



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1537 OF 2014

DICKSON MATINGI..... CLAIMANT

VS

DB SCHENKER LIMITED..... RESPONDENT

AWARD

Introduction

1. This action is brought by the Claimant by way of a Memorandum of Claim dated 2nd September and filed in Court on 3rd September 2014. The Respondent's defence is contained in a Memorandum of Response dated 6th March and filed in Court on 9th March 2015. At the hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Moses Onyango Nzuya.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent on 8th October 1999 as a Porter initially at a daily rate of Kshs.700. He was subsequently promoted to the position of Documentation Clerk at a monthly salary of Kshs.26,382.

3. On 12th November 2013, the Claimant was arrested and charged on allegations of stealing a t-shirt. The Claimant was released on cash bail and upon reporting to work he was informed by the Assistant Human Resource Manager, one Ms. Kioko that his services had been terminated.

4. The Claimant was eventually issued with a letter of summary dismissal on 20th December 2013. He contends that the dismissal was unlawful and unfair. He claims the following:

- a. A declaration that the dismissal was unprocedural and improper
- b. Severance pay for 14 years.....Kshs.184,674.00
- c. Damages for wrongful/unfair termination.....316,584.00
- d. House allowance for 14 years.....664,826.40
- e. Costs plus interest

The Respondent's Case

5. In its Memorandum of Response filed on 9th March 2015, the Respondent states that the Claimant was employed on casual basis on 4th October 1999. From 1st November 2011, the Claimant was employed on permanent basis.

6. In the month of November 2013, the Respondent received a complaint from one of its clients to the effect that some branded t-shirts had been stolen from the client's consignment which lay at the Respondent's premises.

7. The Respondent carried out investigations which revealed that the Claimant was involved in the theft. One of the t-shirts was found in the Claimant's house. On being questioned, the Claimant stated that he had bought the t-shirt from the market. The Respondent states that the t-shirts had been branded for a cause in Rwanda and could not therefore have been sold in the Kenyan market.

8. The Police were called in on 12th November 2013 and the Claimant was arrested and charged in court. He was released from custody on 13th November 2013 but did not report to work for a whole month. He was therefore presumed to have deserted work and was summarily dismissed.

9. The Respondent denies that the Claimant reported to work after being released from custody. The claims for house allowance and severance pay are specifically denied. The Respondent states that the Claimant's salary at the time of dismissal was Kshs.17,000 and not 26,382 as pleaded by the Claimant.

Findings and Determination

10. The issues for determination in this case are as follows:

- a. Whether the Claimant deserted duty or was unlawfully dismissed;
- b. Whether the Claimant is entitled to the remedies sought.

Desertion or Unlawful Dismissal?

11. The Claimant states that upon being released on bail, he reported to work but was locked out. Conversely, the Respondent maintains that the Claimant failed to report to work and was therefore deemed to have deserted duty thus rendering himself liable to summary dismissal.

12. The dismissal letter dated 20th December 2013 states as follows:

“Dear Dickson,

RE: SUMMARY DISMISSAL

We refer to the incident in which a stolen item was recovered from your house by the police on 12th November, 2013 following the Company's complaint on the loss of client items from the store. You may recall that on the material day, a T-shirt branded with the words “Nuru Energy” belonging to our Client and which was awaiting shipment to the Republic of Rwanda was recovered from your residence. Despite your denial as the source of the T-shirt, we have substantial reasons to believe the T-shirt originated from our store. We have since learnt of your release on cash bail from the police custody but have chosen to absent from duty to date (sic).

For these reasons, Management has decided to dismiss you with immediate effect in accordance with the Employment Act Section 44 f and g.

Your final dues shall constitute the following;

- *Days worked up to and including 15th November 2013.*
- *31 days salary in lieu of unutilized leaved days as at 15th November 2013.*

Please handover all Company property in your possession to the Head of Airfreight and report to the HR Department for clearance, withdrawal from the Company's Retirement pension scheme.

Yours faithfully

For SCHENKER LTD,

Moses Nzuya

Human Resource Manager”

13. The Respondent's witness, Moses Onyango Nzuya told the Court that the decision to summarily dismiss the Claimant was informed by his desertion of duty. However, from the dismissal letter which I have reproduced above, it would appear that there were two reasons for the Claimant's dismissal. First, the allegations of theft which led to the Claimant's arrest and second, desertion of duty.

14. Judging from the evidence laid before the Court, the two reasons were inextricably related and I will therefore dispense with them as such. The Claimant was accused of theft by servant and criminal charges to this effect are pending.

15. Counsel for the Respondent rightly submitted that the pendency of criminal proceedings is not a bar to internal disciplinary action by an employer against an employee. Indeed, as held by **Rika J** in ***Clement Mutiso Muinde v British American Insurance Company Limited [2013] eKLR*** the prerogative of an employer to take out internal disciplinary proceedings against an employee cannot be limited by the pendency of a criminal trial over related issues of fact.

