



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 48 of 2011

Benard Juma Agutu

Claimant

v

Maya Freight Limited

Respondent

AWARD

1. Benard Juma Agutu (the Claimant) was employed as a Freight Co-ordinator by Maya Freight Limited (the Respondent) on a 2 year fixed term contract commencing on 1 November 2010 and ending on 31 December 2012. The Claimant was to earn a salary of Kshs 30,000/- and house allowance of Kshs 4,500/- per month.
2. On 16 November 2010, barely two weeks after commencing employment, the Respondent terminated the Claimant purportedly in reliance on section 42(1) (4) of the Employment Act. The letter of termination indicated that the Claimant would be paid for days worked, 7 days pay in lieu of notice, pending off days and accrued leave, if any.
3. A cheque for Kshs 12,498/- was subsequently forwarded to the Labour Office in respect of the Claimant's dues. The Claimant was not satisfied and filed the Claim the subject of this determination.
4. The issue in dispute was stated as *unlawful termination of services and breach of contract*.

Claimant's case

5. The Claimant contended that the termination was unlawful and wrongful because he was not given an opportunity to be heard and because there was no justifiable reason given to terminate his services. His appeal was also not considered.
6. In his sworn testimony, the Claimant stated that his duties included making bookings with airlines for the carrying of fresh produce and flowers to the Middle East region and that a booking which purportedly led to his termination was not made by him but by his senior, a Mr. Madharu through Venus Logistics and Morgan Cargo.
7. He further stated that he was forced to sign the letter of termination by a Mr. Shivachi who was a Human Resources Manager with the Respondent.
8. The Claimant has therefore sought reinstatement or 24 months' salary and house allowance he would have earned during the contract term, notice pay and overtime all totalling Kshs 844,602/-. I will deal with all these individually when discussing appropriate remedies.

Respondent's case

9. According to the Respondent, the Claimant was still serving under probation at the time of termination and the probation was to run for 6 months with effect from 1 November 2010 and therefore the contract was subject to section 42 of the Employment Act. The Respondent also relied on its management practice that all employees serve on 3 months probationary periods which could be extended.

10. The Respondent further pleaded that the termination of the Claimant was not unlawful and was in compliance with the Employment Act and that the rules of natural justice were observed.

11. Regarding the substantive reasons/justification for the termination, the Respondent pleaded that the Claimant failed to follow instructions issued to him by his seniors to cancel a booking which led to a financial loss. Furthermore, the Respondent pleaded that section 45(3) of the Employment Act debarred the Claimant's right to challenge his termination because he had not served for a continuous period of more than thirteen months.

12. The Respondent called one witness, its Human Resources Assistant Beatrice Anam.

Issues for determination

13. To my mind, the issue(s) which arise for my determination are principally two. The first one being whether the termination of the Claimant was unlawful and wrongful and secondly, if so what would be the appropriate remedies.

14. There are issues which arise and where necessary, I will mention them in the course of evaluating the parties' contestations. I need to mention that I have also considered the Claimant's submissions which were addressed to the Deputy Registrar of the Court in Mombasa through letter dated 4 December 2012.

Whether the termination of the Claimant was wrongful and unlawful

15. The Claimant has in his pleadings used interchangeably the terms wrongful, unlawful and illegal. I believe it would be in order for me to observe that within the legal framework for dealing with employment disputes the terms may not always mean the same thing and more so because the statutory consequences or remedies flowing from each may not always be similar. Principles applicable to wrongful termination under the common law are not necessarily applicable in cases of statutory unfair termination. And towards this end, parties should always strive to comply with rule 4(e) of the Industrial Court (Procedure) Rules, 2010 by setting out any principles, policies, conventions, law or industrial relations issue relied upon.

16. The case for the Respondent was that the Claimant was serving on probation at the time of termination and therefore sections 41 and 45 of the Employment Act were not implicated. I must make a finding on this contestation before any determination on whether the termination was wrongful or unlawful.

