated that in every shift, there must be two (2) clerks but at the material time, CW1 was alone in the night shift since the other checker went on leave on 15th May 2017. The reliever was put on other duties. CW1 had complained that he could not handle 150 trucks alone at night but his plea was not attended to. That trucks are loaded at different points and it was impossible to check the loading adequately alone.

6. CW1 testified that the excess 120 crates were detected at the gate by security personnel. The truck was returned for the excess to be offloaded. Security instructed that offloading be done in the morning and this was done. The truck was then released to deliver the soda.

7. CW1 wrote a statement on 8th June 2017 with the security personnel. CW1 had on the material date reported at 4 p.m in the evening and handed over to the next shift in the morning and left for home.

8. The Human Resource Manager summoned the claimant later in the day and he was given notice to show cause letter to which he responded and went home. CW1 was suspended for two (2) days and was given a hearing notice for 28th June 2017.

9. CW1 attended the hearing where he defended himself. The claimant testified that his defence was ignored and he was interjected to variously by the Human Resource Manager. CW1 was accompanied by two (2) union officers. CW1 stated that the explanation by the union was also disregarded. CW1 testified that the respondent wrongly implied that the excess was not a genuine mistake but a plot to steal with no evidence at all. CW1 testified that the reason for termination was not valid. The respondent relied on a falsehood that the company had lost Kshs. 114,000 since the excess was offloaded and returned.

10. CW1 testified that the CBA provided for two months salary in lieu of notice which he was not given nor paid in lieu. Claimant testified that his last pay slip indicated payment of Kshs. 29,703.30. CW1 claims arrear salary up to June 2017. He claims 26 days unpaid leave. CW1 stated that he was not paid his pension under the company pension contributory scheme. The claimant stated that he was deducted Kshs. 5,000 every month. The claimant seeks provision of certificate of service and compensation for unlawful dismissal.

11. Under cross examination, CW1 denied having received the job description produced in court by the respondent. CW1 denied that duties listed in that document were assigned to him. CW1 insisted that it was the duty of the two verifying clerks, Brian Odigo and Juma Mtutu to ensure the truck did not leave with any excess crates of soda. That the two clerks had counted and verified the soda against the invoice. That CW1 did not see the invoice. That he only used a sales order to get the trucks loaded. The sales order only states the quantity to be loaded and has no payment details. CW1 instructed loading of 550 cases of 300 ml. as per the sales order. CW1 stated that the verifying clerks and the driver are still employed and he could not call them as witnesses. CW1 states that he was discriminated against. CW1 was still looking for a job without a certificate of service given to him. CW1 admitted having received only one letter of warning.

12. RW1 Benjamin Omondi testified for the respondent. RW1 stated that he was Human Resource Assistant of the respondent. That he knew the claimant. RW1 relied on a witness statement dated 28th April 2018. RW1 testified that the claimant received a warning letter on 16th November 2013 for mixing up empty regular and ultra-glass bottles. On 22nd October 2014, the claimant was warned for falsifying documents. On 25th November 2016, the claimant was warned for poorly arranging crates which led to leakage of products. On 16th March 2017, 1058 cases were found to be missing from the warehouse where the claimant was working and on 7th June 2017, a truck was intercepted by security personnel at the gate having been loaded with 120 excess cases of 300 ML sodas under the claimant's watch.

13. That the claimant received a show cause letter on 8th June 2017 with respect to the excess loading of 120 crates of 300 ML sodas. RW1 testified that the claimant responded to the show cause letter in which he admitted that the excess loading was an oversight. On 9th June 2017 the claimant was suspended for 2 days and was invited to attend a disciplinary hearing on 12th June 2017. RW1 testified that the disciplinary panel found the claimant guilty and recommended termination of his services. RW1 stated under cross examination that the truck in question was not verified because the claimant released it to proceed to the gate. RW1 stated that the truck had no pallets but security personnel were able to count the number of crates in the truck and the truck had excess of 120 cases of 300 mls. The check was done against the invoice. RW1 insisted that the truck was intercepted by security. RW1 stated that trucks ought not to be released before they are verified by the clerk checkers. RW1 stated that CW1 did not release the truck. RW1 stated that the company did not lose money on this instance. RW1 denied that the letter of termination stated that the company lost Kshs. 114,000. RW1 insisted that CW1 got the job description produced before court and it was his duty to ensure the truck is not loaded with excess sodas. RW1 prays that suit be dismissed with costs.

Determination

14. The issues for determination are:

- a. Whether the respondent had a valid reason to terminate the employment of the claimant.
- b. Whether the claimant is entitled to the reliefs sought.

Issue a

15. The claimant was employed as a checker. His duties included maintenance of records of outgoing products, supervise and confirm the physical loading as per the dispatch advice and invoice, ensure no under or over load is done in the trucks and general supervision of the loading team. There were verifying clerks who counterchecked the correctness of the load as against the invoice before the truck is released to the gate for security check and onward transport of the load to the customers.

