



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1355 OF 2013

CHRISTOPHER KARIUKI GIKONYOCLAIMANT

VERSUS

CARGO SERVICES CENTRE EAST AFRICA BV T/A

SWISSPORT CARGO SERVICES KENYARESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful dismissal of the claimant and failure to pay terminal dues.
2. The claim was filed on 22nd August 2013. The respondent filed defence on 15th December 2014 admitting the claimant was their former employee and was terminated in accordance with justice and equity.
3. The claimant filed the Memorandum of Claim on 22nd August 2013 and a defence filed on 15th December 2014. On 19th May 2015, both parties entered consent and settled the following issues;
 - a. The respondent agreed to pay the claimant leave days due at Kshs.10,000.00 in 14 days;
 - b. A certificate of Service be issued;
 - c. The claimant was at liberty to seek the release of his pension from the relevant body upon withdrawal from the scheme;
 - d. Outstanding items be addressed by way of written submissions.
4. In this regard therefore, both parties filed their written submissions on 22nd June 2015 and 29th June 2015 for the claimant and respondent respectively.

Claim

5. The claimant's case is that on 23rd July 2007 he was offered employment by the respondent as a Warehouse Operator at a salary of Kshs.12, 434.00 and a house allowance of Kshs.2, 000.00. Later, following a successful negotiations of a collective agreement, the salary was increased to Kshs.12, 782.00 and house allowance to Kshs.3, 500.00 per month. On 30th November 2010 the respondent terminated the claimant's employment on the grounds that he had failed to comply with lawful instructions by his superiors. The claimant appealed against the decision through a letter to the Managing Director, his union intervened and sought to have a meeting to resolve the matter but the respondent refused to oblige. The dispute was reported to the Minister but the respondent refused to participate in the conciliation process.

6. The claim is that the respondent did not have a valid reason to dismiss the claimant from his employment contrary to section 43 and 45 of the Employment Act. He was never served with a warning letter; the dismissal was contrary to the collective agreement in force at the time and a very harsh decision to make against him.

7. The claimant is seeking to be reinstated back to his position with the respondent and his dues be paid without any loss of benefit or continuity. The claimant is also seeking notice pay; leave; pension refund; refund of meals balance and compensation for unfair dismissal.

Defence case

8. In response to the claim, the respondent stated that the claimant was their employee until 29th November 2010 when he was summarily dismissed. On 14th November 2010 during transfer of cargo an incident occurred between the claimant and security agents of KAA who were manning the gate which resulted into the claimant's pass being confiscated thus culminating into serious operational issues that resulted into the respondent's client cargo begin offloaded. On 18th November 2010 the respondent's Operations and Export Manager summoned the claimant to discuss the issue but he failed to turn up or give an explanation. A notice was issued to him on 22nd November 2010 to show cause to which he failed to respond despite accepting service of such notice. On 29th November 2010, the respondent carried out a disciplinary hearing where the claimant was represented by the chief shop steward Richard Mwangi. As a result of their being no justification as to why the claimant failed to respond to the notices issued to him, a decision was taken to terminate his employment. The reason for the dismissal were due to the claimant's failure to obey instructions from his superiors and failing to give an explanation when called to do so.

9. The respondent also states that they held a meeting with the union but noting the loss of revenue occasioned by the actions of the claimant, the summary dismissal was upheld. Due process was followed and despite the claimant being given a chance to be heard he failed to respond and at his hearing, he admitted to having received a show cause letter and notice but failed to respond as required of him. That the suit should be dismissed with costs.

Submissions

10. The claimant submitted that his employment was governed by his letter of appointment and the collective bargaining agreement in force at the time. The claimant was terminated on allegations that he had not followed instructions from his superiors, he appealed but was never given audience and the union intervention was ignored. Conciliation efforts with the Minister were never honoured by the respondent. The termination letter does not state what instructions the claimant failed to follow and the superiors' orders not followed are not noted. There are no minutes of an indication as to what the claimant failed to adhere to. The respondent has attached a show cause letter to the defence and minutes of a hearing but these are not signed by the claimant to confirm that he acknowledged receipt or that he participated at the hearing. There is therefore no proof that there were valid grounds for dismissal.

