



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 541 OF 2014

ISIAH OSANO.....CLAIMANT

VS

BASE TITANIUM LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as An Electrical Engineer from 1.2.2013. His starting salary was kshs. 250,000/= but later it was reviewed to kshs.260,728.00. On 5.9.2014 the claimant was suspended and later dismissed on 17.9.2014 for fundamental breach of the contract of employment through improper performance of his duty. He now brings this suit contending that his dismissal was unfair and unlawful and praying for separation dues plus compensation for the termination.

2. The respondent has denied liability for unfair and unlawful termination of the claimant's employment. She avers that she lawfully dismissed the claimant after exercising her right under section 44 (4) (c) of the Employment Act (EA) after establishing that the claimant had wilfully neglected to perform his duties and/or had carelessly and improperly performed the work. The respondent has further averred that before the dismissal the claimant was informed of the reason for the intended dismissal and thereafter given an opportunity to defend himself.

3. The main issue for determination is whether summary dismissal of the claimant was unfair and unlawful. The suit was heard on 30.11.2015 when the claimant testified as Cw1 and the respondent called Mr. Paul Thomson as Rw1. Thereafter both parties filed written submission.

Claimant's case

4. Cw1 told the court that in May 2014, a Flood light Tower was knocked down by a mining equipment. That while he was away the tower was erected and power cables inserted but no bulbs were put in place. That on 18.8.2014, he was instructed to reinstate the bulbs on the tower which he did.

5. To begin with, he verified whether power supply had been properly disconnected and found that it had been disconnected and the cables insulated with tapes and tagged. He then barricaded the power source using Blue-White strips to warn others not to tamper with the power source. Thereafter Cw1 proceeded to restore the bulbs on the tower and then connected the wire terminals and lifted the pole up pending re energisation. The re energisation could only be done with the approval of the supervisor Mr. Tony Vinturin.

6. On 19.8.2014, Cw1 was informed by Mr. Braddy Smith that the Flood light was lit on the night of 18.8.2014 even before Cw1 had written the request for re energization. Cw1 suspected foul play from Mr. Bradly because they were not in good relationship.

7. On 21.8.2014, Mr. Paul Thomson called a meeting of all the people who were involved in the restoration of the flood light tower and demanded that they write statements. Cw1 wrote his statement on 21.8.2014 but later Paul Thomson accused him of colluding with his colleague Mr. Matano to write similar statements and demanded that they should change statements. That when Cw1 refused to change his statement, he was bid fair well by Paul Thomson and he later received a suspension letter. On 10.9.2014 he was given a notice of intention to dismiss. He responded to the said notice on 12.9.2014 after which he was dismissed vide letter dated 17.9.2014. After the dismissal he was paid 3 months salary exgratia but he was never given certificate of service.

8. On cross examination Cw1 admitted that he was given the reason for the suspension and the intended dismissal and wrote his defence on 12.9.2014. He however got a dismissal letter on 17.9.2014. He maintained that the process of his dismissal was unfair because he was never given a chance to interrogate his accusers and further that he was denied a chance to explain his defence before the panel which made the decision to dismiss him. He further maintained that the reason for the dismissal was invalid and without merits. That the investigation was not fairly done and the lights were maliciously switched on probably by Mr. Bradly Smith in order to frame him for wrong doing. Cw1 contended that, he confirmed that power was disconnected before he started working on the flood light tower.

9. He explained that the Power Distribution Box (DB) is accessible to over 22 electricians working in the premises. He denied breach of any safety procedures and measures. He maintained that Paul Thomson was a nurse and hence not qualified to solely investigate the alleged breach without the help from a team of Electrical Engineers.

Defence case

10. Rw1 is the Safety and Training Manager for the respondent. He confirmed that Cw1 was employed by the respondent as an electrician. That Cw1 was suspended and thereafter Rw1 solely did the investigation to establish whether the claimant had breached the safety procedures and measures. He discovered that the DB had not been locked. That had the DB been locked, no one could access into it without breaking into it. That he went to the DB with several electricians, and operators including Matano, Electrical Supervisor, Mr. Bradly Smith and the General Manager Mr. Vickers Vinturini and confirmed that there was no power isolation and no padlock fastened. He however admitted that he never went to the DB with Cw1.

11. On cross examination Rw1 confirmed that he was not a trained Electrical Engineer and could not explain Engineering technicalities from his medical education. He however maintained that he had 24 years' experience in Occupation safety management. He contended that the claimant failed to isolate the power to the tower and further failed to lock the DB with padlock. He however admitted that the DB was the source of power for other functions and the Tower had only one switch therein. He further admitted that other people operating other departments could operate the DB. He however clarified that each switch for the respective function has a hole for one to insert a padlock to bar others from switching it on.

12. Rw1 explained that when one is given work order, he is required to prepare a Job Safety Analysis (JSA). That in this case Mr. Matano prepared the JSA and Cw1 approved it by signing. He contended that he did his investigation according to the respondents' company safety procedures and that he involved Engineer Myatu in the investigations.