16. On the material date, it is not in dispute that the claimant was on duty alone. The claimant testified which fact was not disputed that there were supposed to be two checkers per shift. It is also not in dispute that there were about 150 trucks to be loaded on the material night. There were two verifying clerks on duty during the shift. Evidence not contradicted shows that one truck KAU 206 was overloaded with 120 crates of 300 ml. soda. That the overload was not detected by CW1 nor by the two verifying clerks. The overload was detected at the gate by security personnel and the truck was returned and the excess crates of sodas were offloaded.

17. The claimant testified that he was simply overstretched on the material night and was unable to check all the outgoing trucks. That he had pleaded to be given another checker but the respondent failed to heed to the request. The claimant conceded that the overload was therefore an oversight on his part due to the fact that he was alone as against many loaders and two verifying clerks who unfortunately did not detect the overload until it was picked by security team. CW1 testified that the company did not lose any money since detection as made

by the security team who were part of the loading process. The claimant testified that the loaders and the verifying clerks were not disciplined and were in fact still working for the respondent. The claimant testified that he was unfairly targeted for termination despite that he was placed in an impossible situation on the material night.

18. RW1 in his testimony did not refute the fact that the claimant was supposed to be supported by a 2nd checker. RW1 did not deny that 150 trucks were to be loaded that night and the claimant supervised loading of 41 trucks. RW1 did not deny that the claimant had requested for support by a 2nd checker and the same was not given.

19. The court has carefully considered the minutes of the disciplinary hearing and in particular noted the comment by the Human Resource Manager as follows:

“It was his sole responsibility to ensure the trucks are loaded correctly. Being alone is not an excuse. He should have delayed the trucks rather than load incorrectly. This is not a mistake but clear theft in which the driver, checker, clerk and security were involved”

20. The above was the basis upon which the disciplinary committee decided to terminate the employment of the claimant.

21. The respondent did not adduce an iota of evidence to support this narrative by the Human Resource Manager. It is not disputed that the driver, clerks and security were not disciplined together with the claimant. Indeed, the claimant testified that they were still working and that he was unfairly targeted.

22. The court is in the circumstances satisfied that the failure by the respondent to provide personnel support to the claimant on the material night caused and/or largely contributed to lack of detection of the overload by the claimant.

23. The court is satisfied that the claimant was wrongly blamed for that particular omission and he could not have performed an impossible task in the circumstances he was deliberately placed by the respondent.

24. Accordingly, the respondent had no valid reason to terminate the employment of the claimant. The explanation given by the claimant was reasonable in the circumstances of the case. The termination violated *Section 43(1) and (2) and 45 of the Employment Act, 2007*. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act, 2007*.

25. In this respect, the claimant had served the respondent as a checker from the year 2013 up to 2017, a period of four (4) years. The claimant had received several warning letters but had not been associated with any loss of product by the respondent. Even on this particular incident, no loss was incurred because the system in place picked the overload. This is what the process was meant to do. The claimant was not paid terminal benefits nor compensated for the loss of job. The claimant was not given a certificate of service to help him in seeking alternative employment. The claimant was still unemployed despite efforts to get a job. The respondent largely contributed to the incident for which the claimant was wrongly blamed. The court further relies on the case of *Daniel Kiplagat Kipkebut and SMEP Deposit Taking Micro Finance Limited (2016) eKLR* to find this an appropriate case to award the claimant the equivalent of six (6) months salary in compensation for the unlawful termination of employment.

Terminal benefits

26. RW1 did not adduce any evidence to rebut the following claims by the claimant:

- a. Two months salary in lieu of notice as per the CBA. The court finds that the claimant was not paid in lieu of notice upon termination of employment and was entitled to the equivalent of two months salary in lieu of notice, which the court awards in the sum of Kshs. 37,908.
- b. Arrear salary from March 2017 to 8th June 2017 in the sum of Kshs. 28,140. The court awards the claimant accordingly.
- c. Pension – The claim for pension due and owing to the claimant was also not refuted and the court orders the respondent to facilitate payment of pension due and owing to the claimant in the sum of Kshs. 105,961.90.
- d. The respondent to provide certificate of service to the claimant within 30 days of judgment.
- e. Leave days – The claimant testified that he was owed 26 days in lieu of leave and the court awards him Kshs. 20,000 in lieu of leave days not taken.

27. The claims in respect of leave travelling allowance and various fines sought against the respondent lack merit and are dismissed.

28. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

- a. The equivalent of six (6) months salary in compensation for unlawful termination in the sum of Kshs. 134,280.
- b. Two months' notice pay Kshs. 44,760.
- c. Kshs. 28,140 in respect of arrear salary from March to 8th June 2017.

- d. Kshs. 20,000 in lieu of leave days not taken.
- e. Kshs. 105,961.90 contributory pension. (Payment to be facilitated)
- f. Certificate of service to be provided within 30 days.
- g. Interest at court rates from date of judgment till payment in full.
- h. Costs of the suit.

Judgment Dated, Signed and delivered this 4th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person

M/S Ongira for Respondent.

Chrispo – Court Clerk