



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 134 OF 2016

VICTOR EGESA OGUTA.....CLAIMANT

VS

UNIGROUP TRANSPORTES LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Mechanic from 5.8.2011 for a monthly salary of kshs.24000 which was later increased to kshs.42989. Initially he was based in Nairobi but later he was transferred to Mombasa. In November 2015 he fell ill while at work and he was taken to hospital where he spend four days in ICU. He reported back to work at the end of November but applied for 19 days leave from 3.12.2015 to 28.12.2015. He never reported back on 28.12.2015 because he was still on drugs and he reported the matter to the Workshop Manager but he refused to excuse him. On 30.12.2015, the claimant went back to hospital where he was treated and went back for review on 4.1.2016 when the Doctor gave him 3 sick off days.

2. After the sick off, he reported to work on 7.1.2016 but the Workshop Manager denied that they had talked on the phone with the claimant, and described the sick off note from the Doctor as forged document and assaulted him and dismissed him without giving him a chance to defend himself. The claimant reported the matter to the police and was treated for the injuries inflicted by the workshop manager. The Manager was then arrested on 20.1.2016 and admitted the offence in writing and paid the claimant kshs.20,000. Thereafter the claimant brought this suit claiming kshs.645,930 being his terminal dues plus compensation for unfair termination.

3. The respondent has admitted that she employed the claimant as pleaded in his suit but averred that the claimant was ever misconducting himself through absenteeism and insubordination for which he earned several warning letters. She further averred that the claimant absconded duty from 29.12.2015 when he was supposed to report back from leave until 7.1.2016 when he reported back and on being asked by his supervisor (Workshop Manager) about his absence, he became violent, insulted him and disrupted the work before disappearing.

4. It is the defence case that she served the claimant with a Show Cause letter but he failed to respond. Later on, she served him with an invitation to a disciplinary hearing but again he snapped it and as such she served him with a termination letter dated 18.1.2016, Certificate of Service and copy of cheque for his terminal dues which had been paid to his bank towards his loan account. Consequently she averred that the dismissal of the claimant was procedurally and substantively fair and as such the suit should be

dismissed with costs.

5. The issues for determination in this dispute are:

(a) Whether the termination of the claimant employment contract by the respondent was unfair.

(b) Whether the claimant is entitled to the reliefs sought in the suit or any part thereof.

6. To answer the said issues, when the suit came up for hearing on 19.9.2016, the claimant testified as Cw1 while the respondent called her Workshop Manager Mr. Josphat Juma Omondi and her HR Manager Mr. Thadeaus Birika Oeri as Rw1 and Rw2 respectively. Thereafter both parties filed written submissions which I have carefully considered.

Analysis and Determination

Unfair termination

7. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair if the employer fails to prove that it was founded on valid and fair reason(s) and that it was done after following a fair procedure. In this case the claimant alleged that he was dismissed on 7.1.2016 by the Workshop Manager (Rw1) for presenting forged sick off note to justify his failure to report back from leave on 29.12.2015. Since 7.1.2016, the claimant never reported back to work until 26.1.2016 following an agreement signed on 20.1.2016 to settle the assault case at the police station where Rw1 had been detained for assaulting him on 7.1.2016. The claimant was however not allowed to resume work and he was served by Rw2 with an envelope containing a show cause letter, invitation to disciplinary hearing, termination letter, certificate of service plus copy of cheque for terminal dues. He contended that he had not been served with the show cause letter and the invitation for the hearing before then. He maintained that his dismissal was unfair because there was a lawful cause for him to be absent from work. He denied that he caused mayhem at the place of work on 7.1.2016 alleged by the defence.

8. Rw1 and Rw2 denied that the claimant was dismissed on 7.1.2016. According to the two defence witness, the claimant absconded duty from 29.12.2015 and their effort to reach him by his phone number bore no fruit. That on 7.1.2016, the claimant reported to work and on being asked where he was, he hauled insults to the Rw1 and fought him and disappeared. Rw2 then served him with show cause letter dated 7.1.2016 but he never responded. He again served the claimant with the letter dated 14.7.2016 for disciplinary hearing on 15.1.2016 but he snapped the hearing and he was dismissed by the letter dated 18.1.2016 and later issued him with Certificate of Service and paid his terminal dues. Rw2 admitted that he gave the said documents on 26.1.2016 but stated that he had before then served the documents by post.

9. Rw2 further contended that the dismissal for the claimant was not due to presenting forged sick off note but because of absconding duty from 29.12.2015 to 7.1.2016, use of abusive language and fighting Rw1 on 7.1.2016 and disobeying invitation to attend disciplinary hearing on 15.1.2016. After careful consideration of the rival evidence presented to the court, I find in favour of the respondent that the claimant was never dismissed on 7.1.2016 for presenting a forged sick off note. In addition, I find that the dismissal was done on 18.1.2016 for absconding duty; using abusive language and rough against Rw1 who was his supervisor and also fighting him and also failure to attend disciplinary hearing. The said reason for the termination amounted to gross misconduct under section 44(4) of the Act and were valid and fair within the meaning of Section 45(2) of the Act because the related to the conduct of the claimant and also the respondent's operational requirements.

10. As regards to the procedure followed, I have no doubt that the procedure followed was unfair because it was in breach of Section 41 of the Act. The said provision provides that before terminating his employee on ground of misconduct, poor performance and physical incapacity, the employer shall first explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of choice and thereafter invite the employee and his chosen companion

to air their defence for consideration before the dismissal is decided.

11. In this case the respondent never complied with the foregoing mandatory procedure before dismissing the claimant on 18.1.2016. Although she alleged to have served the claimant with show cause letter, invitation to disciplinary hearing before issuing dismissal letter dated 18.1.2016, no evidence of service of the said letters was adduced. Without such evidence of service, I agree with the claimant that he was served with all the said letters on 26.1.2016 inside one envelope.

12. Rw2 has admitted that he indeed gave the said letters plus Certificate of Service and copy of cheque for his terminal dues on 26.1.2016 when he came back to the office. Consequently, I find and hold that the respondent has failed to prove on a balance of probability that she followed procedure before dismissing the claimant as required by Section 45(2) (c) of the Act. The said procedural unfairness rendered the summary dismissal unfair notwithstanding the existence of a valid or fair reason for dismissing him.

Reliefs

Notice and Compensation

13. Under Section 49(1) and (4) of the Act, the claimant is awarded kshs.41,989 being one month salary in lieu of notice, and kshs.125,967 being three months as compensation for unfair termination. In awarding the small award, I have considered the fact that the claimant contributed to his dismissal through misconduct.

Leave

14. This claim is dismissed because the leave records produced showed that the claimant had exhausted his leave for 2015.

Overtime

15. The claim for overtime worked in November/December is also dismissed for lack of particulars and evidence.

Salary for January 2016

16. The claim for salary for 1st to 7th January 2016 is also dismissed because he never worked. He had absconded work from 29.12.2015 to 18.1.2016 when he was finally dismissed.

Certificate of Service

17. This claim is also dismissed because the claimant admitted that he was issued with a Certificate of Service together with the dismissal letter.

Disposition

18. For the reason that the dismissal of the claimant was rendered unfair by the unfair procedure followed, I enter judgment for the claimant in the sum of **kshs.167,956** plus costs and interest. The said sum shall be paid less any amount that may already have been calculated and paid as terminal dues to the claimant or to his account.

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

O.N. MAKAU

JUDGE