



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO.330 OF 2013

EDWIN NYAMANGA

CLAIMANT

v

SILVER HOLDINGS LTD

RESPONDENT

JUDGMENT

1. Edwin Nyamanga (Claimant) filed a Memorandum of Claim against Silver Holdings Ltd (Respondent) on 30 October 2013 stating the issue in dispute as *non-payment of terminal and contractual benefits, unfair, unjust and wrongful termination*.
2. The Claimant pleaded that he was a Unit Manager of the Respondent at its Mara Intrepid/Mara Explorer camps having been employed in 2006 and that on 15 May 2013 his services were terminated without justifiable cause through 2 different letters. The termination was wrongful and unfair because the laid down procedure was not followed and he was not paid final dues.
3. It was also pleaded that the termination amounted to unfair administrative action and in breach of Article 47 of the Constitution and unfair labour practices and the heads of relief were set out in paragraph 17 of the Memorandum of Claim.
4. The Respondent was served and it filed a Response on 4 November 2013 and asserted that the Claimant was employed by Samburu Tented Lodge Ltd with effect from 24 May 2006 and that it only employed the Claimant from 1 July 2008.
5. On the termination it was pleaded that the same was in accord with the contract of employment, with justice and equity, fair and lawful and for valid reasons related to the Claimant's conduct, Respondent's operational requirements and the Claimant was paid all his terminal dues less lawful deductions.
6. Further, the Respondent pleaded that the Claimant in breach of contract instructed a club attendant to drive the Respondent's vehicle causing an accident leading to injuries/medical bills and repair costs of Kshs 523,700/-.
7. The Respondent sought the sum of Kshs 523,700/- be deducted from any dues to the Claimant.

Claimant's evidence

8. The Claimant testified that at the time of hearing he was working with Ashni Hotels Ltd at a salary of Kshs 135,000/- per month and that before that he worked with the Respondent from 1 March 1999 and was initially based at the Respondent's sister hotel called Voyager Beach Resort. Later he was moved to Samburu Intrepids Camp in 2006 and was issued with a letter of appointment as an Assistant Manager by Heritage Hotels Management Ltd dated 19 June 2006 and the commencement date was stated as 24 May 2006 (letter attached to Memorandum of Claim).
9. Through a letter dated 16 April 2009, the Respondent herein wrote to the Claimant informing him

- that his employer had changed from Samburu Tented Lodge Ltd to Silver Holdings Ltd and all other terms would remain the same save for the amendments enumerated in the letter (letter attached to Claim).
10. The Claimant also stated that on 15 May 2013 his services were terminated. He attributed the genesis of the termination to a familiarization tour to a neighbouring lodge earlier in March 2013 which had been organised by the Respondent's Group Entertainment Manager on 21 March 2013.
 11. The Claimant stated that during the trip he asked a staff member Mary Rotiken who was then an Adventurers Club attendant to drive the vehicle used to transport the staff to the neighbouring hotel. On the return trip, the Claimant again requested the driver of the vehicle to allow the said Mary Rotiken to drive the vehicle.
 12. When Mary Rotiken took over she caused an accident as a result of which some employees got injured and were taken to hospital and the vehicle was damaged. The Claimant informed the Court that he allowed the said Mary Rotiken to drive the vehicle because of the Respondent's need to train and develop a lady driver guide and because she had a valid driving license (produced) and also held a bronze certificate from Kenya Professional Safari Guides Association.
 13. The Claimant stated that the accident was a pure accident and that after the accident he called the Respondent's Group Operations Manager and informed him of what had happened and that the next day he gave a formal report on the accident. The Group Operations Manager visited in April 2013 as a follow up.
 14. The Claimant continued that on 8 May 2013, the Respondent's Group Operations Manager called him to Mombasa and informed him the Respondent was no longer interested in his services due to the accident and directed him to go home and wait for official communication.
 15. The Claimant added that on 14 May 2013 he was called to the Respondent's offices by the Group Human Resources Manager and given a show cause letter to which he responded to. On 15 May 2013 he was called again and issued with a termination letter and because he raised some issues and concerns he was issued with another termination letter which addressed the concerns.
 16. The Claimant further added that he thought the decision of the Respondent was harsh and therefore he wrote two letters requesting for leniency but there was no response.
 17. On why the termination was unfair, the Claimant stated that was so because there was no due process as no disciplinary hearing was conducted and because he was not paid even a penny and was not informed of the costs of the repair of the accident vehicle.
 18. Consequently the Claimant stated he was seeking terminal dues, certificate of service and compensation for unfair termination.
 19. In cross examination, the Claimant stated that he became an employee of the Respondent from 1 March 1999 and was posted to Voyager Beach Resort. From 2006 he was an employee of Samburu Tented Lodge Ltd and received a letter dated 16 April 2009 from the Respondent informing him of change of employer.
 20. He confirmed asking Mary Rotiken to drive the Respondent's vehicle which had 7 passengers though she was not employed as a driver and that the said Mary Rotiken did not have a PSV license authorising her to carry passengers. He also confirmed some passengers were injured and the vehicle got damaged.
 21. On the termination he confirmed receiving a show cause letter and replying to the show cause notice and that the second termination letter addressed his concerns and that his case was of normal and not summary dismissal and that he admitted and took responsibility for the accident.

