



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL SUIT NO. 75 OF 1995

JOHN STANLEY ANDEREPLAINTIFF

VERSUS

EZEKIEL KIPLAGAT KIPEL.....DEFENDANT

JUDGMENT

1. JOHN STANLEY (the plaintiff) has through a further amended plaint sought that Judgement be entered in his favour against **TELKOM KENYA LTD** (the defendant) for;

- a) A declaration that his dismissal was illegal, wrongful and in breach of his contract of employment,
- b) General damages for illegal and wrongful dismissal
- c) Terminal benefits due in accordance with the employment contract
- d) Salary entitlement from the date of dismissal until the date of judgement,
- e) House allowance from the date of dismissal until the date of judgment,
- f) Costs of the suit,
- g) Interest on b) c) d-g at court rates.

2. The background to this claim is that the applicant was an employee of the defendant who by an agreement made on 1st July 1985, was engaged to serve the defendant as a craftsman at a salary of K...792 per annum plus other taxable and non taxable benefits payable monthly. It was an express term of the agreement that the same could be determined by a 3 months' notice on either party, or payment of a month's salary in lieu of notice.

3. Pursuant to the said agreement the plaintiff discharged his duties diligently until 22nd May 1992 when the defendant by a letter interdicted the plaintiff before subsequently dismissing him by a letter dated 11th October 1994. He contends that this was in breach of the agreement, and the defendant even refused to pay him his terminal dues. The dismissal deprived him of the said salary and other allowances he would otherwise have earned and he has suffered loss and damages.

The plaintiff listed his entitlements as;

- a) One (1) month's salary in lieu of notice
 - b) Leave allowance at 27 days per year
 - c) Withheld leave allowance for the period 1992 – 1994 i.e 3000 x 3 + Ksh.9000/-
 - d) House allowance for the unserved period computed at Ksh.4,375/- per month
 - e) Gratuity confirmed at Ksh.2790 x 12 x 15+ 125,550/-
- ii) Reduced Pension of Ksh.2092/50 cts till death

- f) Medical allowance
- g) Contribution under pension scheme
- h) Withheld half salary computing as; 2005 x 27 months + 54,135/-
- i) Damages for wrongful dismissal
- j) Damages for breach of contract of employment.

4. The defendant denied liability and stated that the plaintiff's dismissal was in accordance with the terms of employment entered into between themselves. The claims by plaintiff about suffering loss and damage was likewise denied.

5. The matter was heard by Nambuye 'J' in 1997, when the plaintiff testified as PW1 and informed the court that he was on permanent and pensionable terms and by the date of his dismissal he had progressed to the position of workshop foreman where he worked in an acting capacity earning a basic salary of ksh.4,010/-.

6. He maintained that he was unlawfully dismissed on claims that he had facilitated mass fraud and referred to a memo produced as exhibit relating to on going investigations by where he was the subject matter. He responded to the allegations by way of denials as per Ex.5. The defendant declined to exonerate him and he laments that he was never summoned to appear before a panel nor was he charged in court over the claims of fraud. He stated that he was subsequently dismissed without notice, when he was 38 years old, yet he had expected to work until 55 years of age (which was then the statutory retirement age for employees in civil service and parastatal employment. As a result, he lost 15 years of service.

7. The plaintiff confirmed that prior to his interdiction and subsequent dismissal, there had been a series of investigations affecting senior managers in respect to frauds namely;

Area Manager – Audit

Postal Manager

Workshop Superintendent

8. These named officers were eventually dismissed – but at that time, no disciplinary measures were taken against the plaintiff although he had been questioned during the investigations.

What did the alleged fraud involve? It involved mishandling of the corporation's motor vehicle and irregular requisitions, including double requisitioning as well as unnecessarily contracting services outside the corporation.

9. The plaintiff responded by letters dated 8.06.1992 and 14.10.1992 stating that;

- a) he was merely a messenger,
- b) other officers who had been involved in the mischief had been identified and dismissed,
- c) He was being unlawfully dismissed

10. He appealed and offered an explanation that was considered by the defendant, however this was rejected and then on 10.02.1991, he received a letter charging him with conspiracy to defraud the corporation of money vide certain LPO's content of Ex.8 which stated in part;

