



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 161 OF 2013

(Formerly Cause No. 2296 of 2012 at Nairobi)

JOSEPH OTIENO NYOLO.....CLAIMANT

- VERSUS -

RIFT VALLEY RAILWAYS (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd May, 2014)

JUDGMENT

The claimant **Joseph Otieno Nyolo** filed the memorandum of claim on 14.11.2012 through Gordon Ogola & Associates. The claimant prayed for judgment against the respondent for:

- a. **A finding that the dismissal was wrongful, unfair and reduces it to normal termination.**
- b. **The respondent to pay claimant 3 months in lieu of notice Kshs.194,852.00.**
- c. **The respondent to pay all accrued house allowance Kshs.609,973.00.**
- d. **Respondent to refund the claimant Kshs.504,000.00 being Kshs.7,000.00 deducted for 72 months from claimant's basic pay.**
- e. **Respondent to pay Kshs.892,080.00 for compensation for unfair termination being 12 months gross salaries under section 49(1) (c) of the Employment Act, 2007.**
- f. **The respondent to pay the claimant the balance 13 years of service being 13 years or 156 months at Kshs.64,950.55 making Kshs.10,132,332,60.80.**
- g. **The respondent to issue the claimant with the certificate of service under section 51 of the Act.**
- h. **The respondent to pay costs of the suit.**

The respondent filed the statement of response on 28.01.2013 through Ochieng', Onyango, Kibet & Ohaga Advocates. The respondent prayed that the suit be dismissed with costs. The claimant filed a reply to the response on 25.06.2013.

The case was heard on 5.3.2014. The claimant gave evidence to support his case. The respondent's

witnesses included the Assistant Human Resources Partner Caroline Akinyi Okatch (**RW1**); the respondent's Rolling Stock Inspector Peter Kungu Onyango (**RW2**); the respondent's Regional Locomotive Inspecting Officer Joseph Daudi Ngulutu (**RW3**).

The claimant was employed by the respondent as a Locomotive Driver effective 1.11.2006. Prior to the employment, the claimant had worked for the Kenya Railways Corporation in the same capacity. The claimant was trained at the Kenya Railways Training Institute and certified as a Locomotive Driver. The claimant's case was that he was dismissed by the respondent because he was involved in a train accident on 30.06.2012. The claimant's testimony was that the cause of the accident was the locomotive that was malfunctioning and there were records showing that the locomotive malfunctioned. Thus, the train ran away backwards and capsized. RW2 and RW3 are the respondent's officers who participated in investigating the circumstances and cause of the accident.

The issues for determination are as follows:

- a. **Whether the reason for termination was valid, and whether the claimant was accorded due process before termination.**
- b. **Whether the claimant is entitled to the remedies as prayed for.**

For the 1st issue, the allegations levelled against the claimant were stated in the letter of explanation dated 24.7.2012, thus, **“ On June 30th 2012 while working Train CB 9214 MZR-SBT you failed to secure the train adequately leading to the rake rolling backwards, running away and subsequently capsizing. The acts spelt out above amount to gross misconduct...”** In response, the claimant replied by stating in his letter dated 26.7.2012 that he did not fail to secure the train adequately because:

- a. **immediately the locomotive shut down, he applied the automatic brakes in emergency position which is recommended position in shutdown situation;**
- b. **he applied the locomotive brake in full service;**
- c. **he applied the locomotive hand brake tight;**
- d. **he then put his battery isolating switch (B.I.S.) in off position before detraining so as to secure the rake; and**
- e. **he assisted his train guard in securing the wagons by putting stones on the wheels and applying hand brakes.**

The claimant therefore speculated in his response that he failed to understand why he would be accused of failing to secure the train adequately. The claimant then requested for a hearing and concluded thus, **“Lastly, I conclude by emphasising that, I was not happy with what happened but the core truth of the matter was and is that I did my level best to avoid the accident.”** The respondent then addressed to the claimant the dismissal letter dated 23.08.2012 narrating the charges levelled against the claimant and the claimant's written defence and stating that the explanation as rendered by the claimant was examined by the Western Region Disciplinary Committee at the meeting of June 30, 2012 and found unsatisfactory. The letter step by step discounted the claimant's written defence and concluded that the claimant's explanation was therefore not acceptable. The claimant was therefore dismissed from the service of the respondent with immediate effect (23.08.2012).

