



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO. 170 OF 2012
(Originally Nairobi Cause No. 321 of 2011)

DICKSON MWENDWA MUNUVE

CLAIMANT

v

OCEANFREIGHT (EA) LIMITED

RESPONDENT

JUDGMENT

1. Dickson Mwendwa Munuve (Claimant) was employed by Oceanfreight (EA) Ltd (Respondent) through a letter dated 19 December 1996 as an Export Manager at a salary of Kshs 34,000/-. He was later appointed as the Imports Manager. By 2008 the Claimant's salary had been adjusted to Kshs 148,830/- by 2008.
2. On 22 October 2010, the Claimant was suspended from work pending a disciplinary process. The letter requested him to show cause why more serious disciplinary action should not be taken against him. The suspension was later extended culminating in a termination through letter dated 9 November 2010.
3. The Claimant was not happy and he filed a Memorandum of Claim in February 2011 against the Respondent challenging the termination as unfair. The Respondent filed its Response on 25 March 2011 and List of Documents on 30 January 2012.
4. I heard the parties on 25 March 2013, 6 May 2013 and 24 June 2013 and reserved my judgment for 26 July 2013. I have duly considered the pleadings, evidence and written submissions filed by the respective parties.
5. Before discussing the parties' contestations I need to briefly outline the statutory obligation placed upon the shoulders of employees and employers in complaints of unfair termination.

Statutory obligation in cases of unfair termination/wrongful dismissal

6. The primary provision on what each party needs to demonstrate is set out in section 47(5) of the Employment Act. The section provide that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, *while the burden of justifying the grounds for*

the termination of employment or wrongful dismissal shall rest on the employer.

7. It is clear from the quoted section that an employee bears the burden of proving that an unfair termination has occurred. In discharging the burden placed upon him, an employee may prove any of the grounds set out in section 46 of the Act, e.g. that the termination was due to pregnancy, participation in trade union activities or based on the employee's race, religion, sex tribe etc.
8. The employee may also seek to prove the unfairness by proving that no notification or hearing as prescribed by section 41 of the Employment Act took place or that no written notice as required by section 35 of the Act was given. The employee may also lead evidence that the termination was unfair because the employer did not act in accordance with justice and equity. The list is endless.
9. On the side of an employer, the burden is more onerous. The employer will need not only to justify the grounds for the termination as provided for in section 47(5) of the Act, but prove the reasons for termination as required by section 43 of the Act and further that the reasons were valid and fair as stipulated in section 45 of the Act.
10. An employer must not forget the requirements to produce written contracts with prescribed particulars in legal proceedings as set out in sections 9,10,11,12 and 74 of the Act.
11. Both Claimant's and Respondent's should endeavour to outline in the Statement of Claim and Memorandum of Response the particulars to support the statutory burden placed upon them. The General traverse, denial and putting to strict proof well articulated and beloved by Defendants under the Civil Procedure Rules will not be adequate for purposes of practice and procedure in the Industrial Court. Moreover, the rules of the Court provide that evidence and the law relied on should be pleaded.

