



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1528 OF 2010

TRANSPORT AND ALLIED WORKERS UNION KENYACLAIMANT

VERSUS

FOCUS CAB SERVICE LIMITED.....RESPONDENT

JUDGMENT

The Claimant herein Transport and Allied Workers Union is a trade Union registered in Kenya. It filed this case on behalf of the Grievant Mr. Nzioka Kitheka who was a member of the Claimant.

In the Memorandum of Claim dated 3rd December 2010 the Claimant alleges that the Grievant was unfairly dismissed from employment by the Respondent. The Claimant seeks the following orders:-

a. Payment in lieu of Notice

1 months' salary - Ksh. 12,000/-

b. Payment for 19 days worked in January, 2010 - Kshs. 7,600/-

c. Payment for service pay for the one year worked

15.days wages - Ksh. 6,000/-

d. Pay in lieu of one year's leave entitlement

21.days wages - Ksh. 8,400/-

e. Full salary payment for the period locked out of

Employment - 20th January 2010 to 14th July, 2010

f. 12 months compensation for unfair dismissal and loss of gainful employment.

g. Certificate of service

The Claimant filed a supplementary Memorandum on 21st December 2011 in which it submitted that the Respondent had failed to file its Reply to the Memorandum of Claim or to attend conciliation meetings and prayed for the case to be fixed for hearing ex-parte.

The Respondent filed its Reply Memorandum on 14th June 2012 in which it denied the allegations in the

Claim and averred that the grievant was dismissed lawfully for failure to remit monies collected on behalf of the Respondent.

The case was heard on 30th September 2013 and 10th March 2014. The Grievant testified on behalf of the Claimant while the Respondent called RW1, Mr. Onesmus Githinji, the Accountant. The parties thereafter filed written submissions.

The Claimant was represented by Ms. Makovu instructed by Kilonzo & Company Advocates while the Respondent was represented by Mr. Muhindi instructed by Kimondo Gachoka & Company Advocates.

The facts of the case are that the Respondent, a company carrying on business of taxi services employed the Grievant as a taxi driver on 7th January 2009 at a salary of Shs. 10,000/- per month. On 19th January 2010 the Claimant was summarily dismissed by the Respondent's Managing Director verbally. The Claimant received the letter of dismissal dated 31st December 2009 on 29th July 2010 together with another letter dated 14th July 2010 tabulating his terminal benefits in the sum of Shs. 9,766.00 for days worked and accrued leave. The Grievant received another letter dated 14th July 2010 on 2nd August 2010 tabulating his terminal dues of Shs. 12,562.50 being salary for 9 days worked and 15.75 days leave. The letters of termination and terminal dues are signed by Rachel N. Kiungu, Human Resource/Administrative Assistant.

The letters were issued after intervention by the Claimant by letter dated 21st June 2010 demanding terminal benefits for the grievant and a reminder of 6th July 2010 calling for a meeting on 14th July 2010.

The Claimant thereafter reported a trade dispute to the Minister for Labour by letter dated 30th July 2010 and a conciliator was appointed by letter dated 7th September 2010.

This case was filed following the Respondent's failure to attend conciliation meetings.

The Claimant alleges that the Grievant's summary dismissal was unfair for failure to comply with Section 41(1) of the Employment Act and for invalid reasons being fraud as the grievant did not commit any fraud.

The Respondent's position is that the dismissal of the Claimant was due to dishonestly as he irregularly retained cash that he had been paid by a client in the course of employment without intention to return it until he was confronted. The Respondent further submits that the Grievant admitted retaining the money and that this amounted to gross misconduct under Section 44 (3), (4) (c) (e) and (g) of the Employment Act for which the Respondent was entitled to dismiss the Grievant. The Respondent further submits that the Grievant was called to a meeting on 31st December 2009 attended by four peers to explain his conduct in compliance with Section 41 of the Act.

The Claimant has set out the issues for determination as follows:-

- a. Whether the dismissal of the Claimant was unlawful/unfair;
- b. Whether the Claimant was acting under the Authority of the Operations Manager of the Respondent when he advanced the credit facility to his customer.
- c. Whether the reason for terminating the Claimant was justified and whether his conduct amounted to fraud.
- d. When was the Claimant officially dismissed and whether the Respondent locked him out from 19th January 2010 to 29th July 2010 when he officially received the termination letter dated 14th July 2010;
- e. Whether the Claimant is entitled to the prayers sought in the Memorandum of Claim;
- f. Costs.

The Respondent has on the other hand extracted the following issues for determination by the court :-

1. Was the Grievant informally authorized to offer taxi services on credit?
2. Did the Grievant offer taxi services on credit on 24th December 2009?
3. Did the Grievant irregularly retain the cash that was due to the Respondent?
4. Did the Grievant's conduct amount to gross misconduct that entitled the Respondent to summarily dismiss the Grievant?
5. When was the Grievant summarily dismissed?
6. Is the Grievant entitled to the declarations and reliefs claimed in the Memorandum of Claim and Supplementary Memorandum?
7. Who ought to pay the costs of this suit?

I have merged and collapsed the issues into the following:-

1. **When the Claimant was summarily dismissed?**
2. **Whether or not the summary dismissal was unfair?**
3. **Whether the Grievant is entitled to the prayers sought?**

1. **When the Claimant was summarily dismissed?**

The Claimant pleaded that the Grievant was issued with letters of dismissal giving conflicting dates of 31st December 2009 and 19th January 2010, both letters being received in August 2010. The grievant testified that he was called by the Managing Director on 19th January 2010 and asked why he was holding company money. That the Managing Director got upset when the Grievant informed him that he had paid. The Managing Director then called the Operations Manager who confirmed that the Grievant had paid. The Managing Director thereafter told the Grievant to go home.