“...that on 14th February 1990 you raised requisitions For spare parts which were allegedly acquired Without an LPO ... for Motor vehicle KUG 043. To facilitate payments Were issued ... you raised other PLO's quoting the same spare parts and the same delivery notes ... In this the corporation would have lost Ksh.14,256 through duplication of requisitions engineered and maneuvered by you. It was noted that in doing all this you were taking advantage of a fraud ridden system devised in 1990/91 by the former workshop superintendent and his foreman, you being one of them whereby you could acquire spare parts without LPOs by signing delivery notes at the concerned firms and the invoices were to be sent to the corporation. However due to the delay in settling bills owing to the loss of invoices and that of LPO's it was decided that where the signed delivery notes could be traced, requisition could be raised so as to facilitate issuance of the LPOs and settlement of resultant duplicate invoices. It was this later arrangement that you now capitalized on to duplicate orders and requisitions for your own personal gain and the ones mentioned in paragraph 1 of this letter are just but an example of many others which were not unfolded during the period in question...

Fraudulent dealing which are intended to deprive the corporation of her scarce financial resources is a serious offence which call for instant dismissal and cannot be condoned at any rate. It is the principle intention of this Institute severe disciplinary action against you, including recovery ... from your salary ... However before this is done, you are given a chance in advance acceptable explanation why the intended action should not be carried out”

11. He reiterated the basis of his entitlements and the working out as reflected in the pleadings saying he also lost medical allowance of Ks.

12,000/- per year and his contribution to the pension scheme, in any event before his dismissal he was interdicted for 27 months and was on half pay, so he should be paid the other half of Ksh.54,135/-.

12. On cross examination the plaintiff explained that he was employed as a craftsman but got promoted to the position of foreman. His duties involved receiving defective motor vehicles, inspecting, diagnosing and allocating them to the junior mechanics and order for the required spares through the internal mechanisms. Basically he was in charge of a section of the defendant's workshop. He confirmed that he was questioned and he gave an explanation regarding motor vehicle Reg. No. KUL 548 belonging to the defendant whose radio was missing and there were claims that he had been given custody of the vehicle's radio by one **MR LEL KUTWO**. He was also questioned about delivery matters relating to spare parts purchased and un-procedural assigning of repair works on various motor vehicles to garages/electricians outside the defendant's own garage, and questionable payment vouchers.

13. He denied suggestions that he had colluded with outside garages to defraud the defendant by double requisitioning for transactions which had already been settled.

The plaintiff stated;

"I was given an opportunity to explain concerning the radios' some of the others I was not given, on double requisition I was given an opportunity to explain.

14. PW2 **ABWAYO NDAYA** a retired officer with Kenya Posts and Telecommunication testified that the plaintiff would have retired at 55 years and was entitled to full life pension. He supported the plaintiff's contention that he ought to have been given notice before termination of his services (as he had worked for 10 years) and all the other claims listed as entitlement.

15. He attempted to justify the claims although he conceded that he was not involved in preparation of terminal benefits nor had he made any calculation on any payments for terminal benefits, but insisted he could draw from his 24 years experience.

"... I am not an expert in this matter, what am telling the court is something I am aware of and it is something I have been working on during employment."

16. It is on this basis that he testified that had plaintiff worked upto 55 years, then he would have been entitled to full life pension, but under the circumstances which he left, he was supposed to be paid salary in lieu of 6 months' notice;

2) Pension calculated as;

His last pay x the years worked x ½

50 years into months

3) On commuted pensions the plaintiff should have been given a quarter of the pension, then one continues earning a monthly pension for the rest of their lives. In the event of death the dependant earn the pension for 5years or 60 months.

17. On cross examination he admitted that the plaintiff was summarily dismissed although he contends that it was unlawful.

18. The defence witness **WILSON MIRUMBA BARASA** who worked for the defendant told this court that he worked for the defendant as motor vehicle inspector and his duties involved supervision of proper usage of official transport.

19. With regard to the plaintiff, he stated that he was charged with using official transport on 12 occasions when he was not on official duty. There were work tickets and the witness set out the 12 trips as;

1. 22.4.87 – one journey from workshop to telephone house both are within town established distance is 4 kilometers. It covered 20 kilometers.

2. 29.4.87 the journey started in workshop in town to police inspection opposite KVDA, Police Station to Fims Garage on Oloo Street. The estimated distance is 6 kilometers. Have they covered 32 kilometers.

3. On 6.5.87 the journey started from workshop to telephone house along Elijah Cheruiyot street estimated distance 4 kilometers and it covered 24 kilometers.

4. On 11.5.87 the journey started from workshop and went through West Indies Hospital, telephone house and R. M. Patel. The established distance is 12 kilometers and it covered 44 kilometers.

