



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 831 OF 2016

JOSEPH KINUTHIA MUNGORA.....CLAIMANT

VERSUS

EAST AFRICAN RAIL & HANDLING LOGISTICS.....1ST RESPONDENT

RIFT VALLEY RAILWAYS (K) LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 24.10.2015 alleging that his employment was unfairly terminated by second Respondent vide summary dismissal letter dated 16.8.2016. It is his case that he was suspended for an alleged theft of clients cargo but after the disciplinary hearing, the committee recommended for reinstatement with a final warning after finding him guilty of culpable negligence. However, the management rejected the recommended sentence of final warning and dismissed the Claimant summarily. It is further Claimant's case that he should have been heard by the Respondent before the sentence was enhanced from warning to summary dismissal.

2. The Respondents have denied the alleged unfair termination of the Claimants' services and averred that the Claimant was fairly dismissed for a valid reason and following due process in accordance with the law. It is the defence case that the Claimant performed his duty so negligently between 29.1.2016 and 3.2.2016 that he caused the loss of clients' cargo valued of Kshs.21,178,554.39. The Respondents have therefore counterclaimed for the said Kshs.21,178,554.39 plus General damages for loss of business and reputation.

3. The suit was heard on 9.10.2017 and 29.11.2017 when the claimant testified as CW1 but the Respondent did not attend the hearing despite service of a hearing notice. After the hearing, the Claimant filed written submission which I have carefully considered herein.

Claimant's Case

4. CW1 testified that he was employed by the first Respondent as her Mombasa Branch Manager vide the letter dated 26.6.2014. His duties included overseeing logistic and operations. His salary was Kshs.200,000 per month. He stated that the first Respondent was a subsidiary of the second Respondent doing clearing work for the latter.

5. On 3.3.2016 CW1 was suspended with full benefits for allegation that cargo for two clients had been stolen between 29.1.2016 and 3.2.2016. He was later required to show cause why disciplinary action should not be taken against him in relation to the theft of 21 steel coils on 1.3.2016. He responded on 23.6.2016 denying liability and he was invited for disciplinary hearing on 1.7.2016. After the hearing, the committee found him guilty of negligent performance of duty and recommended for a written final warning.

6. He later was reinstated by the letter dated 8.8.2016 and resumed work. He was however shocked to receive the summary dismissal letter

dated 16.8.2016. He contended that the dismissal was unfair because he was not given a hearing before his reinstatement with a final warning was enhanced to summary dismissal. He also denied the alleged misconduct and blamed the Respondents who personally dealt with the lost cargo. He therefore prayed for the reliefs sought in his suit including medical expenses incurred at Pandya Hospital when his wife delivered through caesarian section during the period of suspension when his medical cover was withdrawn.

7. He denied the Respondent's counter claim as baseless and unascertainable and prayed for the same to be dismissed with costs.

Analysis and determination

8. There is no dispute that the Claimant was employed by the first Respondent until he was summarily dismissed on 22.8.2016 by the letter dated 16.8.2016. The issues for determination are:

- (a) Whether the dismissal was unfair;
- (b) Whether the reliefs sought should be granted;
- (c) Whether the counter-claim by the Respondents should be allowed.

Unfair termination

9. Under section 45(2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent did not adduce any evidence towards discharging the foregoing burden of proof. The Claimant's evidence that the dismissal was for no good cause and that it was done without according him a fair hearing after reinstatement stands unchallenged. Consequently

I find and hold that the summary dismissal of the Claimant vide the letter dated 16.8.2016 was unfair.

Reliefs

10. Under section 49 of the Act, I award the Claimant Kshs.600,000 being 3 months' salary in lieu of notice plus Kshs.1,200,000 being 6 months gross pay as compensation for the unfair termination. In awarding the foregoing sums, I have considered clause 14.1.2 of the letter of Appointment, which provided for 3 months Termination Notice. In addition I have not only considered that the Claimant had worked for a fairly short period of 2 years but also the fact that he was not likely to secure alternative job of similar in less than 6 months after the dismissal.

11. The claim for reimbursement of medical expenses of Kshs.251,985 is dismissal for lack of evidence that delivery of baby was a benefit convened under his employment medical scheme .

Counterclaim

12. The counterclaim was not prosecuted and it therefore dismissed with costs.

Disposition

13. Judgment is entered for the Claimant in the sum of Kshs.1,800,000 plus costs and interest from the date hereof. The said sum shall be subjected to statutory deduction.

Dated and signed at Nairobi this 15th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

LINNET NDOLO

JUDGE