



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 11 OF 2015

SAMSON FURAHA KAZUNGU.....CLAIMANT

VS

MABATI ROLLING MILLS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent from 1992 and rose through ranks to be a Machine Operator and finally Coil Executioner which involved entry of coils data in the computer system. His employment contract was never reduced into writing until 3.2.2012 when he was dismissed. According to him the dismissal was unfair and on 19.1.2015 he brought this suit seeking declaration that his dismissal was unfair and an order that the respondent should pay him gratuity for period he served the company.

2. The respondent has admitted that the claimant was her employee until 2.2.2012 when she dismissed him for fraud, he committed jointly with others, against her. She denied that the dismissal was unfair and averred that the dismissal was fair both substantively and procedurally.

3. The issues for determination in this dispute are:

(a) Whether the dismissal of the claimant was unfair.

(b) Whether the orders sought by the claimant should issue.

4. To answer the said questions, the claimant testified as Cw1 while the respondent called her former Internal Auditor Mr. Edward John Kinyanjui as Rw1. After the hearing both parties filed written submissions.

Analysis and Determination

Unfair termination

5. Under Section 45(2) of the Employment Act, termination of employment by an employer is unfair if the employer fails to prove that, it was grounded on valid and fair reason and that it was done after following a fair procedure. Valid reason is one which is true while a fair procedure is one that relates to the employees conduct or the employee's operational requirements. Fair procedure on the other refers to process of according the employee a fair hearing before dismissing him on ground of misconduct, poor

performance or physical incapacity.

Reason for dismissal

6. In this case the reason for termination of the claimant's employment contract was fraud by manipulating time and attendance system in order to receive payment for overtime he and four others had not worked for between January and October 2011. The claimant has denied that offence in his evidence and maintained that he had no skill and authority to alter data in the Biometric Tap System which recorded time for reporting and leaving work. He however admitted that his duty involved posting data in computer system.

7. Rw1 was requested to audit the overtime requests/claims for January to October 2011 after the HR Manager noted the escalation of the overtime claims. Rw1 went through all the claims made by the 400 employees of the respondent. The data was both in soft and hard copies. He noticed that 5 employees including the claimant were recorded as being on duty every day from January to October and had made claims for overtime every month. However when he compared with the Biometric Tap System he noted that the claims were not tallying. Upon checking the authorizing person in the system, he noted that it was the claimant who consistently altered the attendance record because his name was indicated at the time of alteration.

8. On cross examination. Rw1 admitted that the person who has the authority to altering overtime payment in the system was the Supervisor Mr. Kai. He further admitted that the claimant was on leave from 8.8.2011 to 7.8.2011 and that he never called him to clarify any queries before compiling his audit report while the claimant was away on leave in December 2011. He also admitted that he could not tell the exact overtime worked by the claimant because the record had already been altered. He also admitted that he did not know whether the claimant worked on 12 hour shift every day from January –October 2011 but he pointed out that some claims were for 16 hours per day. On further cross examination. Rw1 stated that the claimant used the password for Mr. Kiprono of the Picking Department to alter the attendance record in the claimant's CMR department. Rw1 maintained that the password from another department could alter data in another department.

9. I have carefully considered the testimonies of the two witnesses and the Audit report by Rw1 which led to the termination of the claimant. The report is neither signed nor dated. Although it talks about fraud through manipulation of payroll system, the report made several observations that are prejudicial to the defence case including:

“ The overtime requisition Forms lacked integrity as an accountable document had many alterations on date and time, and most could not even be found as they were not filed...”

10. The report then concluded that:

“ The staff attendance system (TAP Plus) does not have sufficient controls to prevent or track changes made to the data being transferred to the payroll. There is no audit trail in the system; hence making it difficult to track any changes affecting overtime and identifying who made change, this was also highlighted in our report on the general controls in IT”

11. The question that begs answer is whether the auditor's report by Rw1 proved on a balance of probability that the claimant had manipulated the payroll system to defraud the respondent money for overtime not worked. In my considered view the answer is in the negative because the system lacked integrity. The respondent did not prove how much was defrauded and how many hours were the genuine hours worked as overtime. It has also not been denied that the claimant never worked 12 hour shift per day, Monday to Sunday, January to October save for the period he was on leave between 9.8.2011 and 7.9.2011. Consequently I find and hold that the respondent has failed to prove and justify the reason for terminating the claimants employment contract as required by Section 43, 45(2)(a) and (b) and 47(5) of the Employment Act.

Procedure followed

12. The claimant admitted that he was served with a show cause letter stating the reason for which disciplinary action was contemplated. He also admitted that he was accorded a hearing in the presence of the Shop steward after which he was dismissed by the letter dated 2.2.2012. Finally he appealed against the dismissal but the appeal was dismissed by the letter dated 2.3.2012. After considering the procedure of hearing that the claimant was accorded by the respondent, I have no doubt that the employer proved that she followed a fair procedure before dismissing the claimant.

13. Section 41 of the Employment Act provides that, before an employer terminates the contract of service of his employee on ground of misconduct, under section 44 of the Act, he shall first explain the reason to the employee in a language he understands and in the presence of a fellow employee or union shop floor representative of his choice and thereafter invite the employee and his chosen companion to air their defence for consideration before the dismissal is decided.

14. The foregoing procedural fairness notwithstanding, the termination of the claimant's contract of service was rendered unfair within the meaning of section 45 of the Act by dint of section 43(1) of the Act. The said section provides:

“43(1) in any claim arising out of termination of a contract, the employer shall be required to prove the reason 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.”

Reliefs

15. In view of the foregoing finding that the respondent has failed to prove the reason for the dismissal, I make declaration as prayed, that the termination of the claimant contract of employment was unfairly terminated by the respondent on 2.2.2012.

16. I will however not order the respondent to pay gratuity to the claimant for the years he served her because no basis has been shown, either in law or contract, that the claimant is entitled to the said payment. Even if he was entitled to the said relief, I would still not have awarded him anything because he had not pleaded the amount specifically. It is trite law that special damages must not only be pleaded but must also be specifically proved. Interestingly in this case, the respondent raised the issue on 24.4.2015 and the claimant's counsel sought and obtained leave to amend the claim to plead the particulars of the damages sought. However on 14.9.2015, the claimant swore an affidavit to say that he sought advice from his counsel and was no longer interested in amending the claim to plead special damages specifically.

Disposition

17. For the reason that the termination of the claimant's contract of service was without any valid or fair reason, I enter judgment in his favour declaring that the termination was unfair. He will also have costs.

Signed, dated and delivered at Mombasa this 27th day of January 2017

O.N. MAKAU

JUDGE