



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1626 OF 2013

FRED ONYANGO ADUDA.....CLAIMANT

VERSUS

KAMONGO WASTE PAPER LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 9th October 2013 and averred that he was employed by the Respondent for a period exceeding 20 years as a driver. He averred that while in the Respondent's employ he diligently carried out his duties as a driver earning him a good standing with the Respondent. He averred that he received accolades and recommendations from the Respondent. He averred that sometime in September 2013 he was called to the Managing Directors office and while on the way to the MD's office he was informed by a personnel officer Mr. Ochieng Jabuya that he had been summarily dismissed by the management and would be paid one months notice and severance pay for the years worked at the rate of 15 days for each year worked. He did not get an explanation for the dismissal and was paid Kshs. 64,880/- and told to immediately leave work. He averred that the dismissal was high-handed, inconsiderate, unprocedural and against the rules of natural justice. He thus sought general damages amounting to 12 months pay for the unlawful termination, costs of the suit as well as interest at Court rates.
2. The Respondent was opposed and filed a Memorandum of Reply on 6th December 2013. In the Reply, the Respondent averred that the Claimant was its employee but denied that his termination took place as he had averred. The Respondent averred that the Claimant while enroute to Isebania to deliver goods to the Respondent's customers failed, refused and/or neglected to ensure the goods reached the customers of the Respondent leading to a loss of 100 cartons of goods worth Kshs. 44,000/-. The Respondent averred that the Claimant accepted liability for the loss without consulting the Respondent and when he was asked about the loss of the cartons he was offended and begun insulting the directors of the Respondent. The Respondent averred that the Claimant adopted the habit of absenting himself from work without permission. It was also averred that there was an accident involving the Claimant and that he took inordinately long to make deliveries thus causing the Respondent to lose customers. The Respondent averred that the Claimant was well informed of the reasons why he was summarily dismissed. The Respondent thus sought dismissal of the suit with costs to the Respondent.

3. The Claimant testified on 1st October 2014. He reiterated that he was employed by the Respondent as a driver for 21 years and that he drove a truck carrying goods. Initially he drove a Canter and later he drove a 10-wheeler. He testified that he worked diligently and even worked on holidays and weekends. He testified that his salary was 14,300/- exclusive of house allowance. He produced payslips. He testified that on 14th September 2013 there was an accident in Kisii where he had gone to deliver oxygen cylinders and some goods and there was an explosion as he unloaded the goods. He testified that he brought back the truck to Nairobi and was dismissed on 24th November 2013. He wrote a statement on 14th September about the incident in Kisii and he was called by his boss Devji Karim. He testified that he had made deliveries in Migori, Kisii, Oyugis and finished at Sondu. He gave in the cash he had to the mother of his boss and reported to his boss that he had been charged for driving a vehicle with a worn out tyre. He was called by Wekesa and asked to go to the office and he met Peter Ochieng Jabuya who told him he had been relieved of his duties. He testified that he was given payment and signed for it. He testified that he was told that he would be sent something extra on Mpesa. He stated that he was not given any letter to show why he was terminated. He testified that regarding the deliveries in Migori and Isebania he and the turn-man Opiyo delivered goods and there were delivery notes signed when goods were delivered. He testified that he was called about the deliveries in Isebania and he gave the delivery notes and the deliveries had ID and 2 witnesses had signed. He was given three days off after that. He denied receiving a letter on an incident in August 2013. He denied that he was blamed for the gas cylinders incident.
4. In cross examination he testified that the deliveries in Isebania involved candles and candy and he only knew 3 days later that the boxes were missing. He testified that he did not know that 100 boxes were missing. He denied insulting his boss. He testified that no one was injured in the Kisii accident. He denied being given any suspension but conceded that the 3 days could have been considered a suspension. He testified that he was not given the letter of suspension from 13th to 17th July. He testified that the suspension may have been so that they investigate. He denied having hit a person and run away. He stated that he earned 14,300/- plus allowance of Kshs. 2,600/-. He testified that he was paid Kshs. 64,800/- by cheque and that he recalled being paid one month notice on termination.
5. In re-examination he testified that he was not charged for any accident and he did not know if the company had been charged. He stated that he did not know what service pay is. The Claimant's case was closed as the witness he intended to call had been re-engaged by the Respondent and thus could turn hostile.
6. The Respondent's case was closed due to absence but parties consented to reopen the Respondent's case and it called its witness on 17th December 2014. The witness Kenneth Asega Ndeva testified that he worked with the Respondent as Transport Manager. He testified that he had worked for over 10 years and that he knew the Claimant personally and also in matters concerning his duties. He testified that he had known the Claimant for about 8 years. He stated that the Claimant was a driver in the transport department. He testified that he was the Claimant's boss and the Claimant was a good employee but a few cases came up. Being a driver the Claimant was given goods to deliver at various destinations and severally through negligence the Claimant had lost goods. The first incident involved goods that the Claimant was to deliver in Isebania and the customer complained the delivery was short by 100 cartons. He testified that he asked the Claimant to go and confirm and on return the Claimant did not have a conclusive answer. He testified that the Claimant delivered gas cylinders in Kisii and there was an accident which caused an injury. He testified that the third incident was in Nakuru where the Claimant got clothing material to deliver to Nairobi and the Claimant did not bring all the goods to Nairobi. He testified that these incidents occurred within a span of 12 months and the management sat with the Claimant and spoke to the Claimant and the Claimant was suspended. He testified that the Claimant was suspended for the loss of goods at Isebania and did not give a written reply to the letter of suspension. He testified that the termination of the Claimant was fair in the circumstances.

