



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1283 OF 2013

WALTER MOCHA ONGERI.....1ST CLAIMANT

CYPRIAN SALANO.....2ND CLAIMANT

VS

AIRSIDE LIMITED (SWISSPORT KENYA).....1ST RESPONDENT

CARGO SERVICES CENTRE EAST AFRICA B.V...2ND RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 8th August 2013 and amended on 26th May 2014, the Claimants sued the Respondents for wrongful dismissal. The Respondent filed a Memorandum of Defence on 21st August 2013.

2. The matter came up for hearing before me during the Nairobi Station Service Week on 18th October 2018. The 1st Claimant, Walter Mocha Ongeri testified on his own behalf and on behalf of his co-claimant. The Respondent did not call any witness.

The Claimants' Case

3. The 1st and 2nd Claimants were employed by the Respondents on 1st August 2002 and 8th September 2008 in the positions of Security Agent and Warehouse Operator 1, respectively.

4. The Claimants state that on 27th June 2013, they together with promoters of the proposed Kenya Aviation Workers Union (KAWU) went to meet the Human Resource Manager of the Respondents pursuant to a request made by the interim Secretary General by letter dated 25th June 2013. The Claimants attended the meeting in their capacity as shop stewards and interim officials of the proposed union.

5. Upon arrival at the Respondents' offices, the Claimants and other promoters of the union were informed by the Receptionist to wait to be attended by officers of the Respondents. After about two hours, the Respondent's Human Resource Manager issued a letter addressed to the interim Secretary General.

6. The interim Secretary General went into the Chief Executive Officer's office to seek audience regarding the letter issued by the Human Resource Manager. An altercation ensued after which the 1st Claimant was called by the Human Resource Manager and the Finance and Administration Manager. The two officers asked the 1st Claimant to inform the promoters of the union that the matter would be resolved.

7. Upon going back to the Reception, the 1st Claimant found the Respondents' security personnel who asked him and the other union promoters to leave the Respondents' premises.

8. On 1st July 2013, the 1st and 2nd Claimants were issued with show cause letters on allegations of using abusive language, causing disturbance and insubordination. The Claimants were required to appear for a disciplinary hearing on 5th July 2013.

9. The Claimants were subsequently dismissed. They deny the allegations made against them and term their dismissal as unlawful and unfair. In this regard, the Claimants state that the disciplinary hearing was a sham and a window dressing of a decision already made to dismiss them. In particular, they were not given adequate time to prepare their defence and were denied an opportunity to mitigate and to appeal.

10. The Claimants submit that their dismissal was on the basis of their trade union activities contrary to Article 41 of the Constitution of Kenya, 2010, Section 46 of the Employment Act, 2007, Sections 4 and 5 of the Labour Relations Act, 2007 and the ILO Conventions No 135 on Protection of Workers, 111 on Freedom of Association and 87 on Discrimination.

11. The Claimants further state that their dismissal was in violation of the obtaining Collective Bargaining Agreement.

12. The Claimants seek the following remedies:

- a) An order of reinstatement without loss of benefits and/or seniority;
- b) In the alternative, payment of actual pecuniary loss suffered since the date of suspension and subsequent dismissal, including salary they would have earned, housing allowance and all accruing allowances;
- c) Maximum compensation for loss of employment;
- d) Costs plus interest

The Respondents' Case

13. The 1st Respondent filed a Memorandum of Defence on 21st August 2013, stating that the 1st Claimant, Walter Mocha Ongeri was employed in the position of Security Agent at a basic salary of Kshs. 10,527 which was progressively increased to Kshs. 21,485 as at the time his employment was terminated.

14. The 2nd Claimant, Cyprian Salano was employed by the 2nd Claimant trading as Swissport Cargo Services Kenya in the position of Warehouse Operator 1 at a basic monthly salary of Kshs. 7,826 effective 8th September 2008. At the time his employment was terminated, he earned a monthly salary of Kshs. 13,629.

15. The 1st Respondent states that it had a valid Recognition Agreement with Aviation and Airport Workers Union (K) (AAWU) entered into on 24th February 2010.

16. The 1st Respondent further states that it received correspondence from Kenya Aviation Workers Union (KAWU) requesting to meet its management to discuss matters relating to staff. The 1st Respondent declined the request citing existing legal and binding agreements with AAWU.

17. The 1st Respondent goes on to state that on 25th May 2013, it was holding a meeting with AAWU officials at Federation of Kenya Employers (FKE) offices where KAWU officials turned up uninvited and unexpectedly. KAWU was advised to follow the legal procedures before engaging the Respondents' management.

18. The 1st Respondent avers that on 27th June 2013, officials of KAWU together with the Claimants turned up at the Respondent's offices without an appointment and caused a scene and disrupted meetings that were in progress. The 1st Respondent adds that the Claimants together with officials of KAWU forcefully entered the office of the Respondent's Chief Executive Officer, who had informed them of his unavailability since he already had prior engagements with clients.

19. The 1st Respondent states that it was forced to enlist the services of security personnel to forcefully evict the Claimants and officials of KAWU. The officials of KAWU later returned in the afternoon and barricaded the front entrance to the Respondents' premises. The situation was restored upon intervention by a policeman from the Kenya Police.

20. On 1st July 2013, the Claimants were issued with letters to show cause why disciplinary action should not be taken against them. The Claimants responded on 3rd July 2013 stating that the show cause letters were vague and did not disclose any material particulars of the substantive offence committed.

21. The Claimants were subsequently invited to a disciplinary hearing where they stated that they were attending the meeting of 27th June 2013 as representatives of the Respondents' staff and that they were made aware that the management had not given an appointment for the meeting. The 2nd Claimant is said to have stated that it was an unfortunate incident that had occurred and that he was to carry the burden.

