



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 65 OF 2012

NICHOLAS DANIEL ONGERICLAIMANT

VERSUS

MOMBASA MAIZE MILLERS LTDRESPONDENT

J U D G M E N T

The claimant was employed by the respondent as Insurance Officer on 12/2/2009 and worked continuously in the same capacity until 28/2/2012 when he was summarily dismissed. His gross salary was ksh.30250 per month. He contends that the summary dismissal was procedurally unjustifiable and wrongful. He therefore prays for terminal dues and damages.

The respondent has denied liability in her defence and maintained that the dismissal was procedurally lawful and justifiable since the claimant had grossly misconducted himself by insubordinating his employer. Accordingly the respondent denies the claimant's entitlement to the reliefs sought.

The case was heard on 22/5/2013, 5/6/2013 and 3/7/2012 when the claimant testified as CW1 and Munir Thabit, Stanslus Kahindi Baya and patrick Mwandege testified as RW1, 2 and 3 for the respondent. CW1 produced letter of appointment dated 11/2/2009 to show when he was appointed. He worked for 3 years until 28/2/2013 when he received a letter for his summary dismissal (exhibit 2). Before then he had been verbally transferred from his office of insurance officer to work at the sales department. That no instructions was given to him at the new department and after waiting for one hour he went to the HR officer (RW3) to enquire why he was transferred. That while still there the RW1 called RW2 to his office and the claimant went back to his insurance desk. That he remained at the said desk until 2pm when RW1 called over the phone and asked him why he was not at his new desk place. He replied that he was waiting for the RW2 to answer him why he was being transferred to another office.

RW1 then told him to go for a letter but on arrival he found his colleagues Mr. Patrick and Lithua. That Lithua gave RW1 a letter who in turn passed it over to the claimant which turned out to be for compulsory leave. That RW1 then denied him permission to go back to the office to collect his belongings. That when he insisted on going to the office the RW1 called security guards and escorted him out of the gate with clear instructions that he should never return without RW1 permission. That after 3 days he sent his son to the RW2 to collect his items from his desk but the security guards repossessed them.

That after the leave, the claimant reported back to work but was not allowed in because Rw1 was absent until 29/2/2012. That on 29/2/2012 he reported to work but this time he was given a dismissal letter citing insubordination as the reason for it. He admitted that during his leave he received a Show Cause

letter dated 18/1/2012 which was given after he delivered a protest letter dated 4/2/2012. He also confirmed that he responded to the show cause letter on 9/2/2012.

He averred that he had worked well without receiving any warning letter or other form of disciplinary case before the dismissal. He was skeptical whether he can now get any other job in future considering his current age of 51 years. According to him the Assistant Shop steward he was succeeding was also victimized and dismissed for his role as union official.

On cross examination he contended that he was dismissed after differing with RW1 after he refused to move out of the union. That he was transferred to the sales office and upon enquiring for the reason why, he was dismissed. He agreed that the employer had the right to transfer him but subject to explanation because of the difference in the nature of duties between the insurance department and that of sales department.

He denied that the transfer was temporary to allow preparation of new office as a union officer. He denied being allowed to move insurance working materials to the new office at the sales department. According to him he was removed from his office and directed to resign from the union. That he was bound by oath of secrecy under clause 6 of the employment letter.

RW1 is the man in charge of Finance, Insurance and Administration for the respondent. His docket also deals with HR. he told the court that he received letter dated 13/1/2012 from the claimants union notifying him of the claimants election to the office of Assistant shop Steward. That before then he was still a union member as reflected in his payslip for January 2012.

That he consulted with the HR officer (RW2) about the new status of the claimant and RW2 raised concern that his office was next to that of the claimant and that posed the risk of information leaking from the management to the union and vice-versa. That RW1 responded to the union indicating the said risk and notifying the decision to relocate the claimant's insurance office to the sales officer.

