



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 209 OF 2013

WILLIAM NYAMAWI GAMBO.....CLAIMANT

v

KRYSTALLINE SALT LTD.....RESPONDENT

JUDGMENT

1. William Nyamawi Gambo (Claimant) was dismissed by Krystalline Salt Ltd (Respondent) through a letter dated 24 August 2012 on the ground of gross misconduct. The Claimant was aggrieved with the dismissal and on 17 July 2013 he lodged a Statement of Claim in Court seeking terminal dues and damages for wrongful termination amounting to Kshs 764,878/-.
2. The Respondent was served and it filed a Memorandum of Appearance through Menezes Oloo & Chatur Advocates on 8 August 2013. On 22 August 2013 the firm of Okanga & Co. Advocates filed a Notice of Appointment of Advocate to act on behalf of the Respondent and on 26 August 2013, the firm filed a Statement of Reply.
3. On 13 September 2013, the firm of Menezes Oloo & Chatur filed an application to be granted leave to cease acting for the Respondent. The application was not prosecuted.
4. When the Cause came up for hearing on 10 October 2013, Mr. Okanga for the Respondent was not ready to proceed and an adjournment was granted at his request and hearing fixed for 21 November 2013. The hearing did not proceed on the material day. The Cause eventually proceeded to hearing on 8 April 2014 and 17 July 2014.

Claimant's case

5. The Claimant's case is that he was employed by the Respondent in November 1989 as a Production Supervisor. On 9 June 2009, the Respondent offered him a two year fixed term contract in the position of Storekeeper.
6. Through a letter dated 24 August 2012, the Respondent summarily dismissed him on the ground of misconduct. The reason given was loss of 921 tonnes of salt.
7. On the process prior to dismissal, the Claimant testified that he was not given an opportunity to be heard or explain. He also denied receiving a show cause letter dated 31 July 2012 setting the charges

against him or being given one month notice or pay in lieu of notice but in the same breath stated that he gave explanations to the Respondent's managers, Mr. Bhavesh and Mr. Vino Pindoria.

8. On the reasons for the dismissal, the Claimant's case is that he had taken a physical stock on 28 July 2012 which revealed a shortage of about 80 tonnes of salt (later stated as 921 tonnes). He gave the stock take results to the Stock Controller, Mr. Bhavesh and Sales Manager, Mr. Vino Pindoria after which he was given a dismissal letter on 24 August 2012.

9. On the cause of the shortage of salt which led to the dismissal, the Claimant stated that the salt was stored in the open where it would be rained on (roof of the stores was rusty and leaked when it rained) leading to the salt dissolving in water.

10. In cross examination, the Claimant stated that stock taking was done on a daily basis and further that he was requested to write an explanation letter on the shortage which he did, but did not have a copy in Court.

11. The Claimant also stated that at the time of trial, he was working with Texas Security Ltd and that at time of dismissal he was earning Kshs 22,278/- per month. He further stated the Respondent made a report to the Police with whom he recorded a statement.

12. The Claimant stated that he was seeking one month pay in lieu of notice, wages for July and August 2012 and service pay for 4 years.

Respondent's case

13. In the course of proceedings, Mr. Okanga informed the Court that the Respondent was willing to pay the Claimant July and August 2012 wages amounting to Kshs 44,556/- and the Court directed the parties to attempt out of Court settlement but the same did not succeed.

14. The Respondent called its Human Resources & Administration Manager, Ann Karuga to testify.

15. Regarding the process prior to dismissal, the witness stated that the Claimant was issued with a show cause letter dated 31 July 2012 (produced) but in cross examination, she stated she did not know whether the show cause letter was given to the Claimant.

16. On the reasons for dismissal, the witness stated that according to the records, there was a loss of 921 tonnes of salt from the stores which was under the Claimant, and that the Claimant was unable to explain the loss. The Claimant did not respond to the show cause letter.

17. The Claimant was therefore dismissed for gross misconduct/neglect of duty leading to loss of 921 tonnes of salt.

18. In cross examination, the witness stated that reconciliations were being done and that all incoming and outgoing salt would be weighed at a weighbridge by clerks to ensure no excess weights and that loading clerks would keep records. She stated it was difficult to tell when the salt got lost.

19. The witness also stated that the Claimant was making National Social Security Fund contributions and was serving on a two year contract dated 9 June 2010 but effective 1 July 2010 and set to expire on 30 June 2012.

20. After close of hearing, the Court directed the Claimant to file and serve his submissions on or before 31 July 2014. The same were filed on 5 August 2014. The Respondent was directed to file submissions on or before 15 August 2014 and filed its submissions on 8 August 2014.

Issues for determination

21. The Cause is presented as one of unfair/wrongful termination and therefore the central issue for determination is whether the dismissal was unfair, and if so, appropriate relief.