11. The claimant also submitted that he was unionised under the Aviation and Allied Workers Union which had a collective bargaining agreement with the respondent, it has elaborate disciplinary procedures which were not followed in the case of the claimant. Clause 43 of the CBA makes provision for dismissal where 3 warnings must be issued and in this case the claimant had no warning to warrant the action taken against him. The claimant was therefore not given a fair hearing in accordance with natural justice or as provided under section 41 of the Employment Act and thus his dismissal was unlawful. That even in a case of summary dismissal, the claimant was entitled to be heard before termination as held in **David Otunga Kenani versus Office of the Controller and Auditor General, Cause No.933 of 2013**. Where an employee commits acts of misconduct such an employee maybe suspended to allow the employer to carry out any investigations. Such investigations are meant to give the employer a chance in the absence of the employee to interrogate and establish if there are grounds that warrant a show cause and a response. Before such a process is complete, an employee has nothing to offer in defence as there is no case against him.

12. The claimant also submitted that he was unfairly terminated as due process was not followed. He is entitled to maximum compensation at 12 months' salary. He is also entitled to notice pay as he was dismissed without notice and there was no just cause for the same. This was a term under the CBA and in accordance with section 35 of the Employment Act. That his balance day and night refunds of meals are due as under clause 12 of the CBA all being kshs.22, 040.00. The meal refunds had not been paid at the time of dismissal.

13. In submissions, the respondent stated that the dismissal of the claimant was lawful and valid as under section 45 of the Employment Act. Following an incident that occurred on 14th November 2010 during the transfer of cargo involving KAA security agents, the claimant's gate pass was confiscated which led to serious operational challenges. When the claimant was called upon to give an explanation he failed to do so. When the claimant was issued with a show cause letter he failed to respond or give an explanation. Noting the sensitivity of the respondents operations that required strict adherence to procedures, the failures of the claimant to attend and give an explanation or be at a meeting he was directed to attend amounted to insubordination warranting dismissal there was therefore a valid reasons leading to the termination of employment.

14. Following the acts of insubordination, the claimant was called for a hearing in the presence of the chief shop steward. Such hearing was constituted following the failure by the claimant to respond to the show cause notice issued to him. After the hearing, the respondent took the decision to dismiss the claimant. Due process was followed.

15. The claim for reinstatement is not available to the claimant as he was dismissed for good cause as held in **Dalmas B Ogoye versus KNTC Ltd [1996] eKLR** and as regards section 12(3)(vii) of the Employment and Labour Relations Court Act where the order of reinstatement is regulated. Compensation is not due in cases of bad conduct by an employee and in this case the termination was not unfair to warrant the grant of compensation.

Determination

16. It is not in dispute that the claimant was summarily dismissed by the respondent vide letter dated 30th November 2010. The claimant was unionised and there was a CBA that outlined the terms and condition to apply in disciplinary proceedings.

17. Based on the letter of dismissal, the incident that took place on 14th November 2010 is reiterated noting that the claimant was supposed to attend a departmental meeting on 18th November 2010 but he failed to do so on the grounds that such instructions were not clear. A show cause was issued to the claimant and a meeting was held but the details of the same are contested. The head of department for the claimant had wanted a response by 24th November 2010 but the claimant noted that such instructions were not clear. These are details outlined in the letter of dismissal. The respondent state that this amounted to insubordination and failure to obey instructions from a superior and amounted to misconduct that warranted summary dismissal.

18. For a charge of insubordination to hold, an employee must have committed an act of wilful disobedience or an act that is deliberate and meant to challenge the authority of a superior. The superior must have therefore issued precise and unequivocal instructions that the employee wilfully disobey. Any ambiguity in the instructions given can make compliance hazy for an employee to follow as held in **Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC)** that:

... the offence of insubordination is constituted by the following: When the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious (wilful disobedience), or when the employee's conduct poses a deliberate (wilful) and serious challenge to the employer's authority

19. This does not in any way negate the requirement that employees are obliged to respect and obey their employers because lack of respect renders the employment relationship intolerable and disobedience undermines the employer's authority. However, insubordination is not insolence. One relates to defiance to authority while the other relate to imprudence.

