



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 598 OF 2014

BETWEEN

PATRICK IRUBHAI MWAKANGALU.....CLAIMANT

VERSUS

HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. & Company Advocates for the Claimant

Issac Onyango & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 17th December 2014. He states he was employed by the Respondent as a Tractor Driver sometime in 1993. He was alleged by the Respondent to have stolen a Chassis Air Valve on 8th August 2013. He was arrested and charged in the Magistrate's Court Mombasa with theft. He was summarily dismissed by the Respondent through a letter dated 22nd August 2013 on the ground that: 'you are facing criminal charges in Court bordering on theft of Company property.' The Respondent subsequently issued him with a letter of termination of services dated 17th September 2013. He was not given notice of termination. He contends the Respondent should not have acted before the criminal trial ended. He earned a monthly salary of Kshs. 23,000 as at the time of dismissal. He prays for the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 23,000.
- b) Salary for 8 days worked at Kshs. 7,077.
- c) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 256,000.
- d) Terminal benefits for 5 years at Kshs. 230,000.

Sub -Total... Kshs. 516,000

Less Loan...Kshs. 68,276

Less Advance... Kshs. 25,320

Total Kshs. 422,481

e) A declaration that termination was unfair and unlawful.

f) Costs and Interest.

2. The Respondent filed its Statement of Response on 26th February 2015. It is conceded the Claimant was an Employee of the Respondent. He was employed as a Driver. His date of employment however, was 1st June 2001, not the year 1993. He was alongside other Employees, found to have stolen Respondent's Chassis Air Valve, on or around 6th August 2013. He was charged in the Magistrate's Court Criminal Case Number 1870 of 2013 at Mombasa. He was summarily dismissed for involvement in an act of gross misconduct. He was paid what was due to him upon dismissal. The Respondent urges the Court to dismiss the Claim with costs.

3. Parties gave evidence, and closed their respective cases on 22nd February 2017. The Claimant testified as did 3 Witnesses for the Respondents. The Witnesses for the Respondent were: Security Guards Alex Mwindi Nyaga and Ibrahim Swaleh; and Head of Security Karana Ahmed Abdulrahim. The matter was last mentioned in Court on 31st March 2017, when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

4. The Claimant told the Court he was employed in 1993. The year 2010 is when he was given a written contract. He was issued termination letter and also a letter of summary dismissal, allegedly because he was facing a criminal case. He was acquitted by the Criminal Court. The Respondent should have waited until the criminal trial was concluded.

5. He was paid terminal dues as shown in the Salary Voucher on record. Severance pay was based on the employment year 2001, instead of 1993. He worked for 12 days in 2013. Abdulrahim did not give evidence in the criminal trial, while the other 2 of the Respondent's Witnesses gave evidence. The Claimant was acquitted.

6. Cross-examined, the Claimant stated he did not recognize his own document exhibit 1, which is an Internal Delivery Consignment Document. He was the Driver of the van KAZ 270 R. It was a service delivery van, which transported *fundis*. The signature on the document resembles Claimant's signature.

7. He was supposed to sign the document on delivery of spare parts, and obtain a gate pass. There was a spare part in his van, without these documents. He was questioned by the Respondent's Security and denied involvement. The Claimant was heard, and later taken to the Police Station. Police investigated. The Claimant was in Police Custody for about a month, and could not go back to work. He was eventually acquitted because Police failed to bring the exhibit to Court. He was on casual employment between 1993 and 2001. He was offered salary for days worked in August 2013 and service pay. He was enlisted under the National Social Security Fund, and still was paid service pay. Redirected, he told the Court that the Respondent was aware he was in custody for a month. He was not paid service for the period between 1993 and 2001.

8. Alex Mwindi Nyaga and Ibrahim Swaleh confirmed they arrested the Claimant and his Co-Employees at the gate. The suspects were carrying new spare parts, hidden behind one of the seats in the van. The Guards testified the Claimant and his Co-Employees were charged in Court. The Guards gave evidence in the criminal trial. They did not pursue the matter after giving their evidence. They did not know about the outcome of the criminal trial.

9. Abdulrahim confirmed he was called by the 2 Guards and found they had arrested the Claimant and his

Colleagues at the gate, with unauthorized spare parts. The Claimant was unable to explain the presence of the spare parts in his van. The Employees were handed over to the Police because they denied involvement. If the Claimant had conceded, he would have been dealt with internally.

The Court Finds:-

10. The Claimant was employed by the Respondent as a Driver, on a disputed date. He states he was initially employed as Casual Employee in 1993, while the Respondent states it employed him in 2001. The Claimant explains the latter date is when he was given a written contract. There is on record a letter of appointment showing the Claimant was confirmed as an Employee of the Respondent as from 1st June 2001. If this was the date of confirmation, it would only suggest he had started working earlier, which would give credence to his assertion that he worked on casual engagement from the year 1993. The Respondent did not give any earlier date before the date of confirmation, when the Claimant started working. The date of employment would precede the date of confirmation.

