



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 623 OF 2015
BETWEEN
BENEDICT KARIUKI.....CLAIMANT
VERSUS
DHL WORLDWIDE EXPRESS [K] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Muraya & Wachira Advocates for the Claimant

K'Bahati & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 21st August 2015. He states he was employed by the Respondent Courier Company as a Messenger, on 2nd January 1991. He was promoted later to become Ground Courier. His contract was terminated by the Respondent on 24th August 2012. He earned a last salary of Kshs. 78,723 monthly. The letter of termination states the Claimant falsified daily records to indicate shipment was physically present in Respondent's store, while the Claimant knew he had delivered the shipment to a Customer on the same date, and not submitted duty payment to Respondent's finance department. After being questioned the Claimant was alleged to have secretly wired Kshs. 8,764 to the Accountant through m-pesa platform, for banking, on 2nd August 2012. The Respondent alleged there were other similar incidents of falsified records attributed to the Claimant.

2. The Claimant complains termination was without notice. He was not heard. The decision by the Respondent was arbitrary. He prays for Judgment against the Respondent in the following terms:-

- a) A declaration that termination was unfair.
- b) A declaration that Claimant's employment was on permanent basis having worked for 21 years and 7 months.
- c) 1 month salary in lieu of notice at Kshs. 78,723.
- d) 12 months' salary in compensation for unfair termination at Kshs. 944,676.
- e) Lost bonus of 2 months at Kshs. 18,000.
- f) Annual leave pay of 1 month at Kshs. 78,723.

Total... Kshs. 1,120,122

- g) Costs.
- h) Interest.

i) Any other suitable relief.

3. The Respondent filed its Statement of Response on 5th October 2015. The Claimant was implicated in fraudulent activities. He fraudulently received, and admitted receiving, Kshs. 8,764 from Respondent's Customer, David Njoroge. He similarly received Kshs. 5,879 from another Customer Osman Ali Njoroge. He indicated incorrect check points in the systems to give incorrect delivery details. He falsified records indicating shipment was held for payment, while he had delivered the same to a Customer. He received Kshs. 8,394 from a Customer which he fraudulently shared with a Colleague named William Mwanyasi. The Claimant had previous record of fraudulent behaviour. He was fairly heard. Termination was fair. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

4. The Claimant testified, and rested his case, on 18th November 2016. Respondent's Human Resources Manager Andrew Kenneth Kaunda testified on 18th November 2016 and 1st March 2017. Respondent's Mombasa Station Accountant, Brian Maghanga testified on the latter date also, bringing the hearing to a close. The dispute was last mentioned in Court on 23rd June 2017, when Parties confirmed the filing of their Closing Submissions.

5. The Claimant told the Court he was employed as a Messenger in 1991, and later promoted as Ground Courier. His contract was terminated by the Respondent in 2012, after service of 21 years. He was in the position of Ground Courier when his contract was terminated. He explained to the Court that a Messenger runs office errands, while a Courier delivers parcels to Customers.

6. He was called to show cause by the Respondent, about missing parcel through a letter dated 3rd August 2012. He replied to the letter to show cause. He was suspended through a letter dated 10th August 2012. It was alleged he did not surrender money paid by a Customer, which was meant for payment of duty for the Customer's parcel.

7. The Claimant was not heard before suspension. He was suspended for 2 weeks. He was called after suspension and issued with the letter of termination. It was alleged he falsified documents. There was no hearing before dismissal. He earned a gross monthly salary of Kshs. 78,723. He told the Court he merits compensation for unfair termination. He prays for notice pay. He was entitled to incentive bonus of Kshs. 1,500 per month and 30 days of annual leave every year. He was never charged with any criminal offence.

8. Cross-examined, the Claimant told the Court he was summoned to show cause. He attended a meeting. The Manager and the Claimant's Supervisor also attended. The Claimant was not advised he was entitled to attend the meeting in the company of any person.

9. He replied to the letter to show cause. He stated someone else, made the incorrect entries. A Customer pays for his parcel to be delivered to the Respondent. The Respondent pays duty for the parcel. A Ground Courier would receive the parcel and the money. The Claimant did not receive the parcel shown in the letter to show cause. He received the money with respect to the parcel.

10. He did not recall if he received the parcel on 13th July 2012. He used the computer, not the scanner in receiving the parcel. He did not know if Anne worked with the Respondent. The Claimant dealt with the parcels mentioned under bullet 2 and 3 of the letter to show cause. The parcels were held in Respondent's store. He did not know if the Clients had stated the parcels were delivered, and not held in the store. Accountant should answer the question who received payment? The 2 parcels may have been delivered by other staff.

