



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 840 OF 2015

AMOS NGUGI MAINA

CLAIMANT

v

PREMIER BAG & CORDAGE LIMITED

RESPONDENT

JUDGMENT

1. Amos Ngugi Maina (Claimant) instituted legal proceedings against Premier Bag & Cordage Ltd (Respondent) on 19 May 2015 and he stated the Issues in Dispute as

- Unfair and wrongful termination of employment (no reason) for termination were issued by the Respondent.
- Failure by the Respondent to pay outstanding salary and other dues.
- Failure by the Respondent to issue the Claimant a Certificate of Service.

2. The Respondent filed a Response and documents on 16 July 2015, and the Cause was heard on 18 January 2018 when the Claimant testified and on 25 January 2018 when the Respondent's Personnel & Administration Manager testified.

3. The Claimant filed written submissions on 7 February 2018 while the Respondent filed its submissions on 22 February 2018.

4. The Court has considered the pleadings, evidence and submissions and identified the Issues arising for determination as, *when the employment relationship commenced, whether the dismissal of the Claimant was unfair, whether Claimant owes Respondent rent and appropriate remedies including entitlements outstanding at time of separation.*

Commencement of relationship

5. The Claimant pleaded that he was employed by the Respondent in August 1998.

6. However, during testimony, he changed tune and asserted that he was employed by the Respondent in 1988, when it allegedly existed under a different name.

7. When cross examined on the issue, the Claimant disclosed that the employer in 1988 was *East African Bag & Cordage* (under receivership).

8. In an attempt to demonstrate that its engagement with the Claimant started in 1998, the Respondent produced a letter of appointment dated 20 August 1998.

9. In view of the letter of appointment and considering that the Claimant did not demonstrate that the Respondent took over the business or liabilities of *East Africa Bag & Cordage Ltd*, the Court can conclude that the employment relationship between the parties herein started on 24 August 1998.

Whether summary dismissal was unfair

Procedural fairness

10. In terms of section 41 of the Employment Act, 2007, an employer is under a statutory obligation to observe what in employment law is called procedural fairness (akin to natural justice in public/administrative law).

11. It is now settled that an employer can observe the statutory requirements through correspondence/documentation, oral intervention or a combination of both.

12. Where correspondence/documentation route is taken it should be simple to furnish the documentation (such as show cause notice and minutes of the disciplinary hearing) to demonstrate compliance.

13. And where an oral hearing route is taken, as a minimum and in organisations with structures such as Human Resource/Personnel office, details of *who was present, when the hearing took place and where the hearing took place* should be disclosed.

14. The Claimant's case and testimony was that when he gave notice of retirement to the Respondent's Personnel Officer on 4 September 2013, he was dismissed instead.

15. On the part of the Respondent, the testimony presented was that the Claimant was found with stolen copper wire, was arrested and charged and that he was dismissed for gross misconduct.

16. The witness maintained that a hearing was held.

17. However, no documentation such as show cause notice or minutes of a hearing in respect to the allegation of the theft of copper wires were presented in Court. Equally, the Court was not informed *who was present, when, where and how an oral hearing took place*, if that was the route followed.

18. The Respondent urged in its submissions that a hearing as contemplated by section 41 of the Employment Act, 2007 could not be held because the Claimant was in custody.

19. That submission was inconsistent with its witness testimony and the Court dismisses it.

20. The Court therefore finds that the summary dismissal of the Claimant was procedurally tainted.

Substantive fairness

21. Having come to the conclusion that the summary dismissal of the Claimant was devoid of procedural fairness, it is not necessary for the Court to delve into the question whether the Respondent has proved the reasons for dismissing the Claimant (section 43 of the Employment Act, 2007) and whether the reasons were valid and fair (section 45 of the Act).

Rent (counterclaim)

22. The Respondent and the Claimant had a written agreement on house allocation providing that an employee would vacate on separation.

23. In the Counterclaim, the Respondent pleaded that the Claimant occupied the house after separation and that the market value as of 1 June 2015 was Kshs 6,000/- to Kshs 10,000/- per month.

24. However, the Respondent did not lead any evidence to prove that the Claimant occupied its housing after separation.

25. The Respondent did not even ask the Claimant whether he was in occupation of its house. The issue was also not mentioned in the written submissions.

26. The counterclaim was not proved.

Contractual entitlements

Earned salaries

27. The Respondent admitted that it was possible that the Claimant was underpaid. The Claimant was paid the equivalent of 5 days wages when he parted with the Respondent on 4 September 2013 while the payroll month was from 21st to 20th of the following month.

28. The Respondent should compute the balances outstanding and pay it together with any amounts which will be awarded hereinafter.

Unpaid leave

29. The Claimant sought Kshs 402,350/- on account of leave outstanding as at time of separation.

30. To rebut the head of claim, the Respondent produced leave records which demonstrated that the Claimant either went on leave or encashed the leave, and that at time of separation in 2013 he had 67 accrued leave days and that he was paid Kshs 39,885/- through his bank account in June 2014.

31. Nothing therefore turns on this head of claim as the Claimant did not prove or demonstrate how he arrived at the figure he pleaded or formula of computation.

Severance pay

32. Severance pay is an entitlement in cases of redundancy.

33. The Claimant did not present his claim as one of redundancy or prove that his was a case of redundancy, and therefore he is not entitled to severance pay.

34. If by severance pay the Claimant meant *service pay*, then in terms of section 35(5) & (6) of the Employment Act, 2007 he is not entitled to the same as he was a contributor to the National Social Security Fund.

Losses of Kshs 20,000/-

35. The Claimant sought Kshs 20,000/- being expenses incurred in the course of litigation but presented no proof, this being a special damage.

Pay in lieu of notice

36. Having come to the conclusion that the summary dismissal of the Claimant was procedurally unfair, the Court finds he is entitled to the equivalent of 1 month pay in lieu of notice by dint of section 35(1)(c) of the Employment Act, 2007 and clause 3 of the letter of appointment.

Compensation

37. The Claimant served the Respondent for about 15 years and considering the length of service, the Court is of the view that the equivalent of 10 months gross wages (was Kshs 15,478/- according to April

