



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 155 OF 2013

JOHNSON JADHAN OTHIENO OKUMU..... CLAIMANT

v

PWANI OIL PRODUCTS LIMITEDRESPONDENT

JUDGMENT

1. Johnson Jadhan Othieno Okumu (Claimant) was employed by Pwani Oil Products Ltd (Respondent) as a Operator-Boiler Grade 2 with effect from 18 April 2011(Claimants Exh 1) at a basic salary of Kshs 8696/- and house allowance of Kshs 1304/- per month.
2. The contract was for two years renewable through mutual consent. The offer of employment letter indicated that the Claimant was entitled to 21 working days annual leave for every year of service and that the employment could be terminated by giving 30 days notice or pay in lieu of notice after completion of 6 months probation.
3. On 1 May 2012 the Respondent reviewed the Claimant's basic salary to Kshs 15,217/- and house allowance to Kshs 2,283/- per month (Claimant's Exh 2).
4. Through a letter dated 2 February 2013 Claimant's Exh 3) the Respondent informed the Claimant that it was summarily dismissing him pursuant to section 44(4)(g) of the Employment Act.
5. The Claimant was dissatisfied with the dismissal and after his legal advisors had sent a demand letter he filed a Statement of Claim on 18 June 2013. The nature of claim was stated as *compensation for wrongful summary dismissal*.
6. The Claimant pleaded that the summary dismissal was unlawful and unconstitutional because there was no lawful cause for the dismissal and because the Respondent had failed to pay his terminal benefits.
7. The Claimant in the circumstances pleaded that he had suffered psychological anguish, trauma and financial constraints and sought damages, unpaid salary for 4 days worked in February 2013, unpaid leave allowance for 6 days, damages equivalent to twelve months wages, one month salary in lieu of notice totaling Kshs 233,333/35, and costs of the suit.
8. The Respondent was served and it filed a Response on 15 July 2013. The Respondent denied that the Claimant was its employee or that it wrongfully dismissed the Claimant over unfounded allegations of commission of a criminal offence.
9. The Respondent also denied receipt of a demand notice or that the Claimant's constitutional rights had been breached. The Respondent further denied that the Claimant had suffered damages or was entitled to Kshs 233,333/35 or that there was no other pending suit between the parties over the

- same subject matter.
10. In the same Response, the Respondent submitted that the Claimant was an Operator in its water treatment plant at Jomvu and that on 20 January 2013 the Claimant did not leave work at 5.30 pm at the end of his shift and that later that evening a roll of 95mm cable 4 core was reported missing by night shift technicians.
 11. It was further pleaded that investigations established that the Claimant and two other persons were implicated and consequently he was given an opportunity to defend himself.
 12. On wages and dues, the Respondent submitted that the Claimant worked for 2 days in February 2013 and was paid a total of Kshs 8,020/- (Res Appendix 1) which he acknowledged (Res Appendix 2).
 13. On outstanding leave the Respondent pleaded the Claimant was paid for 3.75 days prorated leave. According to the Respondent the Claimant had been paid all that was legally due to him on dismissal and he was not entitled to compensation.
 14. To justify the dismissal the Respondent pleaded and submitted that the Claimant was reasonably suspected of having committed a criminal offence by stealing a roll of 95mm cable 4 and that he could not explain why he remained at the plant beyond the normal working hours and further that he was implicated by other workers.
 15. The Respondent further submitted that the Claimant should have first attempted to resolve the dispute through the Ministry of Labour and that the Cause should be dismissed with costs.

The evidence

Claimant

16. The Claimant gave sworn testimony. He produced his letter of appointment, letter of salary increment and letter of dismissal.
17. Regarding the events preceding the dismissal, the Claimant stated that on 20 January 2013 he worked day shift and left at about 1930 hours and resumed duty the next day but it is only on Thursday that he was informed the Maintenance Manager wanted to see him. On Friday morning he went to see the Manager who informed him about the disappearance of the cable on Sunday.
18. The Manager wanted to know what he knew about the disappearance but he told him he did not know anything. He testified that it was the mechanical department which was in charge of the cable and he had not seen the cable. He further testified that there were security guards at the gate and that employees were normally searched.
19. He also stated that the Maintenance Manager told him 3 employees had implicated him and they had recorded statements. He was not called to any disciplinary hearing or given any notice or opportunity to defend himself.
20. On 4 February 2013, he was called to the office and there were about 4 other people. He was asked to defend himself, told to wait after which he was given a dismissal letter. 3 other employees were also dismissed because of the disappearance of the cable.
21. During cross examination the Claimant stated that the employee who was to relieve him on 20 January 2013 when the alleged theft occurred reported at about 1900 hours after which he chatted with colleagues before leaving. He also confirmed that he was paid his salary for days worked in February 2013 and outstanding leave of 3 days.

