



IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 174 OF 2014

ALFRED MUTUKU MUINDI

CLAIMANT

v

RIFT VALLEY RAILWAYS (KENYA) LTD

RESPONDENT

JUDGMENT

1. The Claimant was appointed as a locomotive driver with effect from 1 November 2006 by the Respondent through a letter dated 25 October 2006. On 27 October 2008 the Respondent confirmed the Claimant as a locomotive driver on permanent terms.
2. Through a letter dated 11 January 2013 the Respondent issued a show cause letter (first show cause letter) to the Claimant seeking his explanation over failure to supervise the fuelling of a locomotive he had driven from Mtito Andei to Mombasa on 8 January 2013. The show cause letter also accused the Claimant of carrying a mattress, bed and utensils in the locomotive cabin without informing the Respondent and further of failing to comply with his supervisor's instructions to give an explanation.
3. The show cause letter instructed the Claimant to give an explanation within 72 hours. The allegations, according to the Respondent's letter constituted gross misconduct and were in breach of the Employment Act and Respondent's Code of Conduct.
4. The Claimant stated that he responded to the show cause (though response was not produced in Court) after which a disciplinary hearing was held on 20 February 2013.
5. After the disciplinary hearing, the Respondent issued the Claimant with what it called a final warning letter dated 28 February 2013 because its Disciplinary Committee had found his explanations unacceptable.
6. In the meantime, the Respondent had on 13 February 2013 issued yet another show cause letter (second show cause letter) to the Claimant on an unrelated matter. The letter informed the Claimant that it had been alleged that he had failed to answer telephone calls from the Running Shift Foreman on 5 February 2013 while booked to run train A43/9308 and further that he had failed to report to work from 2225 hours to 0600 hours. The said failure led to a train delay of 1 hour and 35 minutes and the Respondent had to assign another driver to the train.
7. The second show cause letter further informed the Claimant that his conduct amounted to gross misconduct and that he should submit an explanation within 72 hours why disciplinary action should not be taken against him. The letter advised him of the options available as part of the disciplinary process.
8. The Claimant stated in testimony that he gave a written explanation through letter dated 13 February 2013 and that on 6 June 2013 he got summons to appear for a hearing before a Disciplinary Committee meeting on 11 June 2013.
9. On 2 August 2013, the Respondent wrote to the Claimant informing him that it was terminating

- his services because it had found his explanations in regard to the charges in the letter of 13 February 2013 not satisfactory and that he would be paid one month salary in lieu of notice.
10. The termination letter also made reference to the first show cause letter/the incident which led to his being given a final warning letter dated 28 February 2013.
 11. The Claimant was aggrieved with the decision to dismiss him and on 16 April 2014 he lodged a Memorandum of Claim in Court stating the issue in dispute as *non-payment of final dues including one month salary in lieu of notice, general damages for unlawful and unfair termination of employment, unpaid leave and severance pay*.
 12. The Respondent was served and on 13 May 2014 it filed a Response denying unlawfully or unfairly terminating the services of the Claimant. The Respondent pleaded the Claimant was dismissed for gross misconduct and gave five particulars of the misconduct. The Respondent further pleaded the Claimant was taken through a disciplinary process and his explanations found wanting.

Questions arising

13. The complaint before Court essentially being one of unfair termination, the key issues for determination are two, whether the termination was unfair, and if so appropriate relief. The Court has considered the submissions filed by the parties and the authorities cited therein, though filed outside the set timelines.

Whether the termination was unfair

Procedural fairness

14. The Claimant was served with two show cause letters dated 11 January 2013 and 13 February 2013 respectively. The letters concerned unrelated allegations. Both letters informed the Claimant of the charges which had been framed against him and gave him 72 hours within which to respond.
15. In his testimony, the Claimant confirmed that he responded to both show cause letters on 11 January 2013 and 19 February 2013 respectively. After the written responses, the Claimant appeared before disciplinary committees for hearings on 20 February 2013 and 11 June 2013 respectively.
16. The Court need to measure the process conducted by the Respondent to evaluate whether it was in compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007. The section obliges an employer to inform an employee of the charges to confront and afford the employee an opportunity to defend/state his case before taking a decision to dismiss.
17. On the basis of the material placed before Court, the Court is satisfied that the Respondent was in compliance with the section 41 of the Employment Act, 2007 requirements on procedural fairness.

