



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 850 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

KUDHEHIA WORKERS.....CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE AND

TECHNOLOGY.....RESPONDENT

JUDGMENT

The claim herein is instituted by Kenya Union of Domestic Hotels, Education Institutions, Hospitals and Allied Workers (KUDHEIHA) against the respondent Masinde Muliro University of Science and Technology (MMUST). The claim is filed on behalf of MR. EDWARD OTATWA, the grievant who was a member of the union. The issue in dispute as reported to the Minister for Labour under Section 62 of the Labour Relations Act is “*Unfair Termination of Mr. Edward Otatwa*”.

The union seeks reinstatement of the grievant back to work and that all his dues withheld by the respondent be paid from the time his services were terminated to the date of reinstatement.

The respondent filed a memorandum of reply denying all the allegations in the memorandum of claim.

At the hearing of the case the claimant called the grievant EDWARD INGUTIA OTATWA who testified on his own behalf. The respondent called JANE LILLIAN KUNDU, an Assistant Registrar at the MMUST.

Facts

The grievant was employed by the respondent as a Driver with effect from 1st July 2007. At the time material to this case, the grievant was assigned to drive the Deputy Vice Chancellor Prof. Shiundu. The grievant picked Prof. Shiundu from his home in the morning and dropped him home in the evening. The substantive driver of the Deputy Vice Chancellor was away on annual leave during the relevant period.

On 28th July 2009, the grievant dropped the Deputy Vice Chancellor (DVC) at his home in Mumias. On his way back he was involved in an accident with a tractor. At the time of accident the grievant had deviated from the authorised route as indicated in the vehicle work ticket. The claimant thereafter reported the accident to the DVC Prof. Shiundu and the Assistant Transport Officer, Mr. David Amakalu. The grievant and Mr. Amakalu subsequently entered into an agreement with the owner of the tractor who paid for the repair of the vehicle.

By letter dated 19th August 2009, the respondent addressed the grievant as follows –

“Office of the Registrar (Administration)

Ref. PF. 0530/

19th August 2009

Mr. Edward I. Otatwa

MMUST

P.O. Box 190 -50100

KAKAMEGA

Dear Mr. Otatwa

RE: NEGLIGENCE OF DUTY AND FAILURE TO OBEY LAWFUL INSTRUCTIONS

On 31st July 2009, Registrar Administration received verbal communication that vehicle Registration NO. KAT 129 X was involved in an accident with a tractor in the night of Tuesday 28th July 2009. No official report was made neither to the University Administration nor to the police station.

You were invited to the office of Registrar Administration on the evening of Friday 31st July 2009 to validate the verbal reports, and you were asked to put in writing your report. You made a shoddy report and Registrar Administration instructed you to include in your report; the location where the vehicle was hit and the time, registration number of the tractor that caused the accident, names of owner and driver of the tractor and the cost of repairs, but you did not respond to the instructions.

Note that your actions are in contravention with clause 5 (d) (iii) and (v) of CBA applicable to you. You are given seven days from the date of this letter to show cause why disciplinary action should not be taken against you for the above misconduct.

Failure to respond within the specified period will mean that you have no defense and therefore the intended disciplinary action will be taken against you without further reference.

Yours sincerely,

SIGNED

David Butali

For: REGISTRAR (ADMINISTRATION)

c.c. Vice Chancellor

Deputy Vice Chancellor (A&F)

Registrar (Admin)

Senior Security Officer

Shop Steward KUDHEIHA

Branch Secretary KUDHEIHA”

The claimant responded to the letter on 22nd August 2009 as follows –

“EDWARD OTATWA

P. O BOX 190

KAKAMEGA

23/08/2009

TO THE OFFICE OF THE REGISTER ADMINISTRATION

P. O. BOX 190

KAKAMEGA

Dear Mr. /Ms

REF: NOT NEGLECTING OF DUTY AND FAILURE TO OBEY LAWFUL INSTRUCTIONS

I Edward Ingutia Oatwa inform you that I did not neglect the duty and fail to obey lawful instructions because as I was instructed by the Register Administration to include in my report the location where the vehicle was hit and the time, registration number of the tractor that caused the accident, name of owner and driver of the tractor and the cost of repairs, I responded to the instructions by writing a letter and took it to the security officer Mr. Ojiambo who said he will forward the letter to the Register Administration.

