



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 25 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOHN OKELLO OBANGOCLAIMANT

-Versus-

C.M.C. MOTORS GROUP LIMITEDRESPONDENT

JUDGEMENT

John Okello Obango the Claimant herein filed this suit against CMC Motors Group Limited his former employer the Respondent alleging that he was unfairly terminated by the Respondent who also failed to pay his terminal dues.

The Respondent in its reply to the Claimant's memorandum of claim denied that the termination of the claimant's employment was unfair or that it failed to pay the Claimant's terminal benefits.

At the hearing of the case the Claimant testified on his behalf and the Respondent called one witness, Samuel Ndungu Gikonyo, an accountant at its Eldoret Branch where the Claimant was based at the time of his dismissal.

The main facts of the case are not contested. The Claimant was employed by the Respondent at its Eldoret Branch as a spray painter in 2007. His starting salary was Shs.16,199 with a house allowance of Shs.3,418 per month. His terms of employment were covered by the Collective Bargaining Agreement (CBA) negotiated between The Motor Trade and Allied Industries Employers Association (the Association) and the Amalgamated Union of Kenya Metal workers (the Union). The Claimant was a member of the Union while the Respondent was a member of the Association.

At the time of termination of employment the Claimant's basic salary was Shs.36,329 with a house allowance of Shs.7,667 per month.

On 25th June, 2014 the Claimant was arrested by contracted security guards from KK security while leaving work at around 5pm for being in possession of a 500 millilitre plastic bottle containing turpentine without a gate pass. He was taken to Eldoret Police Station from where he was transferred to Langas Police Station in Eldoret where he was locked up for one night. He was released the following day after paying cash bail of Shs.10,000/- partly paid partly by his family and partly by his employer. He was never charged with any offence. Apparently the Respondent did not press for charges.

The Claimant was later called for a disciplinary hearing at the Respondent's head office at Nairobi on a date that is not disclosed either in the pleadings or in the evidence adduced in court. The Claimant's employment was terminated by letter dated 15th July 2014 but effective from 17th July, 2014.

The Claimant was paid terminal dues of Shs.316,996.28 made up as follows:-

1.	Service Gratuity	Shs.144,105.03
2.	Pay in lieu of 38 days leave	Shs. 53,096.23
3.	Travelling Allowance of 38 days	Shs. 7,676.17
4.	Two Months Salary in lieu of notice	Shs. 87,992.00
5.	Salary up to 17th July, 2014	<u>Shs. 24,126.84</u>
	Total	Shs.316,996.28

The whole of that amount was not paid to the Claimant as it was used to offset his debts and statutory deductions as follows:-

1.	Co-operative Bank Loan	Shs.109,223
2.	SACCO Loan	Shs.100,770
3.	Staff Debtors	Shs. 34,511
4.	Salary Advance	Shs. 15,000
5.	Income Tax	Shs. 57,492

Claimants Case

The Claimant averred that the thinner he had at the gate on 25th June, 2014 had been bought by him during lunch break at Shs.200 from Bidii Auto Paints. He intended to use it to remove ink from his child's uniform. He stated that he had left it at the gate when he reported for duty after lunch as instructed by the G4S Security Guard on duty at the gate at the time. He testified that by the time he was leaving work in the evening the G4S security guard had left and had been replaced by two(2) KK Security Guards.

He testified that he took the thinner then went to sign out, but while signing out one of the two KK Security guards knocked him down and pinned him on the ground using his foot to press down the Claimant's head while the other guard hit him with a 'rungu'. He testified that he did not resist. That the guards called the workshop manager, Mr, Azim who came and asked what was happening. After the Claimant explained what was happening Mr. Azim instructed that the Claimant be taken to the police station where he was detained until the following day without being required to write a statement. He was released at noon the following day without being charged and the thinner was given back to him. He was however required to report at the police station daily for 2 weeks before he was discharged after the Respondent failed to record a statement.

The Claimant testified that when he was called to the Boardroom in Nairobi, he explained what had happened and produced the cash sale receipt for the purchase of the thinner. He was then told to wait for a response which he never received.

