



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 811 OF 2013

(Before D. K. N. Marete)

ANTHONY KYALO MWOLOLO.....CLAIMANT

VERSUS

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

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 28th May, 2013. The issue in dispute is therein cited as;

Unfair termination as per section 45(4) (b) of the Employment Act 2007

The respondent in his Statement of Response dated 1st August, 2013 denies the claim and prays that it be dismissed with costs.

The claimant's case is that he was employed by the respondent as a Locomotive Inspecting Officer on 1st November, 2006 at a salary of Kshs.28,000.00. He was dismissed on 23rd August, 2012 when he earned an increased salary of Kshs.69, 231.00.

The claimant's further case is that he served the respondent with loyalty and diligence until the 23rd August, 2012 when he was dismissed on allegation of gross misconduct. He puts it thus;

5. *On 17/04/2012 the Claimant received a letter dated 16th April, 2012 from the Respondent, in which the latter alleged that the Claimant had submitted bus receipts for fare charges between MTO – NRB and NRB-*

MAS for 10 crew members amounting to Kshs.10,000 and yet the journeys had not been made. The Respondent also alleged that the receipts submitted by the Claimant were forgery for they were not issued by the respective bus companies.

6. *The Respondent further alleges that the Claimant failed to hand over Kshs.35,700 in time for official use as designated and it was on the grounds set out above that the Respondent dismissed the Claimant on grounds of gross misconduct.*

8. *The Claimant further states that it is the RSF's duty to hand over fares to the Crew members who are travelling for they are known to him. He would then prepare a list (Crew Management Kit) reflecting;*

- i) The names of the crew member travelling;*
- ii) The Personal Number of the crew member;*
- iii) The date the money was received by the crew member;*
- iv) The receipt of the bus company;*
- v) The crew member's destination (to and fro);*
- vi) The bus company used by the crew member; and*

vii) *The amount of money given to the crew member.*

The RSF would then hand over this list to the Claimant together with the receipts from the bus company, which he would then compare to the Crew Management Kit and check off the same before preparing a summary of the same that is the amongst issued against the amount spent.

9. *The Claimant was therefore not in a position to verify the authenticity of the receipts or whether the Crew members actually travelled.*

10. *The Claimant denies the fact that between 17/01/2012 he was given Kshs.100,700/= of which he failed to hand over to RSF 35,700/= in time.*

11. *The Claimant further states that on 24/01/2012 he was given Kshs.2,400/= for Commuter kit for the week which he handed over to RSF Mr. P. Omondi and not Kshs.15,000/= as alleged.*

12. *The Claimant further states that on 24/01/2012 he was given Kshs.2,400/= for commuter kit for the week which he handed over to RSF Mr. A. Wahome and not Kshs.10,000/= as alleged by the Respondent.*

13. *The Claimant on 15/02/2012 was given Kshs.6,000/= which he handed over to RSF Muasa and not Kshs.8,000/= as alleged by the Respondent.*

14. *The Claimant states that on 22/02/2012 he received Kshs.6,000/= which he handed over to RSF Mr. B. Njati.*

15. *On 27/02/2012 the Claimant was given Kshs.15,000/= which he handed over to RSF Mr. B. Njati and not Kshs.30,000/= as alleged. On this date, L. I. O Mr. P. Musando signed a voucher for Kshs.30,000/= in order for the cashier to go and recoup the receipts from headquarter but in actual fact he did not hand Kshs.30,000/= to the Claimant.*

16. *On 2/03/2012 the Claimant received Kshs.6,000/= which he handed over to RSF Mr. R. Mbaabu*

17. *On 6/03/2012 the Claimant received Kshs.27,700/= and not Kshs.25,700/= which he handed over to RSF Mr. Mbaabu to refund to the crew for commuter fares.*

18. *On 5/03/2012 the Claimant together with a Mr. Joshua went through all the vouchers and the total amount of money which he had given the RSF for Crew balancing and Commuter Kit, had balanced, remaining with only Kshs.1160/= of which Kshs.1,000/= was pending receipt of J. Mwambaga of date 5/03/2012 and Kshs.160/= was the cash at hand with the RSF.*

The claimant therefore submits a case for unfair termination as his actions did not amount to gross misconduct. The dismissal also violates the principles and values of the constitution under Articles 10, 25, 27, 41, 43, 45, 47, 48, 30 and 159 of the Constitution of Kenya, 2010.

