



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 361 OF 2013

BETWEEN

MAXWELL MASAI JOSEPH.....CLAIMANT

VERSUS

SYNERGY FREIGHT AND LOGISTICS LTD.....RESPONDENT

Rika J

Court Assistant : Benjamin Kombe

Mr. Maxwell Masai Joseph the Claimant, in Person.

Mr. Tarus Advocate, instructed by Tarus & Company Advocate for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27(1) (a) of the Industrial Court [Procedure] Rules 2010]

1. Mr. Maxwell Masai Joseph filed his Statement of Claim on 31st October 2013. He states he was employed by the Respondent Company, as a Port Clerk in Clearing and Forwarding, between 1st November 2011 and 11th February 2013, earning a monthly salary of Kshs. 16,000. His contract of employment was terminated by the Respondent on the latter date, in circumstances he feels were unfair and unlawful. He claims:-

- a) A declaration that the termination of the Claimant's employment was unlawful and/or irregular.
- b) A declaration that the Claimant was entitled to 1 month leave or payment in lieu of leave.

c) A declaration that the Claimant was entitled to 1 month notice of termination or payment of 1 month salary in lieu.

d) Compensation for unlawful and/or irregular termination of the Claimant's employment by the Respondent.

e) An order directing the Respondent to pay the Claimant the following sums:

(i) Service pay of 1 year at Kshs.8,000

(ii) 12 months' salary in compensation at Ksh.192,000

(iii) Leave pay of 1 year at Kshs.11,200

(iv) Overtime pay at Kshs.186,800

(v) 1 month salary in lieu of notice at Kshs.16,000

(vi) 12 days' salary for February 2013 at Kshs.6,400

Total Kshs.420,000

(f) Certificate of Service to issue.

(g) Any other order the Court deems fit to grant.

(h) Costs.

2. The Respondent filed its Statement of Response on 8th April 2014. It is conceded the Claimant was an Employee of the Respondent, on terms stated in the Claim. The Claimant was involved in absenteeism, occasioning the Respondent loss. Termination was fair, lawful and in accordance with the rules of natural justice. The Claimant was heard, and paid his terminal dues.

3. The Claimant gave evidence on 10th April 2014 and 25th June 2014. He called 2 other witnesses – Fadhili Joseph Karisa and Mohammed Kailo Miriro, who testified on 10th April 2014. The Claimant's case closed on the 25th June 2014.

4. The Respondent gave evidence through its Operations Manager Wilfred Ambunya on 10th February 2015, bringing the hearing to a close.

5. The Claimant testified he was employed by the Respondent on 1st November 2011 as a Port Clerk. His salary was Kshs.16,000. He reported for duty on 9th February 2013 as usual. No work was performed on this date, due to the actions and/or inaction of the Respondent. The Respondent failed to process payments for late acceptance letter. Secondly, the Operations Manager ordered vehicles which were loaded with export goods, to return to Respondent's yard from the Port. The order was based on the failure to process the late acceptance letter.

6. Maxwell explained that the Respondent blamed him for the failure in the processing of the late acceptance letter. It was not his responsibility to process this letter. It is not true that he did not report for duty on 9th February 2013 and 10th February 2013.

