



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 73 OF 2013

SAMUEL MUTUA.....CLAIMANT

VERSUS

ALLIED WHARFAGE LTD.....RESPONDENT

J U D G M E N T

The claimant has sued the respondent claiming terminal dues plus compensation for unlawful termination. The respondent has however denied liability and contended that the claimant's dismissal was legal, procedural, fair and justified.

The suit was heard on 3/7/2013 and 11/7/2013 when the claimant testified as CW1 and Ahamed Kana represented the respondent as RW1. CW1 told the court that he was employed by the respondent in 1975 and worked until 1994 when he was declared redundant. That he was re-employed on 1/9/2003 as a cashier and worked until February 2011. He produced an appointment letter dated 1/9/2003. That in December 2010 he was transferred to a new station of container yard for which he had no experience as supervisor. That he worked there for 2 weeks and removed and then returned in February 2011. His salary was ksh.36000 per month.

On the fateful day, he was instructed to release a container to a client by his senior Mr. Togom through SMS. That after loading he released the lorry and forgot to collect the clients loading instructions from the driver. That the container which seemed to be the subject of criminal investigations caught the attention of the respondent's bosses and it was intercepted and returned to the yard. The claimant was asked to write a statement to explain who permitted the release of the container and specifically to indicate that the permission was through SMS from Mr. Togom and the fact that he forgot to take loading instructions from the driver before releasing the container.

On 22/2/2011 he was served with a dismissal letter citing negligence as the ground for the dismissal. According to him the dismissal was unfair because he was never given any hearing on the alleged negligence. He also denied acting negligently citing the SMS loading instruction from Mr. Togom. He prayed for service pay four the period between 2003 and 2011 maintaining that after the 10 months contract of 2003 ended he continued to work until 13/11/2008 when he was given another written contract which continued until the date of the summary dismissal. On cross examination he admitted that he had instructions not to load containers without a loading instructions.

RW1 is the Administrative manager for the respondent. He admitted that claimant was a cashier in the respondent but transferred to the warehouse. That the claimant was given strict instructions to accept or release containers only with instructions from himself, Togom, Zaher or Anupshah. That the said

instructions had to be in writing followed by a phone call.

He produced copy of written procedure of loading and off loading containers but said that he did not know whether the claimant knew about them. On 19/2/2011 he passed through the claimant's warehouse and was shocked to find that he had released the container to go to Thika. That the claimant showed him SMS from Charles Togom instructing him to release the containers. There was however no loading instructions from the client indicating the name and identity of the driver before loading the container. He then called the Managing Director (MD) Mr. Mukeshi who confirmed that he was not aware of the release of the container. That the MD called Togom and directed him to ensure that the container was returned within 30 minutes or one hour which was done.

That while he waited for the return of the container he asked the claimant to explain how the container was released and he showed the SMS from Togom after which he asked him to write a statement. At that time of waiting for the return of the container every hour was tense. He denied telling the claimant what to write in the statement which he produced as exhibit. It is dated 19/2/2011.

In the following week the claimant was called to a meeting with the MD where the RW1 was present. That was after dismissal. That in the said meeting the MD told the claimant that he had to be dismissed. That the claimant was not accompanied by any other employee. The MD however pledged to assist him with medicine for his sick wife during the said meeting but he (RW1) did not know whether the medical assistance was ever given.

He denied that the claimant was a union member and contended that he was a senior supervisor. In addition no union dues were ever remitted on his behalf to the union as she did for other workers. He admitted that the container was never lost although the client discontinued business with the respondent. According to him the claimant was paid all his dues and no more are payable.

On cross-examination he admitted that the claimant was bound to obey the SMS instructions from Togom on the release of the container. He admitted that the claimant was right in complying with Togom's SMS instructions. He also admitted that he told the claimant to put down in writing that Togom instructed him by SMS to release the container. He admitted that the respondent objected to the claimant's intentions to join trade union because of his job position. He also admitted that there was no direct loss incurred from the release of the container. After the close of the hearing parties filed written submissions.

I have carefully read the pleadings and considered the evidence and the submissions and I am satisfied that the court has jurisdiction to determine the suit by dint of Section 12 of the Industrial Court Act read with Article 162 of the Constitution of Kenya. The issues for determination arising from the said pleadings, evidence and submissions are:

- 1. whether the summary dismissal of the claimant by the respondents was unfair**
- 2. whether the reliefs sought ought to issue.**

In answer to the first issue the court is satisfied that the respondent has proved the reason for dismissal as required under Section 43 of the Employment Act. The claimant admitted that he forgot to ask for vital documents called "loading instructions" from the driver who was instructed to go for the container. The SMS instructions from Mr. Togom also clearly directed him to take all the necessary details before releasing the container. The court finds that the claimant acted negligently in the circumstances and especially because he knew that the container was the subject of criminal investigation by the police. To that extent the reason for dismissal was justifiable.

The court however is not satisfied that the procedure for dismissal was fair and just within the meaning of Section 41, 45 and 46 of the Employment Act. Section 41, aforesaid bars an employer from dismissing an employee for misconduct, poor performance, or incapacity under Section 44 without first according a hearing to the employee. The employer is therefore bound to explain the reason for the intended dismissal to the employee in the company of another employee or shop floor union

representative of his choice. The explanation should be in a language of the employee's understanding and the employee and his companion must be given a chance to make their representations which should be considered before the dismissal is decided. That procedure was not followed before the summary dismissal.

Even if the statement by the claimant dated 19/2/2011 is anything to go by, the same was not made during any hearing as contemplated under Section 41 aforesaid. To that extent the dismissal was in breach of Section 41, 45 and 46 of the Employment Act was therefore unfair.

As regards the second issue for determination the court awards the claimant's prayer for one month salary in lieu of notice and compensation for unfair termination of 12 months gross salary. The prayer for service pay is dismissed because the defence has proved that the claimant was a member of the NSSF.

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

- a. **the summary dismissal of the claimant is declared unlawful and unfair.**
- b. **The respondent to pay the claimant**

(i) **one month salary in lieu of notice36,000**

(ii) **12 months salary for unfair dismissal (12x36000)....432,000**

468,000

- c. **the claimant will also have costs and interest.**

Orders accordingly.

Signed, dated and delivered this 4th October 2013

ONESMUS MAKAU

JUDGE