



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 128 OF 2015
BETWEEN
ELPHAS ODHIAMBO OKENNO.....CLAIMANT
VERSUS
AFRICAN GAS & OIL COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Stephen Oddiaga & Company Advocates for the Claimant

Menezes, Oloo & Chatur, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th March 2015. He states he was employed by the Respondent as a Driver in August 2011. He later became a Terminal Operator. His contract was terminated by the Respondent without notice, on 17th December 2014. He states termination was unfair and prays for the following orders against the Respondent:-

- a. Compensation the equivalent of 12 months' salary at Kshs. 480,000.
- b. The Respondent is compelled to calculate, and pay the Claimant his pension dues.
- c. The Respondent to pay the Claimant all his pending statutory dues.
- d. Certificate of Service to issue.
- e. An order compelling the Respondent to pay the Claimant damages for wrongful and unfair termination.
- f. An order compelling the Respondent to pay the Claimant his pension.
- g. Costs of the Claim.

2. The Respondent filed its Statement of Response on 16th April 2015. Its position is that it employed the Claimant as a Driver- cum- Messenger on 9th November 2011. He was given a letter of employment with standard terms of employment, spelling out the rules and regulations of employment. His last salary was Kshs. 40,000 per month. He was summarily dismissed on 17th December 2014 for gross misconduct. He was given a proper disciplinary hearing on 15th December 2014. His Certificate of Service was readied by the Respondent for his collection; he did not collect the document. He left a Truck at the loading bay unattended, exposing the Respondent to the risk of fire and other disasters. He is not entitled to compensation. The Respondent prays the Claim is hereby dismissed with costs to the Respondent.

3. The Claimant gave evidence, and closed his case, on 14th October 2016. The Parties recorded a consent order to the effect that the Claimant has received Kshs. 39,316 from the Respondent. The Respondent stated the amount represented the prayer for payment of pension, while the Claimant stated he did not know what the amount represented. The Court noted on the record the sum of Kshs. 39,316 has been paid by the Respondent to the Claimant, and directed that Parties would give details of the payment in their evidence. The Respondent testified on 20th February 2017 through its Operations Manager Bwanamkuu Mahmoud Mohamed, bringing the curtain down on the hearing. Further consent, confirming that the Claimant has received the Certificate of Service, was registered on the date hearing closed. The dispute was last mentioned on 24th March 2017 when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

4. The Claimant restated in his evidence, his employment history with the Respondent, and his terms and conditions of employment, as outlined in the Statement of Claim. He oversaw loading of Trucks; receipt of cargo from the ocean vessels; and oversaw also the safety and health of those at the workplace. The Respondent is a terminal for liquefied petroleum gas. Trucks are loaded with gas at the Respondent Company.

5. Trucks have a rotor gauge. It captures quantities in percentages. The Claimant used rotor gauge and chart, in loading gas. Loaders had been instructed by the Respondent not to load beyond 85% Truck capacity. The Claimant had loaded 85% gas on the particular Truck severally. The order was for 10,000 litres. 85% load was 8,500 litres. The order for 10,000 would be 100% loading.

6. The Claimant consulted his Supervisor and the Health and Safety Coordinator on the additional litres. As he was doing so, he heard loud noises form the Truck which he was loading. He went back to the Truck and found it had loaded up to 99%. He had left 2 other Operators loading.

7. His Supervisor came and asked who was loading. The Claimant answered it was him. He was told by the Supervisor he would be sacked. The Truck left with around 9,000 litres. He was asked by the Supervisor to record a Statement. He was taken through a disciplinary hearing. He went there unaccompanied. The minutes of the meeting show it was not the first time an incident of the like had occurred. The Claimant testified the machines had not been calibrated, causing the problem.

8. Cross-examined he told the Court he understood pension rules. The Pension Scheme, and the Employer, are different juridical persons. The Respondent was a reasonable Employer before the incident. According to the Respondent, the Claimant blundered in loading gas. He had instructions not to exceed 85%. The Customer had requested for over 85%. The limit was for safety purposes. The Claimant had a functioning radio through which he could have sought instructions from the Supervisor. Reading after the Claimant returned to the Truck was at 99%. The Claimant was a Member of the Health and Safety Committee. He was asked to show cause why he should not be disciplined. He was not forced to admit anything at the disciplinary hearing. His contract stipulated it could be terminated if the Claimant did not act according to instructions. Redirected, the Claimant stated the Client requested for excess of 85% loading; the Claimant sought instructions of his Supervisor.