7. He received no notice or warning before termination. He received no pay in lieu of the termination notice; he was not paid for 11 days worked in February 2013; he did not go on annual leave, and received nothing in lieu of annual leave; he was denied overtime pay, having worked 4 excess hours daily; and was not availed service pay.
8. Cross-examined, the Claimant stated he asked for leniency from the Respondent after termination. Termination was on the ground that the container was not processed in time. The Respondent blamed the Claimant for the incident. The Claimant was on night shift.
9. There was no attendance register at the workplace. The Respondent's office was at Majengo, not inside the Port. Day shift staff reported at Majengo. He reported for duty on 9th February 2013. Specific instructions would issue from Mr. Ambunya and other Clerks. The Claimant was aware of the pending work for 9th February 2013.
10. It was not true termination was because the Claimant was absent on 9th February 2013 and 10th February 2013. The Respondent alleged the Claimant failed to process the documents, and could not also, be reached on the phone. His duties entailed co-ordination between the Respondent and the Transporter coming from Majengo. The Claimant was unreachable for about 5 minutes, after his phone went low on charge.
11. Respondent's Operations Manager failed to process the late acceptance letter. There was an email from Elijah Mbaru dated 9th February 2013, indicating late acceptance charges had been approved. The Claimant received this information when he reported for duty on 11th February 2013.
12. When he instructed KITUO CHA SHERIA, the Claimant stated failure to process late payment was due to lack of funds. The Respondent had an account with KPA. Funds would be deposited in advance. When documents were approved, the charges would be on this account. The Claimant did not know if the Respondent had funds in the KPA account at the time.
13. Fadhili Joseph Karisa told the Court he worked as a Port Clerk, but for a different Company, Spedag Interfreight Limited.
14. From his experience, KPA allows a container to get into the Port 24 hours before the date of arrival of the vessel. If the container comes late, late acceptance charges have to be paid by the Company having responsibility of the container. Approval is given by the Terminal Manager, who is available only during the day. It cannot be given during the night.
15. He testified on cross-examination that if a container is late, the Shipping Line would be informed. This is done through e-mail. The Shipping Line issues a letter to the Clearing Agent. The letter is presented before KPA Terminal Manager.
16. Fadhili testified the case concerned a company called PIL (Uganda) Limited. He did not know the officers named as Krishna Kumar and Elijah. He emphasized on redirection that late acceptance payments were only made during the day.
17. Mohammed Kailo Miriro works for yet another Company called Flamisco Logistics, as a Port Clerk. He knew the Claimant, having served in the same field. On 9th February 2013, Mohammed was on duty at the Port. The Claimant told the Witness the Claimant could not discharge his duties, because there was no late acceptance letter.
18. Mohammed testified under cross-examination that he worked as a Transporter. He was not conversant with Shipping Line Operations. He ensured vehicles accessed the Port. He did not know KPA had an accounts office, open for 24 hours. Container terminal is accessible 24 hours, where payment has been made.

19. He did not know Mohammed Mwazuzu of KPA and other officers. Transporters relied on Clearing Agents. He did not know which department dealt with late payments. Redirected, the Witness told the court he had never been asked by a Clearing Agent to take or remove a container at the Port, during the night. The Claimant prays the court to allow the Claim.
20. Wilfred Ambunya has been the Respondent's Operations Manager from the year 2003. The Respondent is involved in clearing and forwarding at the Port of Mombasa. The Company employs about 15 Employees. The Employees work on shift. Wilfred assigned duties.
21. The Claimant worked for the Respondent between 2011 and 2013 as a Port clerk. The Witness supervised him. He was based at the Port, and processed Client's goods. There were port charges – which included handling and storage charges.
22. Maxwell's problem arose on 9th February 2013. The Respondent had goods for export, which came late. The Respondent was required to pay charges for late acceptance of the goods.
23. The Respondent placed a request for late acceptance, paid and the goods were accepted. Acceptance is captured in the emails contained in the Respondent's documents. This was during the night shift, when the Claimant was supposed to be on duty.
24. Maxwell was unavailable. He could not be traced. The goods failed to be loaded on the 9th February 2013. They were only loaded on the 10th February 2013.
25. It is not true that the Respondent failed to secure the letter of acceptance. The Respondent retains an account with KPA, with a Guarantee of Kshs.200,000. Goods are charged on this account. The account had funds on 8th, 9th and 10th February 2013. There was US\$5,000 in the account. The Claimant was not truthful in his assertion that the Respondent failed to pay charges for late acceptance.
26. The Claimant's absence compelled the Respondent to request for additional late acceptance. His conduct was habitual. On one occasion, the Respondent's Director had to be involved, calling the Claimant directly. The Claimant had several verbal warnings.
27. The Claimant explained he could not be reached because his phone was out of charge. The Witness and the Director asked the Claimant to account for his absence; the Claimant was not able to do so.
28. Maxwell was therefore summarily dismissed. The Respondent would incur direct and indirect costs due to the Claimant's dereliction of duties and absence. Termination was fair. The Claim has no merit.
29. Late acceptance could not be requested for in the days before 9th February 2013; normal acceptance was going on, Wilfred testified on cross-examination. The day shift Employee for 9th February 2013 was on duty. He was involved in imports. The Claimant was to deal with exports at night. Wilfred could not ask the day shift Employee to work overtime.
30. The incident happened during the weekend. Wilfred and the Director were not at the Port. They made effort to contact the Claimant by phone. The Shipping Line pursued late acceptance. The Claimant was on duty on 10th February 2013 during the day. Wilfred gave him a verbal warning. The Claimant left and returned with the Court Summons. He was not paid terminal benefits. He did not receive overtime pay. He utilized his annual leave. Redirected the witness stated the relevant date was 9th February 2013. The Respondent urges the Court to dis-allow the Claim.

