



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 564 OF 2013

(Before Hon. Justice Mathews N. Nduma)

EVEREST ONYANGO OULA.....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....RESPONDENT

J U D G E M E N T

1. The Claimant seeks the following reliefs vide a memorandum of claim dated 19th April, 2013 and filed on the same day –

- a. A declaration that the Claimant is entitled to work for the Respondent upto the retirement age of 60 years.
- b. That the termination of the employment of the Claimant by a letter dated 26th November, 2012 was unfair and unlawful and he be compensated accordingly.
- c. Damages equivalent to the salary that he would have earned for the unserved period including provident funds, and NSSF compensations.

Facts of the Claim

2. The Claimant was an employee of the Respondent from October 2006 until December 2012 when he was terminated. He joined the respondent's establishment on 27th October 2006. Prior to being taken up in the respondent's employ, the claimant was working for Kenya Railways, on a permanent and pensionable basis.
3. The Claimant joined Kenya Railways, the predecessor of the Respondent on 23rd September, 1991 as a trainee station master on grade RTI where he trained for 18 months. He later graduated on 23rd March, 1993 at Railway Training Institute and was appointed a Station Master Grade R13 II.
4. The claimant was confirmed on a permanent and pensionable basis on 13th June, 1995 and rose through the ranks over the years becoming Data controller and Stock Controller.
5. The claimant worked for Kenya Railways for a total of 15 years with no issues of a disciplinary nature until the Respondent took over the operations of Kenya Railways through a concession agreement dated 23rd January, 2006.
6. Subsequent to the concession, the claimant was among the few staff taken up by the Respondent. The claimant was appointed to the position of Stock controller on a permanent and pensionable basis.
7. It was also an express term of the claimant's contract of employment that the claimant would serve till retirement at 55 years or termination by either party after giving not less than one month's notice.
8. On 1st May, 2007, the Respondent confirmed the claimant to permanent and pensionable terms after the claimant successfully completed his probation.
9. In 2007, the Respondent's entire control office was relocated to Nairobi control office and the work previously handled by 17 employees was mandated to 4 controllers, the claimant being one of them. The claimant's job grade was reviewed to Supervisor Train Controller.

10. On 4th December, 2012, the claimant was issued with a letter purportedly terminating his services on grounds of negligence of duty. At the time of his dismissal, the claimant was earning Kenya Shillings 56,479.

11. The Claimant testified in support of the above facts under oath. The Claimant emphasized that he was a good performer with unblemished record hence he rose through various ranks to the position of Train Control Supervisor, a position he held till termination. The job evaluation and pay adjustment reports produced in court are testimony of the good service. The Claimant produced internal memo dated 23rd August, 2011 in which he was accused of absence from duty without lawful cause on 4th and 5th August, 2011. The Claimant admitted the charges, and received a first written warning valid for 12 months and was deducted pay for the days he was absent.

12. The Claimant further produced correspondence dated 30th August, 2012 in which he explained circumstances that followed an accident which occurred on 18th August, 2012.

13. The Claimant was subsequently given a notice to show cause dated 13th September, 2012 in which he was accused of failure to immediately advise all concerned of the accident and as a result commencement of recovery operations was delayed for 2 hours 45 minutes.

14. This was termed as gross misconduct. The claimant wrote an explanation dated 18th September, 2012 in which he explains that he took all necessary actions to mitigate the effects of the accident and was not negligent at all.

15. The Claimant prays that the suit be allowed with costs.

Statement of Response

16. The Respondent filed a Statement of Response on 30th May, 2013 in which it denies all the particulars of claim and avers that the claimant's employment was terminated on account of negligence of duty. That prior to the termination the Respondent sought explanation from the Claimant by a letter dated 13th September, 2012. That the Claimant submitted his explanation by a letter dated 8th September, 2012, which explanation was found to be unsatisfactory resulting in the dismissal.

17. The summary dismissal was in terms of clause 12.2 of the contract of employment dated 27th October, 2000.

18. The Respondent avered that the dismissal was justified and the suit be dismissed with costs.

Determination

19. The issues for determination are as follows –

- i. Whether the summary dismissal of the Claimant was for a valid reason and in terms of a fair procedure?
- ii. Whether the Claimant is entitled to the relief's sought.

