



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.702 OF 2015

DOMINIC ARNOLD LIANDARO

SIMON KIPLIMO ROP.....CLAIMANTS

VS

THREE WAYS SHIPPING SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimants were employed by the respondent up to 29.4.2015 when they suspended for 30 days for an alleged misconduct. After the end of the suspension period the claimants reported back to work but they were to wait until they were called back. It is the claimants' case that they were never called back and they were not paid any salary during the indefinite suspension and they now believe that their employer has since been unfairly terminated by the respondent. They have therefore brought this suit claiming compensation for unfair termination and terminal dues totaling to kshs.821,578.

2. The respondent admits the claimants were her employees but avers that on 24.4.2015 they were found guilty of defrauding kshs.97,500 during a disciplinary hearing which also recommended that they be dismissed. It is the defence case that on 29.4.2015, the claimants were suspended from work and they were advised to keep phone contacts available for further communication but they switched off their phones and disappeared. The respondent therefore avers that the suspension and the subsequent termination of the claimants' employment was lawful and fair and they were paid all their May salary despite the fact that they never worked.

3. The suit was heard on 17.2.2016 when the 1st claimant and 2nd claimant testified as Cw1 and 2 and the defence called Mr. Cyprian Lumati Mukoshi. Thereafter the parties filed written submissions.

Claimants' case

4. Cw1 stated that he was employed by the respondent in February 2014 as a Procurement Officer earning kshs.31700 per month. That he worked well until 2.5.2015 when he was called by the Cw2 telling him to go for his suspension letter. The letter suspended him for 30 days for fraudulently failure to procure items after receiving the required funds. After the lapse of the suspension period he and Cw2 reported back to work on 5.6.2015 but the HR Manager referred them to the Country Manager for a hearing.

5. Cw1 contended that when they went to see the Country Manager, he said that he was busy and he said

that they should come back the following day. That on the following day they also found the Country Manager busy but they were told to go home until further notice. That they were never paid any salary during their suspension and they were never called back to work and also such they constrained the conduct of the employer to mean that they had been dismissed from work. They therefore served a demand letter followed by this suit.

6. Cw1 contended that he never took leave for 2 years amounting to 42 days. He prayed for 12 months salary as compensation for unfair termination, one month notice in lieu of notice plus arrears of house allowance for 16 months at the rate of 15% of the kshs.31,700 per month.

7. On cross examination, Cw1 denied that he was given a disciplinary hearing on 24.4.2015 and maintained that on that day he was working away from the office from 11 am till 4.30 pm. He explained that when he was called by the Cw2 to collect the suspension letters, he was away for 2 days leave. That after the suspension he was never served with any termination letter even after serving a demand letter through his lawyer. He therefore maintained that the termination of services was unfair.

8. Cw2 stated that he was employed by the respondent in January 2014 as a Procurement Officer and worked until 29.4.2015 when he was served with a letter suspending him from work for 30 days for reason that he conspired with the Cw1 to commit fraud against the respondent. That when he reported back work Cw1 they were referred to the Country Manager for a hearing by the HR Manager Mr. Daniel Kavoi. That effort to see the Country Manager failed and they were told to stay away until further notice. That after waiting in vain for their salary and a call to report back to work, they believed that they had been dismissed and they served a demand letter through a Lawyer followed by this suit. Cw2 also avers that the termination of his employment contract was unfair and prayed for the damages as pleaded in his suit. He associated himself with the testimony by the Cw1 including the fact that he had only 10 days leave balance.

9. On cross examination Cw2 denied the signature in the contract of employment produced by the respondent. He contended that he never worked in the capacity of Assistant Container Control as indicated in the letter. He further denied that he was given hearing before suspension and the subsequent termination.

Defence case

10. Rw1 joined the respondent on 15.7.2014 as a Store Keeper. He confirmed that the claimants were also employed by the respondent in the Procurement Department. He stated that he requested the claimants to procure 65 pieces of strap belts for Lashing Cargo but before delivery, the claimants asked him to prepare a Goods Received Form. He however refused and reported the matter to the Transport Manager Mr. Daniel Kavoi and a meeting was convened by the HR Manager Mr. Opot. The meeting was attended by Store keeper Mr. Joseph Muniyithya, Mr. Daniel Kavoi, Cw2 and himself. That during the meeting Cw1 admitted the offence and apologized and said that he was misled by the Cw1. He produced as exhibit, minutes for the alleged meeting and the contracts for the Cw1.

11. On cross examination Rw1 stated that his request for the Lashing Straps was in writing but he did not have it in court. He further contended that the day he reported the fraud to the management at 12 noon is the same day the meeting was held at 4pm at the store. He however admitted that the Cw1 never attended the meeting which was held while standing and minutes recorded. He further admitted that the minutes were in handwriting and were signed by the persons attending. He however did not have the hand written minutes. He concluded by admitting that he was never called to any hearing by the respondent to explain how Cw2 wanted to introduce him to a fraud.

Analysis and Determination

12. There is no dispute from the material presented to the court that the claimants were employed by the respondent; that they were earning kshs.31,700 and kshs.16,000 respectively; that they were suspended for an alleged fraud for 30 days starting 29.4.2015 but they have since been out of employment; and that

Cw1 was never given a hearing in connection to the said misconduct. The issues for determination are:

(a) Whether claimants were unfairly terminated or they deserted work.

(b) Whether reliefs sought in suit should issue.

Termination vs Desertion

13. The claimants have contended in their testimonies that after the lapse of the suspension period of 30 days, they reported back but the HR Manager referred them to the Country Manager for a hearing but they found him busy. That they were advised to report back the following day but again they found him busy and they were told to go away until they were called back. That after waiting for a long time without being called back and without being paid any salary they served demand letter to verify their employment status but the same was ignored.