22. Following the disciplinary hearing, the 1st Respondent summarily dismissed the 1st Claimant and terminated the services of the 2nd Claimant.

Findings and Determination

23. There are two (2) issues for determination in this case:

- a) Whether the Claimants' dismissal and termination were lawful and fair;
- b) Whether the Claimants are entitled to the remedies sought.

The Dismissal and Termination

24. The 1st Claimant was summarily dismissed by letter dated 8th July 2013, stating as follows:

“Dear MrOngeri,

Re: SUMMARY DISMISSAL

Reference is made to the incident that occurred on June 27, 2013 at the Swissport Offices-Swissport Cargo Complex 1st floor, your response to the show cause letter issued on the July 01, 2013 and subsequent hearing on July 05, 2013.

During the disciplinary hearing, it was established that:

- You were in the company of a party purporting to be Kenya Aviation Workers Union (KAWU) officials who arrived at Swissport offices without a formal appointment and proceeded to cause fracas at our offices.*
- This party barged into the CEO’s office and generally conducted themselves in a manner insulting to Swissport Management*
- The CEO requested your party to leave his office since you did not have a formal appointment. Instead the party refused to leave and caused fracas and was forcefully escorted from the premises.*
- You and your party later returned and blocked the main gate entrance to Swissport offices demanding audience and once again had to be forcefully requested to leave by an officer of the Kenya Police.*
- You had resigned from Aviation and Allied Workers Union Kenya (AAWU-K) on June 11, 2013 and as such were no longer a shop steward representing staff interests.*
- KAWU has not received any legal recognition and as such does not represent the interests of Swissport staff.*

As you are well aware, Swissport has set our rules that govern relationships within the organization. In this particular case it was clearly evident that you failed to promote the interests of the company and behaved inconsistently with Swissport’s values. By failing to request your party to leave after being informed that the Management of Swissport was not in a position to honour your request to be seen, you did not obey a lawful and proper command that had been issued by the CEO, Finance Manager and HR Manager. Meetings that were in progress were disrupted by the actions of your party, eroding the professional image of Swissport and interrupting business due to the commotion caused, which necessitated the intervention of Security to remove you and your party from the premises. Further the actions of you and your party were disrespectful and insulting to Swissport’s Management, particularly considering the fact that the meetings that your party disrupted were with external parties.

During the hearing, you continually refused to acknowledge your role in the incident and instead wanted Swissport to recognize a union – KAWU. This was not the subject of the hearing and besides, you had clearly been informed that a new union cannot have dealings with Management until due process and procedure is followed. As an employee of Swissport, it is expected that you are in the fore front of promoting fair labour practices and the onus was on you to have advised and informed your party on what was required in order to engage Swissport Management. It is also expected that at all times you behave in a manner that is respectful and that promotes the interests of Swissport. From the actions of you and your party it was evident that this was not done.

Having reviewed the facts of your case, Management is unable to sustain your continued employment as a Security Agent on grounds of gross misconduct. You are hereby Summarily Dismissed from employment in line with section 44:4(d & e) of the Employment Act 2007.

On presentation of a duly signed clearance form to the H.R. office your final dues will be processed.

On behalf of Management we wish to thank you for your services and wish you the best in your future endeavors.

Yours Sincerely

(Signed)

(Signed)

Maria N. SimiyuJeroen de Clercq

Human Resource Manager

CEO & General Manager”

25. A similar letter was issued to the 2nd Claimant with the following modification in paragraph 4:

“During the hearing you confirmed that you know the proper process and procedure that is followed when one is requesting for a meeting. You clearly indicated that this was not followed in the above case and the onus was on you to have advised and informed your party on what was required in order to engage Swissport Management.”

26. The only other difference between the two letters is that the 2nd Claimant was terminated as opposed to being dismissed.

27. The Claimants' dismissal and termination letters accuse them of gross misconduct. On their part, the Claimants deny the allegations made against them.

28. The burden of proof in cases of wrongful dismissal or unfair termination is set out in Sections 43 and 45(7) of the Employment Act, 2007. Section 43 provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are 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 employee.

29. Section 47(5) of the Act provides that:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

30. It is now firmly settled that the burden placed on an employer under Section 43 of the Employment Act, 2007 is to establish a valid reason that would cause a reasonable employer to terminate employment. The Court of Appeal affirmed this position in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017]eKLR**, by citing with approval the following excerpt from the Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably taken another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair."

31. From the pleadings and evidence on record, it is evident that there was an incident on 27th June 2013 at the Respondents' premises involving the Claimants and other officials of a proposed trade union. The parties were conflicted as to the nature and extent of the incident. What is clear is that by the time the Claimants and the other union officials showed up at the Respondents' premises, they had not secured an official appointment. The Respondents had reason to be concerned about the approach adopted by the Claimants in this regard and applying the 'range of reasonable responses test' the Court finds and holds that there were valid grounds for dismissal and termination of the Claimants.

32. Regarding the disciplinary procedure adopted in the Claimants' case I have this to say; the Claimants were issued with show cause letters to which they duly responded. They were then invited to a disciplinary hearing where they made their representations. On this account therefore, the Court finds and holds that the Claimants were availed the procedural fairness requirements set out under Section 41 of the Employment Act.

33. Ultimately, the Claimants have failed to prove a case of either wrongful dismissal or unfair termination. Their entire claim therefore fails and is dismissed.

34. Each party will bear their own costs.

35. Orders accordingly.

DATED AND SIGNED AT MALINDI THIS 6TH DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Kyabika for the Claimants