Claimant's pleadings and evidence

12. The Claimant pleaded that the termination was unfair and amounted to breach of contract because it was not in accordance with the law, and sections 41, 43 and 45 of the Employment Act were mentioned.
13. In oral testimony in Court, the Claimant stated that he got a warning letter dated 14 September 2010 drawing his attention to a bill of lading which had been misplaced and that he had authorized the processing of an invoice based on a copy of the bill of lading rather than the original as was the practice. As far as the Claimant was concerned the person responsible for the loss of the bill of lading was not under him and therefore he should not have been blamed. The blame should have been on the Container Manager under whom the lady responsible for the loss of the bill of lading worked.
14. Regarding the termination itself, the Respondent wrote to the Claimant on 9 November 2010 informing him that his services were being terminated immediately. The letter set out various grounds for the termination and in brief these were one, performance and conduct in that the Claimant was not communicating with customers in good time or not all, two, previous warnings concerning Claimant's relationship with customers and colleagues, three, giving special privileges to customers with no facilities with the Respondent and lastly integrity issues.
15. On 22 October 2010, the Claimant stated that he got a suspension letter which he responded to on 26 October 2010. The suspension required the Claimant to show cause why disciplinary action could not be taken against him. The reasons set out in the suspension letter related to the Claimant's conduct and performance in that he had failed to the Respondent's overseas clients.
16. As to why the termination was unfair the Claimant testified that the termination letter did not make reference to his conduct, he had never dealt with Jowaka Agencies which was mentioned in the termination letter, he had not been told about any integrity complaints involving him, the issue of tyres had been concluded in 2008 and in any case the issues raised in the termination letter had not been raised in the warning letters. He further asserted that there were no disciplinary processes regarding the allegations in the termination letter
17. The Claimant therefore sought terminal dues/gratuity and 12 months' salary in lieu of unfair termination all totaling Kshs 2,681,633/- and general damages for breach of contract.

Respondent's pleadings and case

18. For the Respondent, it was pleaded that the Claimant had been issued with a warning letter related to the loss of the bill of lading, that the Claimant was suspended due to escalation of neglect of duties and failure to heed warning letters, investigations were carried out and the termination letter was issued after investigations and that the letter mentioned specific incidences where the Claimant misused the Respondent's name to obtain personal services and other acts of misconduct.
19. The Response further pleaded that the termination was justified and the procedures set out in the Employment Act were followed and that the Claimant was given an opportunity to be heard.
20. In evidence, the Respondent cross examined the Claimant and called one witness, Peter Kimani Njoroge, its Personnel and Administration Manager. According to this witness, the Claimant was dismissed because of poor conduct and performance.
21. One of the grounds the witness made reference to was the loss of the bill of lading. The witness stated that there was no shortcut to production of an original bill of lading and that the Claimant being a Manager was meant to follow up on what happened to the original bill of lading and that the Claimant was negligent in not espousing collective responsibility.
22. The witness stated that another reason for the termination was the Claimant's poor communication with customers and that the Claimant required constant reminders to respond to emails. Reference was made to several email exchanges which were exhibited in the Respondent's List of Documents.
23. The witness further stated that the Claimant was issued with two warning letters, one dated 8 September 2010 through recorded delivery.
24. The termination according to the witness was justified because he had failed to meet the expectations of the Respondent in his work performance.
25. I have considered the respective parties' written submissions though they were filed after the agreed timelines, and the authorities cited therein.

Evaluation

26. There are some conclusions which need no deep analysis to be reached. One is that the Claimant was served with and signed in acknowledgment receipt of the warning letter dated 8 September 2010. This warning letter was in respect of the loss of the original bill of lading and what followed thereon. Two, is that the Claimant was not terminated due to the loss of the original bill of lading. I say so because in my view, the matter of the lost bill of lading appears to have been concluded and finalized, if the warning letter of 14 September 2010 is considered. The outcome of any disciplinary proceedings regarding the bill of lading was that the Claimant was warned, and informed that if such mistake occurred again he would be put through a disciplinary process which could lead to termination.
27. The question which begs for an answer therefore is whether the Claimant committed any breaches of contract or his performance and/or conduct between 14 September 2010 and 9 November 2010 warranted termination. Or in looked at differently whether there were any pending disciplinary complaints regarding the Claimant which had not been concluded by 14 September 2010.
28. And in this respect the focus of the Court must turn to the suspension letter of 22 October 2010. What I understand the suspension letter to be expressing is to raise 'new' issues of concern which the Respondent expected the Claimant to respond to. My keen perusal of the letter indicates there were two 'new' issues of concern raised.
29. The suspension letter made reference firstly to negative attitude and poor communication skills with overseas clients and to the fact that the Claimant had to be reminded to respond to these inquiries. Secondly reference was made to the demoralization of staff working under the Claimant and failure to provide proper direction.
30. It was for these two reasons that the Claimant was requested to explain or show cause why he should not be terminated. The Claimant responded through a letter dated 26 October 2010 seeking to be given details of the unsatisfied overseas customers and junior staff who were demoralized. In summary, the Claimant was seeking better particulars of the allegations set out against him in the suspension letter.
31. From the evidence and documents placed before the Court, it appears that the Respondent did not furnish the Claimant with these details.