That on 16/2/2012 he explained the said decision to the claimant in the presence of the RW2. That he did not give the claimant a relocation letter because according to him it was not necessary. That the claimant relocated on the morning but in the afternoon he returned to his former office and when he called him to his office the claimant came looking emotional and started banging the desk and shouting why he was being transferred from his office. That he called in security to protect him after which he gave the claimant his 36 days accrued paid leave to allow him to go and cool down while another office was being prepared for him. That the leave letter was given to the claimant by the RW2.

That while on leave the claimant lodged a complaint after 2 weeks that his ksh29,000/- was lost from his office drawer but the allegation was denied by RW1 and all the other staff. He contended that the claimant never reported the matter to the police and such it was an unfounded allegation. That on 18/1/2013 the claimant was served with a show cause letter.

On cross examination he admitted that he remarked on the union letter dated 13/1/2012 that

“please inform the union that Ongeru is not unionisable as he is privy to sensitive management information”.

That he later on the same day called the said remarks and wrote

“ we can transfer Ongeru to sales department so that he still continues with his union issues”.

He said that the insurance office was next to the HR office and one passes through the HR office in order to get to the insurance office. That the claimant was supposed to continue doing his normal insurance duties at the sales department.

He denied knowledge of how the claimant went on leave and directed that question to the RW2 who was

the HR officer. He admitted that the transfer was verbal. He concluded by insisting that there was conflict of interest because HR offices were also in the insurance office.

RW2 said that on 16/1/2012 at 9.00am he was called to RW 1 office together with the claimant. They found RW1 holding a letter from the union which had appointed the claimant as shopsteward. That RW1 said that the company had no objection but directed that the claimant was to move to the sales office to avoid leakage of information to the union.

That the claimant obeyed but he never moved his tools to the sales office. That he (RW2) then left for another duty and returned at 4pm when RW1 called him and briefed him how at 2pm he differed with the claimant and he started banging the table and shouted at him until he called in security guards and removed and escorted him out of the gate. That the claimant was demanding to be allowed to collect his belongings from his office after being given a 36 days leave.

The RW2 admitted that he was not present when the incident occurred. He further admitted that the transfer was due to union matters and was necessary to have the claimant from his office. That after his response to the show cause letter, the claimant was found guilty of insubordination under Section 44(d) and(e) and was dismissed. That the dismissal was justified because he was given a chance to defend himself through the show cause letter.

On cross-examination he admitted that after taking the claimant to the sales office, he never told him his duties. He also admitted that he was never sharing common office with the claimant before except the gate. He also admitted that the claimant was never given any warning or suspension letter before the dismissal. He denied giving leave to the claimant because he was away at the material time. He also confirmed that he never convened a meeting to explain to the claimant, his case in the presence of his union and the management.

He however confirmed that the union wrote a letter requesting for a meeting to discuss the claimant's case after the dismissal but no agreement was reached. He confirmed also that the claimant was served with the dismissal when he reported back to work after the leave. That he was paid his salary for February 2012 and he has no outstanding leave days. He confirmed that the claimant had no history of ever leaking out company information before his new status as a shop steward.

RW3 was an insurance officer working with the claimant and were equal in rank. On a day he did not specify, he was called to the office of RW1 to confirm whether claimant was working at the insurance office. He was told that he was not supposed to be working from there. He then heard RW1 call the claimant to come to his office and collect a letter for transfer because he had insisted he could not move out without a letter.

That when the claimant came to the RW1's office he was asked why he could not move to sales department without a transfer letter and he replied that he was not conversant with sales and it was not within his employment. That RW1 then called Accounts department to bring a letter for the claimant and a delivery book.

That the claimant received the letter and signed under protest on the delivery book complaining that he did not apply for any leave and he did not understand why the latter was giving him leave. That he then requested to be allowed permission to collect his documents from his drawer in the office but it was denied and instead the RW3 was told to collect them for him instead. That the claimant refused and demanded that RW3 accompany him to the office to witness him collecting the documents from the desk but the RW1 refused and ordered the claimant to leave. That the claimant then said that he could not leave without his documents which forced RW1 to call in security guards and told them to escort RW3 to collect the claimants documents from his drawer.