20. So what instructions did the claimant fail to obey and did it amount to insubordination warranting summary dismissal? In the show cause letter issued to the claimant and dated 22nd November 2014 it is noted that the claimant together with others were involved in the incident of transfers of SA 183 and his pass confiscated by KAA together with two of his colleagues and according to these other colleagues, The claimant went and obtained back these passes. The next document attached and in support of the stated hearing of the case are *notes of the hearing for Christopher kariuki Gikonyo on 29th November 2010*. The hearing notes do not note what orders were issued to the claimant that he failed to adhere to save that a meeting was called and he was not in attendance. The subject then became the claimant's non-attendance of the meeting and not the incident that took place on 14th November 2010. The notes of the hearing indicate the claimant was present and from the submissions Richard mwangi the chief shop steward were present. Who then were Stephen Mutai and Night Nzovu? Were they the two other colleagues involved in the 14th November 2010 incident with the claimant? These notes though meant to be minutes of a disciplinary hearing, in themselves leave major gaps as to the nature of case being addressed and the person arbitrating over the same. To thus take a decision that;

... Disciplinary action to be taken for knowingly failing to abide by instructions given by persons placed in authority over him

21. The then result in summary dismissal, I find to be details leading to too harsh a sanction to give in the circumstances. Even in an effort to follow due process by the issuance of a show because letter, disciplinary hearings should not take the form of a sham. Such are serious proceedings likely to jeopardise the employment of the subject employee and thus require clarity and order. See **Jenny Luesby versus Standard Group Ltd, Cause No.137 of 2014**. From the attached *notes of the disciplinary hearing for Christopher Kariuki Gikonyo...* it is hard to decipher the nature of case the subject of discussion was supposed to answer to and the defences given in response to warrant the recommendation given.

22. In Frederick **Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR**, the court held that before an employee can be dismissed from employment, proper investigations must be carried out, upon such investigations the employee must be notified of any issues that arise and require his response and once such a process is complete can the matter be heard. At the hearing, the law is clear, section 41 of the Employment Act must be adhered to and where parties such as herein have a CBA, the terms of such a CBA must be followed. In this case, the claimant was dismissed on the grounds that he failed to obey instructions from his superiors. This is a very serious allegation to make against any employee as where proved, the provisions of section 44 of the Employment Act apply a summary dismissal. However before such summary action is taken, an employer must show that there is a just cause that deserve such a harsh action such as that the claimant knew of his charge, he was given time to offer a defence and at the hearing, the provisions of section 41 of the Employment Act were followed. Any omissions in this regard, the resultant action is negated *ab initio*. The hearing thus contemplated under section 41 should not just be processes to be completed so as to make a predetermined finding. The hearing should be commenced in good faith where an employee is given a chance to appreciate the nature of case he is facing and an opportunity to defend him. The CBA in this case allowed the right of appeal. Where such a benefit exists, the employee should be notified of the same. It does apply automatically that since the chief shop steward was present then there was due process and hence compliance with the procedures. Such procedures are not meant to be a sham.

23. The nature of the respondent's business and operations notwithstanding, the standards with regard to due process do not change. To fail to prove the substantive issue that faced the claimant, investigations as regards the cited incident of 14th November 2010 and then rely on procedures to summarily dismiss him is too harsh a sanction. This is not want fair labour practice contemplates. Summary dismissal was not

justified. It was an unfair sanction to give in the circumstances of the case.

Remedies

24. Leave due, issuance of Certificate of Service and pension dues are matters already settled.

25. The claimant is seeking to be reinstated back to his position. He was dismissed in November 2010 and it has been over 3 years. The respondent has moved on and must have filled up the position. In any event the claimant does not submit what his current engagement is so as to mitigate his circumstances. The remedy thus is not available.

26. Notice pay is due on the finding that summary dismissal should not have arisen. This is awarded at Kshs.16, 282.00

27. On meals balance due, I find not contest in the submissions of the respondent. The claimant submitted that these were dues owed to him as under the CBA and he had earned such pay. This shall be awarded at kshs.22, 040.00.

28. Upon the finding that the respondent engaged in an unfair labour practice, compensation shall be awarded. I note the respondent has made effort to pay uncontested issues in advance of the judgement. 3 months' salary in compensation is found appropriate and awarded at Kshs.48, 846.00.

Judgement is hereby entered for the claimant in the following terms;

- a. **Compensation at Kshs.48,486.00;**
- b. **Notice pay at kshs.16,282.00;**
- c. **Balance of meals due at Kshs.22,040.00;**
- d. **50% costs.**

Delivered in open court at Nairobi this 9th Day of July 2015.

M. Mbaru

Judge

In the presence of:

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