The Court Finds:-

31. The Respondent is a registered Company, involved in clearing and forwarding, based at Port City of Mombasa, Kenya. Maxwell Masai Joseph, worked for the Respondent as a Port Clerk, from 1st November 2011 to 11th February 2013. His salary was Kshs.16,000.
32. Although Respondent's Witness, Wilfred, testified that the Claimant reported for duty on 10th February 2013, was warned verbally and left to return with the Court Summons, it is conceded in the Respondent's Pleadings that termination was initiated by the Respondent. It cannot be implied that he left of his own volition, upon being verbally warned about his absence of 9th February 2013.
33. The Employer is required under sections 41,43 and 45 of the the Employment Act 2007 to:-
- a) Show termination is based on fair and valid reason.
 - b) Prove the reason for termination.
 - c) Show the termination decision is preceded by a fair procedure.
34. The dispute revolves around the events of 9th February 2013. The Claimant was supposed to be on night shift duty, during which, the Claimant was to process goods for export.
35. He holds he was on duty, but the goods could not be processed for export, because the Operation Manager failed to process payments for late acceptance of the goods. The Operations Manager ordered the trucks loaded with the export goods to exit KPA and return to the Respondent's yard.
36. On this the Claimant was supported by his 2 Witnesses, Mohammed and Fadhili. Fadhili confirmed late acceptance charges have to be paid by the Company responsible for the container. Approval is done by the Terminal Manager, only during the day. It cannot be done at night. Mohammed was with Maxwell at the Port, on the night of 9th February 2013. Maxwell was on duty. He informed Mohammed he could not perform his duties because there was no acceptance letter.
37. The Claimant's evidence was strongly contradicted by the evidence of Wilfred. He was categorical Maxwell did not report for duty on the night of 9th February 2013. The Respondent had requested for late acceptance of its goods. The request was accepted, and payment made. The goods failed to be loaded on 9th February 2013 on the sole ground of the Claimant's failure to process the requisite documents. The Respondent retained an account with KPA, complete with Guarantee. The account had money on 8th, 9th and 10th February 2013. Goods were charged on this account.
38. The Court agrees with the evidence of the Respondent. The oral evidence of Wilfred was adequately supported by the bundle of email exchanges involving the Respondent, the Shipping Line and KPA. Late acceptance was requested for, approved, and charges paid.
39. The only plausible explanation why the export goods failed to be loaded on 9th February 2013 was the failure in processing requisite documents. This was supposed to be a role discharged by the Claimant. He could not be reached by the Operations Manager and the Director. He testified his phone was off due to low battery charge. This is not an adequate explanation for the Claimant's failure to contact the Operations Manager or the Director. He did not have to wait to be contacted. He ought to have contacted his superiors and enquired about the late acceptance.
40. There was no conclusive proof that the Claimant was completely absent from the Port on the night of 9th February 2013. His friend Mohmmmed may have sighted and conversed with, the Claimant. There was no attendance register at the workplace.

