



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**  
**CAUSE NO. 8 OF 2012**  
**(Originally Nairobi Cause No. 322 of 2011)**

**BEATRICE W. MBOGO**

**CLAIMANT**

**v**

**OCEANFREIGHT (EA) LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Beatrice W Mbogo (Claimant) was offered employment as a Clerk Trainee by Oceanfreight (EA) Limited (Respondent) through a letter of offer dated 29 November 1995. At some undisclosed time she was confirmed as a Clerk.
2. Through a letter dated 20 July 2010, the Respondent suspended the Claimant from duty without pay for ten days, due to what was referred to as inappropriate conduct/performance.
3. The conduct was stated to relate to the loss of a bill of lading no. MSCUBK184410 for three days, between 6 July 2010 and 9 July 2010. The suspension letter served as a notice to the Claimant to show cause why serious disciplinary action should not be taken against her. The Claimant was given until 26 July 2010 to show cause.
4. On 13 July 2010 the Claimant wrote a memo to the Respondent explaining the circumstances under which the bill of lading got lost.
5. The Respondent was not satisfied with the Claimant's explanation and on 29 July 2010 it wrote to the Claimant informing her of the termination of her services. The termination letter is vague but to quote the letter, the reason(s) given for the termination were

*due to your negligence and lack of attention to details which caused an embarrassment to the company. The customer's accusation that you asked 'to be facilitated' in order to look for the document further aggravates the issue at hand meaning you had deliberately hidden the bill of lading for intentions only known to yourself.*

6. The termination was backdated to 21 July 2010. On 10 August 2010 the Respondent notified the Claimant of her terminal dues which included one month pay in lieu of notice, prorata leave and salary upto 20 July 2010. After deduction of statutory dues and loans the Claimant had a zero terminal dues.
7. The Claimant was aggrieved with the decision to terminate her services and on 2 February 2011 she lodged a Memorandum of Claim for unfair termination.

