



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 165 OF 2012

JOSIAH KIOKO KIVUVACLAIMANT

VERSUS

KENYA SHELL LIMITED RESPONDENT

J U D G M E N T

On 11/6/2012 the claimant filed this suit against the respondent claiming terminal benefits for unlawful and unfair termination of employment in 27/6/2011.

The respondent has denied liability and contended that the claimant was lawfully terminated after due process and that all his employment dues paid to him. The cause was heard on 24/4/2013 and 22/5/2013 when the claimant testified as CW1 and Mohammed Abdulrahman and James Odundo testified on behalf of the respondent as RW1 and RW2 respectively.

CW1 told the court that he was employed by the respondent on 11/9/2003 as a lubricant production supervisor in charge of Lubricants Manufacturing at the respondent plant at Mombasa. That on 27/6/2011 he received a letter from RW1 dismissing him from work that before then he had been called to the office by RW1 on 2/4/2011 from where he was arrested by police and taken to Makupa police station in the company of RW1. Later on 4/4/2011 he was charged with stealing lubricating oil from Dakawoo transporters alongside a driver from Dakawoo Transporters. That he was released and proceeded on his leave because it had already been approved before the arrest.

That on 16/5/2011 he received a suspension letter in relation to the stolen oil which was still pending in criminal court. Thereafter he was called to Nairobi Head Office and recorded statement with the respondent's security officer Mr. Kavevi.

That on 10/6/2011 he received summons to appear for a disciplinary hearing at Mombasa office on 15/6/2011 which he attended. That Mr. Odundo, the respondent's salaries manager was the judge and he took the minutes of the hearing and forwarded them to Nairobi. That the charges at the hearing were negligence in discharge of duty and dishonesty in withholding information to his line manager. That on 27/6/2011 the claimant was served with a termination letter.

That the termination was on allegation of theft, negligence and dishonesty. He denied all of them. According to him to him, he send a driver belonging to the Dakawoo Transporters on 23/2/2011 to transport base oil from Oil Libya deport to the respondent's plant in Mombasa. That he was acting within his mandate in sending for and receive base oil. That he issued the driver with authority letter to Oil Libya for the loading of the oil. That Oil Libya called him at 1pm and told him that the base oil may not

be loaded because of the work load and promised to notify him if he managed to load. That the Oil Libya man never called again but at 5pm the driver called him to tell him that he was not able to load and had returned to Dakawoo Yard.

That when oil is loaded to the transporters vehicle a loading note or a delivery order is issued to transfer custody to the transporters until he delivered to the claimant at respondent's premises.

That on 24/2/2011 the Dakawoo driver came for afresh loading order by the claimant but for a different product and from a different customer and the product was delivered. That his record continued to show that the base oil delivery was still pending and did not worry because he still had reserve in the respondents plant. That he did not suspect anything wrong until after a month when the respondent's Supply Chain Manager called him enquiring about the delivery done on 23/2/2011.

That he denied the alleged delivery and maintained that if it was done there should have been a delivery note from Oil Libya signed by the Oil Libya and the driver. According to him the respondent is not the complainant in the criminal case but Dekawoo. That the case is still pending before the criminal court. He contended that the dismissal was unfair because the oil was never in his custody. That he did his duty properly by ordering for the base oil. That the disciplinary hearing was a sham because the panel was biased. He therefore prayed for compensation because he has never secured any other job.

On cross-examination he said that his duty was only to issue instructions for collection of products and to receive them. That he sent Kenedy Kaunga of Dakawoo Transporters to collect base oil from Oil Libya and the instruction was in a complimentary slip. That the unused slip was not returned to him because it expires on the same day and it cannot be used any other day. That a fresh slip was to be issued to get the undelivered cargo another day. That he did not pursue the matter further because he had still more base oil to use in his custody and instead addressed other urgent matters before him

That it was not the first time loading was not done due to work load. That he learned about the loading after balance statement was sent to Nairobi by Oil Libya. That a complimentary slip is received before loading but the claimant had no duty to supervise the transportation process. That the respondent never complained to the police but she suspended him before investigations. He admitted being given a disciplinary hearing but contended that the panel was biased and consisted of one person. That Mr. Odundo only took minutes while RW1 was the prosecutor after which Odundo went with the minutes to Nairobi. He however admitted that he was able to respond to the accusations made to him by RW1 but later received a termination letter.

According to him, an employee must be judged according to the terms of his employment in the employment letter. He however agreed that if there is no trust between employer and employee, then the relation cannot continue. He admitted that he was paid one month's salary after termination. He contended that he is entitled to pay in lieu of leave because although it had been approved he was suspended before he utilized it and thereafter dismissed. He maintained that no oil was lost while in his custody.

