



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC CAUSE NO. 23 OF 2015

JOHN ODHIAMBO OUMA.....CLAIMANT

VERSUS

PWANI OIL PRODUCTS LTD.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a claim about unfair terminations of the Claimant's employment on 31.10.2014 by the Respondent. It is Claimant's case that his dismissal was unfair because it was not founded on justifiable cause and he was not accorded any hearing before the dismissal. In addition the Claimant avers that he was not paid his separation dues and was not given a Certificate of Service.
2. The Respondent denied liability for the alleged unfair termination and averred that the Claimant was dismissed for gross misconduct. It is the defence case that the Claimant failed to follow due procedure when performing Market returns by failing to have a security representative present when receiving back returned goods. In addition, the Respondent avers that that Claimant was accused by the company drivers of receiving money to cover up non-returned items. Lastly the Respondent avers that she processed the Claimant's separation dues but he refused to collect the cheque drawn in his favour on 26.11.2014.
3. The suit was heard on 11.5.2015 when the Claimant testified as Cw1 but the Respondent called no witness. Thereafter counsel for both parties filed written submissions.

CLAIMANT'S CASE

4. Cw1 stated that he was employed by the Respondent as a clerk on 10.4.2008. He worked upto 31.10.2014 when he was dismissed. His salary was kshs.20728 per month. On 16.10.2014, he received a show cause letter accusing him of colluding with drivers to steal from the Respondent. He responded to the show cause *letter* by his letter dated 23.10.2014. He was however dismissed summarily by letter dated 31.10.2014. He contended that the dismissal was unfair because he was not given a hearing to defend himself. In addition he contended that the reason for the dismissal was not true. He denied that he off loaded returned goods in breach of procedures. He consequently prayed for compensation for unfair termination, one month in lieu of notice and 3.75 leave days all totaling to Kshs.248,736.72.
5. On Cross Examination by the defence counsel, Cw1 explained that he returned from his annual

leave on 2.9.2014 only to be told by the HR Manager, one **Jane Waruru** that his reliever **Caroline Owiti** had reportedly been corrupted by transporter's truck driver who had allegedly mentioned that they were doing the same with him. Cw1 admitted that later on 29.9.2014, a truck returned goods and he was in a hurry and as such he was authorised by stores officer **Mr. Robert Ndundi** to open the vehicle before the security officer arrived. Cw1 verified the items and found that it was a short landing (less than what was indicated on the Delivery Note). That the Security Officer arrived while he was offloading the truck and also noted the short landing. Cw1 endorsed the short landing on the Delivery Notice and signed on it. The security Officer also signed on the Delivery Note to confirm that the items returned were less than what was indicated on Delivery Note. Cw1 maintained that he did nothing wrong. He concluded by stating that after dismissal he filled clearance forms and returned Staff Card but he was told by Diana that no dues were payable to him in the circumstances.

ANALYSIS & DETERMINATION

6. After careful consideration of the pleadings, evidence and submissions, it is obvious that the parties herein related as employer and employee. There is also no dispute that the Claimant was dismissed for gross misconduct on 31.10.2014. The issues for determination are whether the dismissal was unfair and unjustified and whether the remedies sought are warranted.

UNFAIR TERMINATION

7. The Claimant maintains that he was unfairly dismissed because the for the dismissal was not founded on a justifiable reason and he was not accorded a hearing to defend himself. He denied that he was breaching procedures laid down for handling returned market goods. He contended that on 29.9.2014 he was authorised by Stores Officer **Mr. Ndundi** to open the truck before Security Officer arrived because the truck driver was in a hurry. He denied that he was dealing corruptly with drivers to steal from the Respondent. He however admitted that he was served with a show cause letter to which he replied by his own letter. He however contends that although the dismissal letter referred to a Disciplinary Committee meeting held on 29.10.2014, he was never called there to defend himself. That piece of evidence was never rebutted by the defence because she never adduced any evidence.
8. Under **Section 45** of the Employment Act, termination of employment of an employee is unfair unless the employer proves that it was founded on a valid and fair reason and that it was arrived at after following a fair procedure. In this case the Respondent never called any witness to adduce evidence in support of her defence. Consequently she has not discharged her burden of proof under **Section 43, 45** and **47** of the Employment Act. **Section 43** of the Act puts the burden of proving the reason for termination on the employer in any legal proceedings like this one where the employee challenges the termination. Section 47 on the other hand puts the burden of justifying the dismissal on the employer in any legal proceedings like this one.
9. **Section 45** then requires that the procedure for dismissal must be just and equitable and must comply with the provision of **Section 41** and **Section 51** of the Act. **Section 41** provides for mandatory oral hearing to be accorded to the employee in respect of misconduct in the presence of a union shop floor representative or any fellow employee of his choice. The hearing must be conducted in a language that the employee and his companion understand and they must be allowed to air their representations before the decision to dismiss is made. **Section 51** on the other hand requires that the employer must give a Certificate of Service to the employee after termination. In the present case, the Respondent has not proved that the dismissal of the Claimant from work was fair in all the aspects discussed above. Consequently the answer to the first issue for determination is in the affirmative.

RELIEFS

10. Under **Section 49**, an unfairly dismissed employee is entitled to reinstatement while an

unjustifiably dismissed employee is entitled to damages. In this case the court has found that the dismissal was both unfair and unjustified. The Claimant never prayed for reinstatement but sought damages. Under **Section 49 (4)** of the Act, the court must take into account, among other things, the wishes of the employee in determining whether to award damages or reinstatement. This court has held elsewhere that the mere fact of praying for damages alone, is enough evidence that the employee does not wish to be reinstated. The court therefore awards him kshs.20,728 being one month salary in lieu of notice, kshs.2,610.72 being 3.75 leave days accrued, plus kshs.124,368 being 6 months gross salary compensation for the unjustified dismissal. The reason for not awarding the maximum compensation is that with due diligence the Claimant could have secured alternative employment within six months.

DISPOSITION

11. For the reasons stated above Judgment is entered for Claimant in the sum of kshs.147, 706.72 plus costs and interest.

It is so ordered.

Dated, signed and delivered at Mombasa this 24th day of July 2015.

O. N. Makau

JUDGE