



REPPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.644 OF 2014

BENSON MUHIA KAMAU1ST CLAIMANT

PAUL SEWE KANGA2ND CLAIMANT

CHARLES MAYAKA ANGOI3RD CLAIMANT

VERSUS

SAFEPARK LTDRESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent as a driver of motor vehicle registration No.KBP 498B, Isuzu Canter on 1st March, 2006; the 2nd Claimant was employed as a turn boy of motor vehicle on 1st October, 2008; and 3rd Claimant was employed as a turn boy on 1st October, 2013.

2. On 22nd March, 2014 the Claimants reported at work. The 1st Claimant parked his vehicle and left the same while the 2nd and 3rd Claimants washed and loaded it from 3pm to 4.30pm. The loading was authorised, supervised and witnessed by the respondent's clerks, officer, agents and employees including Norah, Jacob, Faith, Julia, Rachael and Esther. When the loading completed the Claimants did shut the vehicle but it was not sealed by the authorised officer, Catherine Wangare, Manager Sales Administration. The Claimants then left for the day.

3. The sealing of vehicles is done by the authorised officer upon verification. The Claimant did not have access to the Respondent premises when they left work as the manager kept the keys. On 24th March, 2014 when the Claimants reported to work they found their vehicle sealed. The manager ordered the same be offloaded where the Claimants were shocked to find 18 bundles of bottle tops. The manager called the Claimants thieves and summarily dismissed the claimants.

4. The dismissal was unfair and malicious for the reasons that the loading of the vehicle was duly authorised, supervised and verified by the respondent; the Claimant left work station immediately upon loading the vehicle; the Claimants worked on day shift and had no access of the Respondent premises; and the key was kept by the Respondent manager. The vehicle had been sealed and when the seals were broken for offloading, the Claimants were branded as thieves.

5. The termination was not procedural and was without reason and notice; the Claimants are seeking compensation for wrongful termination of employment; notice pay; damages for embarrassment and humiliation; and costs of the suit.

6. The 2nd Claimant testified that upon employment he worked diligently until 24th March, 2014 when he was dismissed on allegations that he had loaded bottle tops in his vehicle with intention to steal. The vehicle had been loaded and sealed and when he left for home, the keys, seal and premises of the Respondent had no access to him as such were secured by the authorised manager. The vehicle had been left inside the Respondent premises and when he reported back to work he was ordered by Catherine Wangare to offload the same with his colleague and 3rd claimant. When the vehicle was open, there was a bundle of 18 bottle top lids of which he had no knowledge of as by the time he left for home, the vehicle had been loaded and sealed. He was not given a chance to defend himself but was summarily dismissed.

7. The 1st Claimant also testified that he worked for the Respondent diligently until 24th March, 2014 when he reported to work and before he could start his vehicle the turn boys told him that they had been directed to offload the cargo for inspection by the respondent. The manager, Catherine Wangare started screaming and calling the Claimants thieves; security was called; the police were called; and the witness was directed to hand over his phone and do a statement. He was then terminated from his employment.

8. Mr Muhia also testified that on 22nd March, 2014 when he closed the work day he left the turn boys cleaning the vehicle which was empty. They were also to do the loading ready for Monday delivery. The load was for water bottles and bottle tops. On 24th March, 2014 when the Claimant reported back, he remained at the driver's cabin waiting to proceed on duty for deliveries but was stopped by the offloading and inspection.

9. The turn boys are given information on delivery points and a book to take the records. The witness has to drive to designated points for cargo delivery.

10. The witness also testified that he cannot recall being issued with an employment contract and when it was, he did not understand its contents as it was done in English and as a class 6 leaver, he does not understand such language. All documents submitted by the Respondent as having been signed by him he has no knowledge of them and were never explained to him. He was never given copies of any documents of employment and he would be made to sign for documents just before he went off on his daily work hence he had not time to read and understand the same or consult with anybody else to read the documents for him in a language he would understand. That all the employees spoke in Gikuyu all the time and he did not understand English at all.

11. The termination of employment was unfair and he claims for damages.

Defence

12. In defence, the Respondent admit they had employed the Claimants save that they had different contracts of employment. The Claimants had their motor vehicle allocated for work and one Anastasia Achieng Kerubo participated in the process of packing and loading it. The 2nd and 3rd Claimants had a duty to inform the dispatch clerk that they had finished loading the vehicle so that the seal is fixed but they breached this duty by leaving before the requisite seals were affixed and created a conducive work environment for other items to be loaded into the vehicle.