RW1 confirmed that claimant was the production supervisor and had worked for the respondent for about 8 years. That CW1's duty was to receive materials for production, plan and take responsibility for the production including blending materials.

According to him he discovered that base oil purchased from Oil Libya was missing and reported the matter to the management for investigation after which he suspended CW1. That he learned of the deficit after receiving an e-mail from the supplies manager of Nairobi. That when he enquired from the CW1, he contended that there was an error in the documentations and that he had discussed the matter with the Supplies Manager in Nairobi. That the said manager confirmed that she had talked the matter with the CW1 but he had not responded.

That the RW1 then went to the Oil Libya and confirmed that delivery of the base oil had been delivered on 23/2/2011 and took photocopies of the delivery documents. He maintained that the oil was

never delivered to the respondent on 23/2/2011 and the claimant never notified him. That the claimant did nothing to recover the lost base oil. That later the claimant was given a disciplinary hearing for charges of negligence and failure to notify him (RW1) of non-delivery of the cargo and also his correspondence with the supplies manger.

That CW1 was given option to call representative but did not call any. That the proceedings were chaired by the HR Manager of the respondent Mr. James Odundo, while he (RW1) prosecuted the charges.

That minutes of the proceedings were taken and later termination issued. That the termination was justified because of the nature of the charges and the process followed. In his opinion the claimant was involved in the loss of the oil. He however admitted that there was no tangible evidence to connect the claimant with the theft. That the claimant had handled all his deliveries successfully except the last one.

On cross-examination he repeated that there was no tangible evidence to link the claimant with the loss of the oil. That the respondent's Security Team of Advisors Mr. Kavevi and Waititu the Supplies Manager who investigated the matter never visited Mombasa to investigate the Oil Libya or the respondent. He confirmed also that he (RW1) was the only one who went to Oil Libya Mombasa.

That the investigators prepared a report which the RW1 saw after the dismissal of the claimant. He did not have the report in court either. That the investigations report did not form the basis for the dismissal and was not referred to during the hearing. The dismissal was due to the recommendations by the chair of the disciplinary hearing. That the investigators did not appear and testify during the disciplinary hearing.

The RW1 further contended that he confirmed the oil had been loaded on the track from Oil Libya. He also confirmed that the claimant never informed him of the delivery of the first 7 trucks delivered before the lost one because he did not need to inform him. That the only way to know whether delivery had been done was an advise from Oil Libya. That the delivery documents and invoicing were done to the headquarters of the respondent.

He further confirmed that production proceeded uninterrupted despite the lost oil that it was normal to fail to load a truck but whenever it happened Oil Libya would call the claimant and if they failed to call, he would never know of the default.

He further confirmed that the claimant followed the correct procedure to secure the loading. That the problem started after the loading failed. He also confirmed that after loading of oil on the Transporters track liability squarely laid on the Transporter. He confirmed that after the loss of the oil, the driver of the transporter was charged with the claimant and he (RW1) testified. He confirmed that the respondent was reimbursed for the lost oil and the transporter bore the liability.

He confirmed that the disciplinary hearing minutes were not signed. He also confirmed that certificate of service was issued on 9/9/2012. He also confirmed that the claimant had no previous warning. That the claimant should have followed up the case for non-delivery of the oil.

RW2 said he was the respondent's Reward Manager under the HR Department. That he was asked to chair disciplinary hearing of the claimant on 15/6/2011. That he explained to the claimant his rights including calling witnesses and putting questions. That the claimant never called any witnesses. That he prepared minutes and recommended that the claimant be either warned and transferred or be terminated. That he confirmed that he did not sign the minutes because he forwarded them by email. He denied that the RW1 chaired the hearing.

On cross-examination, he confirmed that Rw1 was the accuser during the hearing and there was no other witness heard even from the Dekawoo or Oil Libya. That according to him the order of priority in his recommendations was for a warning letter first or secondaly termination.

After the close of the hearing both parties filed written submissions. I have carefully perused all the pleadings and considered the witness's testimonies together with the closing submissions. It is not disputed that this court has the requisite jurisdiction to determine the dispute before me. It is also not disputed that the claimant was employed by the respondent as claimed.

The issues for determination are:

1. **whether the termination of the claimant's employment by the respondent on 27/6/2011 was unlawful and unfair.**
2. **Whether the reliefs sought ought to issue.**

In answer to the first issue I am guided by Section 43 and 45 of the Employment Act which bar an employer from unfairly terminating the employment of an employee. The factors to consider in determining whether the termination was unfair are the reasons (s) for termination and procedure followed in reaching the decision to terminate.

