



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 191 OF 2013**

**BENUEL MARIERA .....CLAIMANT**

**VERSUS**

**AWANAD ENTERPRISES LTD .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

This is a claim for employment terminal dues and compensation of damages arising from constructive unfair termination of the claimants employment by the respondent. The respondent has denied liability and contended that the claimant was not suspended and constructively dismissed but that he was dismissed for poor performance and/ or negligence of duty, after being accorded a fair hearing.

The case was heard on 13/2/2014 when the claimant testified as CW1 and the respondent called Mr. Godfrey Busige as RW1. All the documents filed by the two parties were admitted as evidence by consent without calling their makers.

**CLAIMANT'S CASE**

CW1 told the court that he was employed by the respondent as Operations Manager and later transferred to the port as Port Supervisor. His duty as port supervisor was to supervise port clerks, coordinate port operations. His salary was Ksh.60000 per month. Around 24/11/2011, the claimant was on duty at the port over seeing offloading of containers from a ship onto transporter's truck for transport to respondent's warehouse. On the said day, operations at the port were delayed until 11.30a.m. due to strike by the transporter's driver in addition to network failure for KRA.

When operations resumed there was still delay due to piling up of containers. In the course of the day, one of the truck loaded with the respondent's containers broke down at the port and remained grounded until the claimant left office at 7.50pm and left the loaded truck still stalled at the port. In the morning the owner of the truck that had stalled the previous day called the CW1 and told him that the lorry had not reached his yard and he was suspecting theft had occurred. CW1 left for the respondent's office but on the way he found the transporter with the allegedly lost truck and the container. The driver was missing and the container was empty. On 23/11/2011 CW1 was served with a letter to explain the theft to which he responded on 24/11/2011 denying the accusation of negligence of duty. CW1 explained that the transporter was responsible for the safety of the cargo after the loading. CW1 denied responsibility over the goods once they were loaded on the transporter's trucks.

On 28/11/2011 CW1 was suspended with full pay but was asked to handover the company car and telephone line. CW1 was paid the salary for November 2011 only and the matter ended there. He never received any correspondence from the employer inviting him to a disciplinary hearing or dismissal or at all. He prayed for compensation.

On cross examination by the defence counsel, CW1 admitted that his duty included organizing transportation of goods from the port to the respondents warehouse. He however denied that he was the senior most officer on duty on the material day. He maintained that he ceased being operations manager when he was transferred from the respondent's warehouse to the port as a supervisor. He denied being on duty at the time when the container was lost and contended that another supervisor for the night shift had already taken over.

He admitted that he recorded statement with the police in respect of the lost cargo but maintained that he was never charged with any offence. He denied the accusation of departing from work prematurely before his shift had ended. He further contended that his suspension was prematurely done before the investigation were completed. He denied knowledge of the owner of the lost cargo. He maintained that his normal working time was between 7a.m and

6p.m. He denied ever being notified of the results of the investigations.

### **DEFENCE CASE**

RW1 is the HR Manager for the respondent. He joined the respondent on 1/8/2012 after the dismissal of the CW1. He became conversant with the facts of this suit from the CW1's file in the HR office. He stated that CW1 was employed as the Operations Manager and his duties were to oversee port operations including cargo transfer from the port to the respondents CFS at Mikindani. He further stated that on the material date, CW1 was the supervisor in charge but he left duty prematurely. The container in question left the port at night but it never reached the respondent's CFS. By the time the container left the port, CW1 had already left the port.

On the following day, he was served with a show cause letter dated 23/11/2011. He replied to the show cause letter on 24/11/2011 but the response was found to be unsatisfactory and consequently he was suspended effective 23/11/2011 to pave way to investigations. Some people were arrested and charged in court with criminal case number 1308 of 2012. By a letter dated 5/12/2011 the claimant was summoned for disciplinary hearing on 13/12/2011 but he snubbed the hearing leading to his dismissal on 10/1/2012 vide a letter signed by the CEO on the same date.

RW1 contended that the said dismissal was lawful because it was grounded on fair reasons namely absconding work and negligence. According to RW1 failure to attend disciplinary hearing by CW1 amounted to absconding duty. RW1 concluded by contending that the suit should be dismissed for want of merits because as at 28/11/2011 when the dismissal took effect, the claimant was paid all his salary including that of November 2011.

On cross examination by the claimants counsel, RW1 confirmed that he joined the respondent 8 months after the dismissal of the claimant. RW1 further confirmed that the working hours for the claimant was 8 hours per day running from 7am to 4pm. RW1 further confirmed that CW1 was never informed of the out come of the investigation of his case. He also confirmed that CW1 was never paid any salary for the period after 28/11/2011. RW1 also confirmed that CW1 signed for the receipt of the show cause letter dated 23/11/2011 but not for the other letters addressed to him. RW1 contended that CW1 was not reachable by phone. RW1 confirmed that CW1 was never arrested or charged in court in connection with the lost cargo. After the hearing, both parties agreed to file written submissions but the respondent did not file any.

