



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 12 OF 2012
(Originally Nairobi Cause No. 190 of 2011)

MOSIGISI ONSERIO JACKSON.....CLAIMANT

v

HYDERY (P) LTD.....RESPONDENT

JUDGMENT

1. Mosigisi Onserio Jackson (the Claimant) filed a Statement of Claim on 4 February 2011 against Hyderly (P) Ltd (Respondent) praying for terminal dues totaling Kshs 280,500/-, compensation for unlawful termination of employment, costs and interest.
2. The Respondent filed a Reply on 7 December 2011 and I heard the parties on 13 June 2013 and 8 July 2013.

Claimant's pleadings and case

3. The Claimant pleaded that he was employed by the Respondent in 1996 as a Clerk earning Kshs 17,000/- per month and that on 10 March 2009 he was suspended without any reasons. The Claimant further pleaded that his termination was unlawful and discriminatory because he was not accorded a chance to be heard and there was no evidence of wrongdoing on his part.
4. When he took to the dock, the Claimant testified that he was employed by the Respondent in September 1996 as a clerk and that on 10 March 2009 at about noon he supervised the loading a vehicle which was taken to a weighbridge and thereafter he was called to the office and informed he had loaded the vehicle with excess cargo and told to go home.
5. The Claimant further testified that the next day he went back to work but was instructed to go back home and wait to be called but he has not been called back.
6. Regarding the loading, the Claimant stated that the loading and weighing of the vehicles was done about 3 kilometres apart and that he was not told which vehicle had been overloaded.
7. He also stated that he was interviewed for the job and offered employment but was never issued with a formal employment agreement, that the Respondent registered him with the National Social Security Fund in 1998 (Exh 1), that he made tax returns for July 2008 (Exh 2) , that a demand letter before action was sent (Exh 3) and that the Respondent used to pay employees who were terminated 3 months pay in lieu of notice .
8. On why the termination was unlawful, the Claimant testified that he was not taken through a disciplinary process or called upon to respond to any allegations. In cross examination he denied authoring the apology letter marked 'HL 1' in the Reply.
9. In his written submissions filed in Court on 18 July 2013 (outside the agreed timelines), the

Claimant reiterated that he was not given a hearing before dismissal and that the person who dismissed him did not attend court to testify.

10. It was also submitted that the Respondent's witness was not competent to testify on the terminal dues payable to the Claimant and that the Claimant should be awarded 12 months' compensation equivalent to Kshs 204,000/- together with costs and interest.

Respondent's pleadings and case

11. In a very brief Reply, the Respondent denied employing the Claimant in 1996 as a clerk at a salary of Kshs 17,000/- per month, that it suspended the Claimant on 10 March 2009 and it was further pleaded that the Claimant was terminated on 11 March 2009 because of misconduct and that the dismissal was lawful and in accordance with section 44(4)(g) of the Employment Act.
12. The Respondent called one witness, Meshack Oyier who stated that he is an agent who facilitates loading/off loading for the Respondent and had worked with the Respondent since 1987.
13. The witness testified that he knew the Claimant and that on 11 March 2009 the Claimant supervised the loading of a vehicle in the afternoon after which the vehicle was sent for weighing and it was found to have been overloaded, thereafter the Respondent's Manager requested him to unload the vehicle and that there were about 60 extra bags. During the loading the Claimant was with another clerk called Kennedy.
14. The witness further stated that after the unloading they went to the office for a meeting and the Claimant, a Mr. Shabir and the Godown Manager were present. The Manager sought an explanation from the Claimant on the overloading and he replied he had no intention to overload the vehicle and they were requested to write statements. The Claimant did not write a statement but signed the statement written by Kennedy as correct (Exh 1). Kennedy, the witness informed the Court, was his son.
15. The Claimant was directed to go to the Respondent's head office in town.
16. In cross examination, the witness stated that the Respondent does not pay his salary, he did not take instructions from the Claimant, he did not see the loading orders and that he only provided the workers to load. He also stated that the Claimant was not terminated at the godown but was told to go the Respondent's offices in town.
17. In its submissions filed on 22 July 2013, it was submitted that the Claimant had not proved that he was unlawfully terminated, that he acknowledged in writing overloading the vehicle and that the Claimant absconded work.
18. It was further submitted that the dismissal of the Claimant was lawful and was pursuant to section 44(4)(g) of the Employment Act, and therefore he is not entitled to the reliefs sought except pay for 11 days worked in March 2009 of Kshs 6,237/-. In the event that the termination was found unlawful, the Respondent submitted the Claimant should be awarded the 11 days salary, one month pay in lieu of notice of Kshs 17,000/- and service pay from 1998 of Kshs 102,000/- and one month compensation for unlawful termination.
19. The Respondent cited Nakuru Civil Appeal No. 281 of 1998, *Daniel N Ngunia v KGGCU Ltd* to support its submissions on the lawfulness of the dismissal; Nairobi Civil Appeal No. 81 of 2000, *Central Bank of Kenya v Julius Nkunge Nkabu* and Nairobi HCCC No. 2363 of 1986, *Mark Kezegule v Pan Africa Insurance Co Ltd*, for the submission that general damages are not available for wrongful/unfair termination of employment and in any case cannot be more than the equivalent of notice period as per an employment contract.