The claimant again refused to the removal of his belongings in his absence and then RW1 ordered the security guards to escort the claimant out of the gate and never allow him again. That he was also not allowed to pick his eye glasses from his office.

On cross examination he confirmed that the functions of the insurance department and the sales department are different. That the HR and the insurance office were separate. That there was no bitter exchange and insults between the claimant and RW1. That he did not know what was in the claimant's drawers. That he did not know whether there was any money in the drawer. After the close of the hearing the parties were allowed to file written submission but only the respondent filed.

I have carefully read through the pleadings and considered the evidence and the submissions filed. I am satisfied that the court has jurisdiction to entertain the dispute before it because its about employment and labour relations.

The issues for determination are:

- a. **whether the summary dismissal of the claimants by the respondent was wrongful and unfair.**
- b. **Whether the claimant is entitled to the reliefs sought.**

In answer to the first issue, the factors to consider are the reason for dismissal and the procedure followed. Section 45 of the Employment Act bars an employer from terminating the services of an employee except if there is a valid reason for that and the same is through fair procedure. Section 43 then provides that in any suit brought to challenge termination of employment the employer shall prove the reason for termination failure to which the termination shall be deemed unfair within the meaning of Section 45 of the Act.

On the other hand Section 41 provides that before an employer terminates an employee's employment on ground of misconduct under Section 44 of the Act he shall first explain to the employee in a language he understands the reason for which the termination is intended. That during such explanation the employee shall be accompanied by fellow employee or shop floor union representative of his choice both of whom shall be allowed to make their representations for considerations before a decision to terminate is made.

In the present case, the claimant was never given the hearing contemplated under Section 41 of the Employment Act. Although show cause letter was served on him that did not in any way take away the right of the claimant to attend a disciplinary hearing accompanied by an employee or a shop floor union representative of his choice. As such the procedure followed to dismiss the claimant was in breach to Section 41 and 45 of the Employment Act and therefore unfair.

In addition to the procedural unfairness, the reason for termination was not proved and was therefore an invalid reason. To begin with, the alleged insubordination took place at 2pm in the form of banging of tables and shouting but that was not proved. The RW1 said that the said misconduct was done in the presence of the RW2 but the latter contradicted him. According to the RW2, he was away from the work place from 9.00am till 4pm when he returned to the office and received a brief from RW1. The RW3 who alleged to have been present during the meeting of the RW1 and the claimant at 2pm confirmed that there was no banging of tables or shouting by the claimant. That the only issue was the claimants demand for a transfer letter from insurance department to sales department. Instead he was given a letter to go for his accrued 36 leave days which he had not asked for. That before he left for leave he was denied access to the office to collect his belongings including eye glasses. The RW1 even called security guards to escort him out the gate and not to allow him back.

From the foregoing, it is obvious that the RW1 lied on oath during his testimony. His evidence is also in sharp conflict with other witnesses. I see a lot of shifting of goal posts in his endeavor to defeat the claimants rights to participate in union activities.

Initially when he received the union letter notifying him about the claimant's new status as shop steward, he endorsed thereon that the claimant was a management employee and could not be a union official. That later he changed to endorse on the letter that the claimant could continue with his union duties but had to be transferred to the sales department. That during the hearing he changed his story to say that he did not transfer the claimant to undertake sales duties but he only relocated his office temporarily to the sales department where he was to continue with his insurance work.

All the foregoing is story of a person telling lies on oath. Firstly, if it was a departmental relocation, why was RW3 not relocated also to the sales department to do his insurance work from their? The answer is obvious, that the RW1 intended to permanently transfer the claimant from his job unprocedurally to new job. It was unprocedural because as per the words of RW2 the HR officer, the claimant was not given any instructions or specific duties to do at the new station. The law requires that a job description should be given to an employee.

