



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 341 OF 2015

BETWEEN

- 1. JEREMIAH OCHIENG' PONDE.....CLAIMANT**
- 2. MARTIN MBWELE.....CLAIMANT**
- 3. PAUL OUYA MINGOYE.....CLAIMANT**
- 4. MICHAEL MKOMBE MWAWASI.....CLAIMANT**

VERSUS

BORDERLESS TRACKING SYSTEMS LIMITED...RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Okanga Advocate instructed by Okanga & Company Advocates for the Claimants

Mr. Rombo Advocate instructed by Rombo & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The 4 Claimants filed their joint Statement of Claim, on the 25th May 2015. They say they were employed by the Respondent Company as Tag Operators, between 1st April 2014 and 6th November 2014. They earned a monthly salary of Kshs. 16,258. The 1st and 4th Claimants state they were summarily dismissed by the Respondent on the 3rd of November 2014. The 2nd Claimant was summarily dismissed on 5th November 2014, and the 3rd Claimant on 6th November 2014. They state termination was unfair and unlawful, and seek the following orders against the Respondent:-

- a. 1 month salary in lieu of notice.
- b. Pro-rata leave
- c. Pay for 4 days of Public Holidays worked.

- d. Salary for days worked in November 2014.
- e. Compensation for work done on rest days.
- f. 12 months' salary in compensation for unfair termination.

In addition the 3rd Claimant prays for salary for the month of October 2014. The Claimants seek a total of Kshs. 1,022,584 under the above heads, costs, interest and any other suitable relief.

2. The Respondent filed its Statement of Response on 30th June 2015. It agrees the Claimants were its Employees. They were fairly and lawfully dismissed after being reasonably suspected of engaging in malpractices. The 1st and 2nd Claimants were paid their dues, after returning Respondent's property and clearing with the Respondent. The 3rd and 4th Claimants are yet to return Respondent's property and to clear and non-payment of terminal dues is of their own making. The Respondent urges the Court to dismiss the Claim, and grant any other order it deems fit to grant.

3. Both Parties were heard and rested their respective cases on 28th September 2015. The 4 Claimants testified as did Respondent's Head of Security Mr. Readon Elisha Atingo.

4. The 1st Claimant and 2nd Claimants were employed on 1st May 2014. They earned a salary of Kshs. 16,258 per month. All Claimants were given written contracts. Their work involved tagging of Cargo Trucks, after receiving clearance from the Control Room. They were called by Regional Manager to the Office, and informed their contracts had been terminated. They were issued termination letters. They were not given a disciplinary hearing. There was no notice of termination. They seek leave for the 6 months' worked. They worked without compensation on Labour, Madaraka, Mashujaa and Idd-UI- Fitr days. The Claimants denied that they were involved in suspicious activities. The 1st Claimant denied that there were items belonging to the Respondent, discovered from his house. The Claimants have not found alternative jobs to-date.

5. Cross-examined, 1st and 2nd Claimants denied that they were arrested for fraudulent tagging by the Police, from Changamwe Police Station. They were asked to report to the Police Station where they recorded 'Reports.' There were allegations of impropriety made against the Employees by their Employer. These allegations were not explained to the Employees. They were not informed they had allowed Cargo to leave the yard without tagging. They were not bribed. CID Officers went to the Respondent's Offices. The Offices asked the Claimants to accompany them, to the Police Station. This was on 31st October 2014, 3 days before the first termination. A search was carried out at the 1st Claimant's house by the Police. Clause 13 in the contracts allowed for termination without notice in cases of misconduct. The 1st Claimant stated he worked on 1st May 2014 the date he was employed. Kenya Revenue Authority Officers would release the Cargo. The Claimants' duty was to tag upon authorization. The 1st and 2nd Claimants were paid October 2014 salary. They signed Vouchers. They worked 7 days a week.

6. The 3rd Claimant testified he went to collect his October salary on 6th November 2014. He was informed he had been dismissed a long time ago. He was not told about fraud. He did not record any statement with the Police. He did not go to Changamwe Police Station. He worked 2 Km. from the others. He was not told about the fraud. He was barred from entering the Respondent's Premises and asked to return Company property. He did not collect his salary. The 4th Claimant conceded he recorded a 'Report' with the Police at the Respondent's Offices. Police came to the Office. He was informed about allegations of fraud. He worked on all Public Holidays without compensation. His contract had a termination clause.