Respondent's evidence

22. The Respondent called Louis Wesusa, its Senior Human Resources Officer to testify. The witness informed the Court that he knew the Claimant and that the Claimant became an employee of the Respondent effective 1 June 2008 and prior to joining the Respondent the Claimant was employed by Samburu Tented Lodge Ltd (letter dated 16 April 2009 referred to).
23. On 16 September 2008 the Claimant was appointed as a unit Manager Samburu Intrepids and his letter of appointment provided for termination by the giving or paying of month notice/wages and that at time of termination Claimant was earning Kshs 157,771/-.
24. On the termination, he confirmed the Claimant was given two termination letters, the second letter was after Claimant raised concerns of missing final dues and that the Claimant has failed to clear

- with the Respondent to be issued with a certificate of service.
25. Prior to termination the Claimant had meetings with the Respondent's Group Operations Manager and Group Human Resources Manager to discuss the issues surrounding the termination and was also given a show cause letter.
 26. Regarding the reasons for termination the witness informed the Court that the Claimant had authorized a kids club attendant (Mary Rotiken) to drive a vehicle while she did not have a PSV license and that recommendations in appraisal forms could not be used as a basis to authorize her to drive the vehicles.
 27. On the terminal dues the witness stated that these were calculated and came to Kshs 308,000/- but because the Respondent incurred repair costs of Kshs 600,000/- the dues could not offset the said repair costs.
 28. During cross examination, the witness stated that the Claimant's services were deemed as continuous, had received a certificate of long service, was not informed of his final dues payable to him or the repair costs and this was unfair and confirmed that there was an objective to develop a lady guide.

Issues for determination

29. From the foregoing and parties respective written submissions, the issues arising for determination are effective date of Claimant's employment by the Respondent, whether the termination was fair and if not appropriate remedies.

Effective date of Claimants employment by Respondent

30. The Claimant's pleading and evidence was that he was issued with a letter of appointment dated 19 June 2006 by Heritage Management Ltd as Assistant Manager. The letter is explicit that the offer of employment was on behalf of Samburu Tented Lodge Ltd.
31. On 16 April 2009, the Respondent herein, Silver Holdings Ltd wrote to the Claimant informing him that his *employer had changed from Samburu Tented Lodge Ltd to Silver Holdings Ltd with effect from 1 June 2008* and that *all terms and conditions of your employment contract shall remain the same and your length of service will be treated as continuous.*
32. The Respondent on the other hand asserted that the Claimant became its employee effective from 1 July 2008 vide a letter dated 16 April 2009.
33. To my mind the letter dated 16 April 2009 is as clear as a bell that the Respondent was employing the Claimant as from the 1 July 2008 but his terms and conditions of service would remain the same and more importantly that the service would be treated as continuous.
34. The letter by the Respondent therefore leads to only one logical conclusion that the Respondent was assuming all obligations/liabilities which Samburu Tented Lodge Ltd owed the Claimant. These would include liability for benefits as applicable from the date of initial appointment of 26 May 2006.

Whether the termination was fair

Procedural fairness

35. The Claimant admitted that the Respondent issued him with a show cause letter and that he responded to the same. He even testified that he was called to the Respondent's offices on 14 May 2013 and this testimony is corroborated by the termination letter dated 15 May 2013 which makes reference to the Claimant's show cause letter dated 14 May 2013.
36. For reasons which were not explained, the Claimant did not find it prudent to produce the show cause letter.
37. Section 41 of the Employment Act requires an employer to follow due process before terminating the services of an employee. This is what is called procedural fairness in employment law and natural justice in public law.
38. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR, I discussed

what section 41 entails as follows

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.

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.

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 Claimant did not suggest that he did not know the charges or allegations that confronted him or that he was not given adequate time or opportunity to respond to the charges. He also did not challenge the process on the basis that his explanation was not considered.
39. In his submissions, the Claimant urged that no disciplinary hearing was held and that the Claimant was not informed of his rights such as to have a representative present and cited my decision in Nairobi Cause No. 1050 of 2011, *Loice Otieno v Kenya Commercial Bank Ltd.*
40. There are authorities which suggest that a hearing could be conducted through correspondence (*Kenya Revenue Authority v Menginya Salim Murgani, Nairobi Civil Appeal No. 108 of 2010*).
41. The Claimant further submitted that failure to consider his appeal meant the termination was not in accord with justice and equity or procedural fairness. The statute has not expressly provided for consideration of appeals within the employment relationship and the effect of an employer to so consider the appeal. The Claimant did not cite any authority for this submission. The Court therefore will not determine the issue here.
42. The Claimant did not address the Court on whether failure to conduct an oral hearing prejudiced or caused an injustice to the himself and therefore he cannot rely on this ground.
43. To my mind, based on the material placed before Court, the Respondent was in substantial compliance with the requirements of section 41 of the Employment Act. The section does not expect an employer to conduct a mechanical rote/process with a check-list. That would be too simplistic an approach.

