



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 194 OF 2016
MUINDI MWANTHI1ST CLAIMANT
MUIA NZWILI2ND CLAIMANT
VERSUS
VOLCAN HOLDINGS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimants were employed by the respondent as heavy commercial drivers until they were dismissed by letter dated 27/10/2015. They have brought this suit seeking compensation among other reliefs, alleging that the reason for their dismissal was invalid and the procedure followed to dismiss them was unfair.
2. The respondent has denied the alleged unfair termination and averred that the claimants were dismissed on account of their gross misconduct and that they were accorded a fair hearing before the dismissal. It is further defence case that after the dismissal the claimants were paid all their terminal dues, were issued with certificate of service and signed a discharge voucher and as such this suit is without merits.
3. The issues for determination herein are whether the summary dismissal of the claimants was unfair and whether the reliefs sought should be granted.

CLAIMANTS CASE

4. The claimants were employed as heavy commercial drivers on 1/6/2012 and 3/7/2014 respectively. They worked until they were served with dismissal letters dated 27/10/2015. The reason cited for the dismissal was negligent performance of work by driving their assigned trucks on a freewheel mode which exposed the trucks to danger. The alleged offence according to the dismissal letters was committed on 16/10/2015 and 25/10/2015 by the first and the second claimant respectively. The claimants have however denied the alleged offence and averred that they were never given fair hearing to defend themselves before they were dismissed.
5. The first claimant has contended that on 16/10/2015, the truck he was driving developed problem of gear box while ascending near Taru and called the respondent who send a mechanic and repaired the same and he proceeded with his journey. He blamed the gear box problems to over loading which has

been occasioned by additional axle on the truck by the respondent. He admitted having received previous warnings but contended that he was never given a chance to defend himself before being condemned with the warnings. Both claimants denied ever driving on free wheel mode and appreciated the danger such driving would expose to their own life.

6. In addition the claimants contended that during their long distance trips, they worked more than 8 hours per day (45 hours per week) and they never rested during public holidays or Sundays and they were responsible for the security of the trucks for 24 hours whenever they went on the trips. They therefore prayed for compensation for the overtime, rest days and public holidays worked. They also prayed for compensation for the unfair dismissal plus one month salary in lieu of notice because their dismissal was in breach of Section 41, 43 and 45 of the Employment Act which entitled them to fairness before termination of their services. Finally the claimants prayed for refund of money which was unlawfully deducted from their salary towards fuel and repair of the trucks.

DEFENCE CASE

7. Mr. Clement Ndungu HR & Administration manager for the respondent testified that the claimants herein repeatedly drove the trucks assigned to them on free wheel mode in order to save fuel and siphon it for sale for their own benefits. As a result of the said misconduct, they caused extensive damage to the trucks' gear box. Despite having been served with warning letters and having been explained the policy of the company against freewheeling, the first and second claimants repeated the offence on 16/10/2015 and 25/10/2015 respectively.

8. According to Mr. Ndunga, the claimants were invited to a hearing on 27/10/2015 by the Health and Safety Manager Mr. Abdul Wahab and an incident report (summary of proceedings) prepared and the claimants signed. Thereafter both claimants were dismissed on the same day. Mr. Ndunga was however not present during the alleged hearing during which the claimant signed the incident report. He admitted that the Kenya National Highways Authority (KeNHA) allowed the enlargement of the carrying capacity of the trucks in order to add more weight from the manufacturers recommended load.

9. He also admitted that the warning letters were served before according the claimants a chance to defend themselves. He further admitted that he never witnessed the alleged freewheeling by the claimants and confessed that it was information he received from the workshop manager Mr. Keah Mbaji. He also confessed that although the trucks had a tracking device to tell when their engines are switched off, no print out from tracking had been produced to prove that the claimants were driving the assigned trucks on a free wheel mode.

10. Mr. Ndunga denied the claim for house allowance and contended that the contract of employment provided that the agreed salary was a consolidated pay. He further denied that the claim for money deducted from the claimants salary and explained that all the trucks were given 1000 litres of fuel from Mombasa to Kampala but the actual consumption was 900 litres. Therefore when the claimants spent more on his fuel card, the value was recovered from his salary. Likewise, the claimants were given money to hire security whenever they parked the trucks but when they failed to do so and the vehicle were vandalized, the cost of repair was deducted from their salary.

