



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 429 OF 2013

MAURICE M. LUTEYA.....CLAIMANT

v

HUNTERS SHIP CHANDLERS & GENERAL CONTRACTORS LTD.....RESPONDENT

JUDGMENT

1. Maurice M. Luteya (Claimant) filed a Memorandum of Claim against Hunters Ship Chandlers & General Contractors Ltd (Respondent) on 5 December 2013 complaining of unfair dismissal.
 2. The Respondent filed its Response on 31 January 2014 and the Cause proceeded to hearing on 2 April 2014.
- Claimant's case**
3. The Claimant's case is that he was employed by the Respondent as a warehouse supervisor in December 2005 at a daily wage of Kshs 1,000/- paid weekly. He stated he was recruited by the Respondent's Operations Manager, Rajab Mohamed. After recruitment he was issued with a permanent port pass.
 4. The Claimant stated in testimony that his duties were to arrange for gate passes on behalf casuals engaged by gang leaders to load cargo on behalf of World Food Program which had a contract with the Respondent.
 5. The Claimant also stated that he knew Vincent Olumo, Samuel Lure, Odimo and Sylvester Ojode who were gang leaders.
 6. The Claimant further stated that he never went on leave for 3 years and was not a member of the National Social Security Fund.
 7. Regarding the termination, the Claimant testified that on 15 October 2013 at around 11.00 am he was summoned by the Respondent's Operations Manager and informed that the management had decided to terminate his services and that he was not given a termination letter. He was not given any reason or explanation.
 8. After 14 days he returned to see the Operations Manager but he was advised that he would be called

and that when he went back again, the security guards did not allow him in.

9. He further contends that prior to termination, he had not been given any warning letters and that the termination was unlawful because he was not given notice and the Respondent refused to pay his terminal dues. He concluded by stating he was seeking the reliefs set out in the Memorandum of Claim.

Respondent's case

10. The Respondent denied that it employed the Claimant in 2005 or had a contract of employment with him in any capacity.

11. The Respondent further pleaded that it outsourced casuals from gang leaders on a daily basis and that it retained the records of the casuals only for purposes of preparation of wages.

12. The Respondent called Samuel Lure, a gang leader to testify on its behalf. He stated that he and other gang leaders he mentioned used to recruit casuals at the port gate and take them to the Respondent to help with offloading/loading of cargo, following an agreement signed on 26 July 2005. Together with the other gang leaders they would supervise the casuals.

13. The witness testified that he knew the Claimant and that he was recruited by the gang leaders and made a supervisor over the casuals and that they used to pay him. He emphasized the Claimant was not a supervisor with the Respondent.

14. On payment to the casuals, the witness stated that a clerk would prepare details of payments and give the details to the Respondents cashier who in turn would give one of the gang leaders the money after acknowledging in a petty cash voucher, to pay the casuals. The witness also stated he used to collect the money and sign the vouchers.

15. In cross examination, the witness stated that the Claimant was initially employed in 2007 and was a fellow gang leader though he did not sign the agreement dated 26 July 2005 with the Respondent.

16. He further stated that the Claimant would take names of casuals to Kenya Ports Authority for processing of gate passes and confirmed the Claimant applied for the passes on the Respondent's letterhead.

17. In conclusion, the witness stated he was surprised to learn the Claimant had been sacked and that he did not know who sacked him.

18. Claimant filed his submissions on 9 June 2014 while the Respondent filed its submissions on 17 June 2014. The Court has taken into consideration the submissions even if reference in depth to the same has not been made.

Issues for determination

19. The issues arising for determination are, whether the Claimant was an employee of the Respondent and if so whether the termination was unfair and appropriate remedies.

Whether the Claimant was an employee of the Respondent

20. The Claimant contends he was an employee of the Respondent. His evidence was that he was not issued with an appointment letter.

21. To demonstrate that he was an employee, he produced letters dated 26 July 2009, 3 December 2009, 20 August 2010, 31 October 2011, 25 November 2011, 31 December 2012, 3 January 2013 and 5 February 2013 addressed to the Managing Director, Kenya Ports Authority seeking gate passes for casuals named in the letters.

22. The letters are on the Respondent's letterheads and are embossed with the Respondent's rubber stamp and signed by the Claimant under the title of supervisor.

23. The Respondent on the other hand asserted that the Claimant was not its employee but a gang leader (independent contractor). The witness who testified on behalf of the Respondent, in examination in chief stated that he knew the Claimant and that the gang leaders who had signed an agreement with the Respondent had employed him and made him a supervisor.

24. At some point he stated that the Claimant was not a supervisor but a gang leader though his name was missing in the outsourcing agreement.

25. In cross examination, the witness changed his story. He stated that he (gang leaders) did not employ the Claimant and he did not know whether the Claimant was employed by the Respondent or how much the Claimant was being paid. He further stated he was surprised to learn that the Claimant had been sacked and he did not know by whom.

