



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 125 OF 2013

HOWARD ANDREW NYERERE.....CLAIMANT

VS

KENYA AIRWAYS LIMITED.....RESPONDENT

AWARD

Introduction

1. The Claimant, Howard Andrew Nyerere was an employee of Kenya Airways Limited the Respondent herein between 13th November 2006 and 22nd June 2012. He filed a Memorandum of Claim on 31st January 2013 seeking relief for unfair termination of employment and failure to pay terminal benefits and accrued dues. The Respondent filed a Reply on 17th June 2013 and the matter was heard on 1st October 2013, 10th December 2013 and 21st January 2014 with Mr. Kandere appearing for the Claimant and Mrs. Ogalo-Omondi appearing for the Respondent.

2. The Claimant testified on his own behalf and the Respondent called Fredrick Onyango Owuor, Manager Baggage Services; Linda Itindi, Manager Industrial Safety & Environment; and Lucy Wangari Muhiu, Head of Employee Relations. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 13th November 2006. On 19th July 2011, he was promoted to the position of Team Leader, Baggage Online. At the time of termination of his employment, the Claimant's monthly salary was Kshs. 60,393, plus a house allowance of Kshs. 30,643.

4. On 22nd June 2012, the Claimant was dismissed on allegations of operating Company equipment without authority. It was the Claimant's case that the termination of his employment was unjustifiable and unfair.

5. The Claimant therefore claims the following:

- a) A declaration that the termination of his employment was unlawful
- b) Compensation for future earnings.....Kshs. 724,716
- c) Service pay.....Kshs. 241,572
- d) NoticeKshs. 120,786

e) Costs plus interest

The Respondent's Case

6. In its Memorandum of Reply, the Respondent admitted having employed the Claimant as a Loading Agent on a 5 year contract effective 6th November 2006. He was confirmed on 16th February 2007 and on 1st April 2007, his employment was converted to permanent terms. On 1st September 2007, the Claimant was appointed to the position of Baggage Service Executive. The Claimant was later promoted to the position of Team Leader, Baggage Online, a position he held until the termination of his employment on 22nd June 2012.

7. It was the Respondent's case that the termination of the Claimant's employment was fair and justifiable following an accident on 28th December 2011 involving an MS (Egypt Air) container which collided with and substantially damaged a stationary tow truck. Investigations conducted by the Respondent's Safety Department showed that the Claimant had operated the equipment without authorisation.

8. By letter dated 20th January 2012, the Respondent asked the Claimant to show cause why disciplinary action should not be taken against him. The Claimant made his representations which the Respondent found unacceptable and constituted a disciplinary panel to hear the Claimant's case. The disciplinary panel sat on 9th March and 24th April 2012 and the Claimant together with two representatives from the Aviation and Allied Workers Union (AAWU) were present.

9. According to the Respondent, the disciplinary proceedings were conducted in accordance with the Respondent's staff Rules and Regulations, the obtaining Collective Bargaining Agreement between AAWU and the Respondent and the Employment Act, 2007. Following the disciplinary hearing the panel chairperson recommended termination of the Claimant's employment on grounds of gross misconduct. According to the Respondent, there was a valid reason to terminate the Claimant's employment and the Claimant was afforded a fair hearing prior to the termination.

Findings and Determination

10. The main issue for determination in this case is whether the termination of the Claimant's employment was substantively justifiable and procedurally fair. Section 43(1) of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

Section 45 itself provides as follows:

- (1) No employer shall terminate the employment of an employee unfairly.***
- (2) A termination of employment by an employer is unfair if the employer fails to prove-***
 - (a) That the reason for the termination is valid;***
 - (b) That the reason for the termination is a fair reason-***
 - (i) Related to the employees conduct, capacity or compatibility; or***
 - (ii) Based on the operational requirements of the employer and that;***

(c) That the employment was terminated in accordance with fair procedure.

11. A show cause letter issued to the Claimant on 20th January 2012 stated *inter alia*:

“We refer to the incident that occurred on 28th Dec 2011 when a stationary KQ Tow-Truck (AV 341) was hit and damaged by MS Container. The findings presented by the safety department revealed that you operated the equipment yet you are not authorized to, consequently resulting to the damaging of the said equipment.

You are therefore required to show-cause why disciplinary action should not be taken against you for operating the equipment without authorization.

Yours faithfully

Fredrick Owuor

Manager, Baggage Services”

12. The subsequent termination letter dated 22nd June 2012 stated in part:

“This is to advise that after consideration of the issues and all the evidence adduced in the matter, the Company finds that there is sufficient evidence to support the issues set out in the panel letter in regards to you driving the tow truck that was towing the MS Container that damaged the stationary KQ Tow truck on 28th December 2011 and in regards to you having driven the tow truck on the said date when you were not authorized to do so. The Company deems your conduct in the matter as gross misconduct for which it has been decided that your employment contract be terminated with effect from 22nd June 2012.

Yours faithfully

Night Nzovu

Human Resources Relationship Manager”

13. A plain reading of these letters indicates that the Claimant was dismissed from the Respondent's employment because he operated a tow truck without authority causing damage to a stationary tow truck belonging to the Respondent. The Claimant consistently denied this accusation both at the internal disciplinary proceedings stage and at the trial in Court. On its part, the Respondent relied on investigations led by Linda Itindi as well as the statement of a Loading Agent by the name Kennedy Ouma.