**Claimant's pleadings and case**

8. The Claimant pleaded that the termination was unfair, malicious and illegal and amounted to breach of contract because sections 41, 43 and 45 of the Employment Act were not followed, she was not issued with a warning letter, not paid gratuity and twelve months compensation.
9. The Claimant testified and called one other witness.
10. On the circumstances and reasons leading to her separation with the Respondent, the Claimant stated that on 6 July 2010 a customer presented a bill of lading number MSCUBK184410 to her for purposes of processing release of a cargo and that the bill of lading had three endorsements by the shipper ( Pacific Sugar Corporation), consignee (Conveyor and Transmission Solutions Ltd) and clearing agent (Transroad Kenya Ltd). Because the details of the clearing agent, Transroad Kenya Ltd was not in the Respondent's system, she placed the bill of lading aside awaiting the clearing agent to formally introduce itself as per the requirements of the Respondent.
11. On 7 July 2010, the Claimant stated that a lady from Dotcom Enterprises Ltd came to follow up on the bill of lading and get details of charges payable. The Claimant checked for a bill of lading endorsed by Dotcom Enterprises Ltd but could not trace any after which she reported to the Container Manager of a missing bill of lading. The Claimant advised the lady to use a copy of the bill of lading endorsed by the Imports Manager so as to get the invoice/charges. This was done by the Imports Manager, Mr. Munuve.
12. According to the Claimant, in the course of the day, she found the bill of lading and discovered that it had been endorsed by Transroad Kenya Ltd and not Dotcom Enterprises Ltd, as the clearing agent.
13. On 9 July 2010 two persons she had not dealt with before came asking for a bill of lading endorsed in the name of Dotcom Enterprises Ltd and she informed them there was no such bill of lading and they became agitated and they reported to the Respondent's management. The Shipping Manager thereafter came to her desk and traced the bill of lading using the number and it turned out it was the one endorsed by Transroad Kenya Ltd, as clearing agent.
14. The Claimant alerted the Shipping Manager on the endorsement but he gave the bill of lading to the customers who endorsed it with a stamp for Dotcom Enterprises Ltd.
15. The Claimant also testified that it was not possible for two different clearing agents to endorse one bill of lading
16. In regard to the process leading to the termination, the Claimant stated that on 12 July 2010 she received a letter from the Respondent's Personnel and Administration Manager asking her to show cause why disciplinary action should not be taken against her (Claimant's exh 4). She responded to the letter on 13 July 2010 (Claimant's exh 5). After the response she received a suspension letter on 20 July 2010 to which she responded to on 23 July 2010 (Claimants exh 6). On 29 July 2010, the Claimant stated she received the termination letter (Claimant's exh 7).
17. The Claimant also testified that she was not called to a hearing before the termination nor was she accompanied by a fellow employee and the Personnel Manager did not inform her of her rights. She seeks the reliefs outlined in the Memorandum of Claim.
18. In cross-examination, the Claimant informed the Court that each bill of lading has a unique number and that on 7 July 2010, a lady called Caroline from Dotcom Enterprises Ltd came to follow up on the bill of lading but she could not trace it because she was looking for a bill endorsed by Dotcom Enterprises Ltd, and not Transroad Kenya Ltd. She was not tracing the bill using the number but name of clearing agent. In her experience, she had never come across two clearing agents clearing the same cargo and explained the procedure for changing clearing agents.
19. She denied hiding the bill of lading or asking for money from the two persons who came to follow up on the bill of lading on 9 July 2010 but admitted the bill was traced on her desk and that her desk had many documents.
20. The Claimant also admitted being given a show cause letter and responding to the same twice.
21. The Claimant called Mr. Munuve to testify on her case. Mr. Munuve was the Respondent's Imports Manager (he was also terminated and he filed a successful claim before this Court).
22. He stated that he was given a copy of the missing bill of lading with a request to have an invoice released in the absence of the original bill, which was unusual. He authorized invoicing but not release of the cargo and further stated two clearing agents could not clear one cargo. He also confirmed the bill was endorsed by two clearing agents and that searching for a bill of lading through endorsement was the easiest way and that the Claimant was a busy person who would go through about 200 documents in a day.

23. He further stated that the cargo was expensive (sugar) and any delays in clearance would cause anxiety to customers and the confusion on endorsements by two different clearing agents was either by the consignee or the clearing agents.

### **Respondent's pleadings and case**

24. In its Response, the Respondent pleaded that the Claimant was suspended for deliberately misplacing a bill of lading and mishandling of customers, that the Claimant was asked to show cause why disciplinary action should not be taken against her, the Claimant responded but the explanation was untenable leading to termination and the Claimant was paid all her terminal dues.
25. The termination was therefore not unfair, malicious or illegal but in compliance with the law.
26. In support of its case, the Respondent called its Human Resources Manager, Peter Kimani Njoroge to testify.
27. On the substantive reasons for the dismissal, the witness stated that the Claimant was terminated for negligence and lack of attention to details in that she misplaced a bill of lading for more than three days. The Claimant lacked diligence. The Claimant soiled the Respondent's image and sought favours from the Respondent's clients.
28. According to the witness the process of clearing cargo should take about a day and the Claimant was presented with the bill of lading on a Monday and should have issued a guarantee and charges to facilitate clearing of the cargo. When the clearing agent returned the next day the Claimant informed her the bill of lading could not be traced.
29. On the third day, the owner of Dotcom Enterprises Ltd complained to the Respondent's Chairman and senior managers were mobilized as a result of which the Senior Shipping Manager traced the bill in the Claimant's desk.
30. The witness further stated that after the tracing of the bill of lading he wrote a show cause letter to the Claimant on 12 July 2010 and the Claimant responded the next day after which she was suspended for ten days to facilitate investigations on other allegations.
31. He confirmed that there was no oral hearing and that the written explanations were considered and that he carried out investigations but did not deal/seek information from Transroad Kenya Ltd.
32. According to his investigations, the bill of lading was presented by Dotcom Enterprises Ltd but was endorsed by Transroad Kenya Ltd only after it had been traced but he did not know who cleared the cargo eventually. He further explained the process to be followed when a consignee changes clearing agents.
33. In the testimony of the witness, Transroad Kenya Ltd was not a clearing agent but a notifying party.