11. It is common ground that the Claimant was arrested alongside 2 other Employees, on suspicion of stealing Respondent's Chassis Air Valve. He was arraigned in Court, tried and acquitted. As the criminal trial was going on, the Respondent issued the Claimant with a letter of summary dismissal dated 22nd August 2013. This was followed up with another letter of termination dated 17th September 2013. The reason given in the letter of summary dismissal was that the Claimant was faced with criminal charges. He lastly earned a monthly salary of Kshs. 23,000.

12. It was not necessary for the Respondent to issue a letter of termination after the letter of summary dismissal. Summary dismissal is a form of the wider concept of termination of employment. It is defined under Section 44 of the Employment Act as termination of employment without notice, or with less notice than the Employee is entitled to under law or contract. The Respondent therefore terminated the Claimant's contract through summary dismissal, on 22nd August 2013, so that the letter of termination of 17th September 2013, would serve no purpose, other than bring confusion as to the date the employment relationship ended.

13. There was strong evidence which would justify summary dismissal. The Claimant and his Colleagues were arrested with new spare parts at the Respondent's gate. They did not have documents authorizing them to have the spare parts. They were not able to explain the presence of the spare parts to the Security Personnel, Respondent's Witnesses in the proceedings herein.

14. The Respondent was not under any obligation to stay its administrative process, pending the process and outcome of the criminal trial. The Claimant was not advised his fate with the Respondent, rested on the outcome of the criminal trial. His acquittal or conviction by the Criminal Court, would not bind the Respondent in determining whether he continued to serve or not. There was nothing in his letter of employment, the law, or in any letter of suspension, bidding the Respondent to await the outcome of the criminal trial. The Respondent was within its right to summarily dismiss the Claimant based on its own internal process.

15. There are 2 clear employment offences which were committed by the Claimant under Section 44[4] of the Employment Act 2007, which would justify summary dismissal. These are the offences created by Section 44[4] [f] and 44[4] [g] of the Act. The first one is that the Employee is arrested for a cognizable offence punishable by imprisonment, and is not, within 14 days of arrest, released on bail or bond, or otherwise set at liberty.

16. The Claimant by his own evidence was in Police Custody for a month. The law does not say that if the Employer knows the Employee is in custody, then the act of being under arrest for over 14 days ceases to be an act of gross misconduct. The knowledge of the Employer about the whereabouts of the Employee is immaterial. The Claimant was in Police Custody for a month, and the Respondent would have valid reason in deeming the Claimant to have been involved in an act of gross misconduct.

17. Second under Section 44[4] [g] is that the Employee is, on reasonable and sufficient ground, suspected of having committed an offence against or to the substantial detriment of his Employer or Employer's property. Respondent's Witnesses were able to show the Claimant was involved in an act of gross misconduct under this provision.

18. The Respondent did not specify either of the acts of gross misconduct discussed above. The letter of summary dismissal, states dismissal was on the ground that the Claimant was facing criminal charges, which in general, would encompass both acts of gross misconduct discussed above.

19. Termination was based on valid ground.

20. It is clear however that the Claimant was not heard on any act of gross misconduct before termination. There were no charges brought against him at the workplace, for being in custody for over a month, or being suspected of committing a criminal offence against the Respondent. The Respondent merely told him his contract had been ended because he was facing criminal charges. The Respondent disregarded the law on fair procedure under Section 41 and 45 of the Employment Act. To this extent, termination was unfair.

21. ***The Claimant is granted the equivalent of 4 months' salary in compensation for unfair termination at Kshs. 92,000.*** The prayer for notice pay is rejected, the Claimant having been dismissed for acts of gross misconduct.

22. The Respondent paid the Claimant service pay for the year 2001 to 2013, as conceded by the Claimant, and shown in the Voucher dated 30th August 2013. There should be no question whether this benefit is payable. Part of it has been paid. The Claimant pleads service pay as terminal benefits. Service pay can be a component in terminal benefits, but is certainly not terminal benefits. The term 'Terminal benefits' is a wider term, comprising all benefits paid on termination. Compensation for unfair termination however, is not to be included in the list of terminal benefits as some Parties frequently do. Service pay is not severance pay as the Claimant suggested in his evidence. Severance pay is under Section 40 of the Employment Act on redundancy. Service pay is under Section 35 [5] of the Act. The Respondent paid for years of service, notwithstanding that the Claimant was actively subscribed to the N.S.S.F. Parties are free to agree on standards of employment above what is given by the Act, as stated in Section 26 of the Employment Act. Section 35, like other provisions on benefits expresses minimum employment standards. The Respondent offered the Claimant service pay, but under-calculated Claimant's creditable years of service. ***The Claimant is allowed service pay for the period 1993 -2001, a period of 8 years, at 15 days' salary for each year at Kshs. 106,153.***

23. The claim for salary for days worked in August 2013 was included in the benefits already paid under the Salary Voucher on record. It cannot be paid twice and is declined.

24. No order on the costs.

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

IN SUM, IT ORDERED:-

a) Termination was based on valid reasons, but not on fair procedure, and to that extent, unfair.

b) The Respondent shall pay to the Claimant the equivalent of 4 months' salary in compensation for unfair termination at Kshs. 92,000 and service pay at Kshs. 106,153- total Kshs. 198,153.

c) No order on the costs

d) Interest allowed at 14% per annum from the date of Judgment till payment in full.

Dated and delivered at Mombasa this 28th day of June 2017.

James Rika

Judge