11. As regards rest days, and public holidays falling within their trips away, Mr. Ndunga admitted that such days were not compensated because the claimants had many days and hours of rest during the loading and offloading and also at border crossing. He therefore maintained that the surcharge on the claimants was done on merits.

ANALYSIS AND DETERMINATION

12. There is no dispute that the claimants were employed by the respondent until 27/10/2015 when they were summarily dismissed for alleged misconduct. The issues for determination herein are:

- (a) Whether the dismissal of the claimants was unfair.

(b) Whether the reliefs sought should be granted.

Unfair dismissal

13. Under Section 45(2) of the Employment Act, termination of contract of service by the employer is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was reached after following a fair procedure. A valid and fair reason includes misconduct among others. Fair procedure under Section 41 of the Act involves explanation by the employer to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which dismissal is contemplated, and thereafter give the employee and his chosen companion a chance to air their representations for considerations before the dismissal is decided.

14. In this case the reason cited for the dismissal of the claimants is negligent performance of duty by driving the trucks assigned to them on a free wheel mode as a result of which the trucks gear box were extensively damaged. The claimants have denied the alleged freewheeling the assigned trucks and blamed the damaged gear boxes on the excess weight loaded by the respondent after enlargement of the carrying capacity. The defence witness admitted the alleged additional carrying capacity on the trucks and explained that the KeNHA had authorized the same.

15. It is trite that he who alleges must prove unless the allegation is admitted by the contestant. In this case the burden of proving that the claimants were driving on a free wheel is on the respondent who did not call any eye witness like the turn boys of the trucks. She has also not produced print out form the trucking system which the defence witness alleged that it indicates when the trucks engine is switched off. Without any evidence to prove that the claimants were driving on free wheel mode and that it caused damage on the gear box of the respective trucks, I find that the respondent has failed to prove on a balance of probability that the reason for the dismissing the claimants from their employment on 27/10/2015. Under Section 43 of the Act, failure to prove the reason for dismissing the employee renders the dismissal unfair within the meaning of Section 45 of the Act.

16. In addition to the foregoing default, the respondent has failed to prove that a fair procedure was followed before dismissing the claimants as required by Section 41 of the Act. The manager who allegedly invited the claimants to a hearing never gave evidence herein. The alleged incidental report is suspect and according to the claimants, it was prepared together with the dismissal letters before hearing them and they were only given to them to sign. The respondent has therefore not proved that she invited the claimant to a hearing and gave him the right of being accompanied by a fellow employee of his choice. She has also not proved that she explained the reason for the intended dismissal to the claimants in a language they understood and therefore accorded them an opportunity to defend themselves. Consequently the dismissal of the claimants was also procedurally unfair.

Reliefs

17. Under Section 49 of the Act, I award the claimants one month salary in lieu of notice plus 4 months salary as compensation for unfair dismissal. In awarding the said compensation, I have considered the fact that they had served the respondent for fairly short time and the alleged misconduct was not proved against them.

18. The claim for withheld allowances and underpayment is dismissed for lack of merits. The contract of employment provided that the agreed salary was a gross pay and as such the claim for arrears of house allowance is neither here nor there. As regards the public holidays, rest days and overtime worked, they have not contested the defence evidence that they had many hours and days of rest during the loading and offloading and also at the border crossing. They have also not denied that there are days they went for their annual leave and as such it is obvious that proper particulars of their claim ought to have been pleaded. Consequently, I dismiss the said claim for being too generalized and lacking in proper particulars and evidence.

Summary of awards

1st claimant Muindi Mwanthi

Notice26750

Compensation.....107000

133750

2nd claimant Muia Nzwili

Notice22265

Compensation.....89060

11325

DISPOSITION

19. For the reasons that the claimants were unfairly dismissed from employment, I enter judgment for them in the aggregate sum of Ksh.245075 plus costs and interest from the date hereof. The said award shall be subject to the applicable statutory deductions.

Dated, signed and delivered this 29th September 2017

O. N. Makau

Judge