



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 243 OF 2015

BETWEEN

JOAQIM MBITHI MULINGE.....CLAIMANT

VERSUS

TRANSOCEANIC PROJECTS & DEVELOPMENT [K] LIMITED....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyithia, Mutugi, Umara & Muzna Advocates for the Claimant

Omondi Waweru & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 23rd April 2015. He states he was employed by the Respondent Company as a Transport Manager in the year 2009. He was confirmed after a period of probation, on 21st January 2010. He earned a gross monthly salary of Kshs. 170,000. His work included supervision of trucks and marketing.

2. His contract was terminated by the Respondent on 21st January 2015, on the grounds of professional misconduct and fraudulent acts against the Respondent. He states, termination was without valid cause and /or notice. He prays for the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 170,000.
- b. Annual leave pay at Kshs. 634,230.
- c. Service pay at Kshs. 490,384.
- d. Salary for 24 days worked in January 2015 at Kshs. 156,923.
- e. 12 months' salary in compensation for unfair termination at Kshs. 2,040,000

Total... Kshs. 3,491,537

f. Certificate of Service to issue.

g. Costs.

h. Interest at Court rate.

3. The Respondent filed its Statement of Response on 23rd June 2015. Its position is that the Claimant was employed as its Transport Manager effective from 1st October 2010, not the year 2009. Termination was carried out in accordance with the terms of service, and the law. Termination was on the grounds of absenteeism and fraudulent acts by the Claimant, against the Respondent. The Claimant absented himself without the leave of the Respondent, on 24th May 2014 at 11 a.m.; 26th February 2014; and 27th February 2014. The Respondent was entitled to summarily dismiss the Claimant under Section 44 [4] of the Employment Act. He had before termination, received several warnings. He was offered salary for 16 days worked in January 2015, and 6 days of pending leave, computed at Kshs. 82,916 after tax. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

4. The Claimant gave evidence and closed his case, in the absence of the Respondent, on 29th September 2015. Parties agreed in Court on 13th June 2016 to have the proceedings reopen; the Claimant recalled for cross-examination; and Respondent's Witness allowed to give evidence. The Claimant was recalled and gave further evidence on 6th October 2016. Respondent's Human Resources Manager, Widad Hussein Said, gave evidence and closed Respondent's case on the same date. The dispute was last mentioned on 7th February 2017 when Parties confirmed the filing of their Closing Submissions, and the dispute reserved for Judgment.

Claimant's Case

5. The Claimant restated the contents of his Statement of Claim, in his evidence before the Court. He had received a letter from Widad, warning him about absenteeism. The letter is dated 24th May 2014. It does not reveal when the Claimant was absent. He did not see the letter of warning dated 28th February 2014. He first saw this letter when it was attached to the letter of termination.

6. He received the letter of termination. It did not have details of the allegations made against the Claimant. He was directed to Respondent's Advocates, after he enquired about his dues. He was offered a cheque for terminal dues, computed at Kshs. 82,916. He declined the cheque, as it did not include all his terminal dues. He instructed his Advocates to issue demand. Demand issued, but there was no compliance. In the letter of termination, the Respondent warned the Claimant against taking legal action against the Respondent.

7. Cross-examined, the Claimant stated he worked from the year 2010. He was in charge of transport. He supervised Drivers and subcontracted Respondent's Vehicles. He always arrived at work punctually, at 8.00 a.m. The Respondent did not complain about his lateness or absence.

8. He recalled complaint by the Respondent, about bags of rice which were stolen. The Claimant did not have anything to do with the vehicle used in ferrying the stolen rice. He was questioned over the incident by a private investigator retained by the Respondent, a Mr. Masumbuko.

9. The Claimant told the Court he was given a fair hearing. He gave his side of the story. He only went on annual leave once, for 2 weeks in 2014. He declined terminal benefits offered by the Respondent. He was offered salary for days worked only.

10. Redirected, the Claimant told the Court he did not mean he was granted a fair disciplinary hearing. Fair hearing was only with regard to theft of rice. He only saw the Investigation Report on the incident, in Court. The Report nonetheless did not state that the Claimant was guilty of theft. Theft of rice was not part of the reasons his contract was terminated.

11. The warning on absence shows the Claimant was merely late for work by 1 hour. He had to move from place to place marketing, engaging Truck Drivers and looking for Clients. There was no misconduct on Claimant's part.

Respondent's Case

12. Widad Hussein Said told the Court Claimant's performance was good, but there were warnings issued against him for various disciplinary lapses. He was in charge of cargo, as soon as it left the warehouse.

13. There were complaints against the Claimant from Clients, about Clients' Commissions. He was absent without authorization. Even when in the field, he had a duty to communicate his whereabouts to the Respondent. He was issued verbal and written warnings.

