



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

BIMA TOWERS

CAUSE NO. 79 OF 2012

METAH MZEE

CLAIMANT

v

SDV TRANSAMI t/a

BOLLORE AFRICA LOGISTICS KENYA LTD

RESPONDENT

JUDGMENT

1. Metah Mzee (Claimant) filed a Memorandum of Claim against SDV Transami t/a Bollore Africa Logistics Kenya Ltd (Respondent) on 3 December 2012 and the issue in dispute was pleaded as *unfair termination/dismissal and non payment of terminal dues & compensatory damages*.
2. The Respondent filed a Memorandum of Reply on 22 February 2013 and the Cause was heard on 27 February 2013 and 23 July 2013. Both parties called oral testimony.

Claimant's case

3. The Claimant pleaded that he worked with the Respondent for 14 years as an Accountant until his dismissal on 24 July 2010. The dismissal, it was further pleaded was unlawful, unfair and inhumane and discriminative because no reasons were given nor was the Claimant given an opportunity to defend himself.
4. The Claimant therefore sought a declaration that the dismissal/termination was unfair and unlawful, terminal benefits, damages, certificate of service and costs.
5. In testimony, the Claimant stated that he was employed as a clerk by SDV Transami on 1 July 1997 and that it later changed its name to Bollore Africa Logistics Kenya Ltd. And that he was to retire in 2029 at the age of 55 years.
6. Regarding the dismissal, the Claimant stated that on 23 July 2010 his Head of Department, Christine Beilahche found a document on his table with a list of names at around 5.30 pm. The said Christine took the document to the Human Resources officer on 24 July 2010 and he was called to explain the document in writing, which he did. On 27 July 2010 the Claimant was given a letter of summary dismissal without informing his union.
7. At the time of dismissal the Claimant stated he was 35 years old and was earning Kshs 19,747/- basic pay and Kshs 5,000/- house allowance all totaling Kshs 24,747/-.
8. On why he was contesting the dismissal, the Claimant stated that the Human Resources Officer had a vendetta against him, he was not given a chance to defend himself and that he was not carrying a money lending business at the Respondent's premises.
9. The Claimant testified that it is his father who used to operate a shylock business and the list had names of the persons his father used to deal with.

10. On relief, the Claimant stated that he worked for 27 days in July 2010 and was not paid. He also sought travelling allowance and pay in lieu of annual leave.
11. On cross examination, the Claimant stated that his explanation letter did not contradict his testimony and that the list showed he had loaned out nearly Kshs 700,000/-, that his father died in 2007, that he was not licensed to carry out the business, interest was charged at 20% and that some of those lent money were employees of the Respondent, that his employment letter did not provide for resignation or termination and that he was not called to collect his benefits of Kshs 23,572/72.

Respondent's case

12. The Respondent in its Reply pleaded that the Claimant was dismissed for gross misconduct and or neglect of duty, was furnished with reasons for the dismissal, afforded opportunity to show cause why disciplinary action could not be taken against him and that the termination was not unfair or unlawful because the Claimant was running an illegal money lending business in the Respondent's premises.
13. The Respondent's witness, Lynna Achieng Owino informed the Court that she had worked with the Respondent for two years but joined the Respondent after the Claimant had been dismissed. Her testimony was based on records. She stated that the Claimant was employed on 10 June 1997 and that the Claimant was dismissed on 24 July 2010 when his monthly salary was Kshs 24,747/-.
14. On how and why the Claimant was dismissed the witness stated that the Claimant was dismissed because he was running a money lending business within the Respondent's premises during working hours and that on 23 July 2010 a Memo was written to the Claimant to explain why disciplinary action should not be taken against him and that the Claimant wrote back to explain and the explanation was considered before dismissal. Further, a meeting was held with the Claimant before the decision to dismiss him was taken.
15. The Respondent, the witness testified had lost confidence in the Claimant and his conduct amounted to conflict of interest. She further stated that the Claimant was a member of the National Social Security Fund, had no previous warnings (letters) and had used the Respondent's printers for personal business.

Evaluation

16. From the case outlined above, the crucial questions which emerge for determination are two, whether the summary dismissal was unfair and if so what are the appropriate remedies.

Fairness of the summary dismissal

Procedural fairness

17. The Claimant attached a letter dated 24 July 2010 informing him of his summary dismissal. The letter made reference to an incident on 21 July 2010 and the fact that the Claimant admitted to running a money lending business without permission.
18. Prior to the dismissal, the Respondent had written to the Claimant a Memo on 22 July 2010 seeking an explanation before 23 July 2010 on why disciplinary action should not be taken against him for misconduct.
19. The Claimant wrote back stating that he had been carrying out the money lending business for over 15 years while the dismissal came on 24 July 2010.
20. In my evaluation, I have to consider whether the process as outlined through the correspondence and evidence meet the legal threshold as set out in section 41 of the Employment Act. The section requires an employer contemplating terminating the services of an employee notify the employee of the reasons the employer has for the termination and getting the explanations. The employee is entitled to have another employee or shop floor union representative present during the explanation.
21. Section 41(2) of the Employment Act makes it mandatory that an employer, before summarily dismissing an employee, must hear and consider any representations the employee may wish to make.

22. The section on the face of it contemplates an oral process at some point. The Claimant was issued with a Memo on 22 July 2010. The Memo was clear that the Claimant was running a money lending business during working hours and he was to give an explanation by 23 July 2010. The dismissal letter also made reference to a meeting held on 22 July 2010 in the Human Resources office and to the fact that the Respondent had carried out investigations.
23. What is missing from the equation is whether the Claimant had another employee or shop floor union representative present. It appears there was no fellow employee present during the meeting. No minutes were kept of the meeting. The Claimant gave an explanation in writing. He knew the case he was to meet. The process to my mind was substantially in compliance with the requirements of section 41 of the Employment Act.
24. Is failure to ask or give an employee an opportunity to call a fellow employee or union representative during the hearing process a minor omission or does it go to the root of procedural fairness? What weight should a court give to a case where an employer makes minor omission.
25. The Claimant was an Accountant. He was not a run of the mill employee carrying out some unskilled work. In the circumstances of this case, I am satisfied that the Claimant suffered no injustice or prejudice. He did not claim either in the pleadings or testimony that he suffered an injustice or prejudice. But a word to employers. A prudent employer would be advised to reduce into writing proceedings of a notification/hearing process or keep minutes.

Substantive fairness

26. Under section 43 of the Employment Act, an employer is required to prove the reasons for the termination of an employee. Section 45 of the Act on the other hand obliges employers to prove that the reasons for a termination are both valid and fair.
27. Section 44 of the Act on its part enumerates matters which would amount to gross misconduct so as to justify summary dismissal.
28. Has the Respondent proved the reasons for the summary dismissal the Claimant and that the reasons were valid and fair?
29. The matters listed in section 44 of the Employment Act as justifying summary dismissal are in brief, absence without leave/permission; intoxication in the workplace; willful neglect to perform work; use of abusive language; failure to obey lawful orders; arrest of an employee who is not released within 14 days and commission of a criminal offence to the detriment of an employer.
30. Strictly speaking, a plain interpretation of section 44 of the Act leaves no illusion that the conduct of the Claimant is not covered under any of the seven categories outlined in the section. But section 44(4) is not conclusive or exhaustive of what conduct would amount to gross misconduct justifying summary dismissal.
31. And it is in this regard that I understand the case of the Respondent that it had lost trust and confidence in the Claimant. Trust and confidence, as submitted by the Respondent is a term implied in the employment contract and this has been accepted in cases such as *Malik v BCCI* (1997) IRLR 462. And implied term of trust and confidence would fit in with the provisions of section 45(4)(b) of the Employment Act which states that a termination would be unfair where it is found that an employer did not act in accordance with justice and equity.
32. The summary dismissal letter to the Claimant stated that the Respondent had carried out investigations which confirmed that the Claimant had advanced loans to several staff.
33. In his response to the show cause letter the Claimant admitted he was involved in a money lending business outside Respondent's premises after work. The Claimant expressed his remorse. Parts of the letter are illegible.
34. In my view, summary dismissal was not just and equitable in the circumstances. I say so because I would have expected the Respondent to confront the Claimant with the details of its investigations so that he could exhaustively reply to the same. Or the Respondent could have confronted the Claimant in Court during testimony.

Appropriate relief

Terminal benefits

35. The Claimant, although initially acting in person appointed E .N Waithira & Co Advocates to represent him and the firm filed a Notice of Appointment on 5 February 2013 The Claimant did not inform the Court or tabulate the terminal benefits he was seeking. No amendment was sought to clarify the benefits claimed. Neither was my attention drawn to any statute relied on to claim terminal benefits. Nor was any contractual term referred to.
36. This head of relief is declined.

Compensation

37. Under section 49 of the Employment Act, the equivalent of a maximum of twelve months gross wages is given as one of the primary remedies for unfair termination of employment.
38. The Claimant has largely succeeded and considering the provisions of sections 49(4)(b),(c),(f) and (i) of the Employment Act, I do award the Claimant the equivalent of three months' gross wages, which I assess at Kshs 74,241/-.

Conclusion

39. In conclusion, I do find and hold that in summarily dismissing the Claimant, the Respondent did not act in accordance with justice and equity and therefore the dismissal was unfair.
40. I do award the Claimant Kshs 74,241/- as compensation for unfair termination.
41. The Respondent had offered to pay the Claimant for the 27 days worked in July 2010 and outstanding leave. The same should be paid to the Claimant after clearing with the Respondent.
42. There will be no order as to costs.

Delivered, dated and signed in Mombasa on this 27th day of September 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Waithira instructed by EN Waithira & Co Advocates for Claimant

Mr. Wafula instructed by Cootow & Associates for Respondent