REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 2280 OF 2012

JUDGMENT

DAVID WAHOME

VERSUS

SCHENKER LIMITED

DELIVERED BY

HON. LADY JUSTICE MAUREEN ONYANGO

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2280 OF 2012

DAVID WAHOME……...……..CLAIMANT

VERSUS

SCHENKER LIMITED ……..……..…… RESPONDENT

JUDGMENT

The claim herein was filed by the Claimant's statement of claim dated 30th October 2012 and filed on 13th November 2012. He seeks the following orders:

i. A declaration that the Claimant's termination from his employment was unlawful.
ii. The Claimant be paid his terminal benefits as set out in paragraph 11 hereinabove totaling to Kshs.1,173,505.90/=.
iii. The Respondent be ordered to compensate the Claimant for wrongful termination of employment at the equivalent of twelve (12) months gross salary.
iv. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
v. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act, 207.
vi. The Respondent to pay the costs of this claim.
vii. Interest on the above at Court rates.

The Respondent's Statement of Response dated 26th February 2013 was filed on 27th February 2013. The Respondent submitted in the Response that the claimant was properly terminated according to the requirements of law and practice and is not entitled to the prayers sought.

The case was heard on 25th March and 30th July 2014. The Claimant was represented by Ms. Mochama and Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates. Mr. Njiru and Mr. Masese instructed by Federation of Kenya Employers appeared for the Respondent.

The Claimant testified on his behalf. The Respondent called two witnesses; Mr. Hashim Adamali Laptawalla, RW1, a Consultant, and Mr. Moses Onyango Nzuya, the Respondent's Human Resource Manager. The parties thereafter filed written submissions.

Facts of the case

The main facts of this case are not in dispute. The Respondent is a Clearing and Forwarding company which deals with both local and international removals. The Claimant was employed by the Respondent on 26th March 1982 as an Accounts Assistant. His employment was terminated on 31st August 2012 by way of summary dismissal. At the time of dismissal the Claimant was a Warehouse Supervisor in charge of the Warehouse in removals department.

On 13th August 2012 there was a shipment that arrived from overseas to be off-loaded and stored for the client to come and collect. The claimant was assigned to handle the consignment.

According to the Respondent the Claimant was supposed to receive the consignment with a packing list indicating the contents of the shipment and the client was supposed to be present to witness the breaking of the seal. RW1 testified that this was the standard operating procedure contained in the operations manual signed by the Chief Executive Officer (CEO) and RW1 who at that time was a Senior Manager for removals and the immediate supervisor of the Claimant.

When the shipment arrived, the CEO found the Claimant off-loading the consignment without the packing list.

RW1 testified that the risk of not using the packing list is that the Respondent would be liable for damage or loss as the shipment passed through different ports where the package was opened for checking then resealed and locked after serial numbers were checked. The CEO asked the Claimant to print the packing list before offloading but the Claimant did not. The CEO was upset about the incident and referred the issue to the Human Resource Manager RW2 to handle. This was after the CEO informed the Claimant in an email communication that he would be issued with a warning letter.

RW2 called the Claimant to his office and inquired about the incident. The Claimant confirmed that he was off-loading without the packing list but according to the claimant, the packing list was not necessary. RW2 called RW1 to inquire if the position given by the Claimant was correct. RW1 confirmed that the packing list was necessary according to procedure.

RW2 then sent an email to the Claimant asking him to show cause why disciplinary action should not be taken against him for disregarding company procedure thereby exposing the company to possible loss through illegitimate claims by the client of missing goods. The email was sent on 21st August 2012 and the claimant was to respond by close of day on 22nd August 2012.

The Claimant responded on 22nd August 2012 explaining his position. He confirmed receiving a tallying list on 11th August 2012 but not the packing list. He also confirmed that he had not printed it out as he was only offloading the container and tallying the number of packages. He also stated in his response that the offloading was done later in the presence of the client's representative and all packages confirmed ok.

