



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 277 OF 2013

FERNINARD MWAMBURI RINGOMACLAIMANT

VERSUS

MABATI ROLLING MILLS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant has brought this suit against the respondent seeking declaration that his dismissal from employment was unlawful and inhuman. He also seeks to recover ksh.1,050,000 as one months salary in lieu of notice plus salary for the unpaid period of the contract upto December 2012. Lastly he prays for compensation for unfair termination.
2. The respondent had denied liability and averred that the dismissal of the claimant was fair, lawful and human because he was afforded an opportunity of being heard on the charges of gross misconduct before the dismissal.
3. The case was heard on 6/5/2014 and 24/7/2014 when claimant testified as CW1 and the respondent called Philomena Mwikah (RW1) and Kithongo Kilonzo Musyoki (RW2) as her defence witnesses.

CLAIMANT'S CASE

4. CW1 produced employment letter to show that he was employed by the respondent on 2/1/2007. His starting salary was ksh.25000 per month. His job title was procurement clerk. His duty was to procure (Buy) goods on behalf of the respondent. He explained that the off loading personnel and security officers were duty bound to ensure that only empty containers left the respondent's premises.
5. On 6/6/2012, at 4pm CW1 was sent by Mr. Mwanza (Store's officer) to the offloading officer Mr. Swaleh to be shown containers for dispatch. CW1 then recorded the numbers of the identified containers and took the report to his senior Mr. Mwanza as requested and shortly thereafter CW1 left for home because it was time.
6. The following day, CW1 reported to work as usual but he was called to a meeting attended by the HR manager, Security Officer and the procurement officer. He was asked to defend himself with respect to the containers he allegedly loaded the previous day. Mwanza and Swaleh were not called to the hearing. CW1 was then given a show cause letter demanding a written response within 24 hours to which he complied.
7. On 9/6/2012, CW1 received a summary dismissal letter. As at the the time of the dismissal, his salary had been increased to ksh.42000 per month. He had 30 days leave outstanding. He prayed

for one month salary in lieu of notice, future salary which he would have earned until 2016 when he was to retire normally.

8. On cross examination by the defence counsel, CW1 admitted that Clause 8(c) of the contract letter entitled the employer to assign other duties to the CW1 other than procurement. He confirmed that he was sent to Mr. Swaleh to get numbers of containers scheduled for dispatch and not to check whether they were empty. He also confirmed that Swaleh was not an employee of the respondent. CW1 admitted that he signed the containers off without checking whether they were empty. He explained that when the containers were delivered at the respondent, he was away on leave. He admitted that was given a hearing and told to give written explanation in response to a show cause letter.

DEFENCE CASE

9. RW1 is the HR officer for the respondent. She told the court that on 6/6/2012, the claimant was requested by his supervisor Mr. Mutinda Mwanza, to go and supervise clearance of an empty container from the respondent's factory. CW1 ought to have verified that the container was empty by opening to check inside before loading it onto the truck. That verification was supposed to be done in the presence of a security officer and then endorse that verification in a book.
10. CW1 was to release 2 containers but they were stopped at the gate by the security after the guards found that one container had not been offloaded but was full of zinc. The containers were then returned to the yard pending decision by the manager. The security office took a statement from the CW1 after which the HR manager served him with a show cause letter dated 7/6/2012. That CW1 responded to the show cause letter on 7/6/2012 but the response was not satisfactory. CW1 was therefore invited to a disciplinary hearing and thereafter dismissed him by letter dated 9/6/2012. The dismissal letter offered to pay terminal dues to the CW1 including leave days, pension and days worked.

According to RW1, the dismissal was fair because of the show cause letter served followed by a disciplinary hearing.

11. On cross examination RW1 admitted that he never dealt with CW1's case. She confirmed that it was HR manager Mr. Silvester Odhiambo who dealt with it. RW1 however confirmed that he participated in the disciplinary case on 8/6/2012. RW1 confirmed that there were other workers who worked with the CW1 including Mutinda Mwanza his immediate supervisor. According to RW1 the instructions to CW1 regarding the containers must have come from Mutinda Mwanza. The crane operator was not duty bound to verify whether the containers were empty, but Security officer was supposed to accompany CW1 in verifying whether the containers were empty. RW1 however confirmed that the security guards were outsourced labour and as such his case was dealt with by his employer.
12. RW1 admitted that had the security worked well in verifying the containers, nothing wrong would have happened. RW1 confirmed that the verification book is signed by store personnel and the security officers. RW1 contended that CW1 attempted to steal in collusion with security officer but no report was made to the police. According to RW1 there was a good reason to dismiss the CW1. She added that a fair procedure was followed. She contended that CW1 had previously done similar offence but was given a warning.
13. On reexamination, RW1 maintained that CW1 cleared for the release of container No. ECMU 1961695 while still loaded with zinc.
14. RW2 is the respondent's crane operator. On the material day of this case he arrived for work at 2pm and worked upto 4.45 p.m. when CW1 asked him to lift a container and load onto a truck. CW1 told him that the container was empty but when he lifted it, the container tilted on one side indicating that it was not empty. He added 4 chains and finally loaded it onto the truck. RW2 loaded the container on the truck in the presence of CW1, security officer and the truck loaders.
15. RW2 explained that the truck loaders were the ones controlling the loading and they were employees of the transporters. He further explained that the role of the security officer was to take the details of the container. RW2 did not know CW1's duty except that of authorizing the loading of the container.

