



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1274 OF 2012

MIKE SHEUNDAH ANJIA.....CLAIMANT

VS

AMICABRE TRAVEL SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Mike Sheundah Anjia against his former employer, Amicabre Travel Services Limited. The claim is documented by a Statement of Claim dated 25th July 2012 and filed in court on 30th July 2012. The Respondent filed a Memorandum of Defence on 20th November 2012.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Hezron Owalo.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 1st July 2005, in the Position of Driver. His salary was increased progressively from Kshs. 13,000 to Kshs. 21,808. The Claimant worked for the Respondent until 10th January 2012, when his employment was terminated, on allegations of loss of fuel and spare parts.

4. The Claimant states that the termination of his employment was unlawful and unfair as he was not given adequate time to defend himself. He avers that the allegations made against him were baseless and his representations were ignored. He adds that he had a clean employment record.

5. The Claimant further states that the Respondent refused to pay him his terminal dues. He now claims the following:

- a. One month’s salary in lieu of notice.....Kshs. 21,808.00
- b. Annual leave.....21,808.00
- c. 10 days worked in January 2012.....8,387.70
- d. Service gratuity for 6 ½ years.....141,752.00
- e. 12 months’ salary in compensation.....261,696.00
- f. 14 days’ paternity leave.....11,742.75
- g. Travel and accommodation.....3,000.00
- h. Refund of fuel top up (KBB 796, 15th September 2010).....500.00
- i. Overtime worked
- j. Certificate of service

The Respondent's Case

6. In its Memorandum of Defence dated 16th November 2012 and filed in court on 20th November 2012, the Respondent admits having employed the Claimant as a Driver at a monthly salary of Kshs. 13,000, effective 1st July 2005. The Claimant was later promoted to the position of Team Leader at a monthly salary of Kshs. 21,808.

7. The Respondent states that the Claimant was lawfully and fairly terminated from employment after failing to perform his supervisory responsibilities with due diligence to prevent contamination of the Respondent's engine oil at the Thika Yard.

8. The Respondent avers that on 12th October 2011, the Claimant received 200 litres of engine oil at the Respondent's Thika Yard. On 16th October 2012, the Claimant together with staff under his supervision opened the drum containing the engine oil. Approximately 40 litres of the oil were used to service the Respondent's motor vehicles registration number KBP 017E and KBP 989B.

9. On the same day at about 7.00 pm, the Claimant requested for 20 litres of oil to carry on a scheduled trip to Nairobi on 17th October 2011, where he was to deliver a defective motor vehicle for further analysis. The Claimant was issued with 5 litres of oil, after his Assistant, one Mr. Musyoka indicated that 20 litres was too much to be carried for emergency.

10. The Respondent claims that while on his way to Nairobi, the Claimant discovered that the 5 litres issued to him was adulterated but he failed to report this to the Transport Manager. The Transport Manager was informed about the adulterated oil by Musyoka on 18th October 2011, upon which he commissioned investigations into the matter. The Respondent goes on to state that during the investigations and interviews with staff at the Thika Yard, it was discovered that two 2 litre containers, one with used oil and the other empty, had gone missing.

11. On completion of investigations, the Claimant was issued with a show cause letter on 29th November 2011, requiring him to explain the circumstances leading to the adulteration of engine oil at the Thika Yard, which was under his supervision. The Claimant responded to the show cause letter on the same day.

12. By letter dated 2nd December 2011, the Claimant was invited to a disciplinary hearing on 7th December 2011. In the invitation letter, the Claimant was advised that he was at liberty to be accompanied by a fellow employee or a shop steward. On 7th December 2011, the Claimant was given a further one week to prepare for the disciplinary hearing which was rescheduled to 15th December 2011. At the disciplinary hearing, the Claimant reiterated the contents of his reply to the show cause letter.

13. The Disciplinary Committee, after hearing the Claimant on 15th December 2011, resolved to invite him for further hearing on 22nd December 2011, when he appeared and made further representations to the Committee. The Claimant was found to have failed in his supervisory duties leading to the adulteration of the engine oil. He was also faulted for failure to report the incident to his supervisor.

14. The Claimant was subsequently issued with a one month's termination notice from 10th January 2012 until 10th February 2012.

