



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 746 OF 2014

JOHN MUTIA MALUKI.....CLAIMANT

VERSUS

SCHENKER LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on the 7th May 2014 and averred that the Respondent dismissed him from service on 14th February 2014 without any justification or excuse. The Claimant was earning Kshs. 66,000/- at the time of the dismissal. He averred that his terminal dues were not paid. He thus claimed Kshs. 66,000/- being his salary for the month of February 2014, 3 month's salary in lieu of notice Kshs. 198,000/- and 12 months compensation Kshs. 792,000/- making a grand total of Kshs. 1,056,000/-. He averred that the Respondent's HR manager and Branch manager laid allegations against him for failure to follow up container interchanges and that he had failed to ensure refund of deposits and failure to keep proper records. He averred that none of these allegations were true and that he explained candidly that the containers had been dispatched on the orders of his boss one Moses Mulama and he could not question the authority of his boss. It was averred that the said Mulama left the Respondent's employ and the Claimant was victimised for the actions and omissions of Mulama and used the failures of Mulama to summarily dismiss him from employment. He averred that he was not afforded a proper hearing to defend himself and that the entire disciplinary process was discriminatory, oppressive, illegal and contrary to the rules of natural justice. He prayed for general damages and a declaration that the termination of his services was irregular, wrong, unlawful and unfair. He sought costs if the suit as well as interest.

2. The Respondent filed a defence and counter claim on 15th June 2015 and averred that the Claimant was responsible for ensuring that the Respondent's shipments did not incur any loss whatsoever in terms of storage costs, demurrage, customs rent or damage to consignment. It was averred that the Claimant was to ensure that any fines and penalties were well documented for onward recovery from customers. The Respondent averred that all the charges levelled against the Claimant lay squarely within the Claimant's job description. The Respondent averred that the Claimant's contract of employment was terminated summarily for Claimant's failure to follow up on container interchanges, return of containers, refund of deposits, ensure cash on delivery clients pay up front before release of cargo and documents, record and invoice all handled shipments. The Respondent averred that the Claimant failed to make amends and improve contrary to the provisions of the Employment Act, 2007 and the Claimant's contract of employment. The Respondent averred that the Claimant was uncooperative and evasive when queries on the above were raised and completely failed to improve his performance to the Respondent's detriment in terms of actual financial loss. The Respondent averred that the Claimant habitually failed to follow up on container interchanges, return of containers on time, refund of deposits, failure to monitor and reconcile

port and suppliers accounts, late invoicing of completed jobs, late posting of invoices, failure to monitor cash on delivery clients' accounts to ensure payment was received before release of cargo and shipping documents. The Respondent gave particulars of loss such the failure to ensure return of containers to WEC Lines Kenya, Emirates Shipping (East Africa) Limited and CMA CGM Kenya Limited resulting to the incurring of loss of US\$ 4,629, 7,380 and 6,790 respectively among others. The Respondent averred that there were demurrage charges incurred from Kenya Ports Authority in excess of 2 million shillings attributable to the Claimant. The Respondent averred that the procedure for termination was through the show cause letter on 13th January 2014 and that the Claimant responded through email on 14th January 2014 denying the charges and was advised to respond through a signed letter. It was averred that the Claimant responded through a signed letter on 15th January 2014 denying the charges. The Respondent averred that the Claimant was invited to a disciplinary hearing over his acts of misconduct and negligence of duty through a letter dated 21st January 2014. The Respondent averred that the Claimant attended the disciplinary hearing on 24th January 2014 and was accorded an opportunity to defend himself against the charges levelled against him. The Respondent averred that the Claimant failed to exonerate himself against the charges and failed to show any remorse and a decision to summarily dismiss him was made for gross misconduct. The Respondent gave details of the disciplinary record of the Claimant and averred that the Claimant was not entitled to the relief sought as his dismissal was in accordance with Section 44(4)(c) and (e) of the Employment Act 2007. In its counterclaim, the Respondent avers that as a result of the Claimant's carelessness and negligence in the performance of his duty and habitual failure to follow up on the return of containers, the Respondent had lost US\$ 4,629, 7,380 and 6,790 respectively as well as demurrage charges incurred from Kenya Ports Authority in excess of 2 million shillings. The Respondent sought payment of the said lost sums. The Respondent prayed for the court to uphold the Claimant's dismissal and proceed to dismiss the Claimant's claim and enter judgment in favour of the Respondent on the counterclaim with costs.