The Respondent

22. The Respondent called four witnesses. This being a complaint of unfair termination/wrongful dismissal, I will refer to the testimony as relates to compliance with the procedural fairness outlined in section 41 of the Employment Act and the Respondent's obligation to prove the reasons for termination and that those reasons are valid and fair as outlined in sections 43 and 45 of the Employment Act and the need to justify the grounds for termination as required by section 47(5) of the Act.
23. The first witness Caleb Ouma stated that he was informed about the loss of the cable on Monday 28 January 2013 and that he carried out investigations. He also stated that when handover took place at about 1900 hours (between day/night shifts) the cable was there.

24. He further stated he was given names of several suspects including the Claimant and that the Claimant's movements on the material day were suspect because he should have left at 5.30pm but he left much later.
25. The witness further testified that he called the Claimant and informed him he was suspected of theft of the cable and gave him an opportunity to give his side of the story and that his explanations were not satisfactory after which he handed over the case to Human Resources department with a recommendation to dismiss the Claimant.
26. In cross examination, the witness confirmed he carried out investigations and prepared a formal report but the same was not given to the Claimant and further that he did not inform the Claimant of those who gave his name as a suspect.
27. Respondent's second witness was Michael Onyango Obiayo, in charge of maintenance. He stated he was called at night and told the cable was missing. He established the employees who were on duty and the Claimant was implicated. He reported to his Caleb, his senior.
28. This witness stated that he also informed the Claimant and sought his explanations. The witness also confirmed that there were night guards and dogs.
29. The third witness was Francis Musyoka, an electrician with the Respondent. He stated he was on duty on the material night and that at about 2100 hours he could not trace the cable and called the Respondent's 2nd witness to inform him. He did not know how the cable disappeared.
30. The fourth witness on behalf of the Respondent was its Human Resources Executive, Andrew Waswa Odinga, based at Respondent's head office. The role of his department was to calculate the final benefits payable to the Claimant. He stated the Claimant was paid Kshs 5,533/- made up of 2 days worked in February 2013, 3.75 leave days and overtime.
31. On the disciplinary process the witness testified that the Respondent has a disciplinary policy but the same was not given to the Claimant because it was introduced this year. He further stated that the Claimant was called twice, taken through a disciplinary process but no minutes were kept and that he does not know whether the Claimant had a representative present during the disciplinary process.
32. The Claimant filed his written submissions on 24 September 2013 while the Respondent filed its submissions on 18 October 2013.

Issues for determination

33. From the pleadings, testimony, documents and parties written submissions the issues arising for determination are whether the Claimant was an employee of the Respondent, whether the dismissal was unfair and if so appropriate remedies.

Whether the Claimant was an employee of the Respondent

34. The Respondent categorically denied in paragraph 3 of the Response that the Claimant was its employee. In fact the whole of the Respondent's body of Response is strictly mere denials and putting the Claimant to strict proof.
35. This type of pleading does not meet the legal threshold required by the Employment Act. The Court is aware that under the civil procedure framework, he who asserts proof. The framework under the Employment Act is completely different.
36. In an unfair termination/wrongful dismissal cause, it is the employer who is under a legal obligation to prove the reasons for termination (section 43 of the Act), that the reasons are valid and fair (section 45 of the Act) and ultimately justify the grounds for dismissal (section 47(5) of the Act).
37. In this regard I would have dismissed the Response save that the Respondent attempted to discharge the legal burden imposed upon it in the part of the Response referred to as *Additional Facts and Submissions*.
38. The Claimant produced his offer of employment letter and this was not challenged by the Respondent. I therefore find that he was an employee of the Respondent on the terms and conditions set out in the letter.

Whether the dismissal was unfair

Procedural fairness

39. Section 41 of the Employment Act requires an employer to comply with certain dictates of natural justice before terminating the services of an employee. The employee should be notified of the reasons in a language he understands, he should have a colleague or shop floor union representative present and if it is a case of summary dismissal, the employer should hear and consider any explanations given.
40. In my view the process envisaged under section 41 of the Employment Act does not and should not amount to an employer holding a sort of mini-court hearing.
41. Further the section is not explicit that the process should be reduced into writing. But a prudent employer is well advised to keep records of such proceedings as to what the charges/reasons for dismissal were, the persons present on behalf of each party and minutes.
42. In the present case, the Claimant's case is that he was not given notice or afforded a hearing. The Respondent's case is that the Claimant was told he was suspected of involvement in theft and should give explanations. The Claimant admitted he was called into the office and asked about the theft and what he knew. It is not clear whether this was part of an investigative process or a disciplinary process. The two processes may not always be the same to meet the requirements of section 41 of the Employment Act.
43. In this case, I am more inclined to believe the Claimant. This is because the Human Resource Executive testified they came into the picture to calculate the Claimant's final dues. Further the Human Resource function is ordinarily responsible for disciplinary process. The Respondent did not argue that under its policies it is the line managers who are responsible for the disciplinary process. No mention was made of whether the Claimant was informed and allowed to have a colleague present during the disciplinary process.
44. In my view, the Respondent has failed to establish that it complied with the *essentialia* (essential ingredients of procedural fairness of, *notification and explanation of reasons for dismissal, that employee was allowed to have a representative present and in cases of summary dismissal, that the employees representations were heard and considered before decision to dismiss is taken*) and therefore the dismissal of the Claimant was procedurally unfair.