26. There is no direct evidence of an employment relationship between the Claimant, the Respondent and the gang leaders. The Respondent opted not to call any of its officers or employees but sought to rely on the evidence of a party it had entered into an agreement with. The witness contradicted himself and the Court finds him not trustworthy and not credible.

27. The Claimant wrote formal letters on behalf of the Respondent to Kenya Ports Authority and signed the same. The letters were on the letterhead of the Respondent and bore its rubberstamp.

28. On the basis of the letters, the Court is satisfied that the Claimant was an employee of the Respondent.

29. The Court is further satisfied that the Claimant was an employee of the Respondent with effect from 2005 at a daily rate of Kshs 1,000/-.

Whether the termination was unfair

30. The Claimant's unchallenged evidence was that on 15 October 2013 at around 11.00 am the Respondent's Operations Manager called him and informed him the Respondent's management had decided to stop him from offering his services. He was not given a termination letter.

31. The Respondent's witness on his part stated that he was surprised to learn the Claimant had been sacked. He did not know who had sacked him.

32. Section 41 of the Employment Act, 2007 requires an employer to inform an employee of the reasons contemplated for termination if the termination is on the grounds of *misconduct, poor performance or physical incapacity*. The employer should also grant or afford the employee a hearing.

33. No reasons were offered and the Court is therefore unable to reach a conclusion that the termination was on the basis of any of the three mentioned grounds to warrant compliance with the section.

34. However, section 45(2) (c) of the Employment Act, 2007 obliges an employer to follow a fair procedure in terminating the services of an employee. If for any reason the termination of the services of the Claimant was not based on *misconduct, poor performance or physical incapacity*, the aforesaid section obligated the Respondent to follow a fair procedure. The fair procedure cannot be anything other than complying with the rules of natural justice.

35. To my mind, although section 41 of the Employment Act, 2007 has only mentioned termination on the grounds of *misconduct, poor performance and physical incapacity*, termination on other grounds are still subject to procedural fairness or natural justice by dint of section 45(2)(c) of the Employment Act. Termination due to redundancy has its own special procedures set out in section 40 of the Act.

36. In my view, the termination of the Claimant was not in accord with the fair procedural safeguard of section 45(2) (c) of the Employment Act, 2007 and thus procedurally unfair.

37. Under sections 43 and 45 of the Employment Act, 2007, an employer is under a statutory burden to prove the reasons for termination and that the reasons are valid and fair reasons. In the instant case, no reasons were offered and the only logical conclusion is that the Respondent has failed to discharge the statutory burden placed upon it and so the termination was substantively unfair.

Appropriate remedies

One month pay in lieu of notice

38. The Claimant's testimony was that he was earning Kshs 1,000/- per day. He therefore seeks Kshs 30,000/- as one month pay in lieu of notice. The figure would only apply if the Claimant worked without the statutory rest day.

39. Putting into consideration the weekly rest day, the Claimant's average monthly earnings would have been Kshs 26,000/-.

40. By dint of sections 35(1) (c) and 36 of the Employment Act, 2007, the Claimant would be entitled to one month pay in lieu of notice.

Leave pay for 3 years

41. Under this head the Claimant sought Kshs 90,000/- . Every employee is entitled to at least 21 days annual leave with full pay. The Claimant's testimony was that he did not go on leave. He did not disclose why he did not go on leave for the 3 years or whether he sought the leave and was denied.

42. Based on the evidence regarding leave and taking into account section 28(4) of the Employment Act, 2007 the Court would award the Claimant leave pay equivalent to one and a half months salary, for the last eighteen months before termination.

43. The Court would therefore award the Claimant Kshs 39,000/- .

Service pay

The Claimant sought Kshs 120,000/-.The formula used to arrive at the sum was not disclosed.

Under section 35(5) of the Employment Act, 2007 an employee is entitled to service pay at a rate to be fixed. The rate has not been fixed. Customarily, and according to practice, the service pay has been calculated on the basis of 15 days pay for each year of completed service.

The Claimant served the Respondent for 8 years and the service pay would be equivalent to 120 days. Using the average monthly salary of Kshs 26,000/- divided by 26 to get the daily rate, the Claimant is entitled to Kshs 120,000/-.

Compensation for unfair termination

47. This is one of the primary remedies for unfair termination. It is a discretionary remedy. Section 49(4) of the Employment Act, 2007 has outlined some 13 factors the Court ought to consider (any, some or all).

48. The Claimant served the Respondent for 8 years. There is no evidence that he contributed to the termination since no reasons were given.

49. Considering these factors, the Court is of the view that an award equivalent to 4 months wages assessed at Kshs 104,000/- would be just.