RW1 the Accountant testified that the Grievant was terminated on 31st December 2009 but was given the letter of dismissal on 19th January 2010. Neither the General Manager or the Managing Director were called to give evidence. The author of the letter of dismissal Rachel N. Kiungu, was also not called to give evidence. The evidence of RW1 is hearsay as he was not present at the meeting and did not issue the letter of dismissal. The evidence of the Claimant is therefore uncontested.

For these reasons I find that the Claimant was dismissed verbally by the Managing Director on 19th January 2010 but issued the letter of dismissal dated 31st December 2009 on 29th July 2010.

2. **Whether or not the summary dismissal was unfair?**

The Claimant alleges the summary dismissal of the grievant was unfair as he was never given a hearing as provided under Section 41(1) of Employment Act. The Claimant further submits that there was no valid reason for dismissal as the Grievant was not guilty of fraud.

The Claimant relies on the case of **James Wainaina Mwaura V. Limuru Farmers Co-operative Society Limited; Industrial Court Cause No. 1095 of 2010** where the court held that Section 45(1) of the Employment Act outlaws unfair termination of an employee by an employer and that unfair termination occurs when no valid reasons for the termination are given or when the procedure adopted in the termination does not meet the requirement of fairness.

The Claimant further relied on the case of **Konig V. Kanjee Naranjee Properties Limited (1968) EA 233** where the court held that "A master is entitled to dismiss his servant for willful disobedience of his master's lawful and reasonable orders which is his duty to obey."

The Respondent on the other hand argues that the Grievant's claim that he gave credit to a client based on authority was a concocted reason.

I find that the summarily dismissal of the Grievant was unfair for the following reasons; first, it was verbal; Secondly the Respondent did not comply with Section 41 of the Employment Act which requires that an employee be informed of the reasons for which the employer wishes to dismiss him in the presence of a fellow employee or union official chosen by the employee, and after hearing representations from both the employee and the person accompanying him.

Thirdly the reason given being fraud was not valid as the Grievant stated that he had already collected and remitted the money alleged to have been defrauded from the Respondent, a fact that was not controverted by the Respondent. Fourthly, the procedure used was not fair. The Claimant was ambushed by being called by the Managing Director without being notified that he was going to be questioned or given an opportunity to prepare his defence and call a representative to accompany him.

For these reasons I find the summary dismissal of the grievant unfair.

3. Is the Grievant entitled to the prayers sought?

The Claimant prayed that the Grievant be paid the following:-

a. Notice

Having found the termination unfair, the Grievant is entitled to pay in lieu of notice by virtue of Section 49(1)(a) of the Employment Act. The Grievant's last salary was Shs. 12,000/-. I therefore award him Shs. 12,000/- being one months' salary in lieu of notice.

b. 19 days worked in January

Having found that the Grievant's employment was terminated on 19th January 2010, he is entitled to salary for the 19 days worked in January 2010 in addition to the full salary for December 2009.

I therefore award him Shs. 7,600 being salary for 19 days worked in January 2010.

c. Service Pay for One year

Section 35 (5) as read with 35(6) of the Employment Act provide for payment of service pay. The Respondent did not contest that the Grievant is entitled to the same.

I award the Grievant Shs. 6000/- being 15 days salary as service pay for the one year worked.

d. Pay in lieu of leave

The Grievant testified that he had not taken leave for the period he was in the Respondent's employment. This was not denied by the Respondent. I award him 21 day's pay in lieu of leave in the sum of Shs. 8400.00. The Respondent may recover the sums paid to the Grievant from this court.

e. Full salary payment for the period locked out of employment

The Claimant prayed for payment for the period 19th January to 29th July 2010 when the Claimant received the letter of appointment. The Claimant argued that this amounted to unfair labour practice in violation of Article 41(1) of the Constitution. The Claimant relied on the case of **Banking Insurance & Finance Union V. Kipsigis Teachers SACCO Society Limited** where the court held that where an employee is unfairly removed, from employment by the employer, the employee is entitled to be compensated including the period when the employee was on suspension or interdiction during the disciplinary process leading to the unfair termination.

I have read the said judgment and I find that the facts are different from this case. In the case referred to the employee was on suspension without pay while the disciplinary process was going on unlike this case

where the disciplinary case was finalized on 19th January 2010 and the only issue outstanding was the issue of the letter of dismissal and payment of terminal benefits.

I find that the Claimant's employment was terminated on 19th January 2010 and he is therefore not entitled to payment for the period 20th January to 29th July 2010. The claim is dismissed for want of merit.

f. 12 months compensation

The court having found that the Grievant was unfairly dismissed from employment, he is entitled to compensation as provided in Section 49(1)

(c) of the Employment Act. Having worked for just over one year, I do not think he is not entitled to full compensation of 12 months. I have however considered all the circumstances of the case and the factors set out in Section 49(4) of the Employment Act and in my opinion 4 months' salary is reasonable compensation in this case. I therefore award the Claimant Shs. 48,000/- being 4 months' salary as compensation for unfair dismissal.

g. Certificate of Service

The Claimant is entitled to a certificate of service in terms of Section 51 of the Employment Act. The Respondent is directed to issue the same within 30 days from the date of judgment.

h. Costs and Interest

The Respondent shall pay the Claimant's costs for this case. The decretal sum will attract interest at court rates from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 30th Day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

No appearance for Claimant

Muhindi for Respondent