



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 859 OF 2015

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VS

M/S CIVICON LTD.....RESPONDENT

JUDGMENT

Introduction

1. Mr. Francis Onzere (hereafter called the grievant) was employed by the respondent as a JCB Operator of Backhoe for a fixed term contract of one year starting 3.1.2014. His gross salary was kshs. 24,000 per month and his work station was Lockichar. On 26.4.2014 the Fanbelt of the Backhoe broke and stopped while he was driving the machine from Ngamia I to Lockichar. When he alighted to check the fan belt, a strong wind banged the cabin glass door and it broke. He reported the matter to his seniors and the Backhoe was repaired. However he was suspended and later terminated unfairly.

2. The respondent admits that she had employed the grievant as pleaded in the suit but denies that his services were unfairly terminated. According to her the grievant performed his work of driving the Backhoe so carelessly and negligently that he caused the rear right hand side glass to break. It is further defence case that the grievant was served with a Show Cause letter and thereafter accorded fair hearing after which his services were terminated and thereafter he was paid all his dues.

3. On 20.7.2016, the parties agreed to dispense with the hearing and instead adopted the pleadings, witness statements and documentary evidence. They further framed the issues for determination and also agreed to file written submission. The issues agreed for determination are:

(a) Whether the reason given for the termination of the grievants services was valid and just.

(b) Whether the termination was procedurally fair

(c) Whether orders should be made with regard to the reliefs sought.

Analysis and Determination

Reason for termination

4. Under section 45(2) (a) and (b) of the Employment Act, termination of an employees employment contract is unfair unless the employee proves that it was grounded on a valid and fair reason. Section 43 and 47(5) of the Act puts the burden of proving and justifying the reason for termination on the employer in legal proceedings like in this case.

5. To discharge the said burden in this case, the respondent has filed a witness statement by her HR Representative, Mr. William Wekesa plus copy of email by Mr. Glenn Delorie dated 7.5.2014 and undated letter by Swaleh Ramadhan addressed to “whom it might concern”.

6. It is vital to observe that there is no dispute that the Right hand side glass door of the Backhoe broke on 24.4.2014 while machine was in the custody and control of the grievant. The issue for determination is whether the glass panel was broken due to the carelessness and/or negligence on the part of the grievant.

7. The defence witness was not present when the incidence occurred and as such all what he states in his statement is what he was told by people he did not wish to disclose. Assuming that he got the information from the said email by Mr. Glenn and the in dated letter from Mr. Swaleh, who also did not witness the incidence but were called afterwards, it is clear that the two people gave contradictory report. Mr. Glenn wrote:

“When I got to the scene of the breakdown the first thing I noticed was the broken R/H side Glass panel and I asked Onzere what happened and he stated that the door flew open and broke the glass while in motion. This is after informing him two days prior to the incident when I personally stopped him on the road and told him he cannot drive with the door open because it would break the side panel glass and I proceeded to close the door and explicitly informed him not to travel with the door open again which he obviously failed to comply with.”

8. Mr. Swaleh who was with Mr. Glenn wrote:

“On reaching there we found the Backhoe Side glass was broken. Mr. Glenn asked the operator Mr. Francis what happened to side glass. Then Mr. Francis said it was broken by the Backhoe door which was blow by the wind. Then Mr. Glenn told him that he had warned him wherever the machine is working he should keep the Backhole Door closed.”

9. In his response to the Show Cause letter dated 9.5.2014, the claimant stated as follows in Swahili:

“...Hapo nikiwa kwa Rafu Road Ambapo nilikua nemetea 40kms, ndio nikasikia mulipuko wa vukwe kubwa. Nilipofungua mlango gafula kutazama nini? Ndio upepo mkali mkali... mlango nakugonga kwa nguvu nakutoboa Dirisha tundu.”

Translated into English:

“...While driving on rough road after travelling for 40kms, I heard an explosion of steam, I opened the door to alight and check what happened and while there, a strong wind banged the door and broke a hole through the window.”

10. The foregoing account is in consonance with the account recorded by Mr. Swaleh in his undated letter aforesaid. The account given by Mr. Glenn in his email dated 7.5.2014 that the grievant told him that the door flew open and broke the glass therefore false. As earlier observed, Mr. Glenn was not present when strong wind allegedly banged the door and caused a hole on the glass window. The only person who was present was the grievant and therefore he is the only witness who can competently testify on the matter.

11. I will therefore believe the grievant evidence and dismiss the presumption by Mr. Glenn that the glass panel broke because the claimant had opened it while the Backhoe was in motion because it is not founded on primary evidence or expert opinion. By dismissing the allegation of negligent driving on the part of the grievant, I find and hold that the respondent has failed to prove on a balance of probability that there was a valid and fair reason for terminating the grievants contract.