Substantive fairness

45. Under this principle, it is the legal obligation of an employer to prove the reasons for termination, that the reasons are fair and valid and to justify the grounds.
46. The Respondent's case being that it had reasonable and sufficient reasons to suspect that the Claimant had been involved in theft of a cable, the Respondent has taken a two pronged trajectory.
47. The first is that the Claimant finished his shift at 5.30pm but did not leave the plant until after 1900 hours and the second that the Claimant was implicated by fellow employees. I will deal with these apiece.
48. The Respondent's witnesses testified that the Claimant had finished his shift at 5.30 pm but did not leave until after 1900 hours. The Claimant's testimony was that he finished his shift at 5.30 pm but he could not leave until the colleague who was to relieve him reported. The said colleague did not report until around 1900 hours.
49. The Respondent's evidence was that it had a clocking system but it did not even attempt to challenge this explanation by the Claimant on why he stayed in the plant beyond his shift. In my view the explanation by the Claimant was plausible and his staying beyond 1900 hours by itself cannot be suspicious or reasonable to suggest an employee who was up to no good.
50. There was evidence that there were security guards at the gate who searched employees and others on patrol with dogs.
51. Further it was stated that the Claimant was implicated by other employees. None of those employees were brought to testify on the basis why they were implicating the Claimant.
52. The Respondent witnesses stated that it carried out investigations and compiled a formal report. That report was not produced in court.
53. There was no suggestion that the Claimant was confronted with these employees who implicated him or their recorded statements.
54. In the circumstances of this case, the Respondent has failed to prove that the Claimant was

- reasonably involved in theft of a cable and that the reason was a valid and fair reason.
- 55.The Respondent has also failed to justify dismissing the Claimant on the ground of gross misconduct (Section 44(4)(g) of the Employment Act is one of the grounds enumerated as gross misconduct justifying summary dismissal).
- 56.In my view the dismiss was substantively unfair and the sanction of dismissal was not appropriate. Further the dismissal was not in accord with justice and equity.

Appropriate relief

Unpaid salary for February 2013

57.Claimant acknowledged receipt of this head of claim and it is dismissed.

Unpaid leave allowance

58.The Claimant equally acknowledged receipt of leave payment for 3.75 days. He did not press claim for leave for 6 days as pleaded. This Claim is dismissed.

One month salary in lieu of notice

59.I have found the termination of the Claimant unfair. The employment letter provided for termination of employment by the giving of one month notice or payment of one month salary in lieu of notice.

60.I would award the Claimant the equivalent of one month's salary in lieu of notice in the sum of Kshs 17,500/-.

Damages for wrongful dismissal

61.The equivalent of a number of months gross wages not exceeding twelve months is one of the primary damages for wrongful dismissal. I have found the dismissal unfair.

62.Section 49(4) of the Employment Act has set out some thirteen factors the court should consider in exercising its discretion to make an award under this head.

63.One of the factors is the length of service the employee expected to serve the employer.

64.The Claimant was on a two year renewable contract. The Court was not told of any expectations of renewal. The contract was due to end on 17 April 2013, some two and a half months before the dismissal.

65.In the circumstances I would award the Claimant of the equivalent of three months gross wages under this head which I assess in the sum of Kshs 52,500/-.

Costs

66.Costs don't follow the event in the Industrial Court. No reasons or argumentation was led as to why the Court should make a costs order one way or the other. Each party to bear its costs.

Conclusion and Orders

67.From the foregoing I do find and hold that the dismissal of the Claimant was unfair and I award him

- a. One month salary in lieu of notice Kshs 17,500/-
- b. Three months gross wages as damages Kshs 52,500/-

TOTAL **Kshs 70,000/-**

68.The prayers for unpaid salary and unpaid leave are dismissed.

69. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 8th day of November 2013.

Radido Stephen

Judge

Appearances

Ms. Njuguna instructed by Sherman Nyongesa & Co Advocates for Claimant

Mr. Muumbi instructed by Omari Muumbi & Kiragu Advocates for Respondent