



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 199 of 2012

1. SHIMEO AYIENDA ONTITA

2. BRYAN AYUB OCHIENG

3. GEORGE OTEINO AGWANDA

4. BONIFACE ONGESO

5. MARTIN MALIT TIRA..... CLAIMANTS

VERSUS

NAS AIRPORT SERVICES LIMITED..... RESPONDENT

JUDGEMENT

The main facts of this case are not contested. The Claimants **SHIMEO AYIENDA ONTITA, BRYAN AYUB OCHIENG, GEORGE OTIENO AGWANDA, BONIFACE ONGESO AND MARTIN MALIT TIRA** were employed by the Respondent on diverse dates as Assistant Aircraft Attendants in the Respondents Catering Department. Their duties included taking packed meals to aircrafts.

The Respondent **NAS AIRPORT SERVICES LIMITED** supplies food for consumption by passengers in aircrafts. In August 2010 several incidents were reported of tailoring pins found in food supplied by the Respondent to Kenya Airways flights. The Respondent suspected sabotage and reported the matter to police. After investigations the Claimants were arrested on 24th August 2010. They were subsequently charged in Court with the offense of sabotage contrary to Section 343(a) of the Penal Code. On 31st August 2010 the Respondent suspended the Claimants from duty without pay pending the outcome of the criminal case.

The case was finalized on 21st December 2011 when the Claimants were acquitted of the charges under Section 210 of the Criminal Procedure Code. The Claimants communicated the outcome of the case to the Respondent by letter dated 28th December 2011 and sought advice on the next course of action in relation to their employment. The Respondent did not reply to the letter prompting the Claimants to instruct their respective advocates to send demand letters to the Respondent. The Respondent replied to the demand letters through their advocate who also enclosed copies of termination letters dated 31st December

2010. The letters stated that the Claimants were terminated from employment with effect from 31st August 2010. The letters of termination offered to pay the following:-

- (i) Salary for the month of August 2010.
- (ii) Three months' salary in lieu of notice.
- (iii) Leave travelling allowance for 2010.
- (iii) Termination gratuity at 13 days salary.
- (iv) Unpaid leave days not taken as at the date of termination.

The Claimants were aggrieved by their termination and filed this case.

The case came up for hearing on 20th November 2012 when the Claimants were represented by Mr. Moseti while the Respondents were represented by Mr. Ndiho. The 1st Claimant **SHIMEYO AYIENDA ONTITI** testified and was cross examined. Thereafter the parties agreed that since his case is similar to the other Claimants all of whom had filed written statements it will not be necessary to call the rest of the Claimants to testify. The Respondent informed the Court that they will not call any witness and will rely entirely on their Memorandum of Defence and list of documents.

The parties thus agreed to canvass the rest of the case by way of written submissions.

The Claimants are seeking the following orders in their Memorandum of Claim:-

- a) Salaries unpaid for the period 31st August 2010 to 31st December 2011.
- b) Compensation for unfair and wrongful termination of 12 months salaries.
- c) 3 months' salary in lieu of notice.
- d) Accrued leave days.
- e) Termination gratuity.
- f) Off days, overtime and shift allowance due by 31st August 2010.
- g) Certificate of service.
- h) Costs.

I have read the pleadings and the written submissions. I will consider the issues as already framed by the Claimant and adopted by the Respondent as follows:-

- a) Whether the Claimants are entitled to salaries from 31st August 2010 to 31st December 2011.
- b) Whether the termination of services communicated and effected on 23rd January 2012 was lawful and justified.
- c) Whether the Claimants are entitled to **the reliefs sought** (I have amended this issue to expand it from the issue as framed by the Claimant which related only to the Certificate of Service).

I note from the Respondents defense that it has already admitted some of the prayers sought by the Claimants. These are:-

- 1) Salary for August 2010.
- 2) 3 months' salary in lieu of notice.
- 3) Leave travelling allowance.
- 4) Termination gratuity; and
- 5) Unpaid leave pending as at 31st August 2010.