11. The Claimant received the 1st parcel. He received Kshs. 8,764 for the parcel. He paid this money to the Accountant. The parcel was delivered on Saturday. He went with the money home. The office closed at 1.00 p.m. He did not recall when he returned the money. He returned it to Brian the Cashier. He paid through m-pesa. There were 2 of 3 Ground Couriers when the Claimant received the parcel and the money. He did not know if other Couriers received money. It was permissible to carry money home.

12. Osman Ali could have been a Customer. The Claimant did not recall receiving money from him. A cage, in Respondent's parlance is a store where parcels are kept. Each Employee had a password.

13. He was not called for a hearing. The letter of 3rd August 2012 was a sort of questioning. Mwanyasi was a Colleague of the Claimant. He alleged the Claimant had shared with him some of the stolen money.

14. The Claimant's letter of employment had a summary dismissal clause. He accepted the terms and conditions of employment. Contract could be terminated for serious breach, or commission of a serious criminal offence. Wrong computer entry comprised breach of contract. If an Employee caused his Employer to lose money, it would amount to breach of obligation. If the Respondent lost credibility with its Customers through the acts of the Claimant, the Claimant would be in breach of contract. Redirected, the Claimant told the Court clause 8 of his contract referred to warning. He never received a warning. He was never charged with a criminal offence. It was not the first time he carried money from the office home.

15. Andrew Kenneth Kaunda confirmed the Claimant was employed by the Respondent for 21 years and 3 months. His duties involved delivery of shipments, receiving money and remitting of money to the Respondent.

16. There are normally various customer shipments in a cage. They are under lock and key, because the Respondent has paid taxes for the goods. Once delivered to the Customer, the Customer reimburses duty paid to the Respondent.

17. It is the duty of the Person manning the cage, to enter the number of the package and give it to the Courier who delivers in the field. If the Customer collects the parcel from the Respondent, the Person manning the cage will hand over the parcel, upon the Customer reimbursing duty paid.

18. The 1st parcel mentioned in the letter to show cause was in the cage. It was there for a number of days. The Person manning the cage

scanned it, confirming it was in the cage. During inspection, it was not there physically. When the Respondent enquired from the Customer, the Customer stated the parcel had already been delivered to him. It was after the event that the money with regard to the particular shipment was wired by the Claimant to Brian the Accountant. There was cheating in the system. Money was wired when investigation was underway. The same case applied to other shipments- 2 and 3 in the letter to show cause.

19. The Respondent's policy is that Customer's money must be receipted and accounted for. It was not allowed to go with the money home. There was a cash-safe, at the office and a receipt book. This was the case even of Saturdays. The Claimant did not issue the Customer with a receipt. His intention was to steal. His account was used in all cases of falsification of records. In the field, Couriers used a hand-held scanner which is computerized. The procedures are the same. If 2 Persons handle same shipment, there should be no discrepancy in documentation.

20. The Claimant was given a hearing. Station Manager and Supervisor called him. He did not give a satisfactory answer. This is why he was suspended. He did not give a satisfactory answer to the letter to show cause.

21. The Respondent carried out more investigations. More irregularities on shipment emerged, attributable to the Claimant. A Colleague named Mwanyasi disclosed he had shared money stolen from the Respondent, with the Claimant. The Claimant was given adequate opportunity to explain himself. All Customers confirmed delivery and payment with regard to their respective parcels. Termination was fair. The Claimant is not owed anything by the Respondent.

22. Kaunda testified on cross-examination that termination was on 24th August 2012. There was a disciplinary hearing before termination. The minutes of the disciplinary meeting were unavailable. The Claimant absconded after receiving the letter to show cause. There was no disciplinary hearing.

23. There was no criminal case preferred against the Claimant. The Respondent uses log-in codes. Passwords were given to Employees. These could be manipulated. There was no manipulation in this instance. Customers confirmed receipt of their parcels. The Customers were not Witnesses in the proceedings herein. .

24. Brian Maghanga told the Court in or around August 2012, the Claimant was in charge of manning the cage [storage for inbound/received shipments]. The cage was for dutiable shipments.

25. On routine inspection, it was discovered a number of shipments were not in the cage. Entries had been made by the Claimant that the shipments were still in the cage.

