



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 920 OF 2012

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 7TH MAY, 2015)

JASON SIKU SIRIMA.....CLAIMANT

VERSUS

DOSHI & CO (HARDWARE) LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 31/5/2012 through the firm of Osoro Omwoyo & Company Advocates. The issue in dispute is about unfair, illegal, wrongful and unlawful termination of his services and failure to pay termination benefits.

Claimant's case

2. The Claimant avers that he was employed by the Respondent on 6/1/2002 as an Export Sales Officer earning a gross consolidated monthly salary of 65,000/=. He commenced work as aforesaid and served the Respondent with loyalty and diligence until 29th October 2010 when he was unlawfully terminated his salary having risen to 73,000/=.
3. The Claimant in his oral evidence stated that he was apparently terminated for allegedly divulging information to a 3rd party which is an invoice he had given out which was in his line of duty to supply. He stated that SGS is an inspection agent which inspects all goods going to Burundi. SGS had asked for a certain invoice which the Claimant gave – Appendix 4 and 5. After this the Claimant discovered that another invoice had been send to SGS on same goods being Appendix 6.

The Claimant further avers that he called SGS Nairobi and asked them if they knew that the Request For Detailed Information (RFI) was expired (Appendix 7). He also checked the RFI. He found that it contained his name but the signature was not his. It was normal for SGS to inspect all goods for export. After these happenings, he received his termination letter.

4. The Claimant contends that before he was terminated he had not been given a hearing. He was not given an opportunity to defend himself. He seeks that court grants him his terminal benefits, leave for 3 years plus 1 months salary in lieu of notice.

In cross-examination, the Claimant stated that he was paid some benefits as terminal dues. He agreed that that the leave form on file from pages 6 to 12 of Respondents documents are his but stated that in 2010 he didn't go on leave.

He also agreed he wrote an apology letter to the Respondents but this was done under duress.

The Respondent's Case

5. The Respondents filed their Memorandum of Response on 26/7/2012 through the firm of Ochieng, Onyango, Kibet & Ohaga Company Advocates. They assert that the Claimant was lawfully and procedurally summarily dismissed on 29/10/2010 on account of gross misconduct and he was paid his terminal dues amounting to 88,154/=.

They also aver that the Claimant was paid his pension dues in the sum of Kshs.212,401/= which he duly acknowledged. They also state that the claimant utilized all his leave days and the remainder was encashed and paid to him. The Respondents want this claim dismissed accordingly.

6. The Respondents further deny discriminating against the Claimant. They also aver that the Claimant was heard before being dismissed and so the dismissal was not unfair or unjustified. The minutes of the meeting were however not available.

Issues of determination

7. Upon considering the evidence from both parties and upon consideration of submissions filed herein, the issues for determination are as follows:

1. ***Whether the Respondent had valid reasons to dismiss the Claimant .***

2. ***Whether due process was followed;***

3. ***Whether the Claimant is entitled to prayers sought.***

8. On the 1st issue, the Claimant was appointed by the Respondent as per Appendix 10 as Export Sales Officer. His job discretion is not exhibited. He was terminated on 29/10/2010 and reasons given were that he divulged very sensitive information to a 3rd party. The Respondent considered this act as an act of gross misconduct. Section 44(4) of Employment Act lists down what may constitute acts of gross misconduct as follows:

“ (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”

The Claimant never committed any of the acts above. In any case, gross misconduct if committed will prevent the Claimant from receiving his terminal dues. The Respondent have in their evidence stated that the Claimant was paid his dues an indication that the dismissal was not in its nature a summary dismissal and the Respondent did not have a valid reason to dismiss the Claimant summarily.

On the 2nd issue, Section 41 of Employment Act states that:

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.

9. The Claimant avers that he was not accorded any hearing as envisaged herein. The Respondent stated that a hearing was done. The minutes of the alleged meeting have not been produced before court. Furthermore, what the Respondent alleges was a disciplinary hearing fall below the standard set under Section 41 of Employment Act above.

The court therefore finds that due process was not followed before the Claimant was dismissed. I therefore find the dismissal unfair and unjustified.

10. On prayers sought, the Claimant has admitted that he was paid some dues amounting to 88,154/=. The Claimant was also paid from the pension scheme a total of 212,401/=. On leave, the Claimant stated that he never went on leave in year 2010. However, the Respondents Appendix 3 show that he went on leave for 18 days from 21/9/2010. His assertion that he didn't go on leave is therefore not true. Having admitted that he was paid 1 months salary in lieu of notice, I only find for Claimant in favour of only compensation for unlawful termination and award him 12 months salary for the same amounting to $12 \times 73,000/= = 876,000/=$.

I also order that Respondent will issue Claimant with a Certificate of Service. Respondent will further meet cost of this suit.

It is so ordered.

Dated and delivered in open Court this 7th May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ilako holding brief Osoro for Claimant

No appearance for Respondent