14. The Respondent complained about Claimant's absence on 26th February 2014 and 27th February 2014. It was not absence of a few hours. If he had communicated, warning letters would not have issued. He took 14 days of annual leave in 2014. Before that, he had taken a few days. Widad did not have details of leave days utilized.

15. Respondent's Client's rice was stolen. The Claimant was in charge of transport at the time. Investigations followed. The Claimant was questioned, and issued termination letter thereafter. Termination was based on acts pointed out by the Respondent in its Pleadings and documents. The Claimant was offered terminal dues, which he declined.

16. Widad told the Court on cross-examination that she has a diploma in human resource management. She found the Claimant in employment, by the time Widad was employed. Some Clients of the Respondent complained about the Claimant in his dealing with commissions. Widad did not have names of the complainants. The Claimant took annual leave for 14 days in 2014. The law does not say annual leave is forfeited if not utilized. Forfeiture was company policy. Policy supersedes the law.

17. Rice was stolen. There was an investigation carried out and report prepared. The report does not state the Claimant was to be investigated. There were no charges at the Police Station. The letter of 24th May 2014 from the Respondent to the Claimant, mentions he left work at 11.00 a.m. It was served on the Claimant. The other letter states the Claimant was absent on 27th February 2014, at 3.00 p.m. The Respondent did not write asking where the Claimant was, when alleged to be absent. The Officer in charge of the warehouse from which the rice was stolen, was not charged. The letter of termination did not mention the rice incident. There was nothing about commissions. The lorry which ferried the rice belonged to the Respondent. The Claimant did not know who authorized ferrying of the rice. Redirected, Widad testified the Respondent would only have asked about the Claimant's whereabouts, after issuing verbal warning. The Respondent was not malicious and acted fairly.

The Court Finds:

18. The history of the Claimant's employment with the Respondent, his terms and conditions of service, and duty description, are largely, undisputed. The Claimant was employed sometime in the year 2009. The exact date is not stated. He states at paragraph 3 of the Statement of Claim he was employed in 2009. His evidence was that he was employed end of 2009. The letter of confirmation states the Claimant had successfully completed an unspecified period of probation. The date of employment preceded 21st January 2010 when the letter of confirmation issued.

19. It is not disputed his gross monthly salary was Kshs. 170,000; neither is it disputed that his contract was terminated by the Respondent, on 21st January 2015, 5 years after employment. The Respondent informed the Claimant termination was "*due to your consistent professional misconduct, after repeated multiple warnings, both verbal and in writing.*" The Claimant disputes the validity of this reason. He states the decision was not arrived at fairly.

20. Which leads to the formulation of these questions, in resolving this dispute:-

- a. Was there a valid reason or reasons, in termination of the Claimant's contract?
- b. Was the decision arrived at fairly?
- c. Is the Claimant entitled to the prayers sought?

21. It is proposed by the Court to first examine some of the prayers sought, before moving on to the other aspects of the dispute.

22. The Claimant prays for service pay of 15 days' salary for each year completed in service, at Kshs. 490, 384. His pay slips show he was subscribed to the National Social Security Fund [N.S.S.F]. The Court agrees with the submission made by the Respondent that the Claimant therefore, is not eligible for service pay, under Section 35 [6] of the Employment Act. The prayer for service pay is declined.

23. He prays for annual leave pay for the period 2011-2013; and for 19 days in 2014, at a total of Kshs. 634,230. Widad Hussein testified the Claimant took 14 days of annual leave, in the year 2014. Before that, she testified, the Claimant "took a few days." She stated in her cross-examination that Respondent's policy was that annual leave is forfeited if not taken, and that such policy superseded the law.

24. There is no employment policy which supersedes the law. The law under Section 28 of the Employment Act 2007 does not sanction the practice of forfeiture of unutilized leave. The law entitles Employees, after 12 consecutive months of service with the Employer, to a minimum of 21 days of fully paid annual leave. There is no provision for forfeiture. The policy of forfeiture of annual leave days, adopted by some Employers, has no foundation in law.

25. The Court is ready to accept the Respondent's evidence, that the Claimant took annual leave for 14 days in 2014. The Court is even ready to accept that the Claimant could have taken additional annual leave for 'a few days,' as suggested by Widad. There is no evidence that he took leave for the period 2011-2013. The assumption on the part of the Respondent was that such annual leave entitlement was forfeited. This position was not based on any law.

26. The prayer for annual leave pay, for the years 2011, 2012 and 2013 is allowed. This translates to $21 \times 3 = 63$ days of annual leave, worth Kshs. 170,000 divide by 26 days = daily rate of Kshs. 6,538 x 63 days = Kshs. 411,923. **The Claimant is granted annual leave pay at Kshs. 411,923.**

27. The letter of termination indicates termination was on 21st January 2015. The Claimant prays for salary for 24 days worked in January 2015. At paragraph 7 of the Statement of Claim, the Claimant confirms termination was on 21st January 2015. He worked for 21 days in January 2015, not 24 days claimed. The Respondent offered no evidence showing the Claimant was paid his salary for January 2015. **The Claimant is granted salary of 21 days for January 2015, at Kshs. 6,538 x 21 days = Kshs. 137,298.**

28. **The prayer for Certificate of Service is granted under Section 51 of the Employment Act.**

29. The remaining prayers on notice pay and compensation are to be answered upon resolution of question [a] and [b] at paragraph 21 of this Judgment.