The Respondent also agreed to supply all the Claimants with a Certificate of Service.

I accordingly enter judgement on the said issues and direct that the respondent computes the actual sums due to each Claimant for approval by the Claimants advocates. Should parties not agree on the computation either of them may move the Court so that the Court can make a determination on the same.

I now turn to the other issues in dispute which are the following:-

1. Salary from September 2010 to 21st December 2011.
2. Compensation.
3. Costs.

1. Salary from September 2010.

The Claimants were suspended without pay by letter dated 31st August 2010. The letters which are similar for all the Claimants read as follows:-

Dear Sir,

RE: *SUSPENSION FROM DUTY*

Following investigations into the recent incidences relating to sabotage of NAS operations, you were arrested and charged in a Court of law on 24th August 2010.

Pending the outcome of this case and in accordance with Clause 10 of the Collective Bargaining Agreement, you have been suspended without pay with effect from today, 31st August, 2010.

***Yours faithfully,
For NAS Airport Services Limited***

***Faith Githaiga,
Group Human Resources Manager***

Copy to: Finance Manager

Airline Contracts & Catering Manager

The letters referred to the Collective Bargaining Agreement which is appended as Exhibit 2 of the Respondents Defense. Suspension is provided for under Clause 10 as follows:-

The Union undertakes that any improvement in the minimum terms and conditions of employment for employees employed by Association members shall come about only through joint negotiations in accordance with this Agreement. Provided that any statutory enactment which alters such minimum

terms and conditions of employment shall automatically apply but the Association and the Union will meet and agree upon a Supplementary Agreement to take into account such statutory enactments.

To this end the Union undertakes that during the life of any current negotiated Agreement on terms and conditions of service no steps will be taken outside of this Agreement to secure or attempt to secure any changes, increases or enhancement of wages of fringe benefits for any class or category of persons employed by members of the Association, involving or likely to involve alteration or abrogation of all or any of the terms of the Agreement extant.

The Claimants were therefore supposed to be on suspension until the date on which the outcome of the Court is known. This was on 21st December 2011. Any action taken contrary to the provisions of the Collective Bargaining Agreement as expressly stated in the letters of suspension is therefore void.

The Respondent could have carried out its own investigations and disciplinary process, but chose to wait for the outcome of the criminal case. They are therefore bound by the decision in the criminal case.

I agree with the decision of the Supreme Court of India in **DELHI, CLOTH & GENERAL MILLS – VS- KUSHAL BHAN [1960]19 FJR 183: 1961 PLC 412** as applied in **Industrial Court Cause No.97 of 2006 KUDHEIHA Workers –vs- Moi University** where the Court held as follows:-

“It is true that very often employers stay inquiries pending the decision of the Criminal Trial Court and that is fair, but we cannot say that the Principles of Natural Justice require that an employer must wait for the decision at least of the Criminal Trial Court before taking action against the employee..... We may, however, add that if the case is of grave nature or involves questions of fact and law, which are not simple, it would be advisable for the employer to wait the decision of the Criminal Trial Court, so that the defense of the employee in the criminal case may not be prejudiced,”

I must add here that the test in criminal cases is much higher than in civil claims like employment cases. The Employment Act does not require an employer to report criminal acts against it committed by an employee as a condition to the carrying out of disciplinary cases against an employee. Any criminal case against an employee is a separate case from the disciplinary process by the employer and the two should be carried out independently of each other. However were an employer makes disciplinary procedure subject to the decision of a Criminal Trial Court, the employer must abide by the decision of the Court. This is the position in the present case.

The Respondent alleges that it wrote letters of termination to the Claimants on 31st December 2010. No evidence has been adduced to the effect that the contents of the letters of termination were communicated to the Claimants before 23rd January 2012.

This therefore raises the issue of when a letter of termination takes effect. As in all contracts, communication is only valid from the date on which the letters are received by the recipient unless they are informed about the contents of the letter by other means before they receive the letter.

The collective agreement annexed as Respondents Appendix 2 provides for employer/employee communication at Clause 2 as follows:-

2. Employer/Employee Communication

- (i) Communication to an employee in respect of the terms and conditions of service, disciplinary matters and house rules may be in written form and signed for by the employee as an acknowledgement of receipt. Such signature shall not constitute acceptance of indiscipline barring an appeal, but only as evidence of receipt of the letter.**
- (ii) Refusal by an employee to accept a letter communicated to him/her may constitute an offence.**
- (iii) The employer reserves the right to issue general communication of staff through circulars,**

notices and regulations which should be displayed conspicuously on Staff Notice Boards and the contents thereof shall be taken to be sufficient communication to all employees in this regard.

(iv) When the employee is on leave, is away without official leave or deserted employment, communication will be posted to the last known address with a copy to the Shop Steward.

All the letters of terminations are addressed to the Claimants through the Catering Department. The Respondent was aware that the Claimants were on suspension and therefore not at the Catering Department to which the letters are addressed. Obviously there was no communication to the Claimants in accordance with the terms of the Collective Bargaining Agreement. The communication therefore is deemed to have reached the Claimants on 23rd January 2012. This then is the effective date of termination.

For these reasons, I find that the Claimants are deemed to have been employees of the Respondent until 23rd January 2012.

The next issue for determination is whether the Claimants are entitled to payment of salary for the said period.

The letter of suspension is specific, that the suspensions are made pending the outcome of the case. The outcome of the case was known on 21st December 2011. The CBA provides that where the employee is found innocent, the employee shall be reinstated back to work. Having been acquitted by the Court, the Claimants were supposed to be reinstated back to work from the date of their acquittal.

For these reasons I find that the Claimants' are entitled to payment of the salary withheld during the period of suspension up-to the date of the determination of their case on 21st December 2012. Thereafter they are deemed to have been in employment until 23rd January 2012 when the Respondent communicated to the Claimants the decision that their employment had been terminated. The effect therefore is that the Claimants are entitled to their salaries up-to 23rd January 2012.

I give judgement to the Claimant accordingly.

Compensation

Section 49 of the Employment Act provides that an employee who has been unfairly terminated is entitled to compensation up-to a maximum of 12 months' salary. For termination to be valid, the employer must prove that there was valid reason for the termination and that the employer complied with fair procedure. This is provided for in Section 45 of the Employment Act.

In this case the letter of termination gives the reason for termination as "the prolonged duration of this case and the sensitivity of the matter."

The Respondent did not comply with the mandatory requirements of Section 41 of the Employment Act which require that an employee be informed of the reasons for termination and be given a hearing before the termination is effected. The Respondent in fact gave no opportunity to the employee to be heard, did not give valid reason for the termination and to compound the situation, back dated the effective date of termination to 31st August 2010 when the Claimants were on suspension. This is in contravention of the provisions of the Collective Bargaining Agreement.

I find that the Claimants' were unfairly terminated and are entitled to compensation for unfair termination. The Claimants' were employed on different dates between 2001 and 2005. Length of service is a factor to be taken into account when considering award of compensation. I do not think all the Claimants should be paid equal compensation. I also do not think they are entitled to maximum compensation.

I therefore award compensations as follows:-

Shimeo Ayienda Ontita, Bryan Ayub Ochieng, Martin Tira Malit who were employed in 2001 will each be paid 9 months' salary as compensation while George Otieno Agwada and Boniface Ngeso are each awarded 6 months' salary as compensation.

The Claimants will also be paid costs of this case.

Due to the fact that there was no proper computation of the claims, the respondent is directed to make a computation of the actual sum due to each employee and submit the same to the Court for adoption.

Final judgement will be given upon receiving the computation from the Respondent.

Orders accordingly.

Read in open Court and signed this 20th day of March, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

Mr. Momanyi holding brief for
Mosei for the

In the presence of: - _____ claimant

Mr. Alurale for the

_____ Respondent