9. Bwanamkuu Mahmoud Mohamed told the Court he is Operations Superintendent of the Respondent. He holds a Diploma in Electrical Engineering from Mombasa Technical Institute. His role involves all operational aspects relating to receipt, storage and loading of LPG.

10. The Claimant was Terminal Operator. He undertook duties as assigned by the Superintendent. On 4th December 2014, Mohamed was at his Office. It overlooks the loading area. He heard a popping sound. He saw gusts of LPG vapour. Health and Safety Manager, Intisam, also heard the sound. The 2 Officers rushed to the Plant Area, where they found the Claimant.

11. They were informed by the Pump Attendant there was a gas carryover from the filling of Truck registration KVF 229 W. Release valve was affected. Filling is done up to 85%, to give room for filling done by pressure and temperature.

12. Mohamed consulted the Claimant who confirmed the Truck had been loaded up to 99%. The Claimant was aware of the limitation, and was a Member of the Health and Safety Committee. There was no valid reason for his errors. He was not supposed to leave the Truck unattended. He was supposed to communicate through radio for any queries. Exceeding 85% would cause explosion. There is no provision for excess. There is no other mode of communication while loading, other than radio communication. Mohamed sat in the disciplinary panel. The Claimant was not able to justify his actions and omissions. The Respondent employed 2 systems of loading. One was semi-automated, the other manually operated. The Claimant had both at his disposal.

13. Mohamed told the Court on cross-examination that there must be an order before a Truck is loaded. There is a weighbridge operator. Mohamed did not know if the Client ordered 10,000 litres. It is not true that the Claimant had to follow through with the order. Maximum loaded must adhere to the 85 % limit. An order could be made even for 20,000 litres. The Claimant was hardworking and had been promoted by the Respondent. It is not true that Mohamed told him he would be sacked immediately after the incident. The system has safeguards. Valve releases vapour. The system is calibrated, but not fully automated. The Operator has a duty to monitor. Mohamed did not chair the disciplinary panel. He was impartial. The main problem with the Claimant was, that he left the Truck unattended, Mohamed testified on cross-examination.

The Court Finds:-

14. The Claimant was employed by the Respondent Gas Company, on 9th November 2011 as a Driver-cum Messenger. His letter of employment is on record. He was confirmed with effect from 1st June 2012, as per Respondent's letter to him, dated 13th June 2012. He became entitled to Staff Pension Scheme, Medical and Personal Accident Insurance Covers, upon confirmation.

15. His designation and responsibilities changed through a letter from the Respondent dated 22nd March 2013. He became Terminal Operator. He was to work in the new position for 3 months, and was advised if his performance was unsatisfactory, he would revert to being a Driver and Messenger. It is not clear to the Court if the Respondent took the Claimant through training before he converted from driving and delivering messages, to operating LPG loading system. The Claimant however seems to have been a quick learner. He was confirmed in the new designation of Terminal Operator, on 19th July 2013.

16. The problem between him and the Respondent arose on 4th December 2014. The standing instruction was that Trucks could not be loaded with LPG in excess of 85%. The limit was to allow space for expected filling through temperature and pressure.

17. A Client had made an order of 10,000 litres. The Claimant testified he would load 85% which translated to about 8,500 litres. The Client wished to have 10,000 litres loaded as per her order. The Claimant abandoned the Truck, and allegedly went to consult his Supervisor.

18. It was while he was away that the Truck loaded up to 99%. There was a popping sound and vapour was noticed to emit from the Plant. The Claimant, Mohammed, and Head of Safety and Health Intisam, converged at the scene of the loading Truck. The Claimant confirmed he was the one responsible for the loading.