17. The employment contract made between the parties on 29 October 2010 does not expressly make any reference as to whether the Claimant's employment was to be subject to any probationary period or whether it was a probationary contract as defined in section 2 of the Employment Act. The Respondent sought therefore to rely on Clause 4(b) of the employment contract wherein reference is made to the staff handbook containing the Respondent's policies, manuals and rules and procedures to establish that the Claimant was serving a probationary contract.

18. The Respondent in support of its contestation that the Claimant was still serving on probation annexed to its Response to the Memorandum of Claim a document approved on 15 April 2008 titled *Probationary Period Policy*. The document provides that *the probationary period for all the newly appointed employees shall be for a period of 3 months for fixed term employees*.

19. In his testimony the Claimant stated that he was not given any document detailing his duties or the staff handbook. In cross examination he denied that his employment letter was accompanied by the staff manual or that he saw or signed the probationary period policy.

20. For the Respondent, it was admitted in evidence that the Claimant's employment contract did not make express reference to probation but that the Claimant, like all new employees was taken through an induction and that he could access the staff handbook from his Line Manager.

21. After addressing my mind to the rival contestations of the parties regarding the issue of probation, it is my humble view that a clause regulating the probation period of an employee is a cardinal provision of a contract and should be incorporated in the contract document expressly and not through reference or by implication. It should be in one document.

22. For this view I draw from the provisions of section 11(4) of the Employment Act which provides that particulars concerning the *name, age, permanent address, sex of employee, name of employer, job description, date of commencement of employment, form and duration of contract, place of work, hours of work, remuneration, entitlement to annual leave, pensions, incapacity to work and pension schemes* need to be in one document. And if this is not possible, a prudent employer should strive to keep a register or other documentation wherein employees can signify or acknowledge that these policies or manuals have been brought to their attention.

23. I note also that Respondent did not call the Claimant's Line Manager to confirm whether the Claimant had access or was given an opportunity to access the staff handbook. The Respondent's only witness, Ms. Beatrice Anam was also not categorical on whether it was her who took the Claimant through the induction but was content to refer to 'us' without elaborating who the 'us' were.

24. Considering the foregoing I do find that the contract offered to the Claimant was vague on whether it was subject to a probationary period and that as a fact the Respondent has not satisfied me that it brought to the Claimant's attention that his employment was subject to probation.

25. Having found that the employment of the Claimant was not subject to a probationary period, I need now to consider whether the termination was unlawful and wrongful and or in breach of contract.

26. It is not disputed that the Respondent sought to defend the termination by placing reliance on section 42 of the Employment Act. The section basically removes the application of the rules of natural justice in respect of termination of probationary contracts. In any case it was not disputed that the Respondent did not give the Claimant an opportunity to be heard. In this regard the termination was unprocedurally unfair because the Claimant was not given an opportunity to be heard.

27. But the matter need not necessarily end there. Sections 43 and 45 of the Employment Act require an employer to prove the reasons for termination of employment.

28. Although the Respondent urged that because the Claimant was still serving under probation and therefore not entitled to a hearing, it also sought to ground the termination on the reason that the Claimant had caused it to suffer financial loss emanating from the failed booking/consignment. It was conceded that this loss was not brought to the attention of the Claimant and further that no show cause letter was issued to him. According to the Respondent, it was the responsibility of the Claimant to ensure the consignment reached its destination. But the Respondent's witness Ms. Anam conceded in her testimony that the booking was done by Morgan Cargo on 14 November 2011 at 1.33 pm as evidenced by Appendix 7 in the Memorandum of Claim. On his part, the Claimant had testified that the booking was not done by him but by his senior a Mr. Madharu, who had allegedly booked the consignment with two different companies, Venus Logistics and Morgan Cargo.

29. The Claimant evidence that the bookings were done by Mr. Madharu was not challenged and therefore I am inclined to accept as a fact that it is the said Mr. Madharu who booked the consignment and the blame cannot fall only on the shoulders of the Claimant.