The court has carefully considered the manner in which the respondent conducted the disciplinary process and arrived at the dismissal decision. It is obvious that in making the decision, the respondent relied upon proceedings of the inquiry held on 30.06.2012 as the conclusive findings of the claimant's culpability. Thus, the court finds that the letter of explanation dated 24.7.2012 that invited the claimant to offer a defence did not serve any purpose as far as the respondent was concerned because in any event, the decision to dismiss was to be based, and was in fact based upon the inquiry findings. The claimant

demanded a hearing and raised pertinent grounds in self-defence. Without a hearing, the court finds that the reason for dismissal as stated in the dismissal letter cannot be said to be matters the respondent genuinely believed to have existed at the time of the dismissal and as envisaged under section 43 of the Employment Act, 2007. The court has not seen how and at what point in the disciplinary proceedings the respondent by considering evidence, resolved the issues in view of the claimant's written statement of defence. It is obvious that the claimant requested to be heard and was entitled to be heard under section 41 of Act but was not accorded the hearing. Accordingly, the court finds that the dismissal was unfair as the reason was not valid and the claimant was denied due process of fairness.

While making the finding of unfair termination, the court holds that the inquiry and any audit or investigation report does not amount to a disciplinary proceeding. The court holds that despite an internal inquiry, audit or investigation where an employee's performance or conduct is questionable, the ensuing report does not supplant the relevant disciplinary procedure as prescribed in section 41 of the Employment Act, 2007 and as may be agreed between the employer and employee. The court further holds that the employee cannot be dismissed or otherwise dismissed on the basis of such reports without the employer undertaking the relevant due process.

The court has carefully evaluated the circumstances of this case and the manner in which the parties engaged themselves in urging their respective cases. The claimant elaborately sought to show that the reason for the dismissal was invalid and the respondent meticulously sought to establish that the reason existed as valid. In the opinion of this court, the parties to employment disputes shall not convert the court into the employer's administrative disciplinary tribunal or disciplinary committee. If the employer fails to exercise the administrative disciplinary power or authority as conferred under the Employment Act and the parties' agreement, it is the opinion of the court that the termination would be unfair *ab initio* and the court need not inquire into the evidential evaluation of the validity or otherwise of the validity or otherwise authenticity of the reasons for termination in such cases. The court holds that it is for the employer to be satisfied of the validity or authenticity of the reason at the time of the termination as envisaged in section 43 of the Act failing which, the termination is unfair *ab initio*.

It is the opinion of the court that the court's investigation into the validity or genuineness of the reasons for termination accrues only where it is shown that the employer invoked due process as per section 41 of the Act and the parties' agreement to establish the reason and if that precondition test is not passed, the termination is unfair. If the precondition is satisfied, in the opinion of the court, the court's investigation at the hearing then takes the direction that the employer established a reason but which the employee disputes and the court has to resolve the dispute one way or the other. That was not the case in the present dispute and the court finds that the termination was unfair *ab initio* as it has been established that the respondent did not invoke due process to establish the reason for the termination.

It was submitted for the respondent that "hearing" was sufficiently satisfied by the respondent according the claimant a chance of tendering a written explanation as happened in this case. In **Richard Bwogo Birir –Versus- Narok County Government [2014]eKLR**, the court stated, "...Due process of law or simply, "due process" entails according the concerned person proceedings in which rules and principles for the protection and enforcement of private rights are upheld by the decision maker or relevant authority. At the core of due process is according the concerned person a reasonable notice with sufficient particulars to prepare for a fair hearing, the second crucial element of due process (see definition and explanation in Black's Law Dictionary, 9th Edition). Thus, the court holds that due process will not be said to exist in absence of a reasonable notice with sufficient particulars to prepare for a fair hearing...." Section 41 of the Employment Act prescribes a notice and a hearing. The court holds that the standard is clear; there must be an oral hearing and the written representations do not meet that standard of a hearing.

