



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 101 OF 2012

VICTOR KIPTOO NGENOCLAIMANT

VERSUS

A.O. BAYUSUF & SONS LTDRESPONDENT

J U D G M E N T

The claimant brought suit on 5/11/2012 against the Respondent claiming terminal dues and damages for unlawful and unfair summary dismissal in April 2012.

The respondent has denied liability and maintained that she only suspended the claimant on 10/4/2012 for failing to discharge severity obligation to pay Ksh.913,000/- to the respondent on behalf of his colleague Mr. Kimtai Rotich. That the said suspension was lawful and within the contract of service contained in the parties Collective Bargaining Agreement (CBA).

The suit was heard on 9/3/2013 and 22/4/2013 when the claimant testified as CW1 while Mr. Shem Onyango Ouma represented the respondent as RW1. CW1 told the Court that he initially joined the respondent as a Turn boy and later because a long distance driver going as far as Kampala and Sudan. That on 10/4/2012 he received a suspension letter which he produced as Appendix B. The reason for suspension was because a colleague he had introduced to work for the respondent had stolen and he was therefore called to pay.

That he went and brought the alleged thief but he was neither arrested nor charged in Court. Instead the respondent demanded the claimant paid the ksh.913,000/- allegedly stolen by Mr. Rotich which the claimant could not afford.

The suspension letter told him not to return to work unless he paid the ksh.913,000/-. That he was never given a hearing on the matter and although no termination letter was issued he believed that he had been dismissed constructively.

He had served from November 1999 to April 2012 and his gross salary was ksh.19,020/- less NSSF deductions. That he was not paid his salary during the suspension by the respondent. He prayed for 12 months gross salary for unfair termination, plus one month salary in lieu of notice which amount to ksh.247,260.00/-

On cross examination he admitted that he introduced Mr. Rotich to the respondent and signed that he knew him. He denied knowledge that Mr. Rotich had committed any crime against the respondent. That he was told to look for Rotich who had been sacked by the respondent on the allegations that he has lost

ksh.913,000/- for the respondent.

He admitted that he was never given a dismissal letter but a suspension letter to go and bring Rotich or pay the money. That he brought Mr. Rotich to the respondent, but when he demanded his job back he was verbally told that there was no work until he paid the money.

On further cross examination he confirmed that he was a member of union but he was not aware that the CBA allowed such suspension. On the issue of surety, he said that the same was signed as a commitment to look for a colleague who went into hiding.

On the dismissal, he said that he believed that he was dismissed because he was not allowed to resume work even after bringing Mr. Rotich.

RW1 told the court that he was the Human Resource Manager for the respondent. He contended that the claimant was not dismissed but only suspended according to the respondents' records. That he was suspended as the surety of Mr. Rotich whom he introduced to the respondent and who thereafter was involved in fraudulent deal delivering 230 damaged jerricans to a customer. That under the said surety the claimant was to recover USD 10000 from Mr. Rotich to indemnify the respondent from the loss occasioned on her by Mr. Rotich.

He cited Clause 30 of the CBA which allowed the respondent suspend employees for 14 days without pay.

On cross examination he admitted that he suspended the claimant on 10/4/2012 although the letter was erroneously dated 10/4/2011. He went on to say that he had no evidence to prove that the claimant and the said Rotich were indeed brothers. He did not also produce the alleged surety agreement signed by the claimant in favour of the respondent.

On the issue of the fraud committed, he admitted that Mr. Rotich was not charged in Court. He further admitted that he did not respond to the demand letter by the claimant's advocates. He also admitted that suspension was supposed to be for 14 days but the suspension letter did not specify that the suspension was for 14 days.

He maintained that denial of the claimant's access to the work place did not mean termination of employment. He confirmed the claimant salary was Ksh.19,020/- and that he was a member of the NSSF.

When asked by the Court, RW1 confirmed that the claimant was not being paid any salary during the alleged suspension. He ended by confirming that no disciplinary hearing was accorded to the claimant by the respondent.

At the close of the hearing both the counsel filed written submissions for the respective parties. I have carefully gone through the pleadings, evidence and the submission filed. I have no doubt my jurisdiction to entertain the dispute before as it relates to employment which is in the province of this Court. I also have no doubt that the relationships between the parties herein as employer-employee is not in dispute.