3. The Claimant testified on 28th September 2017 and he stated that he was a former employee of the Respondent having worked for it from 1986 till February 2014. He testified that the management of the company changed often and that in 2012 there was a change in his title to supervisor. He stated that he worked under 3 managers – ocean freight department, general manager Mombasa branch and logistics manager. He testified that the system of payments was changed and the importer now had to pay the charges and they were required to control the transporters containers some of which started coming late from South Sudan and Uganda. He stated that he was accused of failure to control container interchanges and indicated that interchange is the proof of return of containers to the depot. He testified that the containers for WEC Line were to be cleared from port and the consignment was a transshipment transferred from one vessel to another under customs supervision after authorization from Kenya Ports Authority (KPA). He stated that the accusation against him under WEC Lines was false as there no interchange at all as it was transshipment. He testified that the importer was the one paying and if there was delay it was not his fault and that there was general manager, logistics and Mr. Mulama who were in charge. He stated they would have seen why there was a delay. He testified that the release of containers was after customs release and there was no control over containers not released by customs. He stated that he was not an accountant and that he was not in the accounts department which was responsible for invoicing the client. He testified that when he got the show cause letter the HR came to Mombasa and the new branch manager was Larisa Mason and the three of them sat down on 21st January and he was asked about these allegations and his response was the same. He stated that on 14th February Moses Nzuya came with a show cause letter dated 13th February and a notification of termination. He testified that the letter of show cause dated 13th February was given to him and he went out and after three hours was called and given the summary dismissal letter on 14th February. He stated he received the letter on 14th and the dismissal was in the afternoon. He stated that during the previous years he had received bonuses, increment and appraisal yearly. He testified that he was promoted year in year out.

4. He was cross-examined and testified that he was taken for training in Germany and that the different CEO's and HR did not raise any issues. He stated that when the new CEO's came up he was sent away and had not received any emails warning him of his performance. He was referred to the Appendix 3A-3G of the defence and testified that he responded to the warning letters given against him and that the warning letters expired after 12 months elapsed. He testified that Mr. Nzuya became so personal and he

was required to seek out his former bosses and report on them.

5. In re-examination, he testified that he was told that he should have been reporting on what his bosses were doing. He stated that failure to follow up with former logistics manager Mr. Okumu cost him his job. He testified that the last warning he received was in 2012 and he also got a pay rise that year. He stated that you cannot work for 28 years and not get a warning letter and that the reasons for his dismissal were false allegations.

6. The defence called Moses Onyango Nzuya on 6th November 2017. He testified that he worked for the Respondent as human resource manager. He stated that the Claimants was his former colleague and their work relationship was good. He testified that the Claimant was operations supervisor and the duties were to plan for the activities for the day which would involve transport of cargo, payment with partner agents, liaison with Kenya Revenue Authority, the carriage of cargo with other organisations and the issue of payment for cargo and so on. He stated that the Claimant only sought his intervention on issues of welfare. He testified that the Respondent incurred demurrage and suffered loss for 3 containers not returned to it. He stated that the case was handed over to him after the branch manager had followed up with the Claimant and the Claimant replied to the managing director in brief and because the MD was upset the matter was referred to him. He communicated with the Claimant on email. He stated that the Respondent incurred a bill of about \$7,000 being accumulated charges and demurrage for the containers.