13. The Respondent required the 2nd and 3rd Claimant to be present at the time of sealing the motor vehicle as part of the verification process as operations are for 24 hours and work done on shifts. All employees who finish their shifts are required to vacate the premises.

14. On the night of 23rd February, 2014 the Respondent discovered that several bundles of bottle top lids were missing. On the morning of 24th February, 2014 the Respondent decided to break all seals in 7 lorries that were in the store area for purposes of offloading, verification of all the items and loaded vehicles. The Claimants were present during the exercise and got reluctant to offload their vehicle KBP 498B, the last vehicle to be inspected and where there was discovery of the missing bottle tops.

15. The Respondent required the Claimants to explain on the discovery of the bottle tops in their vehicle

but they declined to oblige. Following internal investigations that the Respondent conducted it was established that the Claimants in collaboration with and or in collusion with other night shift employees had devised ways of tampering with seals that are affixed to designated vehicles with a view to loading items that were not scheduled to delivery. Upon noting that the Claimants were reluctant to have a search conducted in their vehicle and the fact that the 2nd and 3rd Claimants failed to inform the dispatch clerk that they had finished loading their vehicle so that verification and sealing could be done, gave rise and played a critical role in the manner in which the bottle top lids were loaded into their vehicle. Such actions were detrimental to the interests of the Respondent and its business and also amounted to criminal conduct of theft by servant. It amounted to breach of obligations arising from their employment and subject to summary dismissal.

16. The Claimants were paid their terminal dues through the bank accounts. The dismissal was justified in law due to breach of the law, work requirements and the Claimants have no justifiable claim against the respondent.

17. In evidence the Respondent witness was Catherine Wangari who testified that on 23rd February, 2014 it was discovered that several bottle top lids were missing which prompted an investigation. On 24th February, 2014 a decision was made to break all the seals of the 7 Lorries that were in the store area for off-loading and a verification. The Claimants were reluctant to attend to their lorry and it was thus the last to be offloaded and when this was done it was discovered to have the missing bottle tops lids. The matter was reported to the police and the Claimants were interrogated. As this was in breach of the employment contract and human resource policy the Respondent also dealt with the misconduct and the Claimants were dismissed in terms of the applicable law.

Submissions

18. The Claimants submit that their dismissal was not fair as it was contrary to the law. Section 9 of the Employment Act required the Respondent as the employer to ensure that the Claimant signed their contracts of employment which was not the case. The contents of their contracts were never explained. Section 9(4) of the Act required an illiterate employee be explained to the contents of the employment contract and the 1st Claimant testified that this was not done in his case. As a standard 6 drop out, he did not know how to read or speak in English and therefore did not know the content of the contracts alleged signed by him or he was made to sign by the respondent.

19. Section 41 of the Employment Act was not adhered to in the dismissal of the Claimants as the procedures required were not followed and such denied the Claimants procedural justice. There was also no substantive reason given to warrant the dismissal and such is contrary to section 43 of the Employment Act. The remedies sought are therefore due.

20. The Claimants have relied on the following cases – **Mary Chemweno Kiptui versus KPC Ltd [2014] eKLR; Kenya Union of Commercial and Allied Workers versus Meru North Farmers Sacco Ltd, Cause No.74 of 2013; Absalom Ajusa Magomere versus Kenya Nut company Ltd [2014] eKLR.**

21. The Respondent submits that the Claimant was involved in committing acts against the interests of their employer and the dismissal was justified. There was evidence that the claimants' motor vehicle was discovered as having the 18 bundles of bottle top lids and had this not been noted in good time it would have made the Respondent incur huge losses. The discovery of the missing bottle top lids followed a series of similar missing items and putting the Respondent to business losses.

22. The Respondent also submits that the Claimants were employed on annual renewable contracts and the dismissal was in accordance with section 44(4) of the Employment Act and thus justified. In terms of section 45(3) of the Employment Act, an employee employed for a period of less than 13 months has no right to complain of unfair termination. The Claimants having been under yearly contracts can therefore not have a valid claim that they were unfairly terminated from their employment. No remedies are due.

23. The Respondent has relied on the following cases – **Godfrey M Mae versus Equity Bank Ltd**

[2014] eKLR and Metah Mzee versus SDV Transami t/a Bollore Africa Logistics Kenya Ltd [2013] eKLR.