I am sorry to realize that the letter was not forwarded, the photocopy of the letter I wrote is attached.

Yours faithful

SIGNED

Edward Oatwa

c.c. Vice Chancellor

Deputy Vice Chancellor (A&F)

Registrar (Admin)

Senior Security Officer

Shop Steward KUDHEIHA

Branch Secretary KUDHEIHA”

By letter dated 10th December 2009 the grievant was invited for a disciplinary hearing that was scheduled to take place on Wednesday 16th December 2009 from 3 pm at the respondent’s main Catering Unit to answer the following charges –

“Count I: Failing to report the occasion of an accident.

Particulars: That on 28th July 2009 while employed as a driver at Masinde University of Science and Technology (MMUST) driving motor vehicle Reg. No. KAT 129X Toyota Saloon along Kakamega-Webuye Road at a place called Stend Mboga, you were involved in an accident with a tractor Reg. No. KAC 957G which accident your failed to report to the police (traffic) and MMUST Security office, Legal office and University Management as required by the traffic regulations.

Count II: Giving false information to the university management.

Particulars: that on 31st July 2009 while employed as a driver at MMUST, you unlawfully gave false information to the Registrar (Administration) to the effect that motor vehicle Reg. No. KAT 129X Toyota Saloon the property of the university had been involved in an accident on 29th July 2009 along Mumias-Kakamega road near Friends Hotel, Kakamega, a fact you knew to be false.

Count III: Unprocedurally carrying out repair of a university motor vehicle.

Particulars: That between 29th and 31st July 2009 being the driver of Motor Vehicle Reg. No. KAT 129X which had been involved in an accident on 28th July 2009, in collusion with the Acting Transport Officer Mr. David Amakalu, you failed to follow the laid down university procedures for repair of a motor vehicle involved in an accident by privately negotiating with the owner of the Tractor Reg. No. KAC 957G, one Mr Francis Kangethe before reporting to the police, university authority and insurance company for inspection and recommendation in disregard of the university procedure.

The charges were stated to be contrary to Clause 5(d)(iii) of the terms and conditions of service and the Collective Bargaining Agreement (CBA) between MMUST Council and KUDHEIHA.

According to the minutes of the Disciplinary Committee meeting held on Wednesday, 16th December 2009 in the Main Catering Unit, the claimant was among the six employees whose disciplinary cases were heard at the meeting. Among the members of the Disciplinary Committee were Mr. V. Nambani, Acting Shop Steward, KUDHEIHA, Mr. M. Kesesi Secretary, KUDHEIHA and Mr. A. Anguba, Acting Chairman, KUDHEIHA. The charges as read to the grievant were as follow –

“Failing to report the occasion of an accident (sic)

Giving false information to the University Management

Unprocedurally carrying out repair of a university motor vehicle.”

The committee found the grievant guilty of the charges levelled against him and decided that his services with the university be terminated upon payment of three months' salary in lieu of notice as per Clause 10.1(ii) of the KUDHEIHA CBA (MMUST Chapter) that was applicable to him.

The claimant's appeal against termination was dismissed.

Claimant's Case

In the submissions the claimant states that it is normal that accidents normally occur through careful driving and reckless driving. That in these circumstances it was through careful driving that caused the aggrieved be hit by the tractor from behind and that is the reason why the tractor's driver introduced the grievant to the owner of the tractor, who accepted to repair the university vehicle in the normal garage the university's' vehicles were usually repaired and settled the bills

It is submitted that the grievant complied with all the processes of calling the D.V.C whom he had dropped and the acting transport manager who was his superior who both wanted to know the condition of the vehicle.

That the respondent failed to observe clause 8(a) and (b) of the CBA which spells out the composition of the sitting committee by failing to invite the claimant in the committee only to rush in quoting clause 5(d) part (i) on termination.

Respondent's Case

The respondent submitted that the Claimant was taken through the correct procedure required by the Employment Act, 2007 before his employment with the university was terminated. The university gave the Claimant opportunity to be heard including before the commencement of the disciplinary proceedings, during the disciplinary proceedings and after the disciplinary proceedings.

In view of the foregoing state of affairs and or sequence of events, Mr. Oatwa has no basis at all, either in law or fact upon which to sustain his claim as there existed grounds for termination of his employment as aforesaid and the university followed the correct procedure under the law to terminate the employment of the grievant.

