



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 21 OF 2013
(Originally Nairobi Cause No. 1646 of 2012)

TRANSPORT WORKERS UNION

CLAIMANT

v

AFRICAN SAFARI DIANI ADVENTURE

RESPONDENT

JUDGMENT

1. The Transport Workers Union (the Union) filed a Memorandum of Claim against African Safari Diani Adventure (the Respondent) on 14 September 2012 and the issue in dispute was stated as *wrongful termination of Mr. Ali Kirao and refusal to pay terminal benefits*.
2. On 25 January 2013 the Principal Judge of the Industrial Court ordered that this Cause be transferred from Nairobi to Mombasa. On 29 January 2013, the Registrar of the Court acting pursuant to the order of the Principal Judge wrote to the parties informing them that the Cause was being transferred to Mombasa and to attend the registry to take hearing/mention dates.
3. On 8 February 2013 the Deputy Registrar wrote to the parties to appear in Court on 28 February 2013 for mention. Because of a meeting of all High Judges in Nairobi on that day the Cause was not mentioned and therefore on 22 February 2013, the Deputy Registrar again wrote to the parties to appear in Court on 8 March 2013.
4. On 8 March 2013 the Cause was placed before me and none of the parties appeared. As a result I directed the Deputy Registrar to notify the parties to appear in Court on 21 March 2013 for directions. The Deputy Registrar notified the parties through her letter dated 8 March 2013.
5. On 21 March 2013 Mr. Arif appeared for the Union but there was no appearance for the Respondent. Because there was no evidence that the Respondent had been served with Summons and the Claim, I directed the Union to serve the Respondent afresh and file an appropriate affidavit of service. I set a mention date of 11 April 2013.
6. On 11 April 2013, Mr. Nashib Mokua appeared for the Union. There was no appearance for the Respondent but an affidavit of service indicating that a mention notice had been served had been filed, but there was no evidence of service of Summons upon the Respondent. I again ordered that the Union should serve the Respondent with Summons and set 23 April 2013 for mention.
7. On 23 April 2013, Mr. Otieno appeared for the Union and he informed me that the Respondent had now been served with Summons and Memorandum of Claim and an affidavit of service filed.
8. On perusing the file I confirmed that the Respondent had been served with a copy of the

Memorandum of Claim and a mention notice and it acknowledged service by stamping thereon. An affidavit of service was filed on 19 April 2013 to this effect. I thus fixed hearing for 20 May 2013.

9. I had expected that the Respondent would have filed a Response within 14 days of service of summons but it did not. This Cause therefore proceeded *ex parte* because the time for the Respondent to respond had lapsed.

Union's case

10. I will only recap part of the Union's case as is relevant for my determination. The Union called the Grievant Ali Kirao who gave sworn testimony. The Union also relied on the pleadings and submissions. It was the case of the Union that the Grievant was employed by the Respondent as a cook in March 2004 and that he was terminated on 30 April 2012. At the time of termination he was earning Kshs 12,100/- per month.
11. Regarding the termination it was stated that the Respondent suspended the Grievant from duty indefinitely without pay with effect from 30 April 2012 pending verification of alleged mistakes he had committed. The suspension letter was annexed to the Memorandum of Claim as Appendix 1. The suspension letter set out three violations against the Grievant.
12. On 23 July 2012, the Respondent wrote to the Grievant summarily dismissing him from employment. The reasons given in the letter for the dismissal were that the Grievant had taken the Respondent's motorbike without permission, absence from work without permission and reference was also made to previous warning letters. Attempts at conciliation failed.
13. The Union therefore prays that the Grievant be paid salary in lieu of notice, unpaid salaries for May, June and July 2012, pending annual leave of 54 days, service pay and 12 months' compensation for unfair termination.

