



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 856 OF 2016

GILBERT SHIANGALA INJILA.....CLAIMANT

VERSUS

EAST GLOBAL LOGISTICS (K) LIMITED.....RESPONDENTS

JUDGMENT

Introduction

1. The Claimant brought this suit on 4.11.2016 claiming one month salary in lieu of notice plus compensation for unfair and wrongful termination of his employment by the Respondent on 26.8.2016. The Respondent has denied the alleged termination and averred that the reason for the termination was explained to the Claimant vide the termination letter. She therefore prayed for the suit to be dismissed with costs.

Claimant's Case

2. The Claimant testified as CW1. He stated that he employed by the Respondent as a driver on 20.6.2014 after being poached from SDV Transami Limited by the Managing Director (MD) of the Respondent. He started with a salary of Kshs.31,000 but it was never increased. In August 2016, he went for his annual leave and life was hard. He therefore send SMS to his boss Mr. Mehboob on 25.8.2016 lamenting that he left his job at Transami hoping to find greener pastures at the Respondent but it became more difficult. The SMS also notified him that he will leave the job.

3. When he reported to work from leave on the following day 26.8.2016, he was served with a termination letter by the Accountant dated the same date. The letter referred to his SMS of 25.8.2016 and said it was disrespectful to the boss. The Claimant, however denied the alleged disrespect and contended that SMS was only a cry for better terms of employment. He contended that the termination was unfair because he was given a chance to defend himself. He admitted that he had previously been served with two warning letters dated 18.11.2015 and 30.11.2015 for absconding duty and incurring expense on behalf of the company without authority respectively. He however explained that he never absconded duty but rather took the minibus for service and while there asked the mechanic to fit LED lights on the vehicle in order to enhance light during the night.

4. On cross-examination CW1 stated that he had worked with SDV Transami for 13 years before Mr. Mehboob poached him and promised better terms and assistance. He admitted sending SMS to Mr. Mehboob but denied that the SMS requested for a termination letter. He further admitted that the letter cited the reason for the termination and asked for clearance but he never did the clearance. Finally, he admitted that he had loans from the employer but denied knowledge of the loan balance arguing that it was being recovered through salary deduction.

Defence Case

5. Mr. Mehboob Virji, Respondent's Managing Director, testified as RW1. He admitted that he employed the Claimant as a driver. He further contended that over the time he had issues with the Claimant because first, he was not living within his means and as a result, he frequently asked for loans from the office. Secondly, he was a rough driver which landed him to problems with traffic police. He further explained that he served the Claimant with 2 warning letters dated 18.11.2015 and 30.11.2015. The first offence was absconding duty on 17.11.2015 after taking the bus for normal service and the second offence was asking the mechanic to fit LED lights on the bus without prior authority from the company and thereby causing the company to pay for the said lights.

6. RW1 explained that on 25.8.2015 at night, the claimant sent to him unethical SMS which showed that he would never get satisfied with terms of service in the Respondent. He therefore decided to terminate the Claimant's employment without even according him a hearing.

7. On cross-examination, RW1 admitted that he previously worked with the Claimant at SDV Transami where he was earning Kshs.30,000

per month in 2014 when he left to join the Respondent. He further explained that at the Respondent the Claimant started with Kshs.35,000 per month which was later reviewed to Kshs.36,500 per month as at the time of termination. He however denied ever poaching the Claimant from Transami and maintained that it is the Claimant who applied for the job and he gave him. In conclusion he contended that the conduct of the Claimant though the SMS led him believe that the Claimant was no longer interested in his job.

Analysis and Determination

8. There is no dispute that the Claimant was employed by the Respondent as a driver until 26.8.2016 when he was summarily dismissed. The issues for determination are.

- (a) Whether the termination was unfair;
- (b) Whether the reliefs sought should be granted

Unfair termination

9. There is no dispute that the Claimant's employment was terminated by the Respondent by letter dated 26.8.2016. Under section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure.

Reason for termination

10. The reason for terminating the services of the Claimant according to the Respondent was his disrespectful conduct towards the RW1 by sending unethical SMS to him at night indicating that he was going to leave the job due to bad conditions, and terms of service. The interpretation of the SMS by the Respondent was that it was unethical and disrespectful and a clear manifestation that the claimant was no longer interested in his job under section 43(2) of the Act, the Respondent was entitled to make her subjective interpretation of the Claimant's conduct and take disciplinary action against him. Section 43(2) of the Act provides:

"The reason or reasons for termination of a contract are those 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 employer to terminate the services of the employee."

11. It is therefore not upon the Court to interpret the meaning of the SMS on behalf of the employer. If the employer's interpretation is that, the conduct was offensive and warranting dismissal then, so be it. All what matters is whether the offence committed warrants summary dismissal under the contract of service or the law.

12. The Respondent has submitted that the offence committed by the Claimant through his SMS was gross misconduct under section 44(4) (d) of the Act and she was entitled to dismiss him summarily under section 44(3) of the Act. I agree with the Respondent and proceed to find and hold that she has proved a valid and fair reason that entitled her to dismiss the Claimant. Section 44(4) (d) of the Act provides for summarily dismissal if:

"an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer."

Procedure followed

13. Under section 41 of the Act, before terminating the services of our employee on ground of misconduct, poor performance or physical incapacity, the employer must first explain to the employee, in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. In this case RW1 admitted on oath that he never accorded the Claimant any hearing before the dismissal because according to him the offence was clear and the Claimant was no longer interested in his job. The said admission of the failure to comply with the mandatory and express statutory procedure leads me to find and hold that the termination of the Claimant's employment contract was unfair within the meaning of section 45 of the Act.

Reliefs

14. Under section 49 of the Act, I award the Claimant Kshs.36,500 as salary in lieu of notice plus Kshs.146,000 being 4 months' salary for unfair termination. In granting the said compensation, I have considered the fact that the claimant contributed to his dismissal through misconduct and also the fact that he had served the Respondent for a fairly short period. The award shall be subject to statutory deductions.

Dated and signed at Nairobi this 23rd day of February, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 2nd day of March, 2018

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JUDGE