



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE 963 OF 2014

KEPHA GWARO.....CLAIMANT

VERSUS

TIBBET & BRITTEN AFRICA.....1ST RESPONDENT

EXEL CONTRACT LOGISTICS KENYA LTD.....2ND RESPONDENT

DHL SUPPLY CHAIN (K) LTD.....3RD RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 11th June, 2014 the claimant averred that he was employed by the 1st respondent as a senior mechanic and later Assistant Workshop Supervisor. The 1st respondent was acquired by the second respondent and later by the 3rd respondent. On 1st April 2011, the claimant was promoted to the position of Technical Service Manager by the 3rd respondent at an annual salary of Kshs 1,917,096/=

2. By a letter dated 18th March 2013 the claimant averred that the 3rd respondent wrongfully and unlawfully dismissed him without giving him the statutory notice nor the required three months' salary in lieu of notice.

3. According to the claimant, the respondent while dismissing him never gave any tangible reason as required by the employment rules and regulations and failed to adhere to rules of natural justice. By reasons of the above, the claimant averred that he had been deprived of benefits he would have earned. He also had his reputation injured and put to considerable trouble, inconvenience and anxiety and suffered loss and damage. The claimant therefore sought an order for compensation from the court.

4. The respondent on their part admitted that the claimant's services were passed over from 1st respondent to the 3rd respondent and that upon such transfer, the claimant was paid all his lawful dues. The 3rd respondent denied that the termination was wrongful or unlawful. The respondent further averred that the termination was lawful and upon such termination claimant was paid all his dues as per the contract. The respondent further contended that prior to the termination the claimant was accorded a fair hearing before the decision to terminate his services was made.

5. In his oral testimony in court, the claimant stated that he was initially employed as a Workshop Controller and later Workshop Manager. It was his evidence that his promotion was based on

performance and after appraisal. The claimant further stated that on 9th November, 2012 the respondent moved its workshop from Nanyuki road to Kasarani. He oversaw the migration to D. T. Dobie who were to take over the Kasarani workshop. He testified further that on 9th November, 2012 he was issued with a show cause letter for failing to pass the vehicles through maintenance inspection.

6. According to him, the clerk would generate a list of vehicles due for inspection and email to finance for a cheque to be issued. It was his evidence that he used to approve the list but when a Mr Kariuki (DW1) joined the respondent, he took over this function. He admitted that he received a show cause letter on the inspection issue and responded to the same. He was thereafter served with a warning letter. An appraisal was done thereafter in January by Mr Kariuki and by the end of that year he was given a bonus and a ten year award.

7. Mr Kariuki subsequently issued him with another show cause letter after end of year performance assessment. The letter raised concern over his performance. He responded to the letter on 16th March, 2013. According to him, the assessment was for a shorter period and in his response to the show cause letter, he expressed concern over the letter. He was thereafter issued with a termination letter dated the same day as the notice to show cause.

8. The termination letter was issued by Mr Kariuki yet according to him it should have come from HR office. It was the claimant's further evidence that his relationship with Mr Kariuki was initially cordial but became strained when Mr Kariuki was brought to Kasarani and became his boss. According to the claimant, before termination, he ought to have been put through performance improvement program as per the respondent's procedure. The failure to carry out the vehicle inspection, according to him was because Mr Kariuki did not approve the inspection in time.

9. In cross-examination he stated that he disagreed with the second assessment and that he did not ask to be put on performance improvement procedure. He admitted he was paid upon termination and that he accepted the cheque. He however felt the termination was malicious.

10. The respondent witness, Mr Kariuki informed the court that the claimant was initially a good worker, however, in November, 2012 the respondent could not deliver products because the vehicles had not been inspected. According to him, inspection was claimant's responsibility. The clerk would raise the list of vehicles due for inspection and submit the list to the claimant who would refer the same to him. It was his evidence that the process had loopholes and he suspected money was being embezzled through the process.

11. According to him, he received the list for October but did not approve as he wanted the list of specific vehicles. He was only given a flat figure. Regarding the appraisal, it was his evidence that the claimant rated himself highly but he rated him as 'partially meets' because during the year there were three projects going on and the claimant's performance was not upto par. Regarding termination, it was his evidence that he had nothing personal against the claimant and further that he had authority to terminate claimant's services.

12. In cross-examination, he stated that he never reported any suspected fraud to the police but reported the same to the management. He stated further that he never raised the issue of suspected fraud with the claimant because he thought he was not involved. He further denied that the delay on approval was deliberate and further denied causing the delay.

13. The claimant herein was dismissed on account of poor performance below the expectations of the respondent. The dismissal was arrived at after competency assessment for the period between 1st January, 2012 and 31st December, 2012. This appraisal was done jointly between the claimant and his immediate boss Mr Joseph Kariuki whose designation was the Business Units Manager.

14. Whereas in the appraisal, the claimant regarded himself as fully meeting the set targets and strategies, Mr Kariuki's view of him was one of below expectation performer. He rated the claimant all through as

partially meeting the set strategies. As was evident in the testimony of both the claimant and Mr Kariuki there seemed to have been serious disagreement between the claimant and Mr Kariuki over the claimant's performance ratings.

15. In his conclusion to the appraisal, Mr Kariuki remarked in part that the claimant ought to have taken e-learning for leadership, employee engagement and communication concept. This communication seemed to have been in tandem with the claimant's position that it was the respondent's policy to subject staff found not to be performing as expected to performance improvement procedure.

16. What the court finds curious is that Mr Kariuki being the claimant's immediate boss was the one who appraised him, they disagreed with the claimant over appraisal ratings and proceeded to dismiss the claimant without involvement of any other person in the management. The court noted that, Mr Kariuki still brought in the appraisal, the issue of delayed motor vehicle inspections even after the claimant had responded to the same and a warning letter issued. The court further noted that in responding to the show cause letter on delayed inspections, the claimant attributed the same on the omission by Mr Kariuki to approve the inspection request on time. This fact was confirmed by Mr Kariuki himself in his evidence in court when he stated that he suspected the process was used to embezzle funds and sought more details.

17. The court therefore agrees with the claimant that the relationship between him and Mr Kariuki was not cordial. This therefore made it unfair to the claimant for the self same Kariuki to appraise and eventually dismiss the claimant without involving any other person in the management. The claimant was a reasonably senior member of staff hence his dismissal ought to have been deliberated by a disciplinary panel and not a one person affair as was the case here.

18. In conclusion, the court finds and holds that the claimant's dismissal from respondent's employment was unfair in terms of reasons and process followed in the dismissal.

19. The claimant having been paid his other terminal benefits, the court awards him ten month's salary as compensation for unfair dismissal based on gross monthly wage drawn by the claimant as at the time of dismissal subject to statutory deductions. The claimant shall further have costs of the suit.

20. It is so ordered.

Dated at Nairobi this 17th day of March, 2017

Abuodha J. N.

Judge

Delivered this 17th of March, 2017

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.

Abuodha J. N.

Judge