



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 230 OF 2015
(Consolidated with 228 and 231 of 2015)

CHIKOPHE JANJA KURERA.....1ST CLAIMANT
SOSPETER OCHIENG OCHILO.....2ND CLAIMANT
MWERO MARADI.....3RD CLAIMANT

-VERSUS-

KASSAM HAULIERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimants' employment contract by the respondent in October 2014. The respondent has denied liability and averred that the termination of the claimants' services was fair, procedurally and substantively.
2. The claimants filed separate suits initially but on 18.6.2015, the suits were consolidated. That when the suit came up for hearing on 9.6.2016, the parties agreed to disperse with oral evidence and adopted the witness statements and the documentary evidence as their respective evidence. Thereafter both parties filed written submissions.

Claimant's case

3. Mr. Chikophe Janja Kureba, first claimant started that he was employed by the respondent on 7.7.2012 as a mechanic on permanent basis. That the contract was oral and his salary was kshs.15,000 per month. That he worked well until 2.10.2014 when the respondent directed that all employees who had joined Trade union should not enter the respondent's premises. However on 3.10.2014, the directive was rescinded and all the workers including himself reported back to work. That on 5.10.2014 at 6pm he was informed by Mr. Musa Kassim, a Manager for the respondent that he had been dismissed for joining a trade union. The 1st claimant contended that the termination was unfair because it was without following the law and the reason was unfair.

4. Mr. Sospeter Ochieng Ochilo, the second claimant was employed by the respondent on 1.5.2010 as a Cable Handler earning kshs.30,000 per month. That he worked well until 23.10.2014 when he was

dismissed for joining a trade union. That before the dismissal the respondent gave him the option of resigning from the job after joining the union and when he refused he was dismissed from work for unspecified misconduct.

5. Mr. Mwero Maradi, the third claimant, was employed by the respondent on 10.3.2013 as a mechanic. That he worked until 23.10.2014 when he was dismissed for stealing an unknown item. However according to him, the reason for his dismissal was his choice to join trade union against the wish of the employer. That such dismissal was unfair because the reason for the dismissal was unfair and in contravention of the Labour laws.

Defence case

6. The respondent called her HR Manager Mr. Ibrahim Hussein Mangale as her witness and he filed witness statement admitting that the claimants' were employed by the respondent. He denied that the claimants were good performers and contended that they performed poorly and below expectation. In addition he averred that the claimant spent most of their official working time discussing union matters and recruiting other employees to join the Kenya Long Distance Truck drivers and Allied Workers Union instead of doing the work they were employed to do. That as a result the claimants caused back log of the tasks assigned to them.

7. Mr. Mangale further explained that the respondents Director was angered by the claimants' misconduct and poor productivity and summarily dismissed them. That before the dismissal the claimants were called to a disciplinary hearing chaired by the respondents Director. That the dismissal was fair because the respondent followed fair procedure.

Analysis and Determination

8. There is no dispute that the claimants were employed by the respondent until October 2014 when they were dismissed. The issues for determination are:-

a. Whether the termination of the claimants' employment was unfair.

b. Whether the reliefs sought should issue.

Unfair termination

9. Under section 45 of the Employment Act (EA), termination of employees services is unfair if the employer fails to prove that it was founded on valid and fair reason(s) and that it was done after following a fair procedure.

Reason for termination

10. According to the claimants, the reason for their dismissal is that they joined a trade union against the wish of the respondent. On the other hand the respondent contends that the claimants were dismissed for engaging in union activities during working hours as a result of which their performance went very low as a result of which the operations of the company was affected by the delays on the part of the claimants roles.

11. Under section 43, 45 and 47(5) of the Employment Act, the burden of proving and justifying the reason for termination of the employee's employment lies on the employer. In this case, the person who tendered evidence is not the one who dismissed the claimants. He also never produced any cogent evidence to prove the alleged poor performance by the claimant. That no performance appraisal reports were produced and no independent witnesses were called to prove that the claimants were spending time discussing union issues and recruiting other workers to join the union. Lastly, the Director, who is said to have spotted the claimants sitted and not doing work, but discussing union issues never tendered any evidence herein to prove the alleged neglect of duty by the claimants. Consequently, I dismiss as hearsay

the evidence by Mr. Mangale that the respondent's Director spotted the claimants not working but instead discussing and recruiting other employees to the union during working hours.

12. For the reasons stated above, I find that the respondent has not proved on a balance of probability that the reason for dismissing the claimants was valid and fair. Instead I find in favour of the claimants that, they have proved on a balance of probability that the reason for their dismissal by the respondent is because they joined a trade union against the wish of the respondent.

13. Under section 46 of the Employment Act joining a trade union is not a fair reason for dismissing an employee's employment. The said right is guaranteed by Article 41 of the Constitution and the employer has no legal right to take it away. Consequently, I find and hold that the reason for termination of the claimants' services herein was unfair.

Procedure followed

14. Under section 45 the procedure followed for terminating the employment of an employee is unfair if the reason(s) for termination is one of the reasons declared unfair by section 46 of the Employment Act like in this case. However even if the court was to inquire fairness of the procedure followed, there is no doubt that the mandation procedure provided by section 41 of the Employment Act was not followed. The said provision requires that before dismissing an employee's employment for misconduct and poor performance, the employer must explain the reason to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, and thereafter allow them to air their defence for consideration before termination is decided. Although the defence witness herein alleged that a "disciplinary sitting" was held, in which the dismissal of the claimants was decided, the defence witness never proved that the proceedings were in compliance with the provisions of section 41 supra. Consequently, I find and hold that the dismissal was not done after following a fair procedure.

Reliefs

15. Having found that the termination of the claimants services was unfair, I proceed to award each of them one month salary in lieu of notice and 6 months salary as compensation for unfair termination of their services. In making the said award I have considered the fact that they had not served for long period and also the fact that with due diligence, they could secure alternative employment within 6 months after their dismissal. The claimants will also get paid for the leave days earned during their period of service since no evidence in form of leave records was adduced to disprove the claim for leave.

16. The claim for overtime, service pay and punitive damages is however dismissed for want of particulars and evidence. In addition, no legal basis has been demonstrated to warrant punishing the respondent by damages other than through the awards I have made above under section 49 of the Employment Act. As regards to service pay, the claimants have filed statement of NSSF remittance that confirms that they are excluded from service pay. The prayer for Certificate of Service is however granted because it is a right to every employee under section 51 of the Employment Act.

17. The summary of the claimants awards is as follows:-

1. Chikophe Janja Kurera

Notice	15,000.00
Compensation	90,000.00
Leave for 47 days	<u>27,115.40</u>
	<u>132,115.40</u>

2. Sospeter Ochieng Ochilo

Notice	30,000.00
Compensation	180,000.00
Leave for 92.75 days	<u>107,019.25</u>
	<u>317,018.25</u>

3. Mwaro Maradi

Notice	15,000.00
Compensation	90,000.00
Leave for 33.25 days	<u>19,182.70</u>
	<u>124,182.70</u>

Disposition

1. For the reasons stated above, I enter judgment for the claimants in the aggregate sum of **kshs.573,317.35** plus costs and interest.

Signed, dated and delivered this 14th day of October 2016.

ONESMUS MAKAU

JUDGE