Analysis and Determination

13. After considering the pleadings, evidence and submissions, there is no denial that the claimant was employed by the respondent as an Electrical Engineer. That his duties touched on the safety of employees and all other persons lawfully present at the work place the breach of which could lead to summary

dismissal. The issues for determination are:-

- a. **Whether the claimant breached the said Safety rules.**
- b. **If so, whether the process of his termination was unfair.**
- c. **Whether the relief sought should be granted.**

Breach of Safety rules

14. The dismissal letters dated 17.9.2014 was based on the reasons for dismissal communicated via the Notification dated 10.9.2014 being failure to:

- “(a) correctly verify isolation was in place prior to commencing work, and**
- (b) ...complete isolation before carrying out work.”**

15. The claimant has persistently denied the said breach of safety rules and maintained that he and his colleague Mr. Matano complied with all the safety rules and requirements by ensuring that power to the tower was isolated and the DB securely locked. However the JSA prepared by Mr. Matano and signed by the claimant does not support the testimony by the Cw1.

16. The JSA for Work Order No.15893 never indicated that there was to be any power isolation. That the JSA never sought permission for the isolation of power and indeed on the section for electrical isolation, it was indicated NR (meaning electrical isolation Not Required). It is therefore the finding of this court from evidence adduced that the claimant proceeded to do the assignment given before first ensuring that power was properly isolated. That he proceeded on the wrong assumption that, because other people had commenced the work of restoring the flood light tower while he was away, the power had already been isolated. The foregoing finding is founded on the JSA prepared by Matano and approved by the claimant which indicated that isolation was not required. Consequently, the answer to the first issue for determination is that the claimant indeed breached the safety rules and exposed himself and other persons in the work place to risk. That breach constituted a valid and fair reason for dismissing him within the meaning of section 44 and 45 of the Employment Act.

Unfair procedure

17. The claimant contended that the procedure followed to terminate his service was unfair and unlawful because he was not served with prior notice and he was never given a fair hearing. The Rw1 on the other hand stated that the claimant was given an opportunity to defend himself in writing and was also invited to an oral hearing in the company of a fellow employee of his choice.

18. There is no doubt from the evidence that the claimant was served with a written notice of intention to dismiss him citing the misconduct he was accused of and inviting him for an oral hearing on 15.9.2014 at 11.00am. The notice stated in paragraph 3 of its page 2 that:-

- “ We will reconvene on Monday 15th September at 11.00am to hear**
- and consider any representations you may have in relation to this**
- incident and the outcome of summary dismissal. As per our normal**
- process you are able to bring an employee as a support person to**
- this meeting if you desire. We do however suggest that this not be**
- a subordinate or junior member of staff. Please also not that the**
- support persons role is as an observer and note taker only.”**

19. The question that arises is whether the hearing to which the claimant was invited was fair, if at all it took place. The court's opinion is that, if at all the hearing took place, the same was not fair within the meaning of section 41 and 45 of the Employment Act. The reason being that the claimant's rights to call witnesses and to be accompanied by a fellow employee of his own choice with the right to air views was curtailed by the wording of the invitation notice. The contemplated hearing was therefore in violation of section 41 of the Employment Act for denying the claimant's chosen companion and witnesses the right to give their views and to remain as "a note taker and observer". The said section provides that:-

“(2) Notwithstanding any other provision of this part, an employer

shall, before terminating the employment of an employee or

summarily dismissing an employee under section 44(3) or (4)

hear and consider any representations which the employee

may on the grounds of misconduct or poor performance, and

the person, if any, chosen by the employee within sub section

1. make.”

20. After carefully evaluating the evidence against the said provision of the Law the court finds on a balance of probability that the claimant was dismissed without following a fair procedure as contemplated under section 41 of the Employment Act. The said law does not allow any room for the employer to direct the accused employee to be accompanied by an observer and or note taker to the disciplinary hearing. The employee has a right to be accompanied by another employee of his choice and even to call witnesses to support his evidence. Consequently, the failure to follow a fair procedure before dismissal rendered the termination of the claimant's employment unfair within the meaning of section 45 of the Employment Act.

Relief

21. In view of the foregoing finding that the termination of the claimant's employment contract was done without following fair procedure, the court makes declaration that the termination was unfair and unlawful. Under section 49 (1) read with 49 (4) of the Employment Act the claimant is entitled to compensation for the said termination. He is awarded three months gross salary in that respect being kshs. 782,184.00. The reason for not granting the maximum compensation is because the claimant largely contributed to his termination through his misconduct. Secondly, the court has considered the fact that the claimant had had served the respondent for less than 2 years. Lastly, the Court has considered the exgratia payment of 3 months pay after dismissal.

22. The claim for service pay is however dismissed because the claimant admitted in evidence that he was contributing towards the National Social Security Fund (NSSF). Although he doubted whether the employer remitted the NSSF contributions, he produced no evidence like NSSF statements to form a basis for his doubt. Consequently the court finds and holds that the claimant was disqualified from claiming service pay by section 35(6) of the Employment Act. The said provision of the Law bars all employees who are members of the NSSF or gratuity or pension scheme to which his employer contributes, from claiming service pay.

23. Likewise, the claim for loss of income that the claimant would have earned before retirement age is dismissed. Unlike in the case of fixed term contracts, employees under unlimited term contracts cannot claim lost income. In the former case the parties to the contract commit themselves to be bound for a certain period in future and the terms and benefits are known. In the other case, however, the future is not certain just like the benefits. The commitment is also terminable at any time by notice or summarily.

Disposition

24. For the reasons stated above judgment is entered for the claimant declaring the termination of his employment unlawful and awarding him **kshs.782,184.00** plus costs.

Dated, signed and delivered this 27th day of May 2016.

ONESMUS MAKAU

JUDGE