5. On 12.5.87 the journey started from workshop to West Indies and returned to workshop established 4 kilometers.

6. 3.5.87 journey started from workshop to telephone house Fims and A.M. Associated motors.

7. On 15.5.87 journey started from workshop to telephone house Fims Garage and Watatu Motors Spares along Moi street. The established distance is 7 km and it covered 34 kilometers.

8. 15.5.87 afternoon it started from workshop to telephone house. Fims D.C.M R.M Patel Watatu. The established distance is 8 kilometers it covered 23 kilometers.

9. 20.5.87 journey from workshop to Turbo. Established distance is 35 km. This was not official.

10. On 21.5.87 journey started from workshop to telephone house and Patel. I believe R. M. Patel. The established distance is 7 km. It covered 35 km.

11. On 22.5.87 the journey started from the workshop to Kitale. The established journey is 73 km and it covered 90 km.

12. 22.5.87 in the afternoon – from Kitale to Eldoret established distance is 73 but it covered 63 km.

20. He however admitted that although it was a requirement that if a driver was making an official journey, he was required to be accompanied by the person/officer except where he was sent on errands. He also admitted that just by looking at the work ticket it was difficult to tell whether the driver had travelled alone. The plaintiff was surcharged for unauthorized trips and was required to give an explanation to the Surcharge committee.

21. **JACOB MUTUKU MONGANGI** (DW2) was then the officer in charge of the Defendant's North Rift Region and his duties involved investigating all cases affecting the defendant. In 1992, he investigated cases where the plaintiff was accused of fraud involving acquisition of spare parts for an official vehicle Reg. No. KUG 043 Isuzu. He found that on 14.02.1990, the plaintiff had raised two requisitions for spare parts in respect of the aforementioned motor vehicle being Nos 001465 and 001466 supported by substituted delivery notes 6094 purportedly issued on 13.12.1989, another one was 6095 of the same date. On the strength of the three requisition notes the plaintiff raised an LPO to support payments for the same materials. This pattern repeated itself on another occasion and DW1 stated;

“When I compared the spare parts raised in the first two requisition and the spare parts on the second 1st requisition, I found that they were the same, and for the same type and for the same vehicle It meant that the second list of the requisition were made to defraud the corporation.... They had brought a different set of delivery notes ...”

When he questioned the plaintiff, the plaintiff recorded a statement confirming that he had authorized the requisition notes, and he could not give a satisfactory explanation for the double transaction, only saying that he was new in the place and was not conversant with the records.

22. There was another incident where the plaintiff advised Messers Sony Fuel Injection to repair a starter as necessary without being specific thus the manner in which the document was prepared was ambiguous and left room for manipulation. Later the plaintiff received a delivery note from the said firm indicating that the job had been done. However upon scrutiny, there was no specification as to what had been repaired. The odd thing is that the firm had used the same language, purporting that it was repair of starter. This was questionable because the corporation had an electrician in the workshop whose responsibilities included looking into problems affecting starters.

23. In any event the plaintiff was not an electrician and was not competent to raise such a requisition.

DW1 explained;

“By raising requisition to repair parts with a generalized language has a disadvantage to the organization”

24. Apparently the plaintiff also sought a repeat job for repair of the starter by a different entity known as **FRED OMOLO SINGH** dated 30.10.1991. However since this was a repeat job, it ought to have been referred to the initial firm which did the repair as the same was being done within a period of less than one month. Had this been done then the repair would have been done at no cost. The plaintiff therefore placed an extra burden on the corporation who had to make unnecessary payments.

25. There were also instances where payments were made relating to spares for motor vehicle Reg. KXL 619, Isuzu NKR and the plaintiff had raised a requisition note and delivery note and LPO to support the payments yet there were no records showing that the parts were ever brought to the workshop. Infact the payment was rejected at the audit stage for lack of supporting documents.

26. There were instances where the lapse between the time requisition was made and payment done was over a year and the plaintiff could not offer a reasonable explanation. On re-examination, he explained that the firms mentioned in the fraud were not charged because they had documents showing that an officer of the organization had received the materials. However it was the organization's officer who could not account for them. There were supporting documents made one year after date of supplying and thus raised suspicion. There were instances where materials had been received, yet there were no records regarding their disposal.