He prays as follows;

- a) *An order that the Respondent do pay damages to the Claimant as per section 49 of the Employment Act, 2007.*
- b) *An order that the Respondent decision to dismiss the Claimants amounts to unfair dismissal.*
- c) *An order for compensation for wrongful dismissal and/or in the alternative an order for reinstatement.*
- d) *There be such further relief as the court deems fit and just in the circumstances of this case.*
- e) *Costs of this suit and interest thereon.*

The respondent case admits the claim as follows;

- Paragraph 3 is admitted save as to clarify that the Claimant's salary quoted was the gross salary earned.
- Paragraph 4 is admitted save as to clarify that the Claimant's employment was fraught with disciplinary issues.
- Paragraph 7 is admitted save as to aver that the retort by the respondent was examined and found to be unsatisfactory resulting in his dismissal.
- Paragraph 8 is admitted. The Respondent adds that the Claimant has a further duty of confirming if the purported journeys by the crew members were actually made by comparing the tendered receipts with the RSF diary.
- The respondent reasserts the particulars of the dismissal letter dated 23rd August, 2012.

The respondent *in toto* denies the balance of the claim. It is her penultimate case that the claimant was in a letter dated 16th April, 2012 charged upon cogent and valid grounds founding gross misconduct. He was granted an opportunity to defend himself by giving an explanation and also to had a disciplinary committee hearing which he chose not to utilize.

The matter came to court variously until 16th October, 2018 when the parties were directed to proceed by way of written submission. They were agreeable on this.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 29th October, 2018 submits and reiterates his case of unlawful termination of employment. He seeks to rely on the provisions of section 41 (1) and (2) and 45 (1), (2), (3) and (4) as follows;

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

Again,

45.(1) No employee shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

In further support of his case, the claimant sought to rely on section 44 (1), (2) and (3) of the Employment which provides thus;

44.(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

It is his case and submission that the respondent in his dismissal violated the provisions of section 41 of the Employment Act, 2007 in that the stipulated procedure was not pursued. He was not accorded an opportunity to be heard and neither was this awarded to his representatives before taking such a drastic measure of dismissal.

The claimant further sought to rely on the authority of **Nicholus Muasya Kyula v. Farmchem Limited, Industrial Cause Number 1992 of 2011** where the court observed as follows;

“a report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of the due process and fairness. The report must set out the findings on the allegations, any mitigation or aggravating factors and the recommendations which may include termination. In addition, the decision must be communicated to the employee.”

Again, the claimant employed the authority of **Mkala Chitavi v. Malindi Water & Sewerage Company Limited, Industrial Cause Number 64 of 2012** the court stated;

“a prudent employer is advised to keep records and minutes. The charge should preferably be in writing, notices sent and signed by the employee or where he refuses to acknowledge the same, a minute kept.”

The respondent did not file any written submissions.

From her Respondent's Bundle of documents dated 17th October, 2014. There is no indication that the claimant was taken through appropriate disciplinary proceedings per section 41 (1) and (2) of the Employment Act, 2007. Inasmuch as the respondent has adduced evidence of the claimant's fraud and misconduct, it was expected that he puts the claimant through disciplinary proceedings as provided for by law. He did not. I therefore find a case of wrongful, unfair and unlawful termination of the claim and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment he becomes entitled to the relief sought.

I am therefore inclined to allow the claim, declare and order relief as follows;

- i. A declaration be and is hereby issued that the termination of the employment of the claimant by the respondent was wrongful unfair and unlawful.
- ii. Four (4) months salary as compensation as compensation for unlawful termination of employment Kshs.69,231.00 x 4 =.....Kshs.276,924.00.
- iii. The costs of the claim shall be borne by the respondent.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Miss Musonga holding brief for Ondieki instructed by Ondieki & Ondieki Advocates for the claimant.
2. No appearance for the respondent.