7. In cross examination he testified that the Claimant was not assigned any duties on date of termination. He stated that the Claimant was terminated on account of the incidents prior. He testified that the Claimant was not normally alone in the vehicle on trips and was often accompanied by a loader, a turn-boy. He testified that the work of the driver is to deliver the goods and ensure the proper quantity is delivered to each customer. He testified that physical offloading of the goods is by the loader under instruction of the driver. He testified that there is a delivery note signed on delivery. He conceded no delivery note had been availed as evidence. He testified that regarding the cylinder accident at Kisii, the cylinder was offloaded and dropped on the end with the nozzle and the gas started oozing out and the Claimant drove off. He testified that as the Claimant sped off the rear door of the lorry hit someone. He stated that it was reported in Kisii but he did not produce the OB or report. He testified that the Respondent's customer due to their mutual understanding handled the incident and the Claimant was to be charged in Court. He testified that the Respondent avoided sending the Claimant to Kisii. He admitted there was no warning letter to the Claimant on absenteeism and there was no sign-in register before Court. He admitted that the Claimant was a diligent employee. He testified that the Claimant's termination was not out of the blue and that the Claimant signed salary vouchers, service pay vouchers but did not sign the letter of termination and the letter was given to the Claimant.
8. In re-examination he testified that the driver supervises the turn-boy and during the loading of the goods the driver is to ensure that from the ground all the goods are given and has to confirm all the goods have been lifted and loaded. At the destination the driver is to ensure the recipient signs in confirmation and when goods are lost the driver is responsible for them. He testified that the suspension letter is on loss of goods and the dismissal letter also spoke of loss of goods. He testified that the Claimant did not deny or respond to the allegations. The Claimant signed the petty cash voucher and other documents and this was proof the Claimant acknowledged the termination.
9. Parties filed written submissions. The Claimant filed written submissions on 15th January 2015 while the Respondent filed written submissions on 4th February 2015. The Claimant submitted that the fact of his employment had not been denied by the Respondent and that he undertook his work with outmost diligence and discipline save for two minor accidents that occurred in the course of his employment as a driver which he states were not of his making or doing. He submitted that on Saturday 14th September 2013 while in the course of changing a wheel and without any justifiable cause or reason the Respondent through one Ochieng Jabuya proceeded to unprocedurally and summarily terminate his services. He submitted that at the point of terminating his services the Respondent did not explain the reasons culminating in the drastic decision taken. He submitted that the decision to terminate his services was unfair and unlawful as it did not conform to the laws set out in the Employment Act and in particular sections 41(1), 44(4)(a) to (g) and section 45. He submitted that in respect of all the incidents relied on by the Respondent there was no report or record availed to Court. He submitted that the burden of proving the reason for termination lay on the Respondent in terms of Section 43(1). He submitted that his termination was unfair taking into account Section 45(2)(b) of the Employment Act.
10. The Respondent submitted that the Claimant's letter of appointment provided for dismissal without prior notice in the event of disobedience, neglect or refusal to perform duty, dishonesty or other serious misconduct. The Respondent submitted that the Claimant's contract was summarily terminated on 14th September 2013 owing to the Claimant's repeated negligent conduct in the course of employment, reluctance in the performance of his duties, disrespect of persons in authority and absenteeism elaborated in the letter of termination. The Respondent submitted that the Claimant could be summarily dismissed for a fundamental breach of the obligations under a contract of service as provided for in Section 44 of the Employment Act. The Respondent submitted that the burden of proving unfair termination lies with the employee while the burden of justifying the grounds for termination lies with the employer. The Respondent relied on the case of **Shankar Saklani v DHL Global Forwarding (K) Cause No. 562 of 2012** and the case of **Linus Barasa Odhiambo v Wells Fargo Limited Industrial Cause No. 275 of 2012** on summary dismissal. The Respondent also relied on the case of **Professor Gitile v Multi Media University**

College & Another Cause No. 1200 of 2012 where the Court held that it was not the intention of the Employment Act to take away the managerial prerogative from employers.

11. The matter at hand is pretty clear. The Claimant was dismissed summarily by the Respondent. The Claimant asserts the dismissal was unfair and unlawful. He states that he was not given the procedural safeguards as provided in law and was not given the letter of dismissal. The Respondent on the other hand states that the Claimant was given sufficient notification of the issues that he had to respond to and the Respondent exercised its rights under the Employment Act and contract of service to terminate the Claimant's employment.
12. It is not disputed that the Claimant served the Respondent diligently for many years save for a few incidents. The Claimant acknowledges that the Respondent's customer in Isebania complained about the loss of 100 cartons and he was asked to explain this. According to the Respondent the failure to explain the matters satisfactorily was sufficient cause for termination. The Claimant asserts that he was informed of the dismissal by one Ochieng Jabuya while the Respondent asserts the Claimant was given the payment and signed the salary vouchers at the time of his termination.
13. Under the Employment Act, there is a procedure for discharging an employee who is suspected or guilty of the offences listed under Section 44. The Claimant herein was dismissed in a manner that leaves a lot to be desired. While the Respondent asserts the Claimant was dismissed for the incidents in Isebania, Kisii and the loss of clothing material from Nakuru, there was no adherence to the dictates of Section 41 of the Employment Act. This failure would entitle the Claimant to some relief. He served the Respondent for over 20 years and he deserved better treatment. I hold that the dismissal from service even if merited was contrary to the dictates of fairness and natural justice elaborately set out in the law. The Court is in agreement that the managerial prerogative cannot be taken away from employers. However, in exercise of the managerial prerogative employers must adhere to the law. This Court has set precedent on the procedural fairness under Section 41. I find that the Claimant is therefore entitled to 12 months compensation for the unlawful and unfair termination. I will also grant him costs of the suit.
14. In the final analysis I will enter judgment for the Claimant against the Respondent for Kshs. 202,800/- plus costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of March 2015

Nzioki wa Makau

JUDGE