14. The foregoing evidence was never contested and rebutted by the HR Manager and the Country Manager. Rw1 was not present when the claimants reported to the HR Manager on 5.6.2015 or when they were told by Country Manager that he was busy and they should return home until he called them back. Consequently, I find the defence has not proved on a balance of probability that the claimants switched off their phones and disappeared after they were suspended. I however found in favour of the claimants that they were constructively dismissed after the expiry of their suspension period. It is trite Law that an employee is entitled to deem that he has been dismissed if the employer has by his conduct materially breached the contract like failure to pay salary or if he unlawfully prevents the employee from performing his part of the contract. The question that arises is whether the termination was unfair.

15. Under section 45 of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was founded on valid and fair reason and that it was done after following a fair procedure. In this case the reason cited for the suspension and subsequent termination is that the claimants had committed fraud against her by obtaining funds and failing to procure the goods for which the funds were intended. However no evidence was adduced in the form of requisition documents from Rw1 were produced in evidence. Likewise no evidence was adduced to prove that money was paid and received by the claimants for procurement of Lashing Straps. The only evidence relied upon by the defence to accuse the claimants are the minutes of a disciplinary meeting allegedly held on 24.4.2015 at 2pm in which the claimants allegedly admitted the fraud and apologized.

16. I do not hesitate to observe that the said minutes are contrary to the testimony of the Rw1 because according to him, Cw1 never attended the said meeting; that it started at 4pm; the minutes were handwritten and were signed by the people attending the meeting. The minutes produced herein are typed and not signed by the claimants and they indicate that the 1st claimant (Cw1) was present at the meeting. The said sharp contradiction between the said minutes and the evidence by Rw1 must be resolved in favour of the claimants who have maintained that they were never called to any meeting by the Respondent to discuss the alleged misconduct. Consequently, in view of my earlier observation that no evidence of requisitions for the purchase of Lashing Straps and cash payment to the claimants was adduced, and the fact that the minutes produced are at variance with the testimony of the Rw1, I find that the respondent has not discharged her burden under section 43, 45 and 47(5) of the Employment Act of proving and justifying on a balance of probability the reason for suspending and terminating the claimants employment contract.

17. Likewise, and in view of the fact that Rw1 has admitted that Cw1 was never heard before suspension and the subsequent termination, I find that the respondent has not proved on a balance of probability that Cw1 was dismissed after following a fair procedure. As regards the Cw2, Rw1 has not produced the minutes he alleges were taken during the hearing at the store which were handwritten and signed by them. Cw2 has denied ever being called to the alleged meeting on 24.4.2015 and maintains that he was only served with a suspension letter. Even if, this court was to assume that the Cw2 had attended the alleged meeting on 24.4.2015 at the store, the question that begs for answers is whether the said meeting met the threshold of a fair hearing within the meaning of section 41 and 45 (2) (c) of the Employment Act.

18. Under section 41 of the Act, an employer is barred from terminating the employment contract of his employee on ground of misconduct, poor performance and physical incapacity before first according him a fair hearing which takes the following form:

(a) The employer invites the employee with a shop floor union representative or a fellow employee of his choice to the hearing;

(b) The employer explains to the employee in a language he understands the reason for which he contemplates terminating his services

(c) Thereafter the employer invites the employee and his chosen companion to air their representations for consideration before the dismissal is decided.

19. In this case, the respondent did not adduce any evidence to prove that she followed the mandatory procedure provided for under section 41 *supra*. In view of the finding above that the respondent has not proved on a balance of probability that she did observe the substantive and procedural fairness before dismissing the claimants employment contract, the termination was rendered unlawful and unfair within the meaning of section 45 (2) of the Employment Act.

Reliefs

20. In view of the foregoing finding, I make declaration as prayed that the termination of the claimants' employment contract by the respondent was unlawful and unfair.

Notice and Compensation

21. Under section 49 (1) of the Employment Act read with sub section (4), I award each claimant one month salary in lieu of notice plus Ten months salary as compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant have not been able to secure alternative employment upto the date they attended court for hearing. Secondly, I have considered the fact that no misconduct was proved against them that contributed to their termination.

Leave

22. The evidence by the claimants that Cw1 had 42 leave days outstanding and Cw2 had 10 was not rebutted by Leave records by the defence. The claim is therefore allowed.

House allowance

23. The claimants have not produced any evidence to prove that they are entitled to House allowance over and above the pay stated in their respective payslips. They did not even allege in their pleadings that they were entitled to such extra benefits. He who alleges that his benefits were underpaid must prove the alleged under payment on a balance of probability. Therefore I decline to make the award for unpaid House allowance as prayed.

Certificate of service

24. Certificate of service is granted by section 51 of the Employment Act. I therefore direct the respondent to issue the claimant with Certificate of Service as prayed.

Summary of claimants Award

1st Claimant: Dominic Arnold Liandaro

Notice.....kshs. 31,700.00

Compensation.....kshs. 317,000.00

Leave.....kshs. 51,207.70

399,907.70

2nd Claimant: Simon Kiplimo Rop

Notice.....kshs. 16,000.00

Compensation.....kshs. 160,000.00

Leave.....kshs. 6,153.85

182,153.85

Disposition

25. For the reasons stated above, I enter judgment for the claimants declaring the termination of their employment contract unfair and awarding them Certificate of Service and the aggregate sum of **kshs.582,061.55** plus costs and interest.

Dated, signed and delivered at Mombasa this 2nd day of December 2016.

O.N. MAKAU

JUDGE