41. The Claimant however did not show that he was present at the Port, and discharging his role. He gave no reason why he did not do so. He made no effort contacting his supervisor if for any reason, he was inhibited in discharging his role. His position that nothing could be done because the Respondent had failed to pay late acceptance charges was shown through the evidence of the Respondent to be utterly incorrect.
42. While termination on the ground of absence from work was not fully supported by the evidence given by the Respondent, termination on the ground of negligence of duty was adequately supported. The Respondent was entitled to summarily dismiss the Claimant under section 44(4) of the Employment Act. The Respondent demonstrated fair and valid reason justifying termination under section 45 of the Act.
43. The Respondent however, made no attempt to avail the Claimant procedural justice. While pleading it summarily dismissed the Claimant, the Respondent, as seen elsewhere, also implied the Claimant left on his own volition, on being verbally warned, only to return later to the workplace with the Court Summons.
44. If the Claimant was warned on 10th February 2013 about his absence on 9th February 2013, should he then have been summarily dismissed? Clearly not, because the warning itself is a punishment. Employment offences should not be punishable twice.
45. There was no evidence of charges drawn by the Respondent, and forwarded to the Claimant. He was not given an opportunity to explain his absence. He was not allowed any chance to defend any allegations. The Respondent completely ignored the Claimant's procedural guarantees, afforded by Section 41 and 45 of the Employment Act.
46. To this extent, termination was unfair. ***The Claimant is granted 3 months' salary in compensation for unfair termination, at Kshs.48,000.***
47. The Claimant is not entitled to notice pay. Termination was on ground warranting summary dismissal. The prayer for 1 month salary in notice pay is rejected.
48. Paragraph 6 of the Statement of Response states the Claimant was paid all his terminal dues. No evidence of payment was shown to the Court. Wilfred testified instead, that terminal benefits have not been paid.
49. The Claimant prays for service pay calculated at 15 days' salary for 1 completed year of service. The Respondent gave no evidence showing the Claimant is ineligible for service pay under Section 35 of the Employment Act. ***The prayer for service pay is granted at Kshs.9,230***
50. Wilfred testified the Claimant took annual leave and leave forms were available. No leave record was made available to the Court. It was not shown that the Claimant took annual leave, or was paid in lieu of leave. ***He is granted 21 days salary worth of his annual leave at Kshs.12,923.***
51. The figures in paragraph 49 and 50 are granted on the basis of 26 working days, not 30 working days, as pleaded in the Claim.
52. In cross-examination, Wilfred conceded the Claimant was not paid for overtime work. The Claimant prays for overtime of 4 hours per day, for 467 days, compensated at 1 ½ times the normal hourly rate.
53. The Regulation of Wages (General) Order, states that normal overtime is compensable at 1 ½ times the normal hourly rate. Where the Employee is not paid an hourly rate, the hourly rate is calculated at 1/225 of the monthly rate.
54. The Claimant's hourly rate should therefore be $Kshs.16,000 \times 1/225 = Kshs.71$ per hour. $Ksh.71 \times$

4 hours = Ksh.284 x 1 ½ times = Kshs.426 x 467 = Kshs. 199,252.33. ***The Claimant is granted overtime pay at Kshs.199,253.***

55.***He is allowed salary of 10 days, for work done in the month of February 2013, calculated at Kshs.6,153.***

56.He merits the Certificate of Service under Section 51 of the Employment Act. ***The Respondent shall release the Certificate of Service to the Claimant forthwith.***

57.The prayers for declaratory orders, except the prayer for an order declaring termination unfair and unlawful, add no value to the Claim and are rejected.

58.Parties shall meet their own costs.

59.There shall be no order on the interest.

In Sum, IT IS ORDERED:-

(a) It is declared termination was fair in substance, but unfair on procedure.

(b) The Respondent shall pay to the Claimant 3 months' salary at Kshs.48,000 in compensation for unfair termination.

(c) The Respondent shall pay to the Claimant service pay at Kshs.9,230; annual leave pay at Kshs.12,923; overtime pay at Kshs.199,253; and salary for 10 days worked in February 2013 at Kshs.6,153.

(d) The total sum of Kshs.275,559 to be paid within 30 days of the delivery of this Award.

(e) The Respondent to release to the Claimant his certificate of service forthwith.

(f) No order on the costs and interest.

Dated and delivered at Mombasa this 29th day of May 2015.

James Rika

Judge