14. Ouma's statement which was produced by the Claimant was in the following terms:

“I was on duty on 28th/12/2011 working on MS 850. After loading all the bags into the units, I load them in electronic tractor thereafter Howard took them to the Aircraft.”(sic)

15. Ouma testified at the disciplinary hearing but did not testify in Court. The Court therefore did not have the benefit of hearing him on the actual role played by the Claimant in the incident of 28th December 2011. From the proceedings of the disciplinary hearing, it is clear that Ouma was not an eye witness to the incident of 28th December 2011.

16. The Claimant denied operating the tow truck in issue stating that the tow truck whose breaks were faulty rolled on its own. He gave the same account during the investigation by Linda Itindi, at the disciplinary hearing and during the hearing in Court.

17. The disciplinary panel took issue with the conduct of the Claimant after the incident particularly his failure to make an immediate report to his supervisor and to the safety and security teams as well as his decision to move the tow truck from the point of impact. According to the panel, the Claimant deliberately interfered with the scene of the incident in order to cover his back. The panel therefore concluded that the Claimant had indeed operated the tow truck without authorization.

18. The Claimant told the disciplinary panel that he was ignorant of the procedure to be followed in the case of an incident such as the one that occurred on 28th December 2011. According to the Claimant, his report to Menrad Iruna who was a supervisor on duty at the time the incident occurred was adequate. Further, he moved the tow truck from the scene in order to facilitate movement of the baggage to the aircraft in time for departure.

19. The Respondent produced extracts of its Airside Safety Manual but there was no specific reference to the procedure to be followed by staff in case of an accident or incident. At any rate, the Respondent did not pursue a charge of failure to follow procedure nor the Claimant's decision to use a non designated operator to operate the tow truck.

20. Linda Itindi took the Court through an on site assessment undertaken by her with the assistance of one Fredrick Kirui to test the Claimant's version of the incident of 28th December 2011. Itindi's conclusion which she presented to the disciplinary panel and to the Court was that the impact of damage on the KQ truck could not have been caused by a free rolling tow truck as alleged by the Claimant.

21. Itindi told the Court that she holds a Bachelor of Science Degree in Medical Microbiology and a Certificate in Occupational Safety and Health. Based on these qualifications, the Court was not convinced that she possessed the required technical expertise to make a determination on whether the impact on the KQ truck was caused by a free rolling equipment or by human intervention.

22. Fredrick Kirui who assisted Itindi in carrying out the on site assessment was not called to testify and taking Itindi's account in this regard, the Court arrived at the conclusion that the verdict of the assessment was just one of the options of what could have happened on 28th December 2011 but did not provide conclusive evidence that the Claimant operated the tow truck as alleged.

23. Itindi further told the Court that a review of the CCTV footage covering the period when the incident occurred did not show any free rolling tow truck. There was also no CCTV evidence of the Claimant operating the tow truck.

The CCTV footage therefore provided no useful evidence in this case.

24. From the foregoing, the Court finds that the Respondent failed to establish on a balance of probability that the Claimant operated the tow truck without authorization causing an accident to the KQ truck on 28th December 2011. Consequently, the Respondent had no valid reason to terminate the Claimant's employment as required by law.

25. I will now examine the procedure adopted by the Respondent in effecting the termination. Section 41 of the Employment Act, 2007 sets out the mandatory procedure to be adopted in cases of misconduct, poor performance or physical incapacity.

26. In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR, Radido J*** summarised the legal fairness requirements set out in Section 41 as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

27. The Claimant and representatives from the Union participated at the disciplinary hearing. The Claimant was however not shown the minutes arising from the proceedings to confirm his concurrence with the record. Lucy Wangari Muhiu, the Respondent's Head of Employee Relations told the Court that the minutes were signed by a union representative and herself.

28. From the record of proceedings provided to the Court, the Claimant participated in his own right and no reason was given for the failure to avail the minutes to him yet he was easily accessible as he was still an employee of the Respondent at the time. An employee who participates in a disciplinary process is entitled to read and sign the proceedings to confirm concurrence that the minutes reflect a true record of the proceedings.

29. Moreover, minutes arising from disciplinary proceedings should be signed off as soon as the proceedings are complete in order to preserve evidence that may be critical in Court proceedings. In this case the minutes were to be distributed and signed off by 27th April 2012. This however did not happen until 23rd May 2012 and there was no explanation for the delay.

30. The Court therefore finds that by failing to avail the minutes of the disciplinary hearing to the Claimant, the Respondent short circuited the disciplinary process. More significantly the Court did not find any evidence that the representations made by the Claimant and the union representatives were given due consideration in the final determination of the Claimant's case.

31. Overall, I find the termination of the Claimant's employment unfair for want of substantive justification and procedural fairness and award him 8 months' salary in compensation. I also award him 2 months' salary in lieu of notice as set out in his letter of termination dated 22nd June 2012.

32. From the Claimant's payslip submitted to the Court, it is evident that the Claimant was a member of the Respondent's Provident Fund as well as a contributor to the National Social Security Fund (NSSF). The claim for service pay therefore fails and is dismissed. The claim for gratuity which was introduced in the Claimant's final submissions was neither pleaded nor proved and is therefore also dismissed.

33. For purposes of tabulating this claim, the Court has adopted the figure of Kshs. 91,036 being the Claimant's basic salary and house allowance as at June 2012.

34. Ultimately, I make an award in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation

for unfair termination.....Kshs. 728,288

- b) 2 months' salary in lieu of notice.....Kshs. 182,072

Total.....Kshs. 910,360

35. I further direct the Respondent to calculate and pay to the Claimant accrued leave days as at 22nd June 2012. The Respondent will also facilitate payment of the Claimant's Provident Fund and updating of his NSSF Account.

36. The Respondent will pay the costs of this case.

37. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MARCH 2014

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*