The grievant outrightly breached his contract of employment and or terms of service, he was given a very fair hearing by being taken through proper disciplinary proceedings which took into account his side of the matter and thereafter he exercised his right of appeal.

At all times during the proceedings that led to termination of the grievant's employment, the respondent acted within the precincts of law and accorded him opportunity to present his case which case was considered and found lacking merit. The respondent therefore lawfully and fairly terminated his employment.

It is evident from the foregoing that the grievant is the author and accomplisher of his own misfortune and having been lawfully terminated from employment by the respondent, his claim has no merit and is only calculated to harass, intimidate and coerce the respondent into abdicating its responsibilities as well as falling into a trap set by the him to unjustly enrich himself, a state of affairs which should not be entertained by the Court.

The respondent's Staff Disciplinary Committee found the Claimant guilty of misconduct which warranted the respondent to summarily dismiss the grievant from the employment. However, the respondent's Staff Disciplinary Committee was lenient to him and recommended a lenient termination.

The grievant was paid all his dues which included payment of three months' salary in lieu of notice. Even during the period from the time of commission of the offences to the time of his termination of employment, the grievant was not under suspension and he was accorded treatment in the usual manner. The respondent did not have malice against the Claimant and his termination of employment was purely on the revealed grounds aforesaid.

Since termination of employment to date which is about 9 years, the respondent engaged the services of another driver in the grievant's place and the respondent does not have vacant space for him or any other person as this will lead to high wage bill leading to waste of public resources.

The respondent prayed that the court do finds that the grievant was fairly and lawfully terminated from employment and this suit against the respondent be dismissed with costs.

Determination

I have considered the pleadings and evidence on record. I have further considered the submissions and authorities cited. The issues for determination are whether the termination of the grievant's employment was fair and whether he is entitled to reinstatement as prayed in the claim.

Whether the termination of the claimant's employment was fair

Section 45(2) of the Employment Act provides that for termination of employment to be deemed to be fair the reason for termination must be valid and accordance with fair procedure.

In the present case the claimant submits that the Branch Secretary was not invited to the disciplinary hearing and therefore the grievant was not represented. The claimant has stated that the shop steward and other union officials were all employees and therefore not impartial as they could be intimidated by the respondent.

I have looked at the minutes of the disciplinary committee meeting held on 16th December 2009 at which a decision was reached to dismiss the grievant. The Branch Secretary (KUDHEIHA) Kakamega Branch is indicated as having sent apologies. The claimant cannot now be allowed to use the absence of a Branch Secretary who sent apologies to argue that the hearing was not fair. The claimant has not denied that there was a disciplinary hearing called in compliance with the procedure in the CBA.

I find that the procedure for the disciplinary hearing complied with both Section 41 of the Act and the provisions of the CBA between the claimant and the respondent. The grievant was thus subjected to fair procedure.

On the grounds for dismissal, the disciplinary committee observed that –

1. That there were changes on the work ticket carefully done.
2. That Mr. Otatwa left and entered campus several times with Double Cabin KAS 804D which was recorded at the gate there was no record capturing vehicle registration number KAT 129X between 28th and 31st July 2009.
3. That the records entered into the work ticket of KAT 129 do not tally with the record at the gate.
4. That there was contradiction in the verbal statements given by the Mr. Otatwa and Mr. Amakalu.
5. That here was a deliberate attempt to falsify documents and prevent the facts about the accident from coming to the fore.

I find these to be valid reason for disciplinary action against the grievant and that the decision was unanimous, that the shop steward, Secretary and Chairman of KUDHEIHA, the claimant were party to the decision and they cannot complain.

I further find that the claimant has not denied these grounds. Based on the foregoing the termination of the claimant's employment was both procedurally and substantively fair and I hold accordingly.

Remedies

The claimant prayed for reinstatement of the grievant and payment of all dues withheld by the respondent be paid to grievant from the time of termination to the time of reinstatement.

Reinstatement is a remedy that is only available for an employee when the termination of his employment has been found to be unfair. Having found the termination of the grievant's employment to have been fair, he cannot avail himself of the remedy of reinstatement which is further only available within three years from the date of termination of employment.

The result is that the whole claim fails. The claim is therefore dismissed. Each party will bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE