



IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 199 OF 2013

KENEDDY O. OKINYI .....CLAIMANT

VERSUS

GRAIN BULK HANDLERS LTD .....RESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. This is a suit brought by the claimant seeking accrued employment benefits plus compensation for unfair termination of his employment by the respondent on 27/6/2013. The basis of the suit is that the reason for the dismissal was not valid and fair and the procedure followed to dismiss him was not fair.
2. The respondent has denied liability and averred that the dismissal was fair and justified because the claimant committed gross misconduct for which he was accorded an opportunity to defend himself before his dismissal.
3. The suit was heard on 1/9/2014 when the claimant testified as CW1 and the respondent called Mr. Joseph Otin as RW1.

CLAIMANT'S CASE

4. CW1 explained that he was employed by the respondent in June 1999 as a casual but from 2001 he was confirmed as permanent staff vide appointment letter dated 17/7/2001 (exh.1). He started as Machine Operator/Plant Technician but went through a series of promotion until he became Technical Assistant Coordinator on 16/6/2013 vide promotion letter dated 22/5/2013 (exh.2). His salary was ksh.90000 per month.
5. On 15/6/2013, CW1 was served with a show cause/suspension letter in respect of an alleged removal of 200 litres of diesel and 40 litres of coolant from the respondent terminal (exh.3). He responded to the show cause letter vide his letter dated 18/6/2013 (exh.4) denying the alleged misconduct. On 21/6/2013 CW1 was invited to a disciplinary hearing before a panel of 6 officers of the respondent. The result of the hearing was the exoneration of the CW1 from the alleged misconduct and reinstatement to work without any condition by.
6. CW1 resumed work on 22/6/2013 and worked until 27/6/2013 when he was served with a summary dismissal letter dated 27/6/2013 (exh.7), which was enforced by security officers. The reason for dismissal was the said removal of 200 litres of diesel and 40 litres of coolant based on new evidence discovered after the exoneration of the CW1 by the disciplinary committee.
7. According to CW1, the dismissal was unfair because he was not afforded any chance to defend himself against the alleged new evidence which was also never shown to him. He prayed for ksh.1,080,000 being 12 months salary for unfair dismissal. He also prayed for ksh.90000 being one month salary in lieu of notice. He also prayed for gratuity for the 12 years served.

8. On cross examination by the defence counsel, CW1 contended that from 1999 to 2013, he had a clean working record. He explained that although he was heard and exonerated from the alleged misconduct, he was never heard before the dismissal on the subsequent accusation after the alleged new evidence was discovered. When shown clause 9.2 of the respondent's HR Manual, CW1 admitted that the respondent had the right to summarily dismiss him for misappropriation and willful loss or damage of the respondent's property.
9. He admitted that he signed the gate pass dated 9/6/2013 for 20 litres of coolant and extension cable and blamed the security officer at the gate for releasing other items not listed in the gate pass. He confirmed that Mr. Alfonse Nyakwak (a mechanic) and Mr. Gilbert Nyange (security officers) never testified during the disciplinary hearing on 21/6/2013. He denied that any new evidence was discovered after the hearing. CW1 denied responsibility for the 200 litres of diesel and maintained that he only signed for the release of extension cable and 20 litres of coolant which were needed for repair of water system at the legal officer's house at Nyali. CW1 denied any alleged theft and maintained that he only saw the allegations written on paper.
10. CW1 admitted that he was a contributor of NSSF and staff pension scheme. He also admitted that he went for all his leave days earned.

### DEFENCE CASE

11. RW1 is the HR and Administration manager for the respondent. He confirmed that CW1 was employed by the respondent. He also confirmed that CW1 was implicated in a reported theft but he was exonerated after a disciplinary hearing. However on 24/6/2013, new evidence was given by Mr. Gilbert Nyange, the security officer who was manning the gate on the material date when he recorded a further statement on 24/6/2013. According to RW1, Gilbert allowed the vehicle to leave the gate without verifying the cargo upon seeing the signature of the CW1 on the gate pass. RW1 further explained that Mr. Nyakwak also wrote statement on 24/6/2013 stating that he and Mr. Stephen loaded 200 litres of diesel onto the vehicle which diesel was never recovered after it left the respondent's premises.
12. RW1 blamed CW1 for the theft because, being the senior most officer present, had he not signed the gate pass the vehicle would not have been released by the security guards to leave the premises. He maintained that under Clause 9.2 of the HR Manual theft is gross misconduct which warrant summary dismissal and denied the claim for notice pay. He contended that CW1 was a member of NSSF and staff pension scheme and as such not qualified to claim gratuity.
13. On cross examination by CW1's counsel, RW1 contended that CCTV camera footage showed diesel being removed from the store and then loaded on to the vehicle but he admitted that CW1 was never seen on the CCTV footage. RW1 further admitted that the gate pass in issue had only 2 items for delivery. Finally he admitted that he never showed CW1 the new evidence and he never gave him a chance to defend himself after the new evidence.
14. After the close of the hearing, both parties filed written submissions of which the court had carefully considered together with the pleadings and evidence adduced.

### ANALYSIS AND DETERMINATION

15. There is no dispute that CW1 was accused of theft of 200 litres of diesel and 40 coolant from the respondent's terminal but was acquitted by the disciplinary committee after hearing on 21/6/2013. It is also not disputed that by the letter dated 21/6/2013, CW1 was unconditionally reinstated to work after being acquitted by the disciplinary committee. There is also no dispute that CW1 was thereafter summarily dismissed, without any hearing for the same offence he had been acquitted on 21/6/2013, based on allegation that new and incriminating evidence had been discovered. There is no dispute that CW1 was never heard on the alleged new evidence before his dismissal. It is also not in dispute that CW1 was a member of NSSF and staff pension scheme to which the employer contributed 50%.
16. The issues for determination are whether the summary dismissal of the claimant on 27/6/2013 was wrongful and unfair and whether the remedies sought ought to be ordered.

### UNFAIR TERMINATION

17. It is trite that when an employer terminates the services of his employee for an alleged misconduct, the same shall be deemed unfair unless it is done within the provisions of Section 41 and 45 of the Employment Act. Section 45 *supra*, requires that termination of an employee's services shall be done through a fair procedure otherwise the termination is unfair. Fair procedure is explained under Section 41 of the Act in mandatory terms to include an oral hearing of the employee in a language he understands and in the presence of a fellow employee of his choice. This procedure means that a dismissal for misconduct or poor performance and incapacity under Section 44 of the Act is to be done subject to the procedure prescribed under Section 41 *supra*. In the present case, although CW1 was heard and exonerated on 21/6/2013, he was not given a fresh hearing on the alleged newly discovered evidence. That default to accord a fresh hearing rendered his summary dismissal unfair.
18. In addition, the dismissal was unfair because no valid and fair reason was proved against the CW1. Firstly the further statement by Gilbert the security officer was only a confession for his own failure to act with diligence when he allowed the vehicle to leave the premises without verifying that the cargo inside was tallying with the items listed on the gate pass. Secondly, the further statement by Mr. Nyakwak, was also self confession that he personally loaded the 200 litres of diesel to the vehicle with a Mr. Stephen. None of the two statements accused CW1 of coercion or undue influence which forced them to load and release some cargo which was not listed in the gate pass. Thirdly, RW1 confirmed that CW1 was never seen in the CCTV camera footage at the scene of the alleged theft of the diesel and coolant. Lastly no theft of 200 litres of diesel and 40 litres of coolant was proved by the respondent as required under Section 43 and 45 of the Employment Act. The only document produced by the RW1 was Gate Pass dated 9/6/2013 for the release of 20 litres of coolant for generator plus an extension cable. That is the only document on which CW1 signed to authorize release of the two items according to RW1 and it corroborates CW1's evidence. There is therefore nothing on the said document to show that CW1 authorized for the release of any 200 litres of diesel and 40 litres of coolant. If Nyakwak and Stephen loaded extra cargo after CW1 signed the gate pass, and Gilbert negligently or deliberately allowed it to leave the premises CW1 cannot be blamed for such theft.

### RELIEFS

19. In view of the foregoing substantive and procedural unfairness, the summary dismissal of the claimant from employment by the respondent on 27/6/2013 is declared unfair and unjustified within the meaning of Section 45 of the Employment Act. Under Section 49 of the Act, an unfairly and unjustifiably dismissed employee is entitled to salary in lieu of notice accrued employment dues plus compensation for unfair termination. Consequently CW1 is awarded ksh.90000 being salary in lieu of notice plus ksh.1,080,000 being 12 months gross pay for unfair termination. The reason for awarding the maximum compensation is that CW1 did not secure another employment within 12 months. Secondly, the respondent acted unreasonably unfairly when after reinstating CW1 unconditionally capriciously dismissed him on frivolous further statements recorded by the real culprits of the alleged theft of 200 litres of diesel and 40 litres of coolant. In this court's view a reasonable employer in the shoes of the respondent would not summarily dismiss the CW1 based on the alleged further statement by Gilbert and Nyakwak. The prayer for leave is dismissed on the grounds that CW1 admitted that he went for all his leave days. Lastly the prayer for gratuity is also dismissed for reasons advanced by the RW1 that CW1 was a member of NSSF and staff pension and as such disqualified from claiming gratuity under Section 35(6) of the Employment Act.

### DISPOSITION

20. For the reasons stated above judgment is entered for claimant declaring his summary dismissal on 27/6/2013 unfair, and award him ksh.1,170,000 plus costs and interest.

Orders accordingly.

**Dated, signed and delivered this 5<sup>th</sup> December 2014**

**O. N. Makau**

**Judge**