27. In the written submissions, the plaintiff's counsel pointed out that the plaintiff like all workers of his job group, qualified for a medical cover and annual leave for 1 month for every year worked. In lieu of this he would earn the equivalent of 1 month salary for the next 15 years upto 2014. He thus proposed that the court adopts this formula;

Salary ksh.4,010 x 15 x 12 = 721,800/-

House allowance Ksh. 4375 x 15 x 12 = 781,500

Medical allowance Ksh. 12,000 x 15 = 180,000/-

Leave allowance for 1200 days x 15 = 18,000/=

Pension gratuity Ksh. 2,790 x ¼ x 12 x 15 = 125,550/-

Withheld half salary Ksh.2005 X 27 months = 54,135/-

Grand Total = 1,815,300/-

28. It is argued that the defendant failed to prove that the plaintiff was a beneficiary of the double or duplicate orders. Further the defendant ought to have devised a system of early detection of the double invoicing and local purchase orders to save the corporation any losses. That in any event none of the witnesses stated that arising from the formally records, the corporation actually paid for the double service and goods provided. Further, that the corporation was silent on the role of the workshop manager, who was the plaintiff's immediate supervisor in the audit department, and the finance department, which would be involved in the supply chain before any payment is disbursed.

29. It is submitted the defendant was a victim of its own mismanagement, and to dismiss the plaintiff summarily negated all the laws in the books. The action is termed as inhuman, high handed and suspect, and totally unjustified under the circumstances. Further, given the fact that nobody was charged in court for the alleged fraud and falsification of documents renders the dismissal unjustified. Counsel drew from the decision in **ABWAO ANDAYA V KPT & T Ltd HCCC No 5 of 1994** where the court found that the corporation acted excessively and directed that the plaintiff's entitlement be worked out for payment based on the existing and prevailing moments.

30. Also referred to is the case of **JOSEPH SITATI NATO vs KENYA PORTS AUTHORITY HCCC No. 94 of 2006** where the court found that a worker dismissed by an employer under similar circumstances was entitled to his claim.

31. The defence submitted that the plaintiff had acted contrary to his letter of appointment and his employer's code of conduct by;

a) Misusing the company's official vehicle for unauthorized personal trips to **TURBO**

b) Engaging in double requisition aimed at defrauding the company where he intentionally raised double requisitions, and engaged outside services for work which could have been done by internal workers of the corporation.

32. Due to the above, it is argued that the defendant was entitled to act as it did. Reference is made to Sec. 544(3) of the Employment Act which stipulates that an employer may dismiss an employee if he/she acts in a manner that breached his obligations under a contract of service.

33. The plaintiff's conduct is said to have interfered with the defendant's business and amounted to gross misconduct in the performance of duties and he was given a chance to be heard through various letters. This court was referred to the decision in **SHANKER SALKANI VS DITE GLOVAL FORWARDING (K) LTD [2012] eKLR** where it was held that an employer ought to afford an employee a hearing opportunity before dismissing him from employment. In any event, the burden of proving that he was unlawfully dismissed rested with the claimant as was stated in the case of **GEORGE ONYANGO VS G4S**.

34. It is not in dispute that the defendant's officer when carrying out investigations detected irregularities which were linked to the plaintiff with regard to use of the official motor vehicle as well as requisitions and procurement of goods and services. Consequently letters were written to him, and he gave an explanation which the defendant did not find satisfactory.

35. The letter of offer of appointment dated 21st May 1995 indicated that he was eligible for 27 days annual leave and a first/second class Railway ticket or bus ticket to his home area once a year when he would proceed on annual leave. He was also entitled to afford himself at subsidized rate, or house allowance of Ksh.800 per month.

It thus stated;

“During your career with the Corporation, you will be governed by the Corporation's Service Regulations which are in force or may be amended from time to time.”

He was also entitled to non-contributory pension scheme and subsidized medical treatment. His appointment was subsequently confirmed by a letter dated 29th Sept. 1987 which read in part;

“CONFIRMATION IN APPOINTMENT”

... Consequently, from now onwards, should you wish to resign, you will be requested to give three months' notice of such intention or pay to the Corporation one month salary in lieu of notice.

None of the parties presented to the court a copy of the corporation's regulation. However it is common ground that as a consequence of this irregularities a confidential memo was addressed to the Regional Manager by the Assistant Manager/Investigations North Rift one **J. M. MANGANG'I** headed;

“FACILITATING AND ENHANCING FRAUD”

SUSPECT: MR JOHN ANDERE PF 63270

RANK: FOREMAN

This memo mentioned that there were investigations involving cases of fraud in the corporation's workshop between 1990 and 1992 regarding irregularities aforementioned in the earlier part of this judgment. It was recommended that he proceeds on suspension.