Determination

Whether there was unfair termination of employment;

Whether the Claimants are entitled to damages for embossment; and

Whether the remedies sought are due.

24. Before delving into the analysis of the matters in dispute, the Respondent has relied on the provisions of section 45(3) of the Employment Act in terms of challenging the entire claim for unfair termination of employment. The basis is that the Claimants were on yearly contracts which were renewed upon lapse and as such they were serving under 13 months and in terms of the law, a claim for unfair termination does not arise.

25. In this regard, the constitutionality of section 45(3) of the Employment Act has been before the court in several cases and in my view, to have any employee locked out of claiming for unfair termination of employment due to time; whether at 13 months, more or less is retrogressive. A claim for unfair termination of employment should be based on the quality of service; the elements of unfair labour practice as the foundation of the law and the rights under the Employment Act stem from Article 41 of the constitution which outlaws unfair labour practices. As such, no employee should be locked out from the benefit of the law on the basis of time.

26. This is a matter that has been addressed by the Court of Appeal in several cases and cite a few – in **Nation Media Group Limited versus Onesmus Kilonzo [2015] eKLR; Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR** and the findings that constitutionality of section 45(3) of the Employment Act requires to be addressed by an appellate court by an interrogation and determination;

... The constitutionality of the aforesaid section should be interrogated and determined; a constitutional issue that has the potential to abridge the right or entitlement of an individual must generally be given precedence in hearing and determination.

27. As such, in view of article 41 which protects the right to fair labour practice and the contestations now holding with regard to the application of section 45(3) of the Employment Act, the holding in **Samuel G. Momanyi versus Attorney General & Another (2012) eKLR and Mercy Njoki Karingithi versus Emerald Hotels Resorts & Lodges Limited 2014 eKLR** declaring that Section 45 (3) of the Employment Act was inconsistent with Articles 28, 41 (1), 47, 48 and 50 (1) of the Constitution and therefore invalid, I find to be persuasive and I have no reason to take a different view noting my association with the provisions of article 41 of the constitution.

28. On the issues set out above, the Respondent admits the Claimants were in their employment. The Claimants had a vehicle which had to be loaded with goods for delivery and sealed to ensure security of goods. That there were operational rules with regard to fixing the requisite seals and supervised by the dispatch clerk.

29. The defence seeks to place blame with the 2nd and 3rd claimants. Nothing is said of the role the 1st Claimant played in the alleged breach or gross misconduct in the discovery of bottle top lids placed in the vehicle he drove and that were placed there with a view of criminal activity or conduct.

30. The defence is also that the respondent, upon discovery of the missing bottle top lid conducted investigations where it emerged that the Claimants were acting in collaboration with others;

11. The Respondent avers that internal investigations that it conducted established that the claimant's n collaboration and/or collusion with other night shift employees had devised ways of

tempering with seals that are affixed to designated vehicles with a view of loading items that were not scheduled for delivery.

31. Such investigations as to who conducted them and the source of such information is not disclosed or shared; the motive and purpose of the same is not disclosed; the other persons alleged to have been acting in collusion with the Claimant sin tampering with seals are not stated or revealed so as to signed out the Claimants as the ones culpable; and no evidence was called by the Respondent to support such investigations leading to the dismissal of the claimants.

32. The Respondent witness testified that there are CCTV cameras at the loading area. Such would have been very helpful in establishing what exactly happened on the night of 23rd/24th February, 2014. Where indeed the Claimants left after their shifts, the incoming employees who may have tampered with the seals would have been identified through such a device as CCTV camera. To leave it to the Claimants to establish their innocence and follow such with dismissal from employment is a harsh process that was flawed and ultimately without due cause that can find justification.

33. Summary dismissal of an employee is allowed under the provisions of section 44 of the Employment Act. It can from the basis of lawful termination of employment where the employee grossly misconducts self and the employer has given the requisite notice however short in terms of section 41(2) of the Employment Act which requires that;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

34. The employee must be given a hearing for the employer to hear what representations the employee may have with regard to any alleged misconduct unless such hearing is practically or reasonably not possible based on the circumstances of each case. Such exceptional circumstances where they exist must be demonstrated by the employer.