In a hearing, in the court's opinion, the affected party presents arguments to the decision maker in an oral or verbal proceeding. Accordingly, a hearing imposes a higher standard of oral or verbal proceedings as opposed to the right to, "state one's case or to make representation" which do not necessarily impose an oral proceeding. It is the opinion of the court that determination of a dispute by the decision maker solely on the basis of documents may meet ends of justice but will not satisfy a hearing where the hearing

is prescribed like in section 41 of the Employment Act, 2007. The court holds that there cannot be a notion of “**hearing solely based on documents**”.

Thus, the court finds that employer’s administrative provisions like in this case that seek to prescribe written explanations in place of a hearing do not meet the clear provisions of section 41 of the Employment Act, 2007 whose provisions impose a notice and a hearing in event of termination of employment on account of poor performance, misconduct or physical incapacity. Under the section, “**hearing**” is specifically prescribed and other notions of procedural fairness are thereby precluded. Thus, the opinions that fairness does not necessary entail an oral hearing in the cases cited for the respondent will not apply in termination of employment in circumstances envisaged under section 41 of the Act. The cases as cited and found by the court not to apply in such situations include **Republic – Versus- Judicial Service Commission & Another [2013]eKLR ; Kenya Revenue Authority –Versus- Menginya Salim Murgani Civil Appeal No. 108 of 2009; R-Versus- Aga Khan Education Services ex parte Ali Sele & 20 Others High Court Miscellaneous Application No. 12 of 2002; Russel – Versus- Duke of Norfolk [1949] 1 All ER at 118; and Simon Gakuo-Versus-Kenyatta University and 2 Others High Court Miscellaneous Application No. 34 of 2009.**

The second issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

- a. The court has found that the termination was unfair and finds that the claimant is entitled to the declaration that the dismissal was unfair. The court has considered that the claimant was 47 years old and had 13 years to serve before retiring at 60 years of age. The court has considered the otherwise considerable long service that the respondent received from the claimant. The court has also considered that it was not established that the claimant had contributed to his termination. The claimant is accordingly awarded 12 months’ gross salaries at Kshs.84,079.18 making **Kshs.1,008,950.16**.
- b. The claimant prayed for the respondent to pay claimant 3 months in lieu of notice Kshs.194,852.00. The contract provided for a one month termination notice and the court finds that the claimant is entitled to **Kshs.84,079.18** only.
- c. The claimant prayed that the respondent do pay all accrued house allowance Kshs.609,973.00. The basis of this claim was not established. There was an agreement to pay a consolidated salary. The parties were entitled to such arrangements under section 31 (2) (a) of the Employment Act, 2007. The prayer will therefore fail.
- d. The claimant prayed that the respondent do refund the claimant Kshs.504,000.00 being Kshs.7,000.00 deducted for 72 months from claimant’s basic pay. It was established that the deduction was to remit rent to the landlord, Kenya Railways Corporation whose housing accommodation the claimant had voluntarily opted to occupy. As submitted for the respondent, the prayer will fail.
- e. The claimant has prayed that the respondent do pay the claimant the balance 13 years of service being 13 years or 156 months at Kshs.64,950.55 making Kshs.10,132,332,60.80. The court has taken into account the lost future working opportunity in awarding the claimant the maximum 12 months’ salaries for unfair termination. The court finds that the prayer will therefore fail as the claimant is already fully compensated and has an opportunity and capacity to seek and obtain alternative employment.
- f. The court finds that the claimant is entitled to the prayer that the respondent do issue the claimant with the certificate of service under section 51 of the Act.
- g. The claimant is entitled to costs of the suit.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant Kshs.1,093,029.34 by 1.7.2014, failing, interest to be payable at court rates from the date of the judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service under section 51 of the Act by 1.7.2014.
4. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday 23rd May, 2014.

BYRAM ONGAYA

JUDGE