32. Regarding the communication with overseas customers email exchanges from 4 December 2009 to 22 October 2010 were produced in the Respondent's List of Documents. The email exchanges confirm that it is a fact that the Claimant was not responding to communications promptly as is required within the business environment of the Respondent.
33. Lacking any indication that the Respondent informed the Claimant that it was contemplating terminating his services because of this and furnishing him with the particulars which he requested for in his letter dated 26 October 2010, I reach the conclusion that the termination of the Claimant was not in compliance with section 41 of the Employment Act. The termination was not procedurally fair.
34. I have already alluded to the fact that the emails confirm that the Claimant was not responding promptly to emails but this point only goes to the substantive fairness of the termination. Indeed the Respondent produced several memos exchanged with the Claimant raising various shortcomings which would go to the performance of the Claimant but the point is that even in situations where an employer has very good reasons/grounds to terminate an employee, it must still comply with the procedural fairness requirements of the statute.
35. In my considered view the Respondent had good reasons/grounds to contemplate terminating the services of the Claimant, but the process used to terminate the contract fell short of the statutory requirement. The Termination was procedurally unfair.
36. I now turn to discuss appropriate relief and the individual heads of claim pleaded by the Claimant.

Appropriate relief

Terminal dues/Gratuity

37. The Claimant sought Kshs 895,673/- as gratuity. Gratuity is either a contractual or statutory entitlement on the termination of contract. For an employee to claim gratuity he must state clearly whether he is basing his claim in contract or statute, more so where he has the advantage of legal advice or representation.
38. The Claimant's letter of offer of employment did not have any provision for payment of gratuity on termination.
39. The Claimant did not inform the Court that he was basing this claim on statute. The Employment Act has not made any provision for payment of gratuity. What the Act has provided for is payment of service pay in the scenario contemplated under section 35 of the Act. The section provides that the terms of any service pay shall be fixed. My attention was not drawn to any contractual or statutory provision fixing the terms. It was not suggested that gratuity and service pay are one and the same thing. Neither was I addressed on the issue.
40. I know that the Regulation of Wages (Hotel and Catering Trades) Order, the Regulation of Wages (Protective Security Services) Order, 1998 among other Wages Orders have made provision for payment of gratuity on separation. But these are of no assistance to the Claimant.
41. I decline to make any award in respect of this head of claim.

12 months salary in lieu of unfair termination

42. Section 49(1)(c) of the Employment Act has provided for payment of a sum equivalent to a number of months gross wages not exceeding twelve months where there is a finding of unfair termination or wrongful dismissal as a primary remedy. But in granting an award under this head the Court is required to take into consideration any one or all of the thirteen factors set out in section 49(4) of the Act.
43. One of the factors to consider is any compensation paid by the employer in respect of the termination. I have declined to grant the Claimant any gratuity. Another factor is the reasonable expectation as to length of time the Claimant would have served the employer. At the time of dismissal, the Claimant was 58 years old. The length of service of a claimant is another relevant factor. The Claimant had served the Respondent for 14 years. The Claimant was also paid Kshs 2,462,829/- from the Respondent's Staff Retirements Scheme. No evidence was led as to the retirement age of the Claimant.
44. The Respondent in its submissions has made reference to the authority of *Earl v Slater & Wheeler*

Justice Radido Stephen

Judge

Appearances

Mr. Nyamu instructed by Nyamu & Nyamu Co. Advocates for Claimant

Mr. Wafula instructed by Cootow & Associates for the Respondent