### **Questions for determination**

34. From the pleadings, evidence and submissions and in cases of this nature, three broad issues present for determination and these are the applicable law, whether the termination was unfair and if so, appropriate remedies.

### **Applicable law**

35. In complaints of unfair termination/wrongful dismissal, there are both procedural as well as substantive provisions of law which are implicated. Section 35 and 41 of the Employment Act provide for procedural fairness while sections 43, 45 and 47(5) of the Act provide for proof of substantive reasons for dismissal.
36. The obligation upon an employee is not as strenuous as the obligation placed upon employers. The employee's obligation is only to prove an unfair termination has occurred while it is the statutory obligation of the employer to show it complied with procedural fairness requirements as well as prove the reasons for the termination, and that those reasons are valid and fair reasons. The Act also expects the employer to justify the grounds for termination.

### **Whether the termination was fair**

### ***Procedural fairness***

37. This Court has had occasion to pronounce itself on the import of section 41 of the Employment Act. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Co Ltd* (2013) eKLR the Court acquitted itself thus
64. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
65. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
66. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.
38. The evidence before Court is that the Claimant was issued with a show cause letter dated 12 July 2010. The subject of the letter was hiding of bill of lading MSCUBK184410 and she replied on 13 July 2010. On 20 July 2010 the Claimant was issued with a suspension letter and requested to show cause why serious disciplinary action should not be taken against her due to the misplacement of the bill of lading and a further complaint of seeking *facilitation*. The Claimant replied to this latter notice on 23 July 2010.
39. It is clear that the Respondent notified the Claimant of the allegations it had and was considering using to take disciplinary action against her. The Claimant replied to the notices in writing.
40. It appears from the evidence that the Claimant expected an oral hearing as well. The question therefore arises whether an oral hearing is also mandatory. Section 41 of the Employment Act does not explicitly provide for an oral hearing. But one of the rights of an employee is to have another employee or shop floor union representative present when the employer is explaining the contemplated reasons for dismissal.
41. When considering this issue, it is my humble opinion that section 41 of the Act has not created a mechanical rote or checklist which an employer or the Court should tick against to ensure there has been compliance. Rather it is the substance that should be looked into.
42. And therefore while a prudent employer may want hold an oral hearing, lack of an oral hearing by itself should not lead to a finding of unfairness. The real questions would be, was the employee informed/notified of the charges, was the employee granted reasonable opportunity to respond and were the employee's explanations considered.
43. In my view the Respondent was substantially in compliance with the procedural fairness requirements in the process it adopted. The failure to hold an oral hearing did not prejudice or occasion an injustice to the Claimant.

### ***Substantive fairness***

44. The two reasons given for the termination of the services of the Claimant was the loss (at least for three days) or misplacement of the bill of lading and seeking favours (*chap chap*) from a customer(s) in order to carry out her work.
45. As regards the seeking of favours, the Respondent has failed to demonstrate or prove it as a valid or fair reason. Nothing would have been easier to do than to call the customers who complained to testify before Court or at least explain the failure to call them to testify.
46. The Court now turns its attention to the loss or misplacement of the bill of lading for three days. It is not disputed that the original bill of lading was presented to the Claimant. Further, it cannot be disputed that the original bill was *misplaced* for three days in the Claimant's desk or that the Shipping Manager found it on her desk.
47. The evidence before Court and which is common to both sides is that the bill of lading had endorsements by two different clearing agents, Dotcom Enterprises Ltd and Transroad Kenya Ltd.
48. According to the Claimant, she was tracing the document using the name of Transroad Kenya Ltd and not the unique number or name of Dotcom Enterprises Ltd. The dates on which the

