



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 921 OF 2014

BERNARD OTIENO.....CLAIMANT

VERSUS

DHL EXEL SUPPLY CHAIN (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 10th May 2014 and filed in Court on 30th May 2014, the Claimant has sued the Respondent for unlawful termination of employment.
2. The Respondent filed a Memorandum of Response on 7th August 2014 and the matter proceeded to hearing with the Claimant testifying on his own behalf and John Nyang'au Mekenye for the Respondent. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a Receiving Clerk on periodic contracts from the year 2009. In January 2014 he was issued with a one year contract. He earned a monthly salary of Kshs. 27,031.
4. On 4th March 2014, the Claimant was issued with a show cause letter on allegations of theft of company property to which he responded on 15th March 2014, denying the allegations levelled against him. On 19th March 2014 his employment was terminated.
5. The Claimant avers that no investigations were ever conducted to establish the veracity of the accusations made against him and that he was not given an opportunity to be heard.
6. The Claimant claims the following:
 - a) A declaration that the termination of his employment was unlawful and a violation of Articles 35(1)(b), 41(1) and (2)(a) and (b) and 47(1) of the Constitution;
 - b) A declaration that the Claimant is entitled to his monthly salary until the lawful expiry of his employment;

- c) Kshs. 216,251 being Salary for the unexpired period of the contract;
- d) General damages for unfair termination;
- e) 8 months' salary in compensation;
- f) Costs plus interest

The Respondent's Case

7. In its Memorandum of Response dated 31st July 2014 and filed in Court on 7th August 2014, the Respondent admits having employed the Claimant as stated in the Memorandum of Claim but denies that the Claimant served with diligence as alleged.

8. The Respondent denies that the termination of the Claimant's employment was unlawful. The Respondent states that the Claimant's services were terminated when it was discovered that he had colluded with third parties to steal and sell the Respondent's customer's supplies of sunlight soap through falsification of stock records.

9. The Respondent avers that investigations carried out had implicated the Claimant who failed to give a satisfactory explanation on his involvement. According to the Respondent, the Claimant was accorded a fair hearing before the decision to terminate his employment was taken. The Claimant was paid all his dues upon which he executed a discharge voucher.

Findings and Determination

10. There are two issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

11. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. This requirement holds in spite of the provision for termination by notice as a term in the contract of employment.

12. The Claimant's employment was terminated by letter dated 19th March 2014 stating as follows:

"Dear Benard,

RE: TERMINATION OF EMPLOYMENT

Reference is made to your employment with us.

The Company regrets to inform you that your services will no longer be required with effect from 20th March 2014. You will be paid your final dues which will include one month's salary in lieu of notice less Company owings (sic) and statutory deductions where applicable upon satisfactory clearance.

By copy of this letter you are asked to report to your immediate supervisor for hand over and subsequent clearance.

We take this opportunity to thank you for your service and wish you well in your future endeavors.

Yours Sincerely

FOR: DHL SUPPLY CHAIN (K) LTD.

(signed)

Robert Gichohi

CONTRACT MANAGER-UNILEVER”

13. On the face of this letter, there is no reason advanced for the termination of the Claimant's employment. Nevertheless, from a show cause letter dated 4th March 2014 which was issued to the Claimant on 14th March 2014, it would appear that the Respondent had taken issue with the Claimant's honesty. Specifically, the Claimant is said to have been implicated by one Geoffrey Mosigisi Cardinal in past incidents of theft of customer's consignments.

14. There was however no evidence that the Claimant was given any opportunity to face his accuser, Geoffrey Mosigisi Cardinal in an internal disciplinary setting. Moreover the said Cardinal was not called as a witness and the Court was unable to verify the allegations said to have originated from him.

15. In light of the foregoing, the Court finds that the Respondent failed to establish a valid reason for terminating the Claimant's employment.

16. Further, apart from the show cause letter issued to the Claimant which itself did not set out any particular charges against the Claimant, there was no evidence that the Claimant was ever subjected to the mandatory disciplinary procedure set out under Section 41 of the Employment Act. Indeed the Respondent's Security Officer, John Nyang'au Mekenye was unable to prove any such process.

17. As held by **Rika J** in ***Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR*** Sections 41, 43 and 45 of the Employment Act place a burden on the employer to not only justify the decision to terminate employment but also to show that the decision was reached pursuant to fair procedure.

18. In the case now before me none of these tests was satisfied and the Court has therefore arrived at the conclusion that the termination of the Claimant's employment was both substantively and procedurally unfair.

Remedies

19. Before making a final award in this matter, I need to dispense with the issue of the disclaimer signed by the Claimant on 29th May 2014. The law is now well settled that an employer cannot escape lawful obligation to an employee by hiding behind a discharge or disclaimer signed by the employee (see ***Simon Muguku Gichigi v Taifa SACCO Limited [2012] eKLR*** and ***Charles Nyangi Nyamohanga v Action Aid International [2015] eKLR***)

20. In view of the above findings I award the Claimant ten (10) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process.

21. The Court found no basis for the claims for salary for the unexpired period of the contract and general damages which are therefore dismissed.

22. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 270,310 being ten (10)

months' salary in compensation for unfair termination of employment. This amount will attract interest at court rates from the date of Judgment until payment in full.

23. The Claimant will have the costs of this case.

24. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF MARCH 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Ratemo for the Claimant

Miss Guserwa for the Respondent