7. He testified under cross – examination that the Claimant was answerable to Moses Mulama and not him while Okumu was operations manager and managing director at the time he joined was Henrik Sorenson. He stated that the Claimant had responsibilities to know what the shipment is moving, where it is moving and when it is returning. He stated that there were three shipping lines whose containers did not return. He testified that the Claimant was squarely to take responsibility for the mess and that the Claimant had the responsibility to follow up and ensure the company did not incur losses. He stated the containers that were not returned were headed to South Sudan and that he did the show cause in January 2013 and in the show cause mentioned the three containers. He testified that the Claimant responded and he summoned the Claimant before him to answer charges in the show cause. He stated that the Claimant denied the accusations but based on evidence had and the company having lost such a huge sum it was decided that the Claimant be terminated. He testified that the Claimant had tried to follow-up and the issue was not about Moses or Donald and that it was the Claimant who introduced their involvement. He stated that the Respondent followed process where notice was given, the Claimant showed cause and was summarily dismissed on account of the 3 containers. He stated that the termination was lawful and above board.

8. In re-examination he testified that the Claimant was supposed to follow up on the containers and some of the clients were not even those who had agreements with the Respondent. He stated that the client was a one off and did not pay and one could not recover container deposit if the container is not returned. He stated that the Claimant had all the information to flag the issue. That marked the end of oral testimony.

9. The Claimant filed written submissions on 10th November 2017 and the Respondent on 1st December 2017. In his submissions, the Claimant submitted that the Respondent did not accord him a fair hearing before the dismissal on 14th February 2014 following the notification of intended termination dated 13th February 2014 issued to him on the 14th February 2014. He submitted that he had responded to the show cause letter and clearly explained the whereabouts of the containers referred to. The Claimant submitted that the action of terminating his services on account of wrongs or irregularities committed by his boss was not only unfair but discriminatory, oppressive, illegal and contrary to the principles of natural justice.

10. The Respondent's submissions were to the effect that the issues for determination were three:-

- a) Whether the Claimant was terminated unfairly
- b) Whether the Claimant is entitled to the reliefs sought
- c) Whether the Respondent is entitled to the counterclaim

The Respondent submitted that the test as to whether the termination was unfair or justified is twofold – the employer has to prove that there was a valid reason to terminate the Claimant’s employment and secondly, the procedure followed was fair. Pursuant to Section 43 of the Employment Act, the reasons are matters that the employer genuinely believed to exist at the time of the termination and the reason has to be valid and fair. The Respondent submitted that in the present case, the Respondent had terminated the Claimant’s employment for reasons that the Claimant had been negligent in the duties he was supposed to carry out under his contract of employment. The Respondent submitted that the second test of fairness is on the procedure used in terminating the Claimant’s employment. Section 41 of the Employment Act spells out the procedure for handling cases of misconduct, poor performance and physical incapacity. The Respondent submitted that the email correspondences between the Respondent’s officers and the Claimant and other employees show communication on the Claimant’s performance. The Respondent submitted that the correspondence also addressed the specific instances where his performance had been put into question by various persons at the work place and the Claimant given the opportunity to offer his explanation on the same. The Respondent stated that the Claimant was given an opportunity to remedy the shortfalls in the performance and attitude. The Respondent submitted that the termination was triggered and necessitated by the Claimant’s own actions and thus resulted in summary dismissal under Section 44(3) and (4) of the Employment Act. The Respondent submitted that due to the grave financial loss it suffered as a result of the Claimant’s actions, it was proper to take disciplinary action and summarily dismiss him. The Respondent further submitted that the Claimant was given a fair hearing and the procedure to terminate was as fair as under Section 41 of the Employment Act. The Respondent submits it was able to explain to the Claimant the reasons for the termination and the Claimant was given time to make a representation and therefore there was procedural fairness. The Respondent submitted that the Claimant was not entitled to any of the remedies he had sought in his claim and that the Respondent was entitled to recompense for the grave loss it suffered to the tune of Kshs. 3,928,790/- due to the Claimant’s carelessness and negligent performance of his duties over a prolonged period of time. The Respondent thus urged the dismissal of the Claimant’s claim with costs and a judgment for the Respondent on the counter-claim against the Claimant with costs.