Analysis

14. The Union has discharged the burden of showing that the Grievant was dismissed from employment. The letter of dismissal was annexed to the Memorandum of Claim as Appendix 1.
15. Having discharged the onus of showing that the Grievant was dismissed it was incumbent upon the Respondent to establish that it followed the procedural fairness requirements of section 41 of the Employment Act in that it
 - i. Explained to the employee in a language the employee understood the reasons why it was considering the termination
 - ii. Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons
 - iii. Heard and considered any explanations by the employee or his representative.
16. All that I have is the evidence of the Grievant and the suspension letter. The suspension letter listed several allegations of violations against the Grievant. But the suspension letter does not suggest that the Grievant was given a hearing. He was simply notified of several infractions. This letter does not meet the threshold of procedural fairness of section 41 of the Employment Act.
17. In the circumstances the only inference I can draw is that the dismissal of the Grievant was not in accord with the dictates of procedural fairness set out in section 41 of the Employment Act and therefore was procedurally unfair.
18. As to the reasons as to why the Grievant was dismissed I wish to very briefly make reference to sections 43 and 45 of the Employment Act. Section 43 of the Act requires an employer to prove the reasons for termination of employment. The Respondent did not participate in the proceedings to prove the reasons it set out in the letter of dismissal.
19. Section 45 of the Act on the other hand requires an employer to prove that the reasons for termination are valid and fair. Similarly the Respondent did not participate in the proceedings to discharge the burden placed upon it by the statute. The reasons as set out in the dismissal letter therefore have not been proved or proved to be valid and fair. The dismissal therefore is also

substantively unfair.

Appropriate Relief

Salary in lieu of Notice

20. Having held that the termination was unfair and considering that the Grievant was being paid a monthly salary, it is proper to invoke the provisions of section 35 of the Employment Act and award the Grievant the equivalent of one month salary in lieu of Notice in the sum of Kshs 12,100/-.

Unpaid salaries for May, June and July 2012

21. Unless there is a contractual or statutory basis for withholding salary during a period of suspension it is not open to an employer to suspend an employee without pay. The legal obligation at common law on an employer is to pay wages not to provide work. Unless it is varied by statute or contract the obligation continues even during suspension.

22. In the circumstances I award the Grievant the salary he would have earned during the suspension period as claimed totaling Kshs 34,687/- for the period May up to 23 July 2012 when he was dismissed.

Pending annual leave

23. The Grievant in his testimony did not mention any pending leave and I am constrained to deny this particular head of claim.

Service pay

24. Service pay is now a statutory entitlement under section 35(5) of the Employment Act where the employee is not a member or beneficiary under a registered pension/provident fund scheme or other schemes established by an employer or the National Social Security Fund. The entitlement is subject also to the terms of service payment being fixed. My attention was not drawn to any fixed terms.

25. The Grievant sought the service pay at the rate of 15 days pay equivalent for each completed year of service. The general practice/custom has been to calculate the benefit at the rate of 15 days pay for each year of service. The formula is basic salary plus house allowance divided by twenty six to get the daily rate which is then multiplied by the total number of days. The Grievant served the Respondent for 9 years and therefore would be entitled to a 135 days service pay. I would award the Grievant Kshs 62,826/- as service pay.

Compensation for Unfair termination

26. Section 49 of the Employment Act empowers the Court to award up to a maximum of 12 months' gross pay where it reaches a conclusion that termination of employment was unfair. I have reached such a conclusion in the instant case and considering the 13 factors set out in section 49(4) of the Act, it is my humble view that the Grievant should be awarded the equivalent of 4 months' compensation based on the gross salary at the time of termination. I assess the same in the sum of Kshs 48,400/-.

Certificate of Service

27. A Certificate of Service is an employee's right regardless of the nature and circumstances of separation with an employer. That is what the law decrees. The Grievant here is entitled to a Certificate of Service.

Conclusion and Orders

28. From the foregoing, I do find and hold that the termination of the Grievant was unfair and he is awarded and the Respondent is ordered to pay him

a. One month salary in lieu of Notice	Kshs 12,100/-
b. Unpaid salaries for May, June up to 23 July 2012	Kshs 34,687/-
c. Service pay for 9 years	Kshs 62,826/-
d. 4 months' compensation	Kshs 48,400/-

TOTAL

Kshs 158,013/-

29. The Respondent is ordered to issue the Grievant Ali Kirao with a Certificate of Service.

30. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 28th day of June 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Otieno instructed by Transport Workers Union for Grievant

No appearance for Respondent