7. The 4th Claimant adopted the same line of testimony as his Colleagues. He was not given notice, or reason for the decision, before termination. He was not told about fraud. He wrote a 'Report' with the Police. He worked on all Public Holidays.

8. The Claimants submit there were no valid reasons shown by the Respondent, to justify termination.

There was no hearing accorded to the Claimants. Termination was unfair under Sections 41, 43 and 45 of the Employment Act 2007. The Claimants ask the Court to allow their Claim.

9. Readon Elisha Atingo told the Court the Claimants were Employees of the Respondent. The Respondent secures transit goods, under authority of KRA. Goods must be tagged. The Respondent is under obligation to ensure transit goods leave the Port, and the Country's Borders. Tagging is a way of ensuring the goods have left.

10. There was attempted fraud. The Claimants were entrusted with the seals. They colluded to avoid the process. They were to account for the seals at the end of the day. 2 of the Claimants were supposed to be on night duty. If sighted within the Premises during the day, it would raise suspicion. The Claimants were summoned by the Respondent. CID Officers were called in. The 1st Claimant was found to have the Dispatch Book in his house. The Claimants could not be retained in employment. The Respondent lost trust in them. They were to be charged with criminal offences. There were others, including Agents and KRA staff involved in the fraud. The Respondent did not pursue the matter with the Police. Readon took the Statements from some of the Claimants. The 1st Claimant conceded fraud took place. They all were aware about the fraud. The Witness testified on cross-examination that he was in charge of security. He enforced security. He did not have the seals issued to the Claimants in Court. He was the immediate Supervisor to the Claimants. They worked with KRA. Officers of the KRA created the journey. These Officers released the Trucks from the Port. The Claimants were not charged with criminal offences. Readon closed his evidence with the opinion that, not all suspicious activities involving Employees are turned into criminal prosecutions.

11. The Respondent submits the 1st Claimant was evasive, only admitting on cross-examination that he was arrested over the suspected fraud. Readon confirmed the 1st Claimant was arrested and items belonging to the Respondent recovered from his house. There were 3 days between the time of arrest and termination, which constituted fair hearing. All the Claimants were informed of the allegations against them before termination. It was not necessary there be criminal prosecutions.

The Court Finds:-

12. The Claimants were employed as Tag Operators by the Respondent Cargo Handler, earning a monthly salary Kshs. 16,258 each. The 1st and 2nd Claimants were employed 1st May 2014. The 3rd Claimant was employed on 1st April 2014, while the 4th Claimant states he was employed sometime in April 2014. They all were dismissed between 3rd and 6th November 2014. A common reason for termination was given in all the termination letters issued the Claimants: suspicion of being involved in activities with adverse effects to the Company.

13. It is the duty of the Employer, under Section 43 and 45 of the Employment Act 2007, to show valid reason, justifying termination. Section 41 and 45 require such decision is arrived at fairly.

14. It was the duty of the Claimants to tag Cargo at the Port. This was transit Cargo. Tagging ensured the Cargo left the Port, and left the Kenyan territory. The duty was discharged in conjunction with the KRA. The KRA authorized tagging and released the Cargo after tagging. The Claimants' role was to tag, not release the Cargo.

15. The allegation that the Claimants were involved in fraudulent activities, relating to release of transit goods without tagging, was not established in this Court, to constitute a valid and fair termination reason, under the Employment Act. Readon stated there was some form of conspiracy involving Agents, Claimants and KRA staff, to release transit goods without the monitoring devices. The exact role played by the Claimants was not made manifest in the face of the Court. The Respondent's Witness Mr. Readon merely restated in general terms, the contents of the termination letter: that Claimants were involved in suspicious activities.