Substantive fairness

44. The applicable statutory provisions on this question are sections 43, 45 and 47(5) of the Employment Act. The crux of the sections are that an employer should prove the reasons for termination, that the reasons are valid and fair reasons, justify the grounds for termination and that the employer in terminating the services of an employee acted in accordance with justice and equity.
45. The Respondent in the termination letter made reference to section 44(3) of the Employment as the basis (ground) for termination. The section provides for dismissal where an employee has fundamentally breached his contractual obligations.
46. Further, the termination letter informed the Claimant (the Court assumes the show cause letter was to same effect) that reason(s) for termination was that he had instructed the Respondent's designated driver to hand over a vehicle to one Mary Rotiken, an Adventurers' Club attendant.
47. The Claimant did not contest that he gave the instructions. It was also common cause that the said Mary Rotiken caused an accident and several employees were injured. One employee, the Court was informed had an amputation.
48. The Respondent's unchallenged evidence was that the said Mary Rotiken did not have a PSV license to drive passenger vehicles and was not authorized to drive the Respondent's vehicles. She had a valid driver's license though.
49. The Claimant's explanation for allowing Mary Rotiken was that there was a need to develop a

- lady tour guide. This was evidenced through appraisal forms. The Respondent contested this explanation.
50. The Court must now examine these views to reach a conclusion as to whether the reason has been proved, and as being valid and fair and in accord with justice and equity.
51. The Claimant was a senior officer of the Claimant and he must have been conversant with the laws of the country apart from the policies of the Respondent. He did not suggest that there was any practice of allowing trainee drivers/guides under development to carry passengers. The Court has been disturbed that he could allow Mary Rotiken to practice her driving skills while carrying fellow employees and on an official trip and without a trained driving instructor. If the scenario had occurred on a purely training session, the Court would have reached a conclusion that the termination was not in accord with justice and equity.
52. In the view of the Court, the Respondent has proved that the Claimant authorised an employee not designated to drive the Respondent's vehicle and that this was in breach of a fundamental contractual obligation and further that the Respondent suffered a loss which it was entitled to deduct or recover from the Claimant in terms of section 19(1)(b) of the Employment Act.

Whether Article 47 of the Constitution is implicated

53. The Claimant had pleaded that his right to fair administrative action had been grossly violated. This issue was not taken in evidence but was raised again in submissions. The Claimant made reference to the decisions of *Kenneth Njiru Nyorani v Dodhia Packaging Ltd* (2012) eKLR and *Shankar Saklani v DHL Global Forwarding (K) Ltd* (2012) eKLR.
54. In my view, when an employer exercises power to discipline or terminate the services of his employee, the employer is not exercising administrative power but performing a contractual function. The foundation or source upon which the employer terminates is a contract. The nature of the power is therefore contractual.
55. There is no question of legislative implementation. It is an employer/ employee relationship. Even public organs terminating their employee's services are acting pursuant to an employment contract which may have a legislative underpinning but still primarily a contractual power.
56. The primary constitutional source of employee's rights is Article 41 on right to fair labour practices and not right to administrative action in Article 47. Some traits may be common but they belong to different areas of law, subject to separate forms of regulation, review and resolution.
57. The Court is of the view that the issue of the inter play between an employer's decision to terminate the services of an employee ought to be resolved on the basis of Article 41 of the Constitution and the primary employment/labour relation statutes such as Employment Act, Labour Institutions Act and Labour Relations Act and not Article 47 of the Constitution.
58. The Court therefore declines to concede to the submission by the Claimant that his Article 47 rights were implicated or violated.

Conclusion and Orders

59. Bearing the foregoing discussion in mind, the Court reaches the conclusion that the termination of the Claimant was substantially in compliance with procedural fairness and further that the Respondent has proved the reason(s) for the termination and that those reasons were valid and fair.
60. Further, that the Respondent was entitled to deduct the cost of the vehicle repairs from the final dues of the Claimant which leave a deficit and so the Claimant is not entitled to an award of final dues.
61. The Court orders that the Memorandum of Claim be dismissed.
62. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 16th day of May 2014.

Radido Stephen

Judge

Appearances

Mr. Asewe, instructed by

Nyagaka & Co. Advocates

for Claimant

Mr. Kiragu instructed by

Timamy & Co. Advocates

for Respondent