11. The dispute is one over the dismissal of the Claimant and the loss suffered by the Respondent. The issues for determination can be distilled to be as follows:-

- i. Whether the dismissal of the Claimant was lawful and if not, what remedies lie
- ii. Whether the Claimant was responsible for the loss the Respondent incurred on the unreturned containers and if so, what remedies lie

12. The Claimant’s dismissal revolved around some containers which were alleged to have been lost due to the carelessness and malfeasance of the Claimant. The Respondent placed a value of Kshs. 3,938,790/- for the loss and demurrage charges in respect of the containers. The Claimant was dismissed on 14th February 2014 after being issued with a notification of intention to terminate employment dated 13th February 2014. The facts on the process are fairly straight forward. The Respondent’s Human Resource Manager Moses Nzuya, issued a letter dated 13th February 2014 whose subject was notification of intended termination of employment. It was received by the Claimant on 14th February 2014. The letter informed the Claimant that the management was considering terminating the Claimant’s employment for willful negligence in accordance with Section 44(4)(c) of the Employment Act and summoned the Claimant to a further explanation of the reasons given at 12.00 noon on 14th February 2014 at the Branch Manager’s office. The Claimant was entitled to be accompanied by another employee of his choice. The witness for the Respondent was the author of this letter. He also penned the dismissal letter dated 14th February 2014 which terminated the Claimant’s employ for failure to follow up on container interchanges; return of containers and refund of deposits; failure to ensure cash on delivery clients pay up front before release of cargo and documents; and failure to properly document, record and invoice all the handled shipments in the system. The Respondent stated that it considered this to be of grave nature and constitutes gross misconduct and that this failure to perform duties properly led to grave financial losses to the company. The Claimant was summarily dismissed as a consequence and was to hand over all the company items in his possession and the handover notes to the branch manager and leave the company

premises. he was to return on 20th February 2014 at 11.00am to collect the final dues and sign the pension withdrawal form. The provisions of Section 41 are as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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 under section 44(3) or (4) 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 within subsection (1), make.

13. The Claimant it would seem was accorded some hearing. The threshold is at the bare minimum that explanation be given, the Claimant be duly notified in a language he understands that the employer is contemplating dismissal and the reasons for that consideration. The Claimant was therefore given a hearing per Section 41 of the Employment Act. Section 43 of the Employment Act provides as follows:-

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons 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 or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

14. Under Section 43 of the Employment Act, the employer is required in any claim arising out of termination of a contract to prove the reasons for the termination. In the case before me, the Claimant was accused of failure to ensure container interchanges. From the explanations given in the email correspondences by the Claimant for the failure to invoice or ensure payment, it is clear that the fault lay in the systems of the Respondent. The Claimant was an operations supervisor. Nowhere did it appear that the Claimant was responsible for billing or invoicing clients, managing himself or undertaking the roles of the finance office. It was stated in the emails that the persons responsible for the shipment were his bosses who had introduced the business and therefore were responsible for the flaws in the follow up on payment for the shipments. It was not within the remit of the Claimant to give waiver of charges and it seems the blame was placed on his shoulders because the managing director was very upset. The MD directed the HR manager to deal with the Claimant and it was clear the intention was to facilitate the exit of the Claimant in short shrift. The dismissal that took place in Mombasa lacked the backing of proper reasons to terminate and for the foregoing reasons was unfair within the meaning of Section 45 as read with Section 43 of the Employment Act. The Claimant had worked for a relatively long period of time with the Respondent and it was evident he knew what his role was. The Respondent allegedly suffered demurrage and losses which were particularized in the counterclaim. The Respondent however did not prove it paid any of the invoices allegedly connected with the demurrages and container deposit charges. The loss is in the nature of special damages and must be strictly proved and the Respondent woefully failed to adduce evidence to support the loss. The counterclaim thus fails and is dismissed with costs. In the final analysis, the Claimant is successful in his claim and is awarded the following:-

- i. Two month's salary in lieu of notice Kshs. 132,000/-
- ii. 12 months salary compensation for unfair dismissal Kshs. 792,000/-
- iii. Costs of the suit
- iv. Interest on (i) and (ii) above from date of judgment till payment

v. Certificate of service

It is so ordered.

Dated at Nairobi this 20th day of December 2017

NZIOKI WA MAKAU

JUDGE

Delivered at Nairobi this 15th day of January 2018

RADIDO STEPHEN

JUDGE