Evaluation

Procedural fairness

22. Section 41 of the Employment Act, 2007 has now provided that an employer should inform an employee that a dismissal is looming and give him the reasons, and thereafter grant a hearing to the employee before taking a decision to terminate if the grounds are based misconduct, poor performance or physical incapacity. The Claimant was dismissed because of alleged misconduct/negligence and therefore the section is applicable.

23. The Claimant denied receipt of the show cause letter dated 31 July 2012. In examination in chief, he stated that he explained the shortage of salt to the Respondent's Managers. In cross examination he took a different tangent and stated that he was requested to write a letter to explain the shortage and he confirmed that he wrote a letter but did not have a copy in Court.

24. The duty to show that procedural fairness has been complied with is vested upon the shoulders of an employer. In the instant case, the Respondent produced a show cause letter which the Claimant denied receiving (the letter made reference to a letter dated 28 July 2012 from the Claimant and contemplation of disciplinary action). But in the same breath the Claimant acknowledged he was requested to explain the shortage and he did write a letter giving his explanations.

25. With the material placed before Court and the contradictory evidence of the Claimant, the Court finds that as a matter of fact the Claimant was asked to explain the shortage, informed of contemplated disciplinary action and given an opportunity to explain the shortage of the salt which he did in writing.

26. The Court therefore finds the dismissal procedurally fair.

Substantive fairness

27. Sections 43 and 45 of the Employment Act, 2007 have placed a duty upon an employer to prove the reasons for dismissal, and that the reasons are valid and fair reasons.

28. In the case under consideration, the reason given for dismissal was that the Claimant had failed to account for the loss of 921 tonnes of salt despite being asked to do so.

29. Evidence presented before Court was that stock taking and reconciliation was done daily. But the Respondent could not explain or establish over what period the salt got lost.

30. Further, there was evidence that incoming and outgoing salt would pass through a weighbridge for weighing. If the salt was being smuggled out it could have been detected at the time of weighing.

31. The Claimant testified the salt was kept in the open and was susceptible to the elements. He further stated the store roof was leaking. His explanation was that the salt dissolved in the rain. This evidence was not controverted.

32. Balancing the explanation given by the Claimant and the fact that reconciliation and weighing of the salt was carried out every day, it is the view of the Court that the Respondent has failed to prove that the Claimant was responsible for the loss of the salt, or that the reasons were valid and fair reasons to warrant summary dismissal. The dismissal was substantively unfair.

Employment status of Claimant

33. Before discussing relief, a brief word about the terms and conditions under which the Claimant was

serving after 30 June 2012.

34. The Claimant's two year fixed term contract expired by effluxion of time on 30 June 2012. No material was placed before Court to show it had been renewed or a new contract was entered into after the expiry. For the purposes of this judgment the Court would assume that the Claimant continued to serve on similar terms and conditions as those agreed in the expired written contract.

Appropriate relief

Service pay

35. The Respondent alleged that the Claimant was a contributor to the National Social Security Fund but no concrete evidence was produced in Court. Pursuant to section 35(5) & (6) of the Employment Act, 2007 the Court would find for the Claimant for service pay from 2008 to 2012 (4 years) in the sum of Kshs 51,410/- as submitted.

Unpaid wages for July and August 2012

36. The Respondent conceded to this head of relief in the course of the proceedings in the sum of Kshs 44,556/- and the Claimant is entitled to the award.

Accrued leave

37. The Claimant in cross examination testified he was not seeking this relief because he took all his leave days. This prayer is dismissed.

One month wages in lieu of Notice

38. The Court has reached the conclusion that the dismissal was substantively unfair and pursuant to section 35(1) and 36 of the Employment Act, 2007 and clause 19 of the contract letter finds that the Claimant is entitled to one month wages in lieu of notice in the sum of Kshs 22,278/-.

12 months compensation

39. The equivalent of a number of months' gross wages not exceeding 12 months is one of the remedies where the Court finds unfair termination. The award is discretionary and subject to the factors enumerated in section 49(4) of the Employment Act, 2007.

40. The Claimant informed the Court that he had secured alternative employment but not when. At the time of dismissal, the Claimant's two year contract had expired and it was not clarified under what terms he was serving.

41. Putting the above factors into consideration, the Court would award the Claimant the equivalent of 5 months gross wages assessed in the sum of Kshs 111,390/-.

Conclusion and Orders

42. From the foregoing, the Court finds and holds that though the dismissal of the Claimant was procedurally fair, the Respondent has failed to prove the reasons, and that the reasons were valid and fair reasons and therefore the dismissal was substantively unfair, and awards the Claimant and orders the Respondent to pay him

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|-----------------------------------|---------------|
| (a) Service pay | Kshs 51,410/- |
| (b) Unpaid wages July/August 2012 | Kshs 44,556/- |