Substantive fairness

18. The principal grounds/reason for the dismissal of the Claimant as can be gleaned from the termination letter were gross misconduct in that he *failed to report on duty on 5 February 2013 and not answering phone calls from his supervisor*. The allegations were the subject of the second show cause letter.
19. In the view of the Court, the charges arising from the first show cause letter of 11 January 2013 (failing to supervise fuelling of the locomotive and carrying unauthorized items) were dealt with and concluded with the sanction of final warning being given and need not be considered here except as aggravating reasons at most.
20. The Claimant stated in his evidence that he failed to answer the phone calls because he had placed the phone on a charger and at some point his son had taken his mobile phone to play with and inadvertently put it on silent mode. He did not realize this fact before going to bed and therefore he did not hear the phone ring (10 times) until he woke up at about 4.00am and saw ten missed calls from his supervisor.
21. The Court is enjoined to consider whether the Respondent has proved the reasons for the dismissal

- and proved the reasons given as valid and fair reason in light of the explanation which was given by the Claimant.
22. The Court cannot hesitate to find that as a matter of fact, the Claimant did not answer his phone when he was summoned to report on duty. His failure to report was a direct consequence of his not answering his phone.
 23. Conduct which warrants summary dismissal should be such conduct as undermines the trust and confidence expected in an employment relationship. And whether a particular conduct justifies summary dismissal is a question of fact. But the Court should not substitute its decision for that of an employer but to determine whether the decision to dismiss was valid and fair within the circumstances of the employer.
 24. Therefore, the systems of the Respondent at the material time are also relevant as well the resources available to the Respondent. The Respondent had a system where employee locomotive drivers would be allowed to wait for a supervisor to phone them to report on duty at night.
 25. In the instant case, the Claimant went to his house and went to bed most probably expecting a call, but he never had the call when it came, and he gave a very plausible explanation.
 26. The Respondent did not suggest that the Claimant was required or had been informed to report to work at a certain time. The procedure was to wait for a phone call. In the view of the Court, the decision to dismiss the Claimant was not in accord with justice and equity considering the system put in place by the Respondent at the material time.
 27. The ultimate sanction taken by the Respondent did not fit the transgression. It was responding to a mosquito bite with a hammer, rather than improving on its systems.

Appropriate relief

One month salary in lieu of notice

28. Evidence before Court is that the Claimant was earning Kshs 56,479/- per month. The dismissal letter indicated he would be paid one month salary in lieu of notice. This was in line with clause 12 of the letter of appointment. The Court would award the Claimant one month salary in lieu of notice.

12 months' severance pay

29. Severance pay, under the Kenyan statutory framework is only applicable where an employee has been declared redundant. The Claimant was not declared redundant.
30. One of the primary remedies where the Court finds unfair termination is payment of a sum equivalent to not more than twelve months gross pay. The Claimant had the benefit of legal counsel. It appears he did not ascertain the correct legal remedy.
31. The Court has concluded the termination was unfair. Should he be denied the correct and appropriate remedy? The Court was not addressed on the proper approach.
32. The remedy is discretionary. In order to do justice the Court would award the Claimant the equivalent of one month gross wages for the unfair termination which is assessed at Kshs 56,479/-.

Lost bonus

33. No evidential, contractual or statutory basis for this head of claim was laid before Court. Clause 5 of the letter of appointment provided that performance bonus would be at the sole discretion of the Respondent. This head of relief is declined.

One month leave pay

34. Similarly, neither the Claimant nor the Respondent led any evidence on outstanding leave. But pursuant to the requirement placed upon employers to produce records in Court, the Court would award the Claimant the Kshs 56,479/- claimed on account of leave.

Costs

35. The Claimant has been successful. At the conclusion of the hearing the Court directed, with the agreement of the parties that the Claimant would file and serve submissions on or before 3 July 2014. The submissions were filed on 27 August 2014 long after the Respondent had filed its submissions. On this ground, the Court is of the view that this is a suitable case to deny the Claimant costs.

Conclusion and orders

36. From the foregoing the Court finds and holds that though the dismissal of the Claimant was procedurally fair it was not in accord with justice and equity and awards the Claimant and orders the Respondent to pay him

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|------------------------------------|---------------|
| a. One month pay in lieu of notice | Kshs 56,479/- |
| b. One month accrued leave | Kshs 56,479/- |
| c. One month wages compensation | Kshs 56,479/- |

TOTAL

Kshs 169,437/-

37. Each party to bear its own costs.

Delivered, dated and signed in open court in Mombasa on this 5th day of September 2014.

Radido Stephen

Judge

5 September 2014

Mr. Abidha: Claimant was paid leave and pay in lieu of notice already.

Mr. Hayanga: I don't have the records.

COURT: The parties admitted that notice pay and leave had been paid. The Claimant is therefore awarded Kshs 56,479/- only as compensation for unfair termination. Judgment rectified accordingly.

Radido Stephen

Judge

Appearances

For
Claimant

Mr. Wachira instructed by Muraya
Wachira & Co. Advocates

For
Respondent

Mr. Abidha instructed by Ochieng,
Onyango, Kibet & Ohaga Advocates