The Claimant testified that he had been defamed by the Respondent and was unable to get a job. That even his family thought he had stolen. He testified that he was never paid any terminal dues. He prayed for the following orders:-

- (a) A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, she was not remunerated as required by law.

- (b) Payment of the sums of money claimed under paragraph 9 of the Statement of Claim.
- (c) Costs and Interests.
- (d) Any other relieve the honourable may deem fit to grant.

The Claimant denied that the Respondent paid his bank loan as the loan was still outstanding. He stated that the account paid was not his account. He also denied having a loan with the Co-operative Society. He stated that if he had a loan it would have appeared in his payslip.

Under cross-examination the claimant stated that the thinner he had was high gloss which is not used by the company. He stated that the company used slow thinner.

Respondents Case

The RW1 testified that on 25th June, 2014 he was working as branch accountant at the Respondent's Eldoret Branch. At around 5pm he was informed by a colleague that there was a commotion at the gate. He rushed to the gate where he found the Claimant pinned down by the security guards manning the gate. He stated that more security guards were called and they searched the Claimant and found a bottle of liquid tucked in his socks. He testified that the workshop manager came and identified the liquid as thinner and at that time the Claimant was unable to explain where he got the thinner from and did not produce a receipt. He further testified that the Claimant was called for a disciplinary hearing in Nairobi and was paid his full terminal dues which was applied to his debts and statutory deductions.

Findings and Determination

The issues for determination are whether the termination of the Claimant's employment was fair and if he is entitled to the prayers sought. Section 41 and 43 of the Employment Act provide for fair procedure and validity of reasons for termination.

In the present case the Claimant testified that he was called to the Respondent's Boardroom in Nairobi where he explained what happened and showed the Respondent's representatives the receipt. It is however not clear what transpired at the meeting as no letter inviting the Claimant to the meeting has been produced and no information has been given on who attended the meeting or what transpired during the meeting. The letter of termination does not make any reference to a disciplinary hearing.

The two letters from the Claimant's union dated 17th July, 2014 and 30th July, 2014 state that the Respondent did not comply with the procedure set out in the CBA and the Employment Act and that the Union was never involved. The letters also state that the Claimant's letter of termination was issued to the shop steward and not to the Claimant personally.

There is therefore no indication that there was fair procedure in the handling of the Claimant's disciplinary process.

The grounds for termination are also not clear. In the letter of termination it is stated that:-

We have received reports that on 25th June 2014, at around 5.20 pm you were caught by the K.K. Security guard attempting to take out of the Company premises a one tin of thinner and convert the same to your own use without authority.

This is a breach of your honesty and integrity for which your services with this Company have been terminated with effect from 17th July, 2014.

No mention is made of the purchase receipt that the Claimant produced. It has not been stated anywhere that the thinner that the Claimant had was the property of the Respondent. During the hearing the claimant stated that the thinner he had was high gloss while thinner used at the Respondent's workshop

was slow thinner. This evidence was not contested. Again no explanation was given why the Respondent was so fast in taking the Claimant to the police station where he was detained overnight and thereafter made to report daily for two weeks, yet they did not press any charges against him.

In the circumstances I find that there was no proof of valid reason for termination of the Claimant's employment as envisaged at section 43 and 45(1) (2) and (4) of the Employment Act.

I therefore find and declare that the termination of the employment contract of the claimant was unfair both procedurally and substantively.

Remedies

The Claimant was paid salary up to 17th July 2014, two months salary in lieu of notice and 38 days leave earned up to date of termination. The prayers in respect of the same are therefore not valid and are dismissed. The prayer for gratuity is likewise dismissed as the same was paid to the Claimant.

The only valid prayer is for compensation for unfair termination. Taking into account the length of service of the claimant, the circumstances under which he was dismissed and all other relevant circumstances, it is my opinion that compensation equivalent to 10 months gross salary is reasonable. I therefore award the Claimant (Shs.43,997.97 X 10) Shs.439,979.70 as compensation.

The Respondent will pay the Claimant's costs for the case and the decretal sum shall attract interest at court rates unless paid within 30 days from the date of judgement.

Dated, Signed and Delivered this 14th day of July, 2016

MAUREEN ONYANGO

JUDGE