19. Section 44 [4] [c] of the Employment Act 2007, makes in an act of gross misconduct, where an Employee, willfully neglects to perform any work which is his duty to perform, or if he carelessly and improperly performs any work, which from its nature it is his duty, under his contract to perform carefully and properly. Refusal to follow instructions of the Employer, reasonably and properly issued, amounts to insubordination, which is also an act of gross misconduct under Section 44 [4] [e] of the Employment Act 2007.

20. There were clear instructions to the Claimant that LPG loading should not exceed 85%. He was requested by a Client to exceed the limit. If the Court appreciated the evidence of the Respondent sufficiently, there was no problem with Clients making orders in excess of 10,000 litres. The instruction was that there would be no loading exceeding 85% capacity. An order exceeding 10,000 litres would require more than one loading. The Claimant was to communicate with his Supervisor in case of any enquiries, on the radio provided to him. He ignored the instruction on the 85% limit, and loaded, or caused to be loaded 99%. He ignored the instruction on radio communication, and went out searching for his Supervisor. He claims he left the Truck being attended to by 2 other Operators whom he did not name.

21. His actions and omissions clearly placed the Plant at the risk of gas explosion. The Claimant was a Member of the Safety and Health Committee, and knew any careless or improper performance of his role, given the nature of his work, was likely to endanger lives and properties. The Court is not able to agree with him when he shifts blame from himself, to the loading system which he states was not calibrated. It was his error of Judgment which led to the near tragic event at the LPG Plant. The Respondent had valid reason in terminating Claimant's contract.

22. He was asked to show cause why he should not face disciplinary sanction. He wrote a letter dated 10th December 2014 explaining his position. He was called to a disciplinary hearing on 15th December 2014. He was given specific charges on contravention of Terminal Health and Safety Regulations, and on insubordination. He was given an opportunity to defend his position, and defended his position. He did not object to the composition of the panel. It was concluded, and the Court agrees, there was overwhelming evidence against the Claimant.

23. The only dark cloud in the procedure was that the Respondent did not show it advised the Claimant on his right to be accompanied to the hearing by a Colleague or a Shop Floor Trade Union Representative of his choice. Sections 43 and 45 of the Employment Act were adhered to in full. Section 41 of this law was in large followed, but there was default on the right of the Claimant to be accompanied to the hearing. To that extent, termination was unfair.

24. *The Claimant is granted the equivalent of 2 months' salary at Kshs. 80,000 in compensation for unfair termination.*

25. The prayer surrounding calculation and payment of pension is not specific and supported by sufficient material. The Claimant conceded the Pension Scheme and the Respondent are different persons. He did not supply the Court with details of Scheme Trustees and the rules and regulations governing the Scheme. There are documents filed by the Respondent showing MJ Group Limited Staff Pension Scheme operated independently from African Gas and Oil Limited. It is not possible to issue an order against the latter, for obligations of the former. This notwithstanding, there is a letter dated 26th February 2015 from the Scheme Chairman to the Claimant explaining his pension payment. He should follow up the grievance on Pension against the Trustees, if what was advised to him was unsatisfactory. The Court is not in a position to grant the prayers for pension which are generalized and directed at the wrong Party.

26. Lastly the Court must decline the prayer for an order directing the Respondent to pay the Claimant statutory dues. The Claimant has not made an attempt at naming the statutory dues owed. How will the Court or Respondent know what the Claimant has in mind? Why has not the Claimant suggested to the Court what these statutory benefits are? A general order in the nature pleaded by the Claimant would only create another dispute, after Parties came before the Court with the expectation they would be fully heard on all issues, and a determination made. The Claimant should at the very least, have given a hint of what statutory dues remain to be paid.

27. There shall be no order on the costs.

IN SUM, IT IS ORDERED:-

- a. Termination was based on valid ground but flawed on procedure.*
- b. Respondent shall pay to the Claimant the equivalent of 2 months' gross salary at Kshs. 80,000 in compensation for unfair termination, and in full settlement of the Claim.*
- c. It is noted on the record the Claimant has received a sum of Kshs. 39,316, and received his Certificate of Service in the course of the proceedings, in partial settlement.*
- d. No order on the costs.*

Dated and delivered at Mombasa this 19th day of June 2017

James Rika

Judge