



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1443 OF 2013

KENYA UNION OF COMMERCIAL

AND ALLIED WORKERS.....CLAIMANT

VERSUS

KAPA OIL REFINIRIES LIMITED.....RESPONDENT

JUDGMENT

1. This suit was filed seeking to resolve the dispute between a member of the Claimant Union Mr. Jonathan Muthoka (hereinafter the Grievant) and his erstwhile employer the defendant herein Kapa Oil Refineries. In the claim filed on 6th September 2013 it was stated that the Grievant had worked for the Respondent from 11th October 1999 till 1st November 2011 when his services were terminated on account of an incident that occurred along Haile Selassie Avenue on his way to pick company staff. The Grievant was spotted driving along the said avenue carrying unauthorised passengers and was asked to write a letter concerning the incident. He wrote a hand written letter dated 1st November 2011 where he admitted meeting Mr. Milan along the road whilst ferrying the passengers in the company bus. It was averred that the Grievant was served with a show cause notice on 3rd November 2011 and he responded on the same day and apologised for carrying unauthorised family members and that upon receipt of the letter the Grievant received a dismissal letter the same day. In the dismissal letter the Respondent offered to pay salary for days worked upto and including 3rd November 2011, pay in lieu of accrued leave, leave travelling allowance, pay for overtime worked and night shift allowance if any. The Claimant averred that efforts to resolve the matter at the parties level failed and a dispute was reported on 19th December 2012, a conciliator appointed in February 2013 and the conciliator determined that the Grievant be paid terminal benefits but without notice. The Claimant sought a certificate on 17th June 2013 after the dispute remained unresolved and upon service of the certificate of conciliation on 6th August 2013 the matter was ripe for this court. The Claimant averred that the Grievant was not given an opportunity to defend himself under Section 41(1) of the Employment Act 2007. It was averred that the Claimant's shop stewards and even the branch secretary were not given a chance to represent the Grievant at the shop floor level as the Grievant was not afforded such an opportunity. The Claimant averred that the termination was not in accordance with fair procedure in terms of Section 45(2)(c) of the Employment Act. The Claimant thus sought payment of various sums to the Grievant being three months salary in lieu of notice – Kshs. 64,989/-, service gratuity Kshs. 449,923.85, salary for 3 days worked in November 2011 – Kshs. 2,708, unpaid leave Kshs. 1,476/-, overtime Kshs. 3,812/- and compensation for wrongful termination 12 months salary - Kshs. 259,956/-. The Claimant also sought costs of the suit.

2. The Respondent filed its defence on 25th September 2013 and in the response to the memorandum claim averred that the Grievant was responsible for the picking and dropping of staff from home to work in the mornings and evenings. The Respondent stated that the Grievant was on duty on 1st November 2011 and was to pick staff in the morning using the Respondent's staff bus registration number KBH 922V. The Grievant collected the bus from the Respondent's premises at Mlolongo area Mombasa road in the early hours of the morning and was expected to pick company staff from the usual places around Westlands and Parklands. The Respondent averred that at around 5.40am the bus was spotted along Haile Selassie Avenue by a director Milan Shah ferrying several passengers whereas the bus was not supposed to have any persons on board as it had not started picking staff. Upon his return, the Grievant was summoned and notified of the allegations made by Milan on email and he was to respond to them and at first stubbornly denied there were any passengers on board. On insistence on the presence of passengers in the bus the Grievant admitted to having 4 members of his family who were going to see a sick person at Kenyatta National Hospital. The Respondent averred that the prohibition of carriage of passengers without prior written permission of the management was well known to the Grievant who had signed a memo to that effect. The Grievant was issued with a notice to show cause on 3rd November 2011 and he responded on the same day and admitted carrying unauthorised persons in a company vehicle in violation of company policy but claimed they were members of his family. The Respondent dismissed the Grievant from its employment and the Claimant approached the Respondent seeking reinstatement but this was rejected by the Respondent leading to the lodging of a dispute with the Ministry of Labour where Mrs. E Mukanga was appointed conciliator. Upon conciliation the Respondent prepared payment as per the recommendation of the conciliator but the Grievant in company of the Claimant's representatives refused to collect the dues. The Respondent thus urged the court to dismiss the claim as the dismissal was lawful.

