



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.155 OF 2015**

**BONIVENTURE LUBEMBE.....CLAIMANT**

**VS**

**ALBA PETROLEUM LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent from 5.10.1995 in the operations Department where he rose to the position of Operations Assistant earning kshs. 163,418/= per month. On 14.2.2015, he reported to work as usual at 8.30am but he was barred from entering the work place by the security guards who were acting on instructions from the respondent's HR Manager Madam Beatrice Achieng Aoko. He now brings this suit seeking declaration that he was unfairly and unlawfully dismissed. He also prays for payment of his terminal dues, compensation for wrongful termination plus certificate of service.
2. The respondent has admitted that she employed the claimant as prayed in suit but denied that she unlawfully terminated the claimant's service. She avers that the claimant was summarily dismissed for absconding work without any justifiable cause and as such he is not entitled to payment of the reliefs sought in the suit.
3. The suit was heard on 28.9.2015 when the claimant testified as Cw1 and called Mr. Carmlely Oyungu Muruga as Cw2 while the respondent called Madam Beatrice Aoko as Rw1. During the hearing the parties produced all the documents by consent. After the hearing both filed written submissions.
4. Cw1 started that he was employed from 5.10.1995 until 18.2.2015 when he was dismissed. That on 14.2.2015 he reported to work as usual at 8.30am but he was barred from entering the work place by the security guards acting on instructions from the Rw1. No reason was given and no prior notice for that action had been served on him. That the instructions to the guards was recorded in the log book saying that Cw1 was not allowed entry to the respondents' office yard with effect from 14.2.2015. That no reason was stated for the said bar on the logbook or by the Rw1 who passed by the Cw1 at the gate that morning. That Cw1 notified his immediate boss, Miss Donje, the Operations Manager, of the lock out and went back home. That at 11 am Rw1 called him but he refused to pick her call. She then send him SMS telling him that he was supposed to wait at the gate. She then send another SMS telling him to go to the office on Monday 16.2.2015 to meet her or the Financial Controller Mr. Vinay.
5. On 16.2.2015 he however went to seek advise from his lawyer instead of going to the office as instructed. That on 17.2.2015 his lawyer served a demand letter on the respondent who responded on 24.2.2015. Thereafter he received the dismissal letter dated 18.2.2015. That the reason cited for

- dismissal was absconding of duty on 17.2.2015. In total he worked for the respondent for 20 years.
6. On cross examination by the defence counsel, Cw1 admitted he never returned to work from 16.2.2015 because he was threatened by Rw1 by sms. He further admitted that on 14.2.2015 he was severally called by the respondent but he never picked the calls. He maintained that he was dismissed when he was stopped at the gate. He however admitted that a dismissal letter was written on 18.2.2015 after he served a demand letter on 17.2.2015.
  7. Cw2 is the security guard who barred Cw1 from entering the office yard of the respondent on 14.2.2015. He received the instructions to lock out Cw1 from Mr. Charles Ndaou, the respondent's Internal security officer. That no reason was given to him as to why Cw1 was to be locked out. Cw2 denied that he was instructed to tell Cw1 to wait. He maintained that he was only told that he should not let Cw1 in the yard and Cw1 complied and went away just as Rw1 drove in.

### **Defence evidence**

8. Rw1 is the respondent's HR Manager. He confirmed that Cw1 was employed by the respondent as Operations Officer charged with the duty of loading and offloading fuel. On Friday, 13.2.2015 at 5.30pm, she received a report of complaint by a client that a vessel called Sam Tiger which was being fueled by the Cw1 had lost 24 Metric Tonnes of Gas oil. That the report was given by the Financial Controller of the respondent and it was naming Cw1 as a suspect.
9. On 14.2.2015, Rw1 called the Head of Operations Department, Mr. Shushie and the junior officers in the department for explanation of what transpired concerning the lost fuel and thereafter Rw1 send the Assistant HR Manager Mr. Ndolo to call Cw1, but the latter was nowhere to be found. She then send a Miss Rehema to call Cw1 through his mobile phone but the calls were not picked upto 11 am when RW1 decided to call him via her phone. When he failed to pick all her calls, Rw1 send him SMS telling him to see her or the Financial Controller on Monday 16.2.2015. Again Cw1 never reported to the office on 16.2.2015 and never picked calls. He thereafter absented himself from work without citing any reason.
10. On 23.2.2015 the respondent's MD received a demand letter dated 17.2.2015 from Cw1's lawyer alleging that Cw1 had been dismissed on 14.2.2015. That the demand was responded to on 24.2.2015 clarifying that she did not know the whereabouts of Cw1 and that she had treated him as an absconder and notified the Labour office. Rw1 denied that she instructed the security guards to lock out Cw1. She further denied that she dismissed the claimant. She maintained that she only send Mr. Ndaou to tell Cw1 not to enter the Operations area but to wait at waiting point at the main gate. She further maintained that Cw1 was their employee until 18.2.2015 when he was dismissed.
11. On cross examination, Rw1 confirmed that the instructions given to the guards by Mr. Ndaou was to lock out Cw1 from the respondents yard which is different from what she had given. She also admitted that she never served Cw1 with a show cause letter before dismissing him for desertion.

### **Analysis and determination**

12. There is no dispute that the claimant was employed by the respondent between October 1995 and February 2015. The issues for determination arising from the pleadings, evidence and submissions are:
  - a. Whether the claimant was dismissed on 14.2.2015 or 18.2.2015
  - b. Whether the dismissal was unfair and unlawful
  - c. Whether the reliefs sought should issue.