26. Upon investigations, it was discovered the shipments had been delivered by the Claimant to their Consignees. The Claimant had indicated incorrect check points, to show the shipments were still in the cage, while physically they were not.

27. Where a Courier delivered, he would receive payment and forward the same to Brian for accounting. In the absence of the Accountant, all Couriers had been instructed to keep the money in the safes at the office. The Claimant received money for shipments which he fraudulently delivered. He conceded this irregularity. He sent to Brian Kshs. 8,764 on 2nd August 2012, having received the money from the Customer on 13th July 2012. He also shared a sum of Kshs. 8,394 with a Colleague, Mwanyasi. The Colleague confessed this and returned the money to the Respondent.

28. These amounts were payable by the Respondent to Government Agencies such as KRA and KEBS. By not paying, the Respondent risked being penalized and having its License withdrawn. Maghanga testified the Claimant was dishonest.

29. The Witness conceded on cross-examination Respondent's computer system could be manipulated. He did not have documents showing suspected Employees refunded the money to the Respondent. The Respondent risked being penalized by the relevant Agencies. The Claimant had received warnings before termination. There was no disciplinary hearing and no report was made against the Claimant to the Police. Redirected, the Witness told the Court Respondent's system was manipulated by the Claimant. Shipments were indicated to be in the cage. The Respondent called its Customers and confirmed shipments had already been delivered. The Claimant conceded he received the money, and refunded to the Respondent.

The Court Finds:-

30. Parties agree and the Court accepts that: the Claimant was employed by the Respondent as a Ground Courier; he worked for about 21 years; he was dismissed by the Respondent on 24th August 2012; dismissal was on the ground that the Claimant was involved in fraudulent shipment of Customers' parcels and illegal diversion into his own pocket, of money paid by Customers in facilitation of parcel delivery; his last monthly salary was Kshs. 78,723; he was called to show cause why punitive measures should not be taken against him, through a letter from the Respondent dated 3rd August 2012; there is no letter on record in reply to the letter to show to cause, but Parties agree there was a meeting involving the Claimant, his Manager and Supervisor; and lastly it is conceded there was no disciplinary hearing beyond the meeting held with regard to the letter to show cause.

31. In issue is whether there was valid ground to justify termination; whether fair procedure was observed; and whether the Claimant merits the prayers sought.

32. The Respondent outlines the grounds justifying termination in the letter of termination dated 24th August 2012. Under Airway Bill 3326201384, it was alleged the Claimant falsified records to show shipment was in the cage, while he had already delivered the shipment to the particular customer. Delivery was on 13th July 2012. Upon being questioned, the Claimant wired payment for this shipment to Brian the Accountant on 2nd August 2012.