- endorsements were made are not indicated in the bill. For the Respondent, its witness stated that the bill was presented by Dotcom Enterprises Ltd and was only endorsed by Transroad Kenya Ltd after it was traced. How this was done, who did and where he got this information was not stated. The witness stated he did not deal with Transroad Kenya Ltd in the course of his investigations.
49. The Court is alert to the sensitivity of a bill of lading and the consequences which may flow from its loss to the parties concerned. The bill was traced after three days in the Claimant's desk and this may show that the Claimant was not diligent in her work.
50. But putting into perspective the fact that the Claimant had numerous documents to handle on a daily basis and the bill was eventually traced, the Court is of the view that termination of employment as a sanction was too severe.
51. Termination is not the only sanction which is open to an employer. The sanction should fit the gravity of the commission or omission by the employee.
52. Relying on section 45(4)(b) of the Employment Act, the Court finds that the termination was too severe and thus in the circumstances of the case, the Respondent did not act in accordance with justice and equity as the Claimant had only one previous incident in 2007.

### **Appropriate relief**

#### ***Gratuity***

53. The Claimant sought what was pleaded as gratuity for 15 years of service which was computed at Kshs 278,480/-.
54. The letter of offer dated 29 November 1995 did not make any provision for gratuity and in this respect the claim for gratuity has no contractual basis.
55. But by any chance if by gratuity the Claimant meant and was seeking for service pay which is provided for under section 35 (5) of the Employment Act, the Court is unable to make a finding in her favour for two reasons.
56. One, is that the letter dated 10 August 2010 suggests the National Social Security Fund contributions were deducted from the Claimant's terminal dues and this would mean she was a member of the Fund and thus excluded from an award of service pay by virtue of section 35(6)(d) of the Act and, two she did not lay any other statutory basis for the relief.

#### ***Twelve months compensation for unfair termination***

57. The equivalent of a number of months' gross pay not exceeding twelve months is one of the primary remedies for unfair termination. The remedy is discretionary and the Court is enjoined to consider any, some or all of the thirteen factors outlined in section 49(4) of the Employment Act.
58. Parties seeking the Court to exercise its discretion should lay some material before the Court to enable the Court exercise its discretion as to the appropriate measure of compensation to award.
59. The Claimant did not suggest in evidence which of the factors the Court ought to consider. The only material the Court has is that the Claimant served the Respondent for some 15 years.
60. She has also incurred expenses as a result of the termination in pursuing this claim. At the time of termination she was earning gross monthly wage of Kshs 32,180/-.
61. Considering the length of service and expenses incurred, the Court would award the Claimant the equivalent of nine months gross wages which is assessed at Kshs 289,620/-.
62. The Court notes that in a related case, *Dickson Mwendwa Munuve v Oceanfreight (EA) Ltd* (2013) eKLR, it awarded the equivalent of three months gross wages but in that case the Claimant Mr. Munuve was approaching retirement.

#### ***General damages for loss of expected earnings to retirement***

63. No evidential, contractual or statutory basis for this head of relief was placed before Court although the Respondent submitted on it in the written submissions and it is declined.

### **Conclusion and Orders**

64. In conclusion, the Court finds and declares that the Respondent was in substantial compliance with procedural fairness requirements in terminating the services of the Claimant but it did not act in accordance with justice and equity.

65. The Court awards the Claimant and orders the Respondent to pay her the equivalent of nine months' wages as compensation assessed in the sum of Kshs 289,620/-.

66. Each party to bear its own costs because the award of compensation has taken into account reasonable expenses incurred by the Claimant as a result of the unfair termination.

**Delivered, dated and signed in open court in Mombasa on this 16<sup>th</sup> day of May 2014**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Nyamu instructed by

Nyamu & Nyamu Advocates

for Claimant

Mr. Wafula instructed by

Cootow & associates

for Respondent