Findings and Determination

15. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 10th January 2012, stating as follows:

"Dear Mike

TERMINATION OF SERVICES

An incident on 16th November 2011 in which a drum of oil used for company operations in Thika (Del Monte) was found to be contaminated, the correspondence exchanged culminating in your appearance before the Disciplinary Committee refer.

As the Supervisor in charge of operations in Thika and in view of Statements by other witnesses, it emerged that you were among the best placed to explain what exactly transpired. As a result of this you appeared before the Disciplinary Committee on two different occasions i.e. on 5th and 22nd December 2011.

From the presentations before the Committee by yourself and other witnesses in your presence, there is reasonable ground to link you directly to the theft of the oil. Theft of company property is an offence in breach of the company policy, rules and regulations and the Employment Act 2007 whose penalty is summary dismissal.

The above incident has seriously put your integrity to question and regretfully the company feels your employment is no longer tenable.

In pursuant of its rights under the Employment Act, 2007 your services will be terminated with effect from 10th February 2012 (sic).

Upon expiry of the notice period, you will be required to return all the company property in your possession upon which you will receive your final dues being payment for:

a. Salary for the days worked up to 10th February 2012.

b. Prorated leave earned but not taken.

In addition, you will be presented with a Certificate of Service covering the period under which you were in our employment.

In the event that you feel the action taken against you is ill-informed, too severe or improper, you are free to make an appeal to the Managing Director within reasonable time.

We take this opportunity to wish you well in your endeavours.

Yours sincerely

(Signed for)

Hezron O. Owalo

Human Resource Manager”

17. While this letter refers to the incident in which engine oil used for the Respondent’s operations in Thika was found to be adulterated, it gives the reason for the termination of the Claimant’s employment as theft of oil. This reason is different from the ones given in the Statement of Defence, being; failure to perform supervisory responsibilities with due diligence to prevent the contamination of the Respondent’s engine oil at the Thika Yard and failure to report the incident. The written statements recorded by the Claimant and other employees of the Respondent address all these reasons together. Further, the unsigned minutes of the meetings of the Disciplinary Committee held on 15th and 22nd December 2011, introduce the additional charges of loss of fuel and spare parts.

18. What emerges is a lack of clarity as to the actual charges facing the Claimant. In **Rebecca Ann Maina & 2 others v Jomo Kenya University of Agriculture and Technology [2014] eKLR** this Court held that an employee facing disciplinary action is entitled to unequivocal notice of the actual charges facing them, accompanied by adequate opportunity to respond.

19. If the Court is unclear as to the actual charges facing the Claimant at this review stage, the charges could not have been any clearer at the shop floor. For this reason, I find that the Respondent failed to establish a valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act, 2007. Similarly, the Respondent failed to adhere to the procedural fairness requirements set by Section 41 of the Act.

Remedies

20. In light of the foregoing, I award the Claimant eight (8) months’ salary in compensation. In making this award, I have taken into account the Claimant’s length of service and the Respondent’s conduct in the termination process. The Claimant was given a one (1) month termination notice and is therefore not entitled to notice pay.

21. From the record, the Claimant qualified and applied for paternity leave in July 2011, which was not granted. I therefore allow the claim for 14 days’ paternity leave pay. According to Clause 4 of the Claimant’s letter of appointment, he was entitled to 22 days’ annual leave but could only carry forward 12 days. In the absence of leave records, the Court assumed that the Claimant had carried forward 12 days from the year 2011 into 2012. The claim for annual leave pay therefore succeeds to this extent only. The claim for salary for 10 days worked in February 2012 is admitted and is payable.

22. No basis was laid for the claim for service gratuity which therefore fails and is dismissed. The claims for travel and accommodation, refund of fuel top up and overtime compensation were not proved and are also dismissed.

23. Ultimately, I enter judgment in favour of the Claimant as follows:

- | | |
|--|---------------|
| a. 8 months’ salary in compensation..... | Kshs. 174,464 |
| b. 14 days’ paternity leave (21,808/30x14)..... | 10,177 |
| c. Leave pay for 1 year (21,808/30x12)..... | 8,723 |
| d. Salary for 10 days in February 2012 (21,808/30x10)..... | <u>7,269</u> |

Total.....200,633

24. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

25. The Claimant is also entitled to a certificate of service and costs of the case.

26. Orders accordingly.

DATED AND SIGNED AT MALINDI THIS 30TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Miss Kanyiri for the Respondent