3. The Claimant was heard on 18th September 2017 and testified that he was employed by the Respondent in 1999 as a driver and was summarily dismissed on 3rd November 2011 because he had carried 4 members of his family in a company vehicle. He stated that he was summoned and explained himself stating why he had carried them. He said that they had a patient at KNH and he carried them to allow them to donate blood for the relative who unfortunately later passed away. He testified that his dismissal was without notice and that the dispute was unresolved at the labour office prompting the approach to court. He stated that he had never had any other disciplinary case and that he worked for 12 years for the Respondent. He thus sought the prayers in his claim to be granted.

4. In cross-examination he testified that he was aware of the regulations of the company and that he was not to carry any passengers. He stated that he had carried his family and there was no problem carrying family members. He stated that the staff at the gate knew he had carried his family members but he conceded that he had no document to show authorisation. He knew there would be an issue with insurance and stated that the insurance is on the vehicle and not the passengers. He testified that it was an emergency as the visitors were from *ushago* and he carried them from the office to town at around 4.30am. He stated that he was dismissed because of carrying the family members. He received the show cause and responded indicating that the passengers were family members. He stated that he had been paid his salary for the month. He testified that the transport manager assigned duties and the transport manager was the one to give permission. He stated it was urgent and that when he called the call did not go through and he notified the guard at the gate. He said that the guards knew that there was authority to carry family members, a local arrangement which was how they operated. He testified that the conciliator asked that he be paid and he thought it was service. He confirmed the report of the conciliator was given to the Union.

5. In re-examination he testified that he had reported to work at 4.30am and collected the vehicle and there was no supervisor or transport manager. He stated there was no one to give him permission. He testified that there was nothing contrary to the CBA in his claim. That marked the end of the Claimant's oral testimony and the case was deferred for defence hearing on 23rd October 2017.

6. The Respondent called Hasimrath Sawjani who testified that he was the payroll officer for the Respondent from the year 2000. He stated that he was aware the Grievant was dismissed after being spotted carrying unauthorised people on 1st November 2011 in vehicle KBH 922V. He said that the drivers were notified that they are not to carry any unauthorised passengers and the Grievant was seen at 5.40am at Haile Selassie Avenue and HR was informed of this by email. He stated the Grievant was called in for a meeting with the HR manager Malika Sood and the Grievant responded in writing to the allegations made. He testified that the Grievant was given time to respond and the Grievant wrote an apology and after admitting the error indicated he would not repeat it again. After that there were several meetings with the union but because of what the Grievant had done the Grievant was summarily dismissed and the Grievant was to be paid for days worked and leave dues. He stated that the Grievant did not collect the payment as there was no gratuity paid. The conciliation was to effect that the Respondent had to pay per the CBA. He testified that the Claimant wrote seeking the payment of terminal dues and the Respondent replied indicating the Grievant could collect his dues but the Grievant refused to collect the dues.

7. In cross-exam he stated he was the payroll manager and was not at the scene. He stated that as soon as Milan Shah saw what was going on he informed them on email. He testified that Milan was unavailable to testify on the hearing day. He stated that the Grievant was to pick and drop staff and could have other duties assigned by the transport officer. He testified that the Grievant usually collected the vehicle between 5.00 and 5.30am and that at the time the transport manager was not available at that time nor was any one in senior management available at the time. He stated that the Grievant was spotted carrying several passengers. He testified that at the hearing the Grievant denied the allegations but later accepted he had been spotted by Milan. He was shown the conciliation report at page 10 of the claim and stated that the Respondent accepted the conciliation report and were to pay the terminal benefits as per the CBA but not notice. He said that gratuity is not payable in cases of summary dismissal and that normal termination includes service pay.