Issue i

20. The Claimant testified under oath in support of all the particulars of claim on 25th February, 2016 regarding his good work record, his rise in ranks, and increase in salary. The claimant also gave clear explanation as to the circumstances leading to his summary dismissal from the employment. The Claimant made a prima facie case that he had served the Respondent for many years diligently and when the Respondent took over the Railway concessions from the previous employer, the Claimant was selected and retained after a careful process that identified good employees. The explanation given by the Claimant regarding his absence at work on two days in respect of which he was given a 1st warning and the steps he took after a train accident which incident led to his summary dismissal was reasonable and called for a rebuttal by the Respondent in terms of section 47(5) of the Employment Act, 2007.

21. The Claimant concluded his evidence in chief and was stood down for cross examination on 26th May, 2016. The suit did not proceed on 26th May, 2016 and was set down for hearing on 19th January, 2017 when again it could not be reached due to a heavy cause list. Matter was set down by consent of counsel for the parties for hearing on 9th May, 2017 but again it did not proceed and the case was granted a hearing date on 21st September, 2017.

22. On the date, Mr. Juma Advocate appeared for the Claimant whereas Mr. Abidha appeared for the Respondent.

23. The Claimant was ready to proceed, but Mr. Abidha stated that he was not ready to proceed due to certain undisclosed developments at the Respondent's place.

24. The Court allocated the matter to proceed at 12 noon. Mr. Abidha did not appear at 12 noon. The matter was called at 1pm and Mr. Abidha was not present and Juma for Claimant applied to close the claimant's case. The court granted the application on account of the Respondent's failure to appear in court and cross examine the Claimant.

25. The Defence case was deemed closed also and the parties were directed to file written submissions.

26. The Claimant filed written submissions on 23rd November, 2017 but the Respondent filed no submissions.

27. It is the Court's considered view, and finding that the Claimant has proved his case on a balance of probabilities, the Respondent having failed to challenge his testimony in support of the case under oath. Accordingly, the Claimant has discharged the burden placed on him in terms of section 47(5) of the Employment Act, 2007 in demonstrating that his employment by the Respondent was summarily curtailed for no valid reason in violation of sections 43 and 45 of the Act.

28. Accordingly, the Claimant is entitled to reliefs set out under section 49(1) of the Act.

29. The Claimant seeks the equivalent of 12 months salary as compensation in terms of section 49(1)(c) and in addition damages for the remainder of the employment upon retirement at 55 years.

30. Section 49 provides for the maximum compensation of 12 months and not the latter especially in cases in which no fixed term contract of employment exists between the parties and there is no specific clause in the contract of employment that requires payment for the full term of the contract, upon proof of breach by the employer.

31. In this regard, the court takes into consideration the circumstances of this case in terms of section 49(4) of the Act as follows:-

i. The Claimant served the Respondent from 23rd September, 1991 upto 26th November 2012, a period of over 11 years. For most of the period, the Claimant served diligently, and has a clear record until he was deployed by the Respondent in a new capacity in August 2012.

ii. The Claimant contributed to the dismissal by his own admission in that he had a 1st written warning given to him in August 2012. The Circumstances leading to his dismissal however did not relate to this incident.

iii. The Claimant was paid terminal benefits upon dismissal and was registered with NSSF and had a provident fund benefit paid to him.

iv. The Claimant wished to continue working until his retirement age of 55 years.

v. The Claimant enjoys a benefit of doubt, due to the Respondents failure to participate in the hearing of the case.

32. The court has also considered similar cases decided by this court including E & LRC, cause no. 969 of 2013, where court awarded the claimant who had served 8 months 3 months salary in compensation and **E & LRC Cause No. 1725 of 2011 Kenneth Onyango v Grof Services (pty) Limited**, where claimant who had served 6 years was awarded 5 months salary and awards the Claimant equivalent of ten (10) months salary in the sum of Kshs.564,700 in compensation for the unlawful and unfair termination of employment. The award is payable with interest at court rates from date of judgment till payment in full. Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 14th day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of March, 2018

Maureen Onyango

Judge

Appearances

Mr. Juma & Co. for Claimant

Mr. Abidha for Respondent

Anne Njung'e – Court Clerk