In the last paragraph of his response he stated the following:

"9. I have been with Schenker loyally for 30 years, for which there has never been any one instance of me causing damages or loss of liability for Schenker. The warning letter as mentioned by Mr. Henrik Sorensen will not be accepted by me under any circumstances what so ever. I have worked for 30 years and I am competent enough in my duties as a Warehouse Keeper for the removals department. I rest my case".

The Claimant was issued with a warning letter dated 24th August 2012. The letter was to be delivered to him through Elizabeth Kioko, Human Resources Assistant, but he refused to receive it.

On 27th August 2012 RW2 held a telephone discussion with the Claimant and advised him to accept the warning letter and raise any complaints against it after receiving it. This was also communicated to him by email but he still declined to accept the warning letter.

The Claimant was then issued with a show cause letter dated 27th August 2012. The letter required him to show cause why disciplinary action should not be taken against him for refusing to receive the warning letter dated 24th August 2012 from the Human Resource Assistant.

The Claimant did not respond to the show cause letter and on 29th August 2012 was invited for a disciplinary hearing to take place on 30th August 2012. The letter reads as follows:

DB SCHENKER

Schenker Ltd – P.O. Box 46757(00100) Nairobi – Kenya

29th August, 2012

David Wahome

C/o Packing & Removals Department

DB Schenker Limited

Dear David,

RE: INVITATION FOR DISCIPLINARY HEARING.

I refer to the various email communications concerning your violation of cargo handling and acceptance procedure and the warning letter dated 24th August 2012 which you reportedly refused to receive from the HR Assistant. I also refer to my telephone conversation with you on Monday 27th August and my email seeking confirmation of your alleged refusal to receive the warning letter which you did confirm via your email dated August 27th 2012. I further refer to our show cause letter dated 27th August 2012 which you also declined to respond to by the 28th of August.

We now write to invite you for a formal discipline meeting to be held on 30th August 2012 in my office at 11.00 am. The purpose of this meeting will be to discuss the misconducts mentioned in paragraph one above. Please note that you will be at liberty to attend the meeting in the company of any person of your choice.

Yours faithfully,

SCHENKER LTD.

Moses Nzuya

Human Resource Manager

The Claimant did not attend the disciplinary hearing. He was summarily dismissed from employment on 30th August 2014.

It is against the summary dismissal that the Claimant has filed the suit before me for determination.

In the written submissions the Claimant has framed the issues for determination as follows:

1. Was there a valid reason for termination of the Claimant's employment?
2. Was procedure followed in the said termination?
3. Is the Claimant entitled to the terminal benefits sought?

The Respondent has also framed the issues as follows:

a. Whether the Respondent had a valid reason to summarily dismissing the Claimant;
b. Whether the Respondent granted the Claimant due and fair process;
c. Whether the Claimant is entitled to reinstatement to his former employment with the Respondent;
d. Whether the Claimant is entitled to service pay;
e. Whether the Claimant is entitled to leave pay;
f. Whether the Claimant is entitled to any compensatory damages from this Honourable court.

I have merged the issues framed by the parties into the following:

1. Whether the summary dismissal of the claimant was unfair
2. Whether the claimant is entitled to the prayers sought.

1. **Whether the summary dismissal of the claimant was unfair**

The Claimant has submitted that his dismissal was unfair on the grounds that in the 30 years he had worked for the Respondent he had not been reprimanded, that he had already been issued with a warning letter and the dismissal was double jeopardy, that the claimant was entitled to question the warning letter and that he was issued with a final warning even though he had not been warned before. The Claimant further submitted that the Claimant never received the warning letter, the show cause letter and the invitation to a hearing and was at work until 31st August 2012. It is further submitted that the Claimant's dismissal was based on flimsy grounds as the Respondent was getting rid of long serving employees.

It was further submitted for the claimant that the Respondent failed to comply with both Section 41 and 43 of the Employment Act and that basic principles of natural justice were breached by the Respondent.

For the Respondent it was submitted that the Claimant violated the Respondent's internal cargo handling and acceptance procedure exposing the Respondent to risk of liabilities and declined to accept a warning letter.

It was further submitted that the Respondent had valid reason to dismiss the Claimant and that the Claimant refused to subject himself to disciplinary hearing.

