



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 183 OF 2015

VINCENT NGETI MWAMBURICLAIMANT

VERSUS

TRANTRAILERS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimants' contract of employment by the respondent on 22/9/2014. The respondent has admitted that she terminated the claimant's employment but denied that she did so maliciously, unfairly and in a discriminatory manner.
2. The suit was heard on 24/11/2016 and 8/12/2016 when the claimant testified as CW1 while the defence called her HR manager Mr. James Tawa as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

3. CW1 stated that he was employed by the respondent as an electrician from 27/6/2012. His starting salary was Ksh.14500 per month and was paid through his bank. The salary was later increased to ksh.19094 per month. He worked until 1/8/2013 when he was dismissed but on 7/8/2013 he was reinstated. On 22/9/2014, he was again summarily dismissed on ground of non-performance of his assigned duties on several dates including 15/9/2014.
4. He contended that the dismissal was unfair within the provisions of the Employment Act because the respondent never explained to him the reason for the dismissal and she never gave him a chance to defend himself. He therefore prayed for one month salary in lieu of notice, compensation for unfair termination, unpaid salary, pending leave and costs of the suit.
5. On cross examination, CW1 admitted that the production manager had occasionally complained about his underperformance. He however contended that the alleged under performance was in respect of duties assigned in areas beyond his training and experience including electrical wiring on trucks and hydraulic pressing machines.

DEFENCE CASE

6. RW1 confirmed that the claimant was employed by the respondent as an electrician on 27/6/2012 for ksh.14500 per month. He explained that the claimant was perennially underperforming his assigned

duties and also absented himself from work for 4 consecutive days. That due to his underperformance, the respondent was forced to incur expenses of hiring another electrician to do the claimant's duties. That, in 2013, the claimant was dismissed on ground of underperformance but he was reinstated.

7. RW1 explained that on 11/4/2014, the production manager complained to the HR department about the conduct and under performance of the claimant. Specifically the claimant was accused of delayed completion of assigned tasks, refusing to take instructions from the production manager and frequently leaving his work station without permission.

8. RW1 contended that on 15/9/2014, the Production Manager reported poor performance by the claimant that led to loss of ksh.25000. As a result the claimant was dismissed on 22/9/2014 for non-performance of assigned duties.

9. On cross examination, RW1 stated that the claimant was an electrical technician but he could not confirm his grade. He also could not produce any evidence to prove that the Production Manager complained about the claimant's under performance on 11/4/2014.

ANALYSIS AND DETERMINATION

10. There is no dispute that the claimant was employed by the respondent from 27/6/2012 till 22/9/2014 when he was summarily dismissed. The issues for determination are:

- a. Whether the termination was unfair.
- b. Whether the reliefs sought ought to issue.

Unfair termination

11. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if the employer fails to prove that the termination was grounded on valid and fair reason and that it was done after following a fair procedure.

PROCEDURE FOLLOWED

12. In this case the claimant contended that he was merely served with a summary dismissal letter without first being explained the reason for the termination and without being accorded an opportunity to defend himself. RW1 did not adduce evidence to rebut the foregoing contention by the claimant because he was not present when the claimant was dismissed and he was not the one who handled the issue. His testimony is therefore short of discharging the burden of proving fair procedure as contemplated by Section 45 (2) (c) and 41 of the Act.

13. Section 41 of the Act provides that before terminating the employment of his employee, the employer shall first explain the employee in a language he understands, and in the presence of a fellow employee or shop floor union representative, the reason for the intended termination and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided. RW1 has not proved that the mandatory provision of Section 41 of the Act was complied with.

Reason for termination

14. The reason cited for the summary dismissal of the claimant on the termination letter dated 22/9/2014 was "non-performance of assigned duties/tasks". The evidence by RW1 is that he was given duties which he took too long to finish and another person had to be hired to do the job. The said accusation was allegedly made to the HR department by the production manager. The email used to convey the said accusation was not produced in evidence and neither the production manager nor the HR officer who received the email testified herein. The said allegation of non-performance is therefore hearsay and inadmissible.

15. According to the claimant the production manager was fond of assigning him tasks which were beyond his training and experience and as such CW1 denied that he failed to perform the duties. He gave the example of his dismissal in 2013 on the same ground but when he explained the predicament to the respondent's General Manager, he was reinstated to his employment.

16. After careful consideration of the evidence and the submission before the court, I find that the respondent has failed to prove that the claimant was guilty of non-performance of assigned duties/tasks. His evidence that the tasks allegedly not performed were those beyond his qualifications including doing wiring on trucks and hydraulic press machines. The respondent has not rebutted the said allegations by the claimant.

17. In view of the fact that the respondent has failed to prove and justify the reason for dismissing the claimant, and that she did so after following a fair procedure as required under Section 45(2) of the Act, I find and hold that the summary dismissal of the claimant was unfair.

Reliefs

18. Under Section 49 of the Act, I award the claimant Ksh.19094 being one month salary in lieu of notice, plus ksh.57282 being 3 months compensation for the unfair dismissal. In awarding the compensation, I have considered the fact that the claimant did not contribute to his dismissal through misconduct and that he had also not worked for a long time. However the claim for seven days worked is dismissed for lack of particulars and evidence. Likewise the claim for pending leave is dismissed for the same reasons.

DISPOSITION

19. For the reasons that the dismissal of the claimant was unfair, I enter judgment for him in the sum of Ks.76376 plus costs and interest.

Dated, signed and delivered this 9th June 2017

O. N. Makau

Judge