



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1117 OF 2012

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 20TH APRIL, 2015)

CALISTO ODUOL.....CLAIMANT

VERSUS

SAMEER AFRICA LIMITEDRESPONDENT

JUDGMENT

1. The Claimant herein Calisto Oduol filed his Memorandum of Claim on 29/6/2012 through the firm of Paul Mungla & Co. Advocates. The Respondent is a limited liability company incorporated in Kenya Pursuant to the provisions of the Companies Act Laws of Kenya.

Claimant's case

2. The Claimant's case is that, he was an employee of the Respondent from 9/12/1998 where he was employed as a stores clerk. On 14/4/2011, he was transferred to from Nairobi to Eldoret in same capacity on temporary basis. After being in Eldoret for 11 to 12 days he got a call from one Mr. Biketi concerning a transaction occurring 10/3/2011 in Nairobi which he was involved. By then, the system was down and so he explained to Mr. Biketi that he could explain once the system was up. He later learnt that there were emails send on his official mail which he couldn't access as the system administrator had not configured him in Eldoret. Apparently, the emails were alleging that there were tyres transferred from ABC shop to central warehouse which were not involved. It is the Claimant case that he had dealt with this transaction when he was in central warehouse where he used to transfer tyres to other branches and internal and external customer.
3. The Claimant contends that on this transaction, one Sammy Kiptarus the store keeper at ABC Place had called him and asked him to transfer tyres from ABC to Central stores where they were to be billed. The customer then picked them from ABC. It was upon the person requesting for the transfer to ensure that he tyres were billed.

The Claimant further avers that this was a system transfer and such transfer goes to the manager who decides to release or not and Claimant's instructions alone could not transfer tyres. One Oscar Omenda was his manager when Biketi was on leave.

4. Before the Claimant responded to the tyres transfer inquiry he got a letter of suspension from work pending further investigations. After receiving the letter on 18/4/2011, he got a call from one Elizabeth Mungai to go to head office. He availed himself on 20/4/2011 and went to the HR one Irene who told him to go and record a statement with the security manager. It was in connection with a certain statement for which Claimant was not given a copy. He was never invited for any

disciplinary hearing concerning the transaction. He was on suspension for almost 1 year.

In February 2012 he contacted his lawyer to help him know the status. The lawyer wrote to the Respondent and they replied on 22/2/2014 indicating that they had terminated his services. The Claimant never received any information about a termination letter he was to pick and he says that he never received any letter from his P.O. Box 69 Siaya.

At time of his suspension, his salary was 45,400/.97. The Claimant seeks prayers as per his claim.

Respondent's case

5. The Respondent filed their response to the claim on 14/8/2012 through the firm of Messrs Ochieng, Onyango, Kibet & Ohaga Advocates. They also called one witness one Biketi Wanjofu. It is the Respondents case that the Claimant worked for Respondent. It is further the witness's case that he had been on leave and on resuming he decided to go through orders made by his juniors. He saw a transfer from ABC to central warehouse. It had a difference of 5 tyres. He discovered that the stock had been transferred in the system without any corresponding physical document showing transfer of tyres. He inquired with warehouse supervisor who was not aware of physically receiving the tyres from ABC to central warehouse. This transaction had been made by the Claimant. He inquired from claimant about it and the Claimant promised to come back to him. He send emails to the Claimant inquiring about the transfer of tyres but later the Claimant told him that he never got the emails send.
6. The Respondent avers that the orders made by the Claimant were not justified as he had no documents authorizing the move. The Respondent's witness then reported the matter to his boss who called the Claimant and the Claimant didn't reply. The matter was then escalated to their HR department and the security manager. That the transfer was against the rules of the company. He also stated that the system has control and once an order is made it will trigger the manager either to approve it or not but in this case the person in office approved it.

In cross examination RW1 told that he reported from leave on 9/4/2011. He also stated that in his absence as warehouse manager Oscar Omenda the Ag warehouse manager approved he order. He also accepted that page 10 of Respondents list of statement. Paragraph No. 2 states that TDR can either call or email his request to both the receiving and supplying warehouse. TDR means a sales representative. The standard procedure therefore allows instructions from both emails or telephone calls.

In case of Claimant, it is Respondents position that the Claimant raised a request and it was approved by the warehouse manager. The witness also stated that he did not know if Calisto did not receive his emails while in Eldoret. He also admits that Claimant's role was limited to a systems transfer.

7. The RW1 also told court that there was no hearing give to Claimant and there is no evidence that Claimant was served with a dismissal letter.

Issues for determination

8. Upon hearing both parties, issues for determination are as follows:
 - (a). ***Whether there were valid reasons to warrant dismissal of Claimant.***
 - (b). ***Whether due process was followed before Claimant was dismissed.***
 - (c). ***Whether Claimant is entitled to remedies sought.***
9. On the 1st issue, the reason given for claimant's dismissal is system transfer of tyres without corresponding physical documents. From the evidence on the file the Claimant accepted he did

this transfer of tyres but this was after receiving the authorization from the warehouse manager one Mr. Oscar Omenda. This fact is not denied by the Respondent. Infact the Respondents in their evidence agree that the work of Claimant was limited to systems transfer and the same was approved by the warehouse manager. The rules of the company also allowed such transaction. It is therefore this court's finding that there was no valid reason to warrant dismissal of Claimant. Section 43 of Employment Act states that:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Since the Respondents have not proved existence of reasons to warrant dismissal of the Claimant it follows that the dismissal was unfair.

10.As to due process this was also not followed. The RW1 admitted that the Claimant was never given any hearing before termination. This contravenes Section 41 of Employment Act which states:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

11.Having found the dismissal unfair, I award Claimant the following remedies:

1. **1 month salary in lieu of notice = 45,400/=**
2. **Leave earned upto 12th April 2012 44 days = 76,565/=**
3. **Gratuity for years served in unionisable terms = 196,297/=**
4. **General damages for unfair termination 12 x 45,406= 544,800/=**

TOTALS = 863,062/=

5. **Certificate of service**

Costs

Dated in open court this 20th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mungla for Claimant

Miss Omolo for Respondent