I do not agree with the submissions for the Claimant that he did not receive the warning letter, show cause letter and letter inviting him for disciplinary hearing. RW2 testified that the letter of warning was handed over to the Claimant and he refused to accept it. The Claimant confirmed this in his discussions with RW2 and had indicated that he would not accept any warning when he responded to the first show cause letter on 22nd August 2012 through email communication. Both the first and second show cause letters and the invitation for disciplinary hearing were sent to the Claimant by email communication. The Claimant under cross examination stated that email communication was one of the modes of communication at work, that he had an email address and had communicated with RW2 on email. He further admitted stating that he will not receive a warning letter under any circumstances. In the

Respondent's Appendix 5, the Claimant was responding to the email from the CEO and his response is addressed to RW2 with copy to the CEO among others. Paragraph 9 of his email was in response to the CEO's statement in his email to the effect that:

"This is by no means acceptable and I will therefore again issue you with a warning letter, this time final to ensure that you do the job that we employ you to do, proper and according to given guidelines".

From the foregoing I find that the Claimant received all the communication sent to him by email and that email was an accepted mode of communication. I further find that he was given ample opportunity to defend himself after the initial refusal to accept the warning letter and that he had already decided even before the warning letter was issued that he would not accept it under any circumstances.

The Claimant's allegation that the Respondent was getting rid of long serving employees is not supported by any evidence as he did not name any long serving employee other than himself who had been dismissed.

On the allegation that he was dismissed on a ground that he had already been warned, the Respondent can only blame himself. The letter from the CEO which was the first indication of a warning did not anticipate any further action against the Claimant, but the Claimant boldly asserted that he was not going to accept that warning letter under any circumstances. True to his word he refused to accept the warning letter when it was finally delivered. Even after the issue was discussed with him he persisted in his refusal to accept the letter which then escalated the matter to a show cause letter which he refused to respond to, and finally, to a disciplinary hearing which he again refused to attend. He has no one to blame but his obstinacy for what befell him.

As stated by Justice Ndolo in **Jackson Butiya v. Eastern Produce Kenya Ltd Cause No. 335 of 2011**:

"An employee who squanders the internal grievance handling mechanism provided by the employer cannot come to court and say" I refused to talk with those people and therefore I was not heard, order them to pay me. "It is not the role of the court to supervise the internal grievance handling process between employers and employees. The role of the court is to ensure that such processes are undertaken within the law. In this case, I find that the Respondent followed the law but the Claimant failed to cooperate".

I agree with the Judge and find that in this case, as in the one before Justice Ndolo, the Claimant was availed every opportunity to participate in the internal disciplinary process but refused to cooperate leaving the Respondent with no alternative but to take the action it did to dismiss him. The Claimant seems to have become too big for the workplace and had the false impression that after 30 years service he had become untouchable, even informing the CEO that he will not accept the letter of warning that he CEO intended to issue under any circumstances.
I find that there was valid reason to dismiss the Claimant and the Claimant was given an opportunity to defend himself but he refused to participate in the disciplinary process.

Having found that the Respondent had valid reason to discipline the Claimant and that the Claimant reused to avail himself of the disciplinary process the Claimant is not entitled to compensation.

I have however taken into account the Claimant's long service and clean disciplinary record and consider the dismissal to be too harsh. I think in the circumstances of this case it is fair to reduce his summary dismissal to normal termination. For this reason I order that the summary dismissal be reduced to normal termination. The Respondent will therefore pay the Claimant one month's salary in lieu of notice. The Claimant is also entitled to any leave days earned but not taken as admitted by the Respondent.

The Claimant is however not entitled to service pay as he was a member of both NSSF and the Respondent's retirement benefits scheme as evidenced by his pay slip.

In the final analysis I order that the Respondent pays the Claimant the following:

i. Pay in lieu of notice Kshs.40,511/=.
ii. Leave earned but not taken of 5 days
iii. Certificate of Service

The rest of the claim is dismissed.

Each party shall bear their costs.

Orders accordingly.

Read in open Court this 26th day of November, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Nyabena for Claimant

No appearance for Respondent