35. In this case, the evidence is that the Claimants reported to work on 24th February, 2014 and the 2nd and 3rd Claimants made to offload their lorry where extra bottle top lids were discovered. The Claimants were all made to surrender their phones and the police were called. This was followed by summary dismissal. The Respondent also stated in defence that their officer Ms Kerubo had been present when the search and investigations were being done, Ms Wangare was supposed to have fixed the seals but the 2nd and 3rd Claimants left their lorry before seals could be affixed to the vehicle. As such the Claimants were found to have colluded with other employees on the other shifts so as to place the bottle top lids in their vehicle for criminal motive. Only Ms Wangare was called as a witness and even in her case, she does not demonstrate the adherence to the provisions of section 41(2) of the Employment Act.

36. An employer must give an employee clear, succinct and unambiguous instructions while at work at all material times. Such is to enable the employee undertake his duties with clarity and where there is misconduct such instructions can be revisited. Such instructions, communication or directions must be communicated in writing at every opportunity starting with the employment contract, the rules and or regulations at work for the employee to have a point of reference when need be and to have the employer refer to the same where there is misconduct. Without such written instructions, the employee is left at large to interpret any given instructions. The law is clear on how such instructions should be given. Section 9(4) of the Employment Act gives the nature of language of instructions;

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

37. The contract of employment must be communicated in a language where the employee understands.

Where the contract is in a different language the employer must demonstrate that such a document was read to the employee and that the same was understood.

38. Communication and mode of instructions at the shop floor is so important and crucial that the law specifically makes it mandatory for an employer to issue the requisite notices in a language that the employee can understand; section 35(3) of the Employment Act requires that;

(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands. [Emphasis added].

39. Such is to ensure there is effective communication to the employee and the import of the notice issued is understood as with it there are rights and obligations that flow from the notice. Once the notice is issued and read to the employee and upon understanding it, the employee has a right to be given a hearing and such hearing must also be conducted in a language he can understand. Section 41(1) of the Act requires that;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

40. Therefore the language of communication and instructions at the shop floor becomes relevant in this case. The 1st Claimant testified that as a standard 6 leaver, he was issued with several documents by his supervisor to sign, such would be brought to him while aboard his lorry and just before he could take off for duty and to make deliveries and he had no chance to read the same or have copies so that he could consult on its contents. The Claimant therefore ended up having several important work records that he had no knowledge of save for the pay he received at the month end. The contracts allegedly issued were never explained to him where there were policy issues attendant to his work, such were never explained to him and even where such an explanation was done, and it was not in a language he could understand so as to engage with the same effectively. The 1st Claimant testified that while at work the main language of communication was in Gikuyu. I am not certain that such Gikuyu language was understood by all the Claimants but for the 1st claimant, his testimony to this effect was not challenged.

41. I therefore find the Respondent failed to adhere to the mandatory provisions of the law in ensuring that its employees were given instructions and that communication to each individual employee was in a language that was understood. Such a lapse can therefore explain the failures committed by the Claimants in not waiting for the loading and dealing of their vehicle where such regulations existed. The Claimants cannot be faulted for a mistake that should have legally been well addressed by the employer. To require the Claimants to undertake their work effectively while the instructions given were not understood is to engage in rush business and thus unfair.

Remedies

42. On the finding that the Claimants were unfairly terminated, compensation and not damages are due in accordance with section 49 of the Employment Act. Paul Kanga the 2nd Claimant was earning a gross wage of Kshs.12, 889.00 which includes the house allowance; Charles Mayaka Angoi was earning a gross wage of Kshs.11, 248.00; and Benson Muhia Kamau the 1st Claimant was earning a gross wage of Kshs.20, 973.00.

43. The 1st Claimant is awarded compensation at 6 months gross wage all being Kshs.209,280.00; and the 2nd and 3rd Claimants awarded compensation at 3 months wage all being Kshs.38,667.00 and Kshs.33,744.00 respectively.

44. Notice pay is also awarded at Kshs.20, 928.00; Kshs.12, 889.00 and 11,248.00 for each Claimant respectively.

45. Each party shall bear own costs.

Accordingly judgment is hereby entered for the Claimants with a declaration that the termination of employment was unfair and compensation awarded at Kshs.209,280.00, Kshs.38,667.00, and Kshs.33,744.00 for the 1st, 2nd and 3rd Claimants respectively; notice pay at Kshs.20,928.00, Kshs.12,889.00 and Kshs.11,248.00 for each Claimant respectively; and each party to bear own costs.

Dated, signed and read in open court at Nairobi this 2nd day of May, 2017.

M. MBARU

JUDGE

In the presence of:

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