### **Date of the dismissal**

13. According to Cw1, he was dismissed on 14.2.2015 when he was locked out. That the act of being barred from entry to the work place meant that he had been dismissed. On the other hand, Rw1 contends that on 14.2.2015 she directed Cw1 to wait at the gate but he decided to go away. That when she send for Cw1 to come in to see her, Cw1 was nowhere to be seen and all calls through his mobile phone were not picked. That she send SMS to him telling him to come to the office on Monday 16.2.2015 but he refused to show up till 18.2.2015 when she reported the desertion of

Cw1 to the Labour office and proceeded to dismiss Cw1 by the letter dated 18.2.2015. According to her Cw1 was still in employment until 18.2.2015 when he was dismissed for desertion.

14. After considering the contention by the two sides, the court finds on a balance of probability that the terminations of the claimant's employment contract was done by the respondent on 18.2.2015 when she wrote the dismissal letter dated the same date. The allegation by Cw1 that he was terminated on 14.2.2015 vide the lock out instructions contained in the Log book produced in evidence is dismissed. The court has considered the Log book which stated in part that:-

*“... instructions form the Management (H.R.M.) at hand that, MR*

*BONIVENTURE LUBEMBE of Alba Operations is not allowed to*

*enter in AMGECO YARD, W.E. 14.02.15...”*

15. The plain meaning of the above excerpt from the Log book is that the claimant was not dismissed but only barred from accessing the respondents' premises. The claimant never sought clarification from the Rw1 before going away. He just presumed that he was dismissed from work and left. The claimant has admitted that on 14.2.2015 he refused to pick several calls from Rw1 and even failed to comply with SMS from the Rw1 calling him back to the office to see her or the Financial Controller. Consequently the court is persuaded to believe the evidence by the defence that termination for the claimant's employment was not on 14.2.2015 but on 18.2.2015 when he was dismissed for absconding work. The said termination dated was confirmed by the claimant in paragraph one of his witness statement dated 17.3.2015 filed with the suit.

#### **Unlawful and unfair termination**

16. There is no dispute that after Cw1 was barred entry to the work place, he disappeared and refused to pick calls from the respondent. That he also refused to comply with SMS from the Rw1 calling him to see her or the Financial Manager. There is also no dispute that Cw1 knew that the reason he was being called to see the said to managers was in connection with the complaint by a client that 24 MT of Gas oil had been lost while Cw1 was fueling vessel Sam Tiger. It is also without dispute that instead of the claimant reporting to the office for inquiry as instructed by Rw1 through SMS, he went to instruct his lawyer to serve a demand letter for alleged dismissal.
17. In view of the said undisputed facts, the court finds that the respondent was justified to dismiss the claimant as he did. The claimant deserted work without permission and deliberately refused to pick calls from his employer. He also deliberately refused to report to the office to see Rw1 or the Financial Controller on 16.2.2015 as instructed by Rw1 but instead went to instruct his lawyer to commence legal claim against the employer before he was formally dismissed. Consequently the answer to the second issue for determination is that the termination of claimant's employment was fair and lawful in the circumstances caused by the claimant's misconduct of desertion and refusal to report back to the office to meet the Management for hearing after invitation.

#### **Reliefs**

18. In view of the foregoing finding that the dismissal of the claimant was justified, the court declines to make declaration that the dismissal was unfair and unlawful. Under section 44 of the Employment Act (EA), absenting from duty without permission or just cause is a misconduct which entitles an employer to terminate the employee summarily subject to procedural fairness provided under section 41 of the Employment Act. In this case Cw1 admitted that he was invited to meet Rw1, or the Financial Controller on 16.2.2015 but he declined and instead went to instruct his lawyer to prematurely pursue a claim for his purported unfair dismissal. In this court's view the declaration sought should not issue in favour of an employee who is to blame for his dismissal.
19. Likewise, in view of the finding above that the summary dismissal was justified the prayer for salary in lieu of notice is dismissed. Such relief is only availed under section 49 (1) of the Employment Act to an employee whose dismissal is found to be unjustified. In the same manner,

the claim for compensation for wrongful termination of employment is dismissed because of the same finding above that the dismissal of the claimant was justified.

20. The claimant is however awarded salary for the 14 days worked in February 2015 being kshs. 76,066.70/=. The said relief could only have been denied had the respondent not issued the dismissal letter dated 18.2.2015 and treated the desertion by the claimant as termination of the employment contract without notice. Instead, the respondent insisted that she is the one who dismissed the claimant for gross misconduct.

21. As regards the claim for pro rata leave, the court has considered the leave Application form produced by the claimant dated 5.3.2013. The said form indicates that the accrued leave days for the claimant as at 31.12.2012 was 60.5. On 5.3.2013, he took one day leave leaving 59.5 days outstanding. Under the Appointment letter dated 5.10.1995, the claimant was entitled to 21 days annual leave. That means, from 1.1.2013 to 31.12.2014 he earned 42 leave days. From 1.1.2015 to 18.2.2015 he served one complete month and hence earned 1.75 leave days on pro rata basis. In total therefore the claimant had 103.25 leave days outstanding as at the time of his dismissal on 18.2.2015. Based on his basic pay of kshs. 155,918.10/= per month, he is awarded 536,618.15/= for his outstanding annual leave of 103.25 days. The claimant is also awarded certificate of service as prayed in the suit and admitted in the defence.

### **Disposition**

22. For the reasons stated above, judgment is entered for the claimant in the sum of **kshs.612,684.85/=** plus half costs of the suit and interest. The claimant will also have certificate of service.

**Signed, dated and delivered this 19<sup>th</sup> February, 2016.**

**ONESMUS MAKAU**

**J U D G E**