33. The Court is satisfied particularly with the evidence of Brian the Accountant, that the Claimant falsified the above entry, with the intention of defrauding his Employer. He lied that the shipment was still in the cage. He retained the money which was meant to be reimbursed to his Employer as duty paid in advance on behalf of the Customer, to KRA. For as long as it was shown shipment had not been delivered in the system, and that shipment was still in the cage, it was safe for the Claimant to continue keeping his Employer's money in his pocket.
34. It was only after the Respondent initiated investigations, 3 weeks after the Claimant had received the money on delivering the shipment on 13th July 2012, that the Claimant secretly wired the money to Brian on 2nd August 2012.
35. When cross-examined, the Claimant was dicey. He at first told the Court he did not receive the parcels indicated in the letter to show cause. Pressed, he changed this, conceding he indeed received the parcels. He dealt with the parcels. The parcels were held in the cage. He did not know if Customers confirmed the parcels had already been delivered. The Accountant should answer who received payments. The 2 parcels may have been received by other staff. He received money for the 1st parcel, Kshs. 8,764 which he paid to the Accountant. The money was received by the Claimant on Saturday and the office was closed at 1.00 p.m.
36. The Claimant's evidence was inconsistent, contradictory and evasive. He stated the Accountant should answer who received the money, before he acknowledged he received the amount of Kshs. 8,764. He conceded he pocketed the money justifying his decision on the fact that receipt was on a Saturday and it was not the first time he had carried money home. He did not explain why he retained the money from 13th July 2012 to 2nd August 2012.
37. In his cross-examination of Respondent's Witnesses, he assumed the position that the computer system was open to manipulation, and third Parties may have falsified records in his name. This was a position not worthy of belief.
38. The Court is convinced the Claimant was a dishonest Employee who converted his Employer's resources to his own use. Later refund did not absolve him from this act of gross misconduct. The Court is persuaded other allegations against the Claimant with respect to different shipments, were established on a balance of probabilities. Customers who received the different shipments confirmed to the Respondent they received these shipments, paid for the shipments, even as the Claimant recorded in the computer system that the shipments were physically stored in the cage. The Claimant stated it was not the first time he had pocked his Employer's money and taken it home. There was system and policy in place for custody of money collected by Couriers at the office. It appears to the Court it was his practice to retain his Employer's money, probably convert this money to his own use, so long as the computer showed the parcels were still in the cage.
39. Termination was based on valid reason, and justified under Sections 43, 44 [4] [g] and 45 of the Employment Act 2007.
40. The Claimant was asked to show cause on 3rd August 2012. His reply took the form of a personal meeting between him, his Manager and Supervisor on the other hand. Following this meeting, the Respondent issued the Claimant a letter of suspension dated 10th August 2012. The letter was expressed to issue pending investigation. Suspension would last 1 week. He was advised to return to work on 20th August 2012.
41. There was no disciplinary hearing after suspension. He was dismissed on 24th August 2012, after returning from suspension. Some of the Witnesses for the Respondent were categorical as they should be, there was no disciplinary hearing. Others vacillated, equating the show cause proceedings with a disciplinary hearing. Show cause process is an investigatory process, and as shown in Respondent's suspension letter, other investigation was to follow, which should have culminated in a full blown disciplinary hearing.
42. Consequently, the Court finds termination did not follow a fair procedure as contemplated under Section 41 and 45 of the Employment Act 2007. To this extent termination was unfair. ***The Claimant is granted the equivalent of 4 months' gross salary in compensation for unfair termination at Kshs. 314,892.***
43. There Court does not understand his pursuit of '12 months' severance pay' and 'compensation for loss of employment.' It is presumed the Claimant meant to pursue compensation for unfair termination.
44. Notice pay is not merited the Claimant having been dismissed for an act of gross misconduct, over which the Respondent was entitled to summarily dismiss him under Section 44[4] [g]. The item is rejected.
45. Incentive bonus of Kshs. 1,500 is reflected in the pay slip of July 2012. It was shown at Kshs. 500 in the Claimant's letter of employment of December 1990. It was paid with the rest of the monthly salary. The Claimant did not explain to the Court which incentive bonus of 12 months he lost as a consequence of termination. Bonus is not anticipated. It is given for work already done, and production achieved. The prayer for 12 months' bonus pay has no merit. It is even questionable whether an Employee who is engaged in stealing from his Employer would still earn bonus, even where such bonus is given as an invariable benefit under the contract of employment. Whichever the case, the Court is satisfied that the Claimant received his incentive bonus as part of his salary and his prayer for anticipated bonus is misplaced.
46. In his Statement of Claim, the Claimant makes a prayer for annual leave pay of 1 month at Kshs. 78, 723. There is no pleading preceding the prayer, showing which year annual leave pay is pegged on. In his evidence, all he said with regard to this prayer was that he was entitled to 30 days of annual leave. In his Closing Submissions, nothing is said specifically with regard to annual leave. There is a general submission that the Claimant is entitled to reliefs as prayed in the Claim. The Court has no way of knowing which year, of the 21 years worked by the Claimant, annual leave is claimed. There is no evidence at all which would enable the Court to consider the item. There is no submission. The prayer is rejected.
47. The Court is urged to declare that the Claimant was employed on permanent basis, having worked for 21 years. There is no law which states an Employee should be declared to be in permanent employment after working for 21 years. The Claimant's contract like all contracts was terminable and has been terminated. 'Permanent employment' is a legal fiction, which is meant to classify regular and pensionable

employment, from other irregular contracts, such as casual and piece-rate work arrangements. A declaration that an Employee is 'permanent' would only serve a useful purpose where there is a dispute whether employment is regular or irregular [e.g. permanent or casual]. The declaration sought by the Claimant under this head is completely illogical, and adds no value to the Judgment. It is rejected. It is a prayer commonly pleaded in this particular Court Station, and the Court has ruled on it in various Judgments, but the prayer is unabated.

48. No order on the costs.

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

IN SUM, IT IS ORDERED:-

a) Termination was based on valid reasons, but flawed on procedure.

b) To that extent termination was unfair.

c) The Respondent shall pay to the Claimant the equivalent of 4 months' gross monthly salary in compensation for unfair termination at Kshs. 314,892.

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 29th day of September 2017.

James Rika

Judge