Procedure followed

12. The respondent contended that the procedure followed before terminating the grievant's contract was fair. That the grievant was first served with a show cause letter to which he responded in writing denying that he caused the damage in the Backhole through negligence and/or carelessness. That the grievant was also accorded an oral hearing in the presence of his witness. That after considering his defence, the respondent found it unsatisfactory and instead of dismissing him summarily, she reduced it to a termination. That the grievant was given a chance to appeal, but he never attended the hearing but the CEO still considered the same but dismissed it for lack of merit.

13. The grievant has denied that he was heard on 9.5.2014 as earlier invited. He explained that when he arrived at the gate for the hearing, he was not allowed in by the security personnel and the respondent and the respondent terminated his contract. That he appealed against the termination but again on the day for the hearing he was kept waiting till evening and left. He then by letter dated 29.5.2014 sought for hearing on 3.6.2014 but the CEO dismissed his appeal on 30.5.2014.

14. After careful consideration of the evidence on record, I find that the respondent has failed to prove on a balance of probability that she followed a fair procedure before terminating the grievant's contract. She did not call the members of the disciplinary committee and the security personnel to prove that the grievant attended the disciplinary hearing on 8.5.2014 at 2.00pm. At least the respondent should have produced as evidence visitors or employees register to prove that indeed the claimant visited the respondent's premises on 9.5.2014 at 2.00pm. Without such evidence I find that the respondent has failed to prove that the claimant was heard by the disciplinary committee on 9.5.2014 as per the minutes produced by the respondent.

15. Under section 45(2) (c) of the Employment Act the employer must in mandatory terms follow a fair procedure before terminating the services of his employee. Under section 41 of the Act provides that before an employer terminates the services of his employee, he shall first explain the reason for the intended termination to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter accord the employee and his chosen companion to air their defence which must be considered before the termination is decided.

16. In this case the claimant was never heard. Even if he was to be heard the hearing would still be in breach of section 41 of the Act because the Show cause letter which invited him for the hearing did not give him the right to be accompanied by a fellow employee or shop floor union representative of choice. The letter stated:

“You are required to be accompanied by a witness if you have one”.

17. Having made a finding that the respondent has failed to prove that there was a valid and fair reason for terminating the grievant's contract and that she followed a fair procedure before the termination, I find and hold that the termination of the grievant's services was unfair within the meaning of section 45(2) of the Employment Act.

Relief

18. The claimant has prayed reinstatement of the grievant to his employment without loss of benefit. The relationship between the grievant and the employer is however broken down. In addition, the respondent has shown no interest in employing diabetic people like the grievant as clearly stated in the email by Mr. Glenn stated:

“Further to this, he is suffering from diabetes, which caused him

to open the door because of his condition...According to him, he was removed from Ngamia 1 site by Tullow because of his diabetic condition in 2010/2011, so he is not allowed on any Tullow site!”

19. In addition to the foregoing, the contract of the grievant was to expire on 20.12.2014. Consequently in this case reinstatement will not be practicable.

Damages

20. Under section 49(1) of the Employment Act, the claimant is entitled to one month salary in lieu of notice plus upto 12 months salary as compensation for unfair termination. However because he had only 6 months remaining before his fixed term contract expired, I will award him the salary for the remainder of his contract term being kshs.144000. In making the said award, I have considered the fact that the total sum he reasonably expected to earn if the contract was not unfairly terminated was Kshs.144000.

Leave

21. The claimant has prayed for 26 days leave but no particulars were pleaded. However because the contract in dispute is pleaded as starting 3.1.2014 and to expire on 20.12.2014, I will only award pay for leave days earned before termination on pro rate basis. Under section 28(1) (b) of the Employment Act, an employee who is terminated after serving for two or more consecutive months is entitled to one and three quarters leave days for every completed month of service. That means, for the six months he served, he earned 10.5 days which equals to kshs.9,692.30.

Transport refund

22. The claimant has prayed for refund of kshs.10,000 to the grievant as the transport cost incurred by him from his work station at Lokichar to Mombasa for disciplinary action. That claim sounds reasonable. However, being a claim for special damages, the claimant is obligated to prove it. In this case no receipts were produced to support the said claim and it therefore dismissed.

Disposition

23. For the reasons stated above I enter judgment for the claimant and on behalf of the grievant in the sum of **kshs. 153,692.30** plus costs and interest.

Signed, dated and delivered at Mombasa this 20th day of January, 2017.

O.N. MAKAU

JUDGE