16. At 7pm, he learned that the container had been intercepted because it was loaded with goods inside. He was interrogated by security officers and even recorded a statement on 8/6/2012 but no disciplinary action was taken against him.
17. On cross examination by the claimants counsel, RW1 admitted that in the statement he recorded during investigations he stated that he received instructions to load the containers by 2 loaders including Masumbuko. RW1 admitted that he was instructed to load the container by the truck loaders who were employees of Bahari forwarders the transporter. He further admitted that he recorded the said statement the same day the incidence occurred. RW1 confirmed that there were may containers both loaded and unloaded in the respondent's yard.
18. After the close of the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

19. There is no dispute about the employment relationship between the parties herein. The issues for determination arising from the pleadings, evidence and the submissions are:

- a. **Whether the termination of the claimant's employment was unfair.**
- b. **Whether the claimant is entitled to the reliefs sought.**

Unfair Termination

20. Under Section 45 of the Employment Act, termination of employment is unfair unless the employer proves that it was founded on valid and fair reason and that it was reached after a fair procedure. The reason for the termination according to the summary dismissal letter was:

"...you ought to apply due diligence when carrying out your duties. Your action in itself is tantamount to theft of an employee from employer and whose consequence is summary dismissal..."

From the foregoing excerpt of the dismissal letter, it is obvious that CW1 was dismissed for negligent performance of duty which led to the wrongful release of a loaded container which was luckily intercepted at the gate.

21 Before the dismissal CW1 had been served with a show cause letter to which he responded in part as follows:

" at around 4pm I went to the stores and Mr. Mwanza requested me to go to CRM loading bay to meet Mr. Swaleh of Bahari Forwarders so that he can show me the containers he wanted to load. I met him, he showed me the two containers. I took the S/Nos. on his presence as I was instructed by Mr. Mwanza. I sent the report to Mwanza after a short while I heard from the gate that one of the containers was found with zinc (not off loaded). Sir, I had no information that the containers were not off loaded since I found that the containers were already loaded on the truck and I assumed that they were empty.....my duty was only to take the S/Nos. as instructed."

The question to answer is whether CW1 performed his duty negligently by releasing an un-offloaded container to be dispatched. The court is of the view that CW1 did not release the alleged loaded cargo. His uncontested case is that he was instructed by Mr. Mwanza to get serial numbers of containers which Mr. Swaleh of Bahari forwarders was taking away. When CW1 reached the container yard he found the containers already loaded onto a truck and took the serial numbers and sent the numbers to Mwanza as instructed. CW1 maintained that he was not required to verify whether the containers were empty. He therefore executed his mandate diligently and no complaint as to the serial numbers for the containers was ever raised.

22 The foregoing view was corroborated by the evidence of RW1 who confirmed that he was instructed to load the containers by 2 loaders of the truck. The loaders and RW2 knew that one of the containers was not empty at the time of the loading but they never told CW1 or any of the respondent's managers. There is no way therefore CW1 can be blamed for negligence in releasing loaded

containers when he was not duty bound to verify if it was empty. In this court's view the only officers of the respondent who acted negligently are Mr. Mwanza who failed to give adequate instructions to CW1 and RW2 who knowingly loaded a container full of zinc without verifying with the management whether it was okay to load. The other culprits were the security officer and Mr. Swaleh both of whom were outsourced staff.

23 In this court's opinion, a reason is only valid and fair if it falls within the claimant's cause of duty. In this case it was not proved that CW1 was to confirm that the containers were empty before loading. In fact he found the containers already loaded onto a truck. That evidence was not contested by the defence because the person who gave the instructions to CW1 Mr. Mwanza never testified in this case to confirm that he instructed CW1 to verify whether all the containers were empty.

24 On the other hand, it has been agreed by the claimant that he was given an opportunity to defend himself in a hearing. That however did not render the dismissal fair. In view of the earlier finding that the dismissal was not founded on a valid and fair reason

RELIEFS

25 In view of the foregoing findings the court makes declaration that the dismissal of the claimant from employment was unlawful, unfair and wrongful. Under Section 49 of the Employment Act, an employee who is unfairly dismissed is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination by upto 12 months gross salary.

26 CW1 prayed for one month salary in lieu of notice being ksh.42000 and the same is awarded. The claimant is also awarded 6 months gross salary being ksh.252,000/ for unfair termination. The claim for 1,050,000 loss of income for the entire 2012 is dismissed for lack of legal basis.

DISPOSITION

27 For all the reasons and findings stated above, judgment is entered for the claimant in the sum of ksh.294000 plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 3rd October 2014

O.N. Makau

Judge