



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1261 OF 2012

GERISHOM SIMIYU WAMUKOTA.....CLAIMANT

VERSUS

BLOWBLAST LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the unlawful dismissal from employment with the Respondent. The Claimant averred that he was employed as a machine operator by the Respondent. He averred that he worked with diligence, honesty and responsibility until his termination without notice on 7th September 2010. The Claimant thus claimed 2 months salary in lieu of notice, payment for 31 days leave not taken, overtime for 364 days worked on weekends, service pay for 7 years, 12 months compensation, costs & interest, certificate of service and any other relief the Court may deem fit and just to grant.
2. The Respondent filed a Reply to Claimant's Claim and averred that the dismissal was lawful on account of gross misconduct on the part of the Claimant. The Respondent denied the Claimant's salary was 16,000/- and the Respondent thus sought the dismissal of the suit and costs.
3. The Claimant testified and stated that he worked for the Respondent as a casual from 28th January 2004 before the formal employment in 2007. He was accused of stealing 500 litres of diesel that was in the process of delivery to the Respondent. He testified that he went for a short call and on return was advised that the diesel had been fully discharged and that the persons delivering the diesel explained the extra fuel not discharged as due to a faulty lock switch. The Claimant thus claimed wrongful dismissal. In cross exam he testified that he was not given an opportunity to defend himself. He denied that he was accorded the chance and was only asked to write a confession and that he refused to do so. He also denied signing the verifying affidavit in verifying the claim.
4. The Respondent did not call any witness and the parties agreed to file written submissions. The Claimant filed his submissions and submitted that the Claim had been proved and that his termination was unprocedural and that he was not paid his terminal dues. The Claimant relied on the case of **Shankar Saklani v DHL Global Forwarding (K) Ltd [2012] eKLR**. The Respondent submitted that the Claimant had testified that on 7th September 2010 while in the course of offloading diesel it was discovered that not all diesel had been pumped out by him and he was thus implicated in the plan to steal 500 litres of fuel. The Respondent submitted that the Claimant was given an opportunity to defend himself but he declined to do so. The Respondent also submitted that the Claimant admitted that he did not sign the verifying affidavit. The

Respondent relied on the case of **Shirika la Kusaidia Watoto wa Kenya & Anor v Rhodah Rop & 4 Others [2005] eKLR**.

5. In the case before me the Claimant testified that he was unfairly dismissed. He stated that he was not accorded an opportunity to defend himself as provided for in Section 41 of the Employment Act 2007. He thus sought the reliefs in his Claim. He however during cross-examination admitted that he was not the one who swore the verifying affidavit. I applaud him for his honesty as others in his position would have tried to conceal the truth in order to benefit. In any claim before the Court there must be a verifying affidavit. The Industrial Court (Procedure) Rules 2010 provides under Rule 4 and 5(1) as follows:-

4. A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—

(a) the name, the physical and the mailing address and full particulars of the claimant;

(b) the name, the physical and mailing address and the description of the respondent;

(c) the name, the physical and mailing address of any other party involved in the dispute;

(d) the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of trade dispute the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;

(e) any principle or policy, convention, law or industrial relations issue or management practice to be relied upon; and

(f) the relief sought.

5. (1) A statement of claim filed under rule 4 shall be accompanied by an affidavit verifying the facts relied on.

6. In the suit before me an admission was made on oath while under cross-examination that the verifying affidavit filed herein was not executed by the Claimant. The provisions of Rules 4 and 5(1) of the Industrial Court (Procedure) Rules 2010 are mandatory in nature. The verifying affidavit is *ex facie* incompetent, fatally defective and inadmissible as a verifying affidavit as it was signed by someone other than the Claimant. I strike it out and consequently also strike out the Claim with costs. The costs of the suit be paid by the Advocates for the Claimant and NOT the Claimant as the advocates are responsible for the false affidavit.

Orders accordingly.

Dated and Delivered at Nairobi this 30th day of June 2014.

Nzioki wa Makau

JUDGE