Questions arising for determination

20. From what has been outlined hereinbefore the questions which emerge for determination are whether the Claimant absconded or not; if not, whether the dismissal was (un)lawful/(un)fair and appropriate relief.

Whether the Claimant absconded

21. The question of whether the Claimant absconded is one of fact. The case of the Claimant was that he was told to go home and wait to be called. In the Reply the Respondent contended that the

- Claimant was terminated for misconduct.
22. In its submissions, the Respondent submitted that the Claimant absconded. And the basis for this submission was the testimony of the Respondent's witness that he never saw the Claimant again after he was directed to report to the Respondent's offices in town.
23. Weighing the two parties' case on this point, I am inclined to believe the Claimant. The Respondent's witness was not privy to what happened at the Respondent's head office in town or if the Claimant reported there as directed at all. He was an independent contractor. The Respondent in fact did not call any of its own employees in administration or human resources office. Moreover the Respondent's case was that the Claimant was dismissed for misconduct for overloading a vehicle.
24. I do find on the basis of the pleadings and evidence on record that the Claimant did not abscond from work.

Whether the dismissal was (un)lawful/(un)fair

Procedural fairness

25. In the Reply, the Respondent pleaded categorically that the Claimant was dismissed for misconduct.
26. Section 41 of the Employment Act is very clear that before dismissing or terminating the services of an employee on the grounds of misconduct, poor performance or incapacity, the employer should notify and explain to the employee the reasons it has for contemplating the dismissal, allow the employee to have a fellow employee or shop floor union representative to be present and to consider any explanations the employee may make, if the dismissal is for fundamental breach of contractual obligations or gross misconduct.
27. It is an obligation placed upon an employer by statute and the Respondent in this case did not establish that it complied with the requirements of section 41 of the Employment Act. The dismissal of the Claimant was procedurally unfair.

Substantive fairness

28. Section 43 of the Employment Act on its part requires an employer to prove the reasons for termination. And section 45 of the Act expects the employer to prove that the reasons were valid and fair reasons. Has the Respondent discharged this burden?
29. The Respondent alleged that the Claimant overloaded a vehicle with nearly 60 extra bags. The evidence before Court was that the vehicles would be loaded and then driven nearly 3 kilometres away for weighing. No evidence was produced to indicate what type of instructions had been issued to the Claimant when loading and the maximum loads. Was the Claimant expected to consider the weight of each bag? It is not the duty of the Court to speculate or fill in gaps for litigants.
30. In my view, the Respondent has failed to discharge the burden placed upon it by proving the reasons for dismissing the Claimant and that the reasons were valid and fair. I find that the dismissal of the Claimant was also substantively unfair.

Practice and Procedures in the industrial Court

31. The Respondent in its Reply made a traverse of mere general denials. Unlike the practice and procedure under the Civil Procedure Rules, the Employment Act and the rules of this Court have placed certain obligations upon employers. The form, content and structure of a Response should therefore adhere to the legal obligations placed upon employers.
32. A Respondent/employer who wishes to rely on mere denials and putting Claimants 'to strict proof' is advised to keenly take cognizance of the provisions of section 10(7) of the Employment Act on production of written contracts and particulars, section 41 on compliance with procedural fairness, section 43 on proving reasons for termination, section 45 on proving the reasons for termination are valid and fair and section 47(5) on justifying the reasons for termination. Under the practice of the Court, an onerous burden has been placed upon employers.

Appropriate relief

Terminal dues

Salary for March 2009

33. It is not in dispute that the Claimant worked until around March 11 2009. By virtue of section 49(1)(b) of the Employment Act, he is entitled to the wages for the days worked.
34. The Claimant sought Kshs 17,000/- as salary for March 2009. That would amount to a full month's wages. He did not serve out the full month. He worked for 11 days. Using the correct formula of basic salary plus housing allowance divided by twenty six to get the daily rate, the Claimant would be entitled to Kshs 7,192/- under this head.

3 months pay in lieu of Notice

35. The Claimant stated that he was not issued with a written contract of employment. Under section 9 of the Act it is the responsibility of an employer (the Respondent) to draw up the contract. It did not. The Claimant in effect was serving out a contract of service whose particulars he did not know. This is an unfair labour practice and an offence under labour legislation.
36. Considering the provisions of Article 41 of the Constitution and sections 9 and 10(7) of the Employment Act, I would award the Claimant 3 months pay in lieu of notice in the sum of Kshs 51,000/-.

6 years leave earned but not taken

37. Under section 28 of the Employment Act, an employee is entitled to at least 21 days annual leave with full pay after every 12 consecutive months of service.
38. Again it is the responsibility of an employer (Respondent) to keep employment records which include leave records. Section 10(3) of the Employment Act is explicit on this. The Respondent did not rebut this head of claim or produce any leave records.
39. The Claimant would therefore be entitled to the equivalent of 6 months' salary in lieu of annual leave which I assess at Kshs 102,000/-.

Service pay for 13 years

40. The Claimant sought Kshs 110,500/- on account of service pay. The Claimant had annexed to the Statement of Claim a National Social Security Fund Member Statement of Account showing that he was member number [particulars withheld]. In his evidence, he also stated that he was registered as a member of the National Social Security Fund in 1998.
41. Pursuant to the provisions of section 35(5) and (6)(d) of the Employment Act, the Claimant is not entitled to service pay.

Compensation for unlawful termination

42. In the pleadings, the Claimant sought damages for unlawful termination. In the course of evidence this was amended to be compensation for unlawful termination.
43. Section 49(1)(c) of the Employment Act has provided for the equivalent of a maximum number of months wages not exceeding twelve months as one of the primary remedies for wrongful dismissal and unfair termination.
44. There are some thirteen factors which the Court ought to consider in making an award under section 49(1)(c) of the Employment Act. The Court can consider any one, some or all of them.
45. The Claimant did not lead any evidence on which of these factors the Court should consider in his case. He had served the Respondent for thirteen years. I have reached the conclusion that his termination was unfair. I have awarded him pay in lieu of notice, salary for March 2008 and accrued outstanding leave but dismissed his claim for service pay. Putting these factors into consideration, it is my view that the equivalent of 6 months compensation would be just. I assess

the award in the sum of Kshs 102,000/-.

Costs

46. The Respondent was in flagrant breach of the Employment Act. I have already stated that the Claimant did not know the particulars or details of his engagement with the Respondent. He did not know his annual leave entitlement, job description, form and duration of contract or hours of work as required by section 10 of the Employment Act. By failing to cause a contract of service between it and the Claimant to be reduced into writing, the Respondent was practicing an unfair labour practice. This would be a suitable case to award costs.

Conclusion and Orders

47. In conclusion, I do find and hold that the Claimant did not abscond from work but was unfairly dismissed by the Respondent and award him

a. Salary for 11 days worked in March 2009	Kshs 7,192/-
b. 3 months pay in lieu of Notice	Kshs 51,000/-
c. Accrued leave for 6 years	Kshs 102,000/-
d. 6 months compensation	Kshs 102,000/-

TOTAL

Kshs 262,192/-

48. The award is subject to statutory deductions as provided for under section 49(2) of the Employment Act.

49. The claim for service pay is dismissed.

50. The Claimant to have costs of the Cause to be taxed by the Deputy Registrar of the Court.

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

Justice Radido Stephen

Judge

Appearances

Mr. Nyabena instructed by

Mathew Nyabena & Co. Advocates for Claimant

Ms. Munyari instructed by

E W Munyari & Co. Advocates for Respondent