I have no doubt that the procedure followed in terminating the claimant's employment was a fair procedure within the meaning of Section 45 of the Employment Act. He was given an opportunity to defend himself of the charges of negligence and dishonesty on 15/6/2011 in form of a disciplinary hearing. The said hearing was in compliance with Section 41 of the Employment Act. Apart from the allegation that the matter was done before one person, no evidence was adduced by the claimant to prove that the disciplinary hearing ought to have been heard by more than one person. There was no proof of any prejudice suffered by reason that the case was heard before one person. As regards the allegation of bias, it is my view that the hearing was an internal inquiry and not a court of law. The concept of fair procedure should never be equated to court proceeding. It is only meant to afford the employee an opportunity to know the reason intended to be relied upon by the employer to terminate his employment and then allow him to defend himself before termination.

As regards the reason for termination, Section 43 provided that

“in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45..”

The question that arises is whether the respondent has proved negligence and dishonesty against the claimant. The negligence attributed to the claimant was that he did not follow up to ensure that delivery of the base oil had been delivered by the transporter's driver to the respondent. The claimant in his evidence has maintained that it was not within his duties to supervise the transporter's driver since the obligation to deliver the cargo was upon the transporter. In addition he has contended that there was no guidelines and procedure put in place by the respondent to guide the process. The foregoing averments were confirmed by the RW1. In my view I don't need to belabour the point. One cannot be accused of negligence where there is no policy, procedure or guidelines of doing a particular duty. In any case there is evidence that the property in the base oil was in the transporter and that is why she is the complainant in the criminal case and also the reason why she indemnified the respondent for the loss.

Consequently, negligence was never a valid reason to terminate the claimant because supervision of transportation of cargo while in the custody of a transporter was not within the scope of his employment and did not put his employer's property to danger. There was also no evidence to implicate him with the loss of the oil.

As regards the issue of dishonesty, the same was not proved. The fact a senior officer of the respondent breached protocol and dealt with the claimant directly to enquire into the delivery of the base oil meant that the claimant did not need to respond to her through the RW1. The question is why did not the Supplies Chain Manager contact the RW1 before contacting the claimant first?

The obvious inference is that she did not want to involve the RW1. Possibly because he was hands off

manager who could never know what was being delivered into the plant until a complaint was raised concerning the last out of the eight deliveries ordered. There was nothing dishonesty about the conduct or explanation given by the claimant to the Supply Chain Manger. In any case the manager did not testify in this case. The chairman of the disciplinary hearing did not also reach the conclusion that the claimant was guilty of the misconduct charged. Surprisingly however he recommended for a warning letter or in the alternative a termination of employment.

This court finds that the reasons advanced for termination during the disciplinary hearing were never proved before the court. I say reason advanced during the disciplinary hearing because the termination letter did not cite any reason for the termination.

I have noted with surprise the submissions by defence that an employer did not need to cite the reason for termination provided that she pays salary in lieu of notice. I dismiss the said submission as outdated and not being in consonance with the concept of fair termination. In the contemporary labour standards, it is unfair to dismiss an employee without citing the reason. It would be holding onto the doctrine of employment at the will of the employer. It will also be difficult to determine procedural fairness if employers were allowed to continue with that old doctrine. Such tendencies will continue to confuse every body because procedural fairness is depended on the reason for the termination.

Consequently in this case the termination though procedurally fair was rendered unfair by the failure by the respondent to prove the reason for the termination. There was no evidence to connect the claimant with the alleged loss of base oil which was in the custody of a transporter.

As regards the issue of the relief sought and in view of the answer to the first issue being in the affirmative, I have granted the claimants prayer for 12 months salary for unfair termination. I have also awarded leave days as at the date of his suspension and subsequent termination. The respondent did not produce record to prove that the claimant was only entitled to 6 days for leave. Section 74 of the Employment Act binds employer to keep records of leave taken by an employee. Section 49 also entitles an employee to cash pay for all accrued leave days.

I will also award him costs and interest as prayed. The prayer for certificate of is service dismissed because because it had already been issued. I will also dismiss the prayer for exemplary damages because there was no basis for that nor is it contemplated under the Employment Act.

In summary therefore I enter judgment for the claimant against the respondent and make orders as follows:

- a. **That the termination of the claimant's employment was unlawful and unfair.**
- b. **The respondent is ordered to pay to the claimant:**

(I) Ksh.90204 being cash in lieu of un-utilized 29 leave days.

(II) Ksh.1,119,963/ being 12 months salary for unfair termination of employment. The total award is Ksh.1,210,172.00

(III) The respondent will also pay costs and interest as prayed.

Orders accordingly.

Signed dated and delivered this 26th July 2013

ONESMUS MAKAU

JUDGE