16. There were Police Officers called in, whose investigation did not result in prosecution. Whereas the

Employer was at liberty to act independently without waiting for the outcome of the Police Investigations, the decision to terminate was required to be based on valid and fair reasons, established through an internal investigation process. The absence of a criminal prosecution, on serious allegations relating to release of transit goods to the domestic economy, would suggest there was no substance, to the allegations. Mere suspicion is not sufficient to justify termination. The law requires reasons justifying termination are reasonable and valid, and suspicion must be shown to be reasonable and valid. The Respondent did not show that the Claimants in any way manipulated the tagging process for personal gain; or that they conspired amongst themselves and other persons at large, to release transit goods illegally. The Dispatch Book said to have been recovered from the 1st Claimant was not availed to the Court, and shown to be in any way related to the allegations on release of transit goods. The Respondent's Witness testified somewhat vaguely, that if an Employee assigned night duty was sighted at the workplace during the day, it would raise suspicion. This kind of irrational suspicion would not in the view of the Court, amount to valid reason justifying termination.

17. The Court finds termination was not based on valid reason.

18. The Claimants were not given a chance to be heard. The Respondent submits there were 3 days, between the time the CID Officers were called in and went through investigation motions on 31st October 2014 and the date of first termination on 3rd November 2014. In these 3 days, the Claimants must have been given a fair hearing. The record of such a hearing was not availed to the Court. Fairness of procedure is not to be read from the number of days which lapsed from the date of the investigation to the date of the termination. There were no letters calling on the Claimants to explain themselves; no internal investigation with the resultant report; no charges; and no hearing. No process contemplated under Section 41 of the Employment Act 2007, is shown to have taken place.

19. Termination was flawed both for want of valid reason and fair procedure. The Claimants are entitled to compensation for unfair termination under Section 49 of the Employment Act 2007 as read together with Section 12 of the Employment and Labour Relations Court Act.

20. They had however worked for only 6 months, so that their claim to compensation the equivalent of 12 months' salary seems to this Court way out of proportion. They in fact, served the first 3 months under probation. They had worked in confirmed positions for 3 months. ***They are allowed 1 month salary each as compensation for unfair termination.***

21. ***They are granted 1 month salary each as notice pay.***

22. Their Claims for pro-rata leave; public holidays; salary for days worked; and rest days were not sufficiently contradicted by the evidence brought to the Court by the Respondent. The contracts issued the Claimants gave the working hours as 8.00 a.m. to 5.00 p.m. Monday through Friday, and 8.30 a.m. to 1.00 p.m. on Saturday. Saturday afternoon and Sunday were, presumably rest hours. The Claimants' position was that they worked 7 days a week. The Respondent did not bring any attendance records showing this was not the case. Similarly there was no employment record to contradict the claim on public holidays. The Court has no reason to deny these claims. The Computation forwarded by the Claimants has not been faulted. ***The Court allows the claims for pro-rata leave, public holidays, days worked, and rest days as prayed.***

23. IN SUM, IT IS ORDERED:-

a. ***Termination was unfair.***

b. ***The Respondent shall within 30 days of the delivery of this Award, pay-***

i. ***JEREMIAH OCHIENG' PONDE: notice pay-Kshs. 16,258; pro-rata leave- Kshs. 5,250; 4 public holidays- Kshs. 4,495; 3 days worked- Kshs. 1,685; 24 rest days at Kshs. 26,972; and compensation for unfair termination at Kshs. 16,258 – total Kshs. 70,918.***

- ii. *MARTIN MBWELE: notice pay- Kshs. 16,258; pro-rata leave-Kshs 5,250; 4 public holidays- Kshs. 4,495; 5 days worked- Kshs. 2,809; 24 rest days-Kshs. 26,972; and compensation for unfair termination at Kshs. 16,258- total Kshs. 72,042.*
- iii. *PAUL OUYA MINGOYE: notice pay Kshs. 16,258; pro-rata leave- Kshs.5,250; 4 public holidays- Kshs.4,495; 6 days worked- Kshs. 3,371; 28 rest days at Kshs.31,468; salary for October 2014-Kshs. 16,258; compensation for unfair termination- Kshs. 16,258 –total Kshs. 93,358.*
- iv. *MICHAEL MKOMBE MWAWASI: notice pay-Kshs. 16,258; pro-rata leave-Kshs.5,250; 4 public holidays- 4,495; 3 days worked- Kshs. 1,685; 24 rest days- Kshs.26,972; and compensation for unfair termination- Kshs. 16,258-total Kshs. 70,918.*

[c] Parties shall bear their costs of the Claim.

Dated and delivered at Mombasa this 26th day of February, 2016.

James Rika

Judge