30. I therefore do find that although the termination letter did not refer specifically to the failed consignment ground as one of the reasons for the termination, and that it was only raised in evidence, it would not constitute a valid or fair reason to terminate the employment of the Claimant. The Respondent failed to prove the reason(s) for the termination as required by section 43 of the Employment Act or that the reasons were valid and fair as required by section 45 of the Employment Act. The termination was substantively unfair and was in breach of contract.

Appropriate relief

31. Having reached the conclusion above, I will now venture to examine each of the heads of relief/claim sought in the Memorandum of Claim.

24 months salary and house allowance

32. The Claimant sought Kshs 720,000/- and Kshs 108,000/- being the amount of salary and house allowance he would have earned had he served the full two year contract. The contract itself did not make provision for what would happen was it to end prematurely.

33. Section 49 of the Employment Act has set out the remedies for wrongful dismissal and unfair termination. The section has capped at twelve months the maximum damages which the Court can award.

34. An award of the twelve months damages, in my considered view is not automatic on the Court holding that the termination/dismissal is wrong, unjustified or unfair. It is a discretionary remedy and like all discretions the Court ought to act judiciously and not arbitrarily or capriciously. Having regard to the 13 parameters set out in section 49 (4) of the Employment Act and especially the practicality of ordering reinstatement at a time the two year fixed contract would have already expired, the length of the Claimant's service with the Respondent and the fact that the Claimant did not state out clearly what work it is he was doing before getting the contract in contention, I believe this is a fit case for me to exercise my discretion in favour of the Claimant and award him the equivalent two month's gross pay in compensation in the sum of Kshs 69,000/-.

Notice pay

35. The Claimant also sought Kshs 34,500/- being the equivalent one month's pay. In my view the Claimant is entitled to an award under this Claim and I do grant the same.

Overtime

36. A sum of Kshs 4,600/- was also sought by the Claimant allegedly being overtime worked. A claim for overtime should be capable of precise mathematical calculation. The hours worked overtime and the rate of calculation need to be established. In the instant case it was incumbent upon the Claimant to put up a case. He could easily have done this by requisitioning for attendance records kept by the Respondent to build up this head of Claim. He did not. Moreover, I was not informed nor was it suggested that the Claimant position was either in management or lower cadres to justify this Claim. As a matter of practice in many workplaces, management staffs do not get paid overtime but are remunerated by bonuses and in other ways for their time and skills over and above the agreed remuneration.

Reinstatement

37. Reinstatement was one of the core reliefs sought by the Claimant. But bearing in mind the Claimant had served for only two weeks with the Respondent and his Claim is being determined shortly after his two year contract was supposed to come to an end, it is my view that reinstatement would not be an appropriate and effective relief.

38. One final word before I turn to the conclusion and final orders. I had a nagging feeling that the way the Respondent has structured its probation policy leaves a lot to be desired and may be a deliberate practice

which may amount to an unfair labour practice. But that is just a feeling and nothing turns on it.

Conclusion and Orders

39.I therefore do find that the termination of the Claimant contract of employment was unlawful and he is awarded :

(i) Two month's gross pay in compensation Kshs 69,000/-

(ii) One month's basic pay in lieu of Notice Kshs 30,000/-

TOTAL ***Kshs 99,000/-***

40.The amount of Kshs 22,498/- already acknowledged as received by the Claimant shall be deducted from the above sum.

41.The claims for overtime and reinstatement are declined and no order is made as to costs.

Dated and signed in Mombasa on this 14th day of December 2012.

Justice Radido Stephen

Judge of the Industrial Court

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Delivered in open Court in Nairobi this 14th day of December 2012.

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Justice Nzioki wa Makau

Judge of the Industrial Court

Appearances

Mr. Rakoro instructed by Rakoro &

Co. Advocates

For Claimant

Mr. Nyaberi instructed by Omwoyo, Momanyi,
Gichuki & Co. Advocates

For Respondent