16. I hold the view that this is the correct legal position. Nevertheless, the law is a double edged sword. Just like an employer is not bound to await the outcome of a criminal trial before taking disciplinary action against an employee, they cannot rely on the mere fact that an employee has been arrested and charged to explain a disciplinary action.

17. An employer must have solid grounds for its decision to take out disciplinary proceedings against an employee. Such grounds are to be established, on a balance of probability, in an internal disciplinary process within the parameters set out in law. In determining this case the Court will ask itself whether the Respondent has discharged this mandate.

18. I now turn to the question whether the Claimant deserted duty. The Court was referred to the South African decision in ***Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)*** where the Court held as follows:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”

19. Closer home, **Radido J** in ***Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR*** held that an employer asserting desertion by an employee must demonstrate attempts made to establish the whereabouts of the employee.

20. I hold a similar view. It is not enough for an employer to state that an employee has deserted duty and on that basis proceed to dismiss. Desertion is a form of gross misconduct which must be proved.

21. Apart from stating that the Claimant had deserted duty, the Respondent made no effort to

prove its assertion and the Court therefore rejects this line of defence.

22. Ultimately, the Court finds that the Claimant's dismissal was wrongful for want of substantive justification as required under Section 43 of the Employment Act, 2007 and violation of the procedural fairness requirements set out under Section 41 of the Act.

Remedies

23. Before addressing the issue of the remedies available to the Claimant, I need to lay the matter of his salary to rest. The Claimant told the Court that when he held the position of Porter, he earned a monthly salary of Kshs.26,382.00.

24. For some reason that was not clear to the Court, the Claimant's salary was reduced to Kshs.17,712.00 when he was appointed to the position of Documentation Clerk. No explanation was given for this obvious discrepancy. Moreover, the Claimant did not offer any documentary evidence in support of his assertion in this regard and the Court found his testimony on this issue far-fetched and untruthful.

25. At any rate, the Claimant's employment effective 1st November 2011 was evidenced by a letter of appointment of the same date. Where the terms of employment are documented, the Court has no business engaging in speculative arguments. That being the case, I adopt the figure of Kshs.17,712.00 as the Claimant's monthly salary for purposes of tabulating his claim.

26. Another preliminary issue has to do with the effective date of the Claimant's employment. In its Memorandum of Response, the Respondent states that prior to 1st November 2011, the Claimant was a casual employee. This position is however contradicted by the Respondent's letter dated 4th October 1999 which states as follows:

“Mr. Dickson Matingi

RE: LETTER OF APPOINTMENT

I am pleased to inform you that the company has decided to offer you permanent/casual employment with effect from 08/10/1999. You are thereby advised to avail yourself on the very date at 8.00AM at our offices at Jomo Kenyatta International Airport. Terms and conditions will be set on that day.

Note: Remember to carry your original certificate and ID for verification.

Thanks

Yours faithfully,

SCHENKER & CO. (E.A.) LTD

PETER N. MUTUA

FINANCE AND ADMINISTRATION MANAGER”

27. The terms and conditions referred to in this letter were not availed to the Court and no record was produced to show that the Claimant worked on casual basis from 1999 to 2011. Significantly, the Respondent's Human Resource Manager, Moses Nzuya could not tell the period over which the Claimant was a casual employee. Taking all factors into account, this Court has reached the conclusion that the Claimant was a regular employee of the Respondent from 8th October 1999 until 20th December 2013 when he was dismissed. The Respondent's assertion that he was a casual employee is thus rejected.

28. Back to the dismissal. In light of the finding that the Claimant's dismissal was devoid of substantive justification and procedural fairness, I award him twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the dismissal process. In light of the declaration that the summary dismissal was unlawful, the Claimant is entitled to one (1) month's salary in lieu of notice.

29. With regard to the claim for house allowance, the Court observed that the Claimant's letter of employment dated 1st November 2011, provided for a distinct figure for house allowance at Kshs.3,000.00 as required under Section 31 of the Employment Act.

30. The Claimant produced a number of payslips issued to him by the Respondent. Curiously, these payslips, save for the one for November 2013, do not reflect the figure for house allowance and the Respondent did not provide any explanation for this omission.

31. The Court therefore concluded that the Respondent withheld the Claimant's house allowance from the date of employment until his dismissal. Consequently, the claim for house allowance succeeds and is allowed.

32. No basis was laid for the claim for severance pay which fails and is dismissed.

33. Finally I make an award in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation (17,712x12)..... Kshs.212,544.00
- b) 1 month's salary in lieu of notice.....17,712.00
- c) House allowance for 170 months @ contractual rate of
Kshs.3,000.....510,000.00
- Total.....740,256.00**

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34. The award amount will attract interest at court rates from the date of the award until payment in full.

35. The Respondent will meet the costs of this case.

36. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF JULY 2016

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JUDGE

Appearance:

Ms. Muhanda for the Claimant

Ms. Mumia for the Respondent