The only issues in dispute in my view are:

- 1. Whether the claimant is lawfully under suspension or has been terminated from employment;**
- 2. If the answer to (1) above is termination, whether the termination was unfair;**
- 3. If the answer to (2) above is in the affirmative whether the relief sought ought to issue.**

The answer to the first issue above lies in the clause 30 of the CBA and the suspension letter itself. The CBA provides for suspension without pay for only 14 days and leaves no room for extension of the period. The only option given is to either dismiss him if misconduct is proved or reinstatement without loss of benefit if the employee is found to be innocent.

The suspension letter did not specify the period of suspension and even after 14 days the claimant was not allowed back to work. In my view the alleged misconduct was not committed by the claimant and it was not a good ground for the suspension under Clause 30 of the CBA which only deals with gross misconduct or other offences by the particular employee not his colleague. It follows therefore, that the suspension was unlawful and in breach of the employment contract contained in the CBA.

In addition the wording of the suspension letter clearly meant that the claimant was to automatically lose his employment after after the required time if he defaulted in paying the full amount of ksh.913000/- to the respondent. Assuming that the time frame meant the suspension period under the CBA was 14 days as stated by RW1, the claimant was therefor to lose his job after 14 days from date of the suspension letter. The letter stated

“... (1) You must first of all submit to it Ksh913,000 as a guarantor to of set the cost given herein;

***(2) That failure to remit the amount within the required time will mean an automatic loss of employment with total loss of benefit*”**

Without reference to any other date for remittance of the ksh.913000/- by the claimant this Court will adopt the interpretations given above to mean that the claimant’s employment ended 14 days after suspension which is 24/4/2012 after he failed to remit the demanded sum to the respondent.

This position is fortified by the fact that after that date the the respondent never allowed the claimant to resume work nor did she pay his salary or remit his NSSF deductions as per claimant's exhibit F. The said letter shows that NSSF deductions were no longer remitted after April 2012. This court therefore agrees with the claimant that his employment was constructively terminated.

Turning to the second issue of whether the termination was unfair, I have considered the provisions of Section 43, 45 and 47 of the Employment Act.

The burden of proof for the claimant is to prove that he was unfairly terminated while the employer is required to justify the ground for termination and the procedure for termination. The claimant has adduced evidence to prove that his services were constructively terminated. He says that he did not do anything wrong and he was not sure that Mr. Rotich had committed a crime. According to him he brought Mr. Rotich to the respondent but he was never arrested or charged.

On the other hand the respondent did not provide any security agreement binding the claimant to criminal liability on behalf of the said Mr. Rotich. Indeed the respondent denied terminating the claimants services expressly or constructively. She therefore did nothing to prove the validity of the reason for termination.

The question in my mind therefore is, whether there was any valid reason for suspending and letter terminating the services of the claimants. The answer is no. The allegations of fraud relating to another worker against whom no legal action was taken should not have been valid ground for terminating the services of the claimant by making it completely impossible to work. That impossibility was actualized through unlawful suspension of the claimant and his denial to access work place until he remitted Ksh.913,000/-. In my view the sum was a tall order and an impossibility for a driver whose gross salary was ksh.19,020/-.

On the issue of procedural unfairness, I do not need to belabour the point that the suspension and the subsequent termination was unfair. The reason is because the RW1 on oath admitted that the respondent

never accorded the claimant any hearing before or after the alleged suspension. Consequently, it is the courts decision that the termination of the claimant's employment was unfair within the meaning of Section 45 of the Employment Act

Lastly, I have considered the issue of relief sought and guided by Section 49 of the Employment Act agreed with the Claimant that he is entitled to Notice pay and 12 months gross salary for unfair termination. He is also entitled to the salary for 24 days April 2012 upto 24/4/2012 when the termination of employment constructively occurred.

In summary, I therefore enter judgment for the claimant against the respondent as follows:-

- a. **That the claimant's employment be and is hereby declared to have been unfairly terminated by the respondent.**
- b. **The respondent to pay the claimant:-**

(i) **one month salary in lieu of Notice19,020**

(ii) **12 month salary for unfair termination.....228,240**

(iii) **salary arrears for 24 days**

in April 2012..... 15,215

TOTAL262,476

Dated signed and delivered this 28th June 2013

ONESMUS MAKAU

JUDGE