### **ANALYSIS AND DETERMINATION**

The court has carefully perused the pleadings and considered the evidence and the submissions

filed and framed the following issues for determination.

- a. **Whether the termination was constructive or by dismissal letter.**
- b. **Whether the claimants employment was unfairly terminated.**
- c. **Whether the claimant is entitled to the reliefs sought.**

### **Constructive termination -versus- dismissal by letter**

The claimant's case is that the only correspondences he received from the respondent before termination of his employment were a show cause letter dated 23/11/2011 and the suspension letter dated 28/11/2011. He admits that he was paid his November 2011 salary but maintains that before he left he was told to hand over the company car and the telephone line to which he complied. He waited for a year without hearing anything from the employer and then he went to find out what was his fate.

The defence case on the other hand is that, on the suspension the claimant left without handling over. That by letter dated 5/12/2011 the claimant was invited for disciplinary hearing on 13/12/2011 but he failed to attend. As a result of the said default the HR Manager recommended for the dismissal of the claimant and the CEO of the respondent issued the termination letter dated 10/1/2012. The question that arises is whether the respondent has proved service of the letters dated 5/12/2011 and 10/1/2012. To answer to the foregoing question one has also to show which mode of service he used.

The defence has neither pleaded nor adduced any evidence to show the mode of service used for the said two letters. There is nothing from the defence to show whether the alleged service was by hand, post or email or at all. The person who delivered the letters was also not called to testify. Consequently the alleged service of the letter dated 5/12/2011 and 10/1/2012 is dismissed as falsehood or an uncorroborated hearsay.

That leaves the court with only one option of believing the evidence of the claimant that he was never served with any invitation for disciplinary hearing or a terminal letter. This view is corroborated by the RW1's testimony when he confirmed that the claimant was never notified about the outcome of the investigations. Consequently the court finds on balance of probability that the claimant's employment was constructively terminated by the respondent. The foregoing finding is founded on the fact that although the claimant's suspension was with full pay, the respondent never paid him any salary during the suspension. Secondly, the suspension was indefinite and the claimant was supposed to handover all the company property. Lastly the claimant was never called back to work even after the alleged investigations with respect to the lost cargo failed to implicate him.

It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his part of the contract of employment, the contract is deemed to have been constructively terminated by the employer. In this case failure to pay salary during the suspension as promised and failing to communicate with the claimant were enough reasons for a reasonable employee to believe that his services had been terminated.

### **Unfair termination**

Termination is rendered unfair by the reason upon which it is grounded and/or the procedure followed before reaching the decision and thereafter communicating the decision. Section 45 of the Employment Act bars employers from unfairly dismissing their employees by ensuring that there is a justifiable reason for it and that the same is reached after a fair process.

The reason is justifiable if it is valid and related to the operational requirements and the employee's conduct, capacity or the compatibility. The procedure is fair if the same is just and equitable considering communication of the decision, conduct of the employee on the date of termination, the employer's compliance with statutory requirements on termination with respect to disciplinary hearing and issuance of certificate of service. Specifically Section 41 of the Employment Act outlines how a fair disciplinary hearing should be done in mandatory terms.

In this case the reason for dismissal was never proved as required under Section 43 of the Employment Act. The burden of proof was on the respondent to prove that the claimant performed his work negligently and that he absconded duty. No attendance register was produced to show that the claimant left work prematurely. Likewise the respondent failed to prove that it was the duty of the claimant to escort the cargo from the port to the respondent's CFS. The claimant's evidence is that he left work at 7.50 p.m. after another supervisor had come to relieve him. He also contended that it was not his duty to supervise the transporters truck drivers to ensure that cargo is not lost. That evidence was never controverted. The alleged negligence and absconding of duty was therefore not a valid or fair reason to justify the claimants dismissal.

As regards the procedure, suffice it to say that the procedure under Section 41 of the Employment Act was never complied with. To avoid the risk of repeating itself, the court has already made finding above that the claimant was never invited to any disciplinary hearing before termination and the dismissal letter was also never served on him. In addition the claimant was never issued with a certificate of service as required under Section 51 of the Employment Act.

Considering all the foregoing matters and observations together, the court is satisfied on a balance of probability that the constructive dismissal of the claimant from his employment was unfair within the meaning of Section 45 of the Employment Act.

### **Reliefs sought**

In view of the foregoing finding, the court makes declaration in terms of prayer (a) and (b) of the claim. The indefinite suspension of the claimant without pay or communication amounted to constructive dismissal. The said dismissal was unfair within the meaning of section 45 the Employment Act 2007. Consequently, the claimant is entitled to one month notice, 21 leave days plus 12 months gross salary for unfair dismissal as prayed in paragraph 21 of the claim. No evidence was adduced by the defence to show that the claimant utilized all his leave days. The foregoing award calculated using Kshs.60,000 monthly salary works to ksh.822,000.

### **DISPOSITION**

As a consequence of all the findings and observations made above, judgment is entered for the claimant against the respondent for ksh.822,000 plus cost and interest.

Orders accordingly.

**Dated, Signed and delivered this 6<sup>th</sup> June 2014**

**O.N. Makau**

**Judge**