8. In re-exam the witness stated that he had calculated the Grievant's dues and once the Grievant was given indication of the person who had seen him carrying passengers he accepted and sought pardon. He stated the Grievant was to contact the transport manager by phone if there was any emergency. He testified that one cannot ascertain the number of people in the vehicle when it is moving but one can see there are people. He stated the Grievant was given an opportunity to be heard and respondent to the allegations. The conciliator advised that the Respondent pays in accordance with the CBA and that upon summary dismissal one is not entitled to gratuity. That marked the end of oral testimony in the case.

9. The parties were to file submissions and the Claimant filed submissions on 20th November 2017 while the Respondent filed submissions on 1st December 2017. In the submissions, the Claimant submitted that the Respondent unfairly dismissed the Grievant for carrying unauthorised family members in the company bus on 1st November 2011. It was submitted that the Grievant was not given an opportunity to appear in the meeting with a union shop floor representative or a fellow employee at the meeting hurriedly convened on 1st November 2011. The Claimant submitted that on 3rd November 2011 the Grievant received a show cause letter which he was verbally asked to respond to immediately and was dismissed the same day. It was submitted that there was total breach of procedural fairness as demanded by Section 41, 43 and 45 of the Employment Act, 2007. The Claimant submitted that the Grievant accepted the Conciliator's recommendation as basis for settlement but refused to pay gratuity. The Claimant urged that the termination of service should not carry with it a forfeiture of gratuity.

10. In their submissions, the Respondent submitted that the issues for determination were twin:-

- i. Whether the Claimant was unfairly, unlawfully and unprocedurally terminated
- ii. Whether the Claimant is entitled to his terminal dues as prayed

The Respondent submitted that the Grievant was accorded a fair hearing in accordance with Section 41 of the Employment Act. The Respondent asserted that the Grievant even admitted in the memorandum of claim to having carried unauthorised passengers on 1st November 2011 along Haile Selassie Avenue on his way to pick company staff. The Respondent submits that it complied with the statutory requirements under section 41 of the Employment Act and cited the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** in support. The Respondent submitted that the Grievant was aware of the prohibition on carrying unauthorised passengers and had even signed a memo to adhere. On summary dismissal, the Respondent placed reliance on the case of **Erick Karanja Gakenyo &**

Another v Samson Gathimba [2011] eKLR where Emukule J. held that *summary dismissal connotes the dismissal of an employee without giving the notice which the employee is entitled to by virtue of the contract of employment*. The Respondent submitted that the Conciliator made a recommendation that the payment of the Grievant's terminal dues were to be without notice pay. The Respondent submitted that the Grievant was summarily dismissed for just cause and was not entitled to gratuity per the parties CBA.

11. The Grievant was dismissed summarily for the carriage of unauthorised passengers, a fact that the Grievant admitted. The Claimant and Grievant are of the view that the dismissal was unwarranted as the passengers were family members of the Grievant who were ferried to town to proceed to KNH as there was a family member at the hospital in need of blood. The Grievant was to receive Kshs. 8,321/- as the terminal dues. The Grievant declined to receive the sum as it was without the gratuity he anticipated to receive upon dismissal. The Respondent asserts that the Grievant was dismissed for cause and his dues are as calculated. The matter was referred to the Conciliator appointed by the Minister for Labour. The Conciliator determined that in order to settle the dispute amicably they were to pay the Grievant his terminal benefits per the CBA but not notice. The CBA makes provision for payment of gratuity under clause 18 but under the same clause exempts from payment of gratuity for any summary dismissal for just cause. The Grievant was dismissed for carrying unauthorised passengers in a company vehicle, a matter that was well known to him to constitute a breach of his terms and conditions of service. In my considered view, the dismissal was warranted and it resulted in the loss of his benefits. In the case before me, no basis was laid for an award of any relief other than the payment he was entitled to receive which was pay for the days worked, pro rata leave, overtime if any. The Respondent is to pay the Grievant the Kshs. 8,321/- that was due to him. He is also to receive a certificate of service. Each party will bear their own costs of the suit.

It is so ordered.

Dated at Nyeri this 25th day of January 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 30th day of January 2018

Radido Stephen

JUDGE