30. The reasons for termination are given in the letter of termination. These are:-

- a. The Claimant was engaged in consistent professional misconduct.
- b. He was given multiple warnings.
- c. Warnings detailed unacceptable activities.

d. The Respondent had previously stated Claimant's wanton misdeeds.

e. The Claimant was engaged in fraudulent activities.

f. Evidence of such activities would be provided by the Respondent at future proceedings.

31. These reasons are generalized. There are no details in the letter, giving substance to the generalized complaints against the Claimant.

32. The evidence of the Respondent in Court however, did attempt substantiation. Widad testified Respondent's Client's rice was stolen from Respondent's premises. The Claimant was implicated because he was in charge of transport.

33. The Respondent was not able to show in what way, the Respondent was associated with the stolen rice. Widad conceded Respondent's Internal Investigation Report, did not implicate the Claimant. He was not reported to the Police for any offence. There was no internal or external process, showing Claimant was involved in any theft of rice.

34. The other grounds relate to warning letters written by the Respondent to the Claimant, complaining about his absence from work. He was reported to be absent on 26th February 2014. On 27th February 2014, he was reported to be absent at 3.00 p.m. On 24th May 2014, he was warned for being absent at 11.00 a.m. He was told his contract would be terminated, should this continue.

35. Termination was on 21st January 2015, 8 months after the last warning. It was not shown the Claimant repeated the offence of being absent without leave, in the period between 24th May 2014, and 21st January 2015.

36. The Claimant's role included marketing. He would go out in the field, and search for Clients, as well as engage Truck Drivers. He was not by his duty description confined to the office. He would be expected to be away from the office. Respondent's complaint that the Claimant was absent at 11.00 a.m. or 3.00 p.m. on the given dates. Considering his job description, such absence would not be deemed to be without leave or lawful cause, amounting to gross misconduct, under Section 44 [4] [a] of the Employment Act. There was implied leave, and in any case, lawful cause for the absence, considering the Claimant's job description.

37. The letter of termination alluded to evidence which the Respondent would supply in future proceedings, demonstrating the Claimant's involvement in fraudulent activities. The Respondent did not to supply such evidence to the Claimant at the workplace, and opted to hold onto the purported evidence, until some unknown future proceedings unfolded.

38. If the future proceedings in the mind of the Respondent are the current proceedings before this Court, no evidence of fraudulent activities against the Claimant, has been brought forward.

39. The Respondent also seems to have mishandled the process of termination, by threatening to hold the Claimant responsible for *'many misdeeds affecting our company, in event you seek retribution against our company.'* A fair-minded Employer, who undertakes a genuine disciplinary process at the workplace against an Employee, has no reason to threaten an Employee not to seek redress in Court.

40. There were no valid reasons justifying termination, under Section 43 and 45 of the Employment Act 2007.

41. The Claimant expressly conceded on cross-examination that he was granted a fair hearing. He was allowed to give his side of the story. The Court did not understand him when he attempted on redirection, to explain that by fair hearing, he was referring to the handling by the Respondent, of theft of rice incident. It is improbable that such handling was fair, while the disciplinary process, of which theft of rice

was a major plank, was unfair. How is the Court to draw a line between what the Claimant calls handling of stolen rice, and the disciplinary process? The Court has no reason to examine further if the process was fair, where an Employee has expressly testified he was treated fairly. Procedure, on the admission of the Claimant, was fair.

42. Termination was unfair for want of valid reasons. ***The Respondent shall pay to the Claimant the equivalent of 6 months' gross salary in compensation for unfair termination at Kshs. 1,020,000.***

43. ***The prayer for 1 month salary in notice pay is allowed under Section 36 of the Employment Act 2007, at Kshs. 170,000.***

44. ***The Respondent shall release to the Claimant his Certificate of Service forthwith, under Section 51 of the Employment Act 2007.***

45. No order on the costs.

46. ***Interest allowed at 14% per annum, from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: annual leave pay at Kshs. 411,923; 21 days' salary for January 2015 at Kshs. 137,298; equivalent of 6 months' gross salary in compensation for unfair termination at Kshs. 1,020,000; and 1 month salary in lieu of notice at Kshs. 170,000- total Kshs. 1,739,221.

c. Certificate of Service to issue.

d. No order on the costs.

e. Interest granted at 14% per annum, from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge