



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 87 OF 2013

DIDAS TOM OKWEMBACLAIMANT

VERSUS

BAMBURI CEMENT LTDRESPONDENT

J U D G M E N T

The claimant was employed by the respondent on 8/11/1982 as Craft Apprentice and worked upto 13/1/2013 when he was suspended and subsequently dismissed summarily on 25/2/2013.

He has therefore brought this suit claiming reinstatement with full benefits or in the alternative his dismissal be declared wrongful and terminal dues be paid to him including pension. The respondent has denied liability for wrongful suspension and/or dismissal for the claimant and contends that the same was done in accordance with the law and the employment contract. The suit was heard on 29/5/2013 and 27/7/2013 when the claimant testified as CW1 and Rose Kebati Sally testified for the defence as RW1.

The summary of the CW1's case is that he joined the respondent in 8/11/1982 and worked upto 25/2/2012 when he was summarily dismissed. The dismissal letter stated that the reason for dismissal was a serious breach of obligation on the night of 4th and 5th January 2013 when he was seen with another employee transporting of cut metal beams from the company garage using quarry vehicle registration number KBC 496M.

The dismissal letter was allegedly confirming the suspension of the claimant which was made by letter dated 13/1/2013 which accused him of cutting and transporting from the plant metallic Kiln support Beams in the garage. He appeared before the disciplinary committee for hearing on 7/2/2013 accompanied by two people but only one was allowed to be present and the one was rejected because he was from the union and not workmate. That he was never supplied with any witness statements before the hearing and he did not meet his accusers thereby making the disciplinary process unfair.

He denied the alleged offence and contended that the respondents premises is fenced round with only 3 exit gates which are guarded 24 hours. No security guards recorded any statement. Also no complaint was ever lodged by the manager of the maintenance plant against him before the disciplinary committee.

In total he worked for 31 years and his last salary was kshs.156,000 per month. He prayed for his salary for January and February 2013 adding that he received the dismissal letter on 25/2/2013. He also prayed for overtime for May 2012 to January 2013 which he claims to be 324 hours. He also prayed for 27 days leave not taken.

He prayed for accrued bonus of ksh.186,000 for the year 2012. He also claimed that as at 1990 when he joined the management he had earned gratuity amounting to ksh.1,474,441 of which after taxation a net of ksh.1,032,108.70 was transferred to the pension as per the respondents letter dated 21/2/2011 but the respondent never added a corresponding amount on the pension. He has since received his pension less taxes meaning that he was taxed twice on his benefits. He denied ever consenting to the transfer of his gratuity to the pension.

On cross examination he admitted that he never appealed against the decision to dismiss. He also confirmed that clause 3.2 of the respondents Handbook excluded him from overtime. He denied that during the disciplinary hearing he indicated that he did not wish to go back to work. He contended that he was not shown how the ksh.1,474,441 gratuity was calculated.

RW1 is the HR Manager for the respondent. She served the claimant with a suspension letter dated 13/1/2013. The suspension was due to cutting and transporting metal beams without authority. That on 5/2/2013 the claimant was invited for disciplinary hearing on 7/2/2013. He attended the hearing accompanied by a fellow employee of his choice in the proceeding where she was the secretary recoding the proceedings, and which she produced as exhibit. She maintained that the claimant and his colleague of choice were accorded hearing by the disciplinary committee. She later served him with a dismissal letter stating the reason thereof and outlining the dues payable to him and his right of appeal. She argued that the prayer for bonus cannot be allowed under the respondent's policy because the termination was by dismissal. She however admitted the prayer for 27 accrued leave days worked as $27/22 \times 124,272 = 153074$. She denied the prayer for overtime because management Grade 9 was not entitled to overtime. She further denied the prayer for January and February 2013 and maintained that the claimant was only entitled to salary upto 12/1/2013 amounting to ksh.75405. He was however paid negative 14619 due to other commitments.

On the calculation of gratuities she contended that the salary used was the one he earned as an unionized staff plus interest based on the treasury bills between 1990-2010. According to her the claimants gratuity in 1990 was ksh.103901 and it grew to ksh.1474440 upto 2010 using the treasury bill and not CBA formula. She contended that the gratuity was taxed in 2011 before transfer to the pension scheme and it was never taxed again during its release to the claimant. She relied on a document dated 31/1/2013 as proof of the foregoing.

She confirmed that the metal beams were never transported through the gate because nothing was recorded in the gate registers. They were removed from the plant through other means not known to her! She maintained that the offence committed was gross misconduct and entitled the respondent to dismiss the claimant without any warning.

On cross examination she admitted that the night guard who allegedly witnessed the offence was never called to testify before the disciplinary committee because it was not necessary. She confirmed that the statement by the security guard talked about an offence on 4/1/2013 and not 12/1/2013. She also confirmed that the suspension letter referred to an offence done on 12/1/2013. She further confirmed that the respondent gates are guarded 24 hours and details of every vehicle leaving are recorded. She admitted that an employee is entitled to sign authority before transferring his gratuity to pension scheme but if he is not retiring in 12 months the said authority is not required and the transfer of the gratuity is automatic.

She was not able to confirm or deny whether the money was taxed again after transfer to the pension because respondent has no control over it any more. She concluded by contending that the delay in payment of the dues was because the claimant never went to her office to sign acceptance of the figures as calculated. After the clause of the hearing the parties filed written submissions. The issues for determination arising out of the pleadings, evidence and submissions are;

- a. **whether the summary dismissal of the claimant was wrongful**
- b. **whether the claimant is entitled to the dues prayed for.**

In answer to the first issue, the court was called to consider whether the summary dismissal was

substantially and procedurally wrongful. The claimant has asked the court to declare that the dismissal was wrongful. He has denied the alleged misconduct which was the reason for his termination and maintains that the disciplinary hearing accorded to him was unfair due to procedural reasons. He believes that he ought to have been supplied with witness statements and also believes that he ought to have faced his accusers during the hearing. The respondent has argued that the disciplinary hearing was an opportunity to defend himself. That the hearing was in accordance with Section 41 of the Employment Act and the claimant was allowed to call a workmate to company him during the hearing. That they were both heard and proceedings of the hearing were produced a exhibit. She further contended that the offence was proved by the statement given by the security guard who witnessed the offence. The court is in agreement with the respondent that the dismissal was procedurally fair in that the claimant was explained the reason for which dismissal was intended and thereafter he was accorded a disciplinary hearing in the company of a workmate of his choice. That opportunity of being heard was in line with Section 41 and 45(c) of the Employment Act.

The dismissal was however rendered unfair by the fact that the reason for the termination was not proved as required under Section 43 of the Employment Act. The suspension was for an offence done in the night of 11th and 12th January 2013 while the disciplinary hearing and the summary dismissal were based on an offence done either on the night of 4th and 5th or 11th and 12th January 2013. To that extend the reason for the dismissal was not valid because the employer was not sure which date the offence was done.

The reason for termination under Section 43(2) is defined as to the matters that the employer genuinely believed to exist at the time the decision to terminate was made. In this particular case the respondent did not prove that as at the time of deciding to dismiss the claimant she genuinely believed that the claimant had cut and transported metal bars using company vehicle registration number KBC 496M on either of the alternative nights. The court finds that even if such a belief existed the same cannot hold water because of several observations. Firstly, there was no eye witness who testified against the claimant on the offence. Secondly, the RW and CW1 confirmed that the respondents premises is fenced completely leaving only 3 exit gates which are guarded 24 hours daily. Thirdly, RW1 confirmed that the metal beams were not transported through the gate but through means she did not know.

The question that arises is that if a Mr. Kilinda loaded KBC 496m using a folk lift, did the car fly over the fence? It follows from the foregoing question that there was no evidence to confirm that the claimant indeed transported the metal beams from the respondents plant. If there was, RW1 would not allege that the metal beams were removed from the plant through unknown means. To that extend the court agrees with the claimant that the reason for dismissal was not proved and as such the summary dismissal was not justified. If the respondent did not want to continue employing the claimant, she should just have served notice to terminate his services as provided for under the contract of employment.

The failure by the respondent to serve notice to terminate amounted to breach of the contract of employment because there was no justifiable reason to warrant summary dismissal under Section 44 of the Employment Act or the contract of service itself. It is trite law that where termination of employment is through breach of the obligation to serve notice by the employment, the same is deemed to be wrongful termination as in the present case.

As regards the issue of the reliefs sought the court starts by declaring the summary dismissal of the claimant to be wrongful as prayed. The reason for the said declaration is based on my observations and findings on the reason for the dismissal above. I will however not order for reinstatement for the reason that the employer has registered her lack of desire to continue employing the claimant and that the claimant did not appeal against the dismissal. Section 49 of the Employment Act caution the court against reinstatement of workers except on very exceptional cases. It is trite that reinstatement is akin to an order of specific performance and unless carefully handled, it may either lead to servitude or undermining of the freedom of contract. The court has therefore been inclined to consider the alternative prayer for payment of statutory dues, salary and/or damages for wrongful dismissal, and the release of pension. The claimant however did not make any specific quantum for consideration. There was no justification for failing to plead the figures. I will therefore not assess the actual quantum but only

award the damages as per headings.

In summary therefore the court enters judgment for the claimant against the respondent as follows:

- a. **The claimants summary dismissal is hereby declared to be wrongful.**
- b. **The respondent is ordered to pay to the claimant salary in lieu of notice accord to the contract, 27 days leave, salary for January and February 2013, bonus for 2012, gratuity for the period when the claimant served as unionized staff and pension if not yet paid.**
- c. **The respondent to file herein and serve the claimant's counsel with the calculations for the sums payable within 14 days of today.**

The claimant will have costs and interest

Signed dated and delivered this 4th October 2013.

ONESMUS MAKAU

JUDGE