



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 310 OF 2013

BETWEEN

MOHAMED HASSAN MKOMA CLAIMANT

VERSUS

KENYA MARINE CONTRACTORSRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

*Mr. Njenga Advocate holding brief for Mr. Asige Advocate instructed by Ojode Udoto & Onjoro
Advocates for the Claimant*

Ndegwa Muthama Katisya & Associates Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR TERMINATION

AWARD

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

1. Mr. Mohammed Hassan Mkoma filed his Statement of Claim on 23rd September 2013. He states he was employed by the Respondent Company as a Crane Operator on 1st April 2012. He initially worked as a Truck Driver from the year 2010.
2. He was accused by his Employer of stealing 180 litres of diesel, charged in Court, tried and acquitted on 6th June 2013. The Respondent locked him out of the Workplace at the beginning of the criminal process, advising the Claimant he would not continue working for the Respondent as the Claimant had a pending criminal case.
3. The Claimant seeks compensation for wrongful termination, relying on the Labour Institutions Act 2007, under paragraph 9 of the Statement of Claim.
4. The Respondent filed its Statement of Response on 5th November 2013. It alleges the Claimant was on probation at the time of termination, and cannot therefore claim his contract was unfairly terminated, under Section 42(1) of the Employment Act 2007. Alternatively, the Respondent holds it acted fairly and lawfully in terminating the Claimant's contract, the Claimant having been reasonably suspected to have

committed a criminal offence against, or to the substantial detriment of his Employer or Employer's property.

5. The Claimant testified, and closed his case on 19th March 2014. The hearing of the Respondent's case was, with the consent of the Parties, fixed for 25th November 2014. There was no appearance on the part of the Respondent on the hearing date. The Court entered an order for closure of the proceedings, and directed the Claimant to file his Closing Submissions. Filing was confirmed at the last mention on 23rd February 2015.

6. The Claimant testified he was employed by the Respondent as a Crane Operator/Truck Driver. He was first employed in the year 2010 as a Truck Driver. He was placed on 3 month renewable contract.

7. He served under the contract dated 1st April 2012 at the time of termination. His salary was Kshs.30,000 per month.

8. He was accused by the Respondent of stealing fuel, and charged in Court on 8th May 2012. He was acquitted on 6th June 2013.

9. He had at the outset of the criminal proceedings been granted bail. He availed himself at the workplace, ready for normal duty, on 9th May 2012. The Guards at the gate denied him entry. They told him he was not allowed there, and refused to call for him the Human Resource Manager for consultation. The Claimant went home. He was never issued a letter of termination of employment.

10. He was not on probation. He had previous contracts with the Respondent. He was not heard by the Respondent on the allegation of loss of fuel. No investigations were carried out by the Respondent. He was not responsible for the fuelling of Cranes. He was not in the Crane when arrested. He was not paid any terminal dues.

11. The Claimant testified that his last contract was for 3 months, effective from 1st April 2012 to 30th June 2012.

12. He operated the Crane on 5th May 2012. It operated within the Respondent's premises. He had been issued a gate pass. He was to transport fuel to a site at Ndogo Kundu. The Guards stopped him at the gate, alleging he was a thief. The Claimant made his demand to the Respondent after acquittal in the criminal case. The Guards were from G4s firm. Boaz Alvisia Munyasa was one of the Guards. He gave the gate pass to the Claimant. The Claimant's contract allowed for termination on the ground of the Employee having committed a criminal act against the Employer. The fuel was Respondent's property. The Claimant reiterated on redirection that he did not steal his Employer's fuel. He prays the Claim be allowed.

The Court Finds

13. The Claimant was initially employed by the Respondent as a Truck Driver in the year 2010. Thereafter, the Respondent made him a Truck Driver-cum-Crane Operator.

14. He was placed under short term renewable contracts. The last was for 3 months, effective from 1st April 2012 to 30th June 2012.

15. He was not on a probationary contract at the time of termination, as alleged by the Respondent. He was in a continuous employment relationship, going back to the year 2010. Section 42(1) of the Employment Act 2007, would therefore not apply to him.

16. He was suspected of siphoning the Respondent's fuel on 5th May 2012. He was charged for the offence of stealing in a Criminal Court, and granted bail on 8th May 2012. He reported to work on 9th May 2012, but was denied entry, and access to the Respondent's Human Resource Office. He was not taken through a disciplinary process, and received no letter of termination of employment from the

Respondent. He was acquitted by the Criminal Court on 6th June 2013.

17. The Respondent failed in its obligations under Sections 41, 43 and 45 of the Employment Act 2007.

18. It did not avail the Claimant any opportunity to be heard at the workplace. There were no charges. There is no record of investigation. There was no hearing. The Respondent did not even formally terminate the Claimant's contract; it simply locked him out. It completely locked out the Claimant, and refused to engage.

19. The Claimant is entitled to compensation, though not under the Labour Institutions Act as pleaded. Section 15 of the Labour Institutions Act was repealed through Section 31 of the Industrial Court Act 2011. It was not in operation at the time the Claimant was locked out. Compensation is granted under Section 49 of the Employment Act 2007 and Section 12 of the Industrial Court Act.

20. The Court has taken note that the Respondent opted to give no evidence. Its Pleadings failed to justify termination. Termination was unfair both on substantive and procedural grounds.

IT IS ORDERED:-

(a) The Termination was unfair.

(b) The Respondent shall, within 30 days of this Award, pay to the Claimant 12 months salary in compensation, at the rate of Kshs.30,000 per month, total Kshs.360,000.

(c) Costs to the Claimant.

Dated and Delivered at Mombasa this 13th day of May, 2015

James Rika

Judge