Secondly, the pay for the new job was not agreed on. Even if the letter of appointment provided for a transfer, the said clause has to be interpreted positively and not with a view to punish or frustrate an employee for his involvement in his union activities. Any such transfer should be subject to prove of a valid reason and fair procedure because it is like termination of one's services in a particular department and re-employing him in another department.

I blame the respondent for acting in bad faith. It was confirmed by the RW2 and RW3, that the Insurance office and the HR office are separate and the only reason one can access the HR office is because the door is always left open! Is that a valid reason for ending the claimants services through a transfer to a department he has no knowledge or skill of? Isn't it easier and logical to tell the HR officer to lock his office? In my view there was no valid reason to transfer or even dismiss the claimant.

The allegation of refusal to go on transfer has also not been proved in view of the observations made on the evidence of the RW1. Firstly if the insubordination was refusal to go on transfer, the same was defeated by RW1 himself when he said he did not transfer him but only relocated him to sit at the sales office. Secondly it is also self defeating to allege that he relocated him because the evidence of both the claimant and respondent agree on the fact that the claimant's tools of work and desk and all his belonging's and RW3 were not moved to the new work station. Lastly, as earlier observed the insubordination by way of banging, shouting and insulting was denied by RW3 the only eye witness called to testify.

Upon the foregoing analysis, the court is satisfied that the claimant has discharged his burden of proving that he was unfairly terminated as required under Section 47 of the Act. That the reason for the termination was elevation to succeed another shop steward who had also been dismissed for championing the workers rights. That piece of evidence of dismissal of previous shop steward was not contested by the defence.

On the other hand, I find and hold that the respondent has failed to discharge his burden of proof under Section 43 and 47 of the Employment Act which requires that employer shall justify the reason for and the procedure followed in terminating the employment of the claimant. The dismissal was therefore wrongful and unlawful and that amounted to unfair termination within the meaning of Section 45 of the Employment Act.

As regards the second issue for determination, the court is guided by the appointment letter, the CBA and Section 35, 49 and 50 of the Employment Act. The claimant prayed for 3 months notice pay in lieu, 38 outstanding leave days, severance for 3 years, lost cash and general damages.

On the prayer for notice pay, it is obvious that both the appointment letter and the CBA provided for one months notice period in writing. I will therefore award him one month salary in lieu of notice. I will however dismiss the claim for leave and severance pay for the reason that the claimant admitted that he went for all his leave days upto the time of dismissal. Whether he did not request for the same, is another issue all together. Similarly the claim for severance pay is not warranted because the claimant was not declared redundant. Even if the claimant mistook severance pay to be service pay, he would still not be entitled to same simply because Section 35 of the Employment Act bars an employee who is a contributor to NSSF or pension from getting the service pay at the end of his service.

I also dismiss the prayer for the lost Ksh.29000/ for the reason that firstly the claimant did not mention the same during his testimony on oath. There is therefore no evidence on record to support the same. Secondly it sounds like an afterthought because the claimant did not raise the issue of the money in his

drawers when he was denied access to the office. To me if indeed he kept the money in he drawer for urgent need of his children's fees he should have mentioned that even to the most reasonable employer.

I will however award damages for unfair termination at the rate of 12 months gross salary because as at the time of hearing which was after one year the claimant was still unemployed and was losing hope of getting another job at his age of 51 years.

In summary therefore I enter judgment for the claimant as follows:

- a. **That the summary dismissal of the claimant by the respondent on 29/2/2012 was wrongful, unlawful and unfair.**
- b. **That the respondent is condemned to pay to the claimant:**

(I) one month salary in lieu of notice30,250

(ii) 12 months salary for unfair termination363,000

393,250

- c. **The respondent will also pay costs and interest.**

Orders accordingly.

Signed dated and delivered this 26th August 2013

ONESMUS MAKAU

JUDGE