36. The plaintiff was consequently required to give an explanation and the recorded a statement dated 26.5.92.

37. Following his interdiction, the plaintiff appealed vide a letter dated 8th June 1992 where he basically argued that he was being wrongly victimized for offences committed by other persons. The defendant's Area Manager R. C. Kandie by a letter dated 5th October, 1992 rejected his appeal on the basis that;

“.... you did not raise any new grounds to warrant rescission of the interdiction order. Instead you admitted having initiated the using requisitions for purchase of motor vehicle spare parts, but at the same time tried to dodge the truth by claiming that whatever you did was done under instructions from your supervisor ... your argument that double payment could have been detected by Internal Audit does not hold water because at the time the offence was committed, all systems had broken down, and the sections you mentioned Procurement and Internal Audit could not be relied upon ... having worked closely with the Workshop Superintendent, there is no way you can claim that you did not know what was happening in the Workshop.”

38. Plaintiff contested this rejection by a letter dated 14th October 1992 arguing that the defendant had raised new grounds. There were also letters dated 10th February 1993 addressed to the plaintiff still on the issue revolving around conspiracy to defraud the corporation, and the defendant's contention that the plaintiff used the existing gaps within the corporation to achieve his mischief. Ultimately by a letter dated 11th October 1994, a letter of dismissal from service was written to the plaintiff It read in part as follows;

“DISMISSAL FROM SERVICE”

“... that you be dismissed from service of the corporation on grounds of dishonesty with loss of all earned benefits and privileges with effect from the date you receive this letter.

39. From the evidence presented vide the letter of offer and the subsequent confirmation, as well as the various correspondences there is no dispute that the plaintiff was an employee of the defendant corporation under a written contract. The contract also indicates that the same could be determined by a 3 months' notice. It is also common ground that following investigations which revealed certain anomalies or malpractices, the plaintiff was called upon to render explanation in writing – which he did by his written statement. There were several other correspondences, including his interdiction, before his ultimate dismissal. The letter of dismissal also gave reasons for the action taken.

40. The explanation given by the plaintiff in his statement of 26.05.92 was that he only dealt with mechanical needs and not electrical needs. He however admitted issuing the requisition orders including the one to Soni Fuel Inspection and to Fred Omolo Singh. He could not give an explanation about the questioned repair of the same starter. In his other statement dated 21.05.1992, he acknowledged the double requisition, with replicate items, but blamed a MR CHERUIYOT whom he says ought to have checked the records and passed a verbal message to him.

Then he stated;

“... I would also wish to state that I was by then not very much conversant with the records in the workshop and this was a contributory factor.

41. However the investigation report indicated that the plaintiff was an experienced officer who could have given advice for purchase of anew starter instead of repeating maintenance for six times a decision which led to great loss.

42. Under Section 44(3) of the Employment Act 2007 an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising from the contract of service.

43. In the case of **LINUS BARASA ODHIAMBO vs WELLS FARGO LTD** (Industrial court case No.275 of 2012), the court stated;

“...summary dismissal is a dismissal which the employer is entitled to dismiss without notice.” Sec.44 of the Act (providing for summary dismissal) no employer is entitled by any statutory provision or contractual term. Summary dismissal is tenable only where “the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.” Such contract on the part of the employee is referred to as gross misconducts Then the employer is not culpable for breach of any law and is free from liability and in such instances section 41 of the Act prescribing notification of alleged misconduct and hearing before termination shall not apply. Thus met the provisions set out.

44. Was this a case of gross misconduct? Certainly neither party presented the corporations Code of Regulations to assist the court on what terms were detached therein. For instances of gross misconduct there must be a notification of the act complained of, and a hearing – I think these were met. In my view fraud involving deliberate double requisitioning cannot be excused as an act not contemplated in the employment contract. It is wrong, it is gross and does not deserve indulgence in any shade.

45. Roping in PW2 did little to assist this case as PW2 was simply plucking out statements from an undisclosed source on grounds that because he was paid his benefits, the same principle must apply in favour of the plaintiff. Blaming the defendant for a poor system does not justify the kind of mischief the plaintiff got involved in and the fact that there is no evidence to prove that he benefitted from the mischief does not lessen the misconduct.

It was not necessary for the plaintiff to benefit from the money, he facilitated the mischief and the intention was unmistakable. It was to hoodwink the corporation into making double payments and thereby lead to losses. The case of **ABWAO NDAYARA** is not helpful as I have not had the benefit of viewing the statements (if at all) to determine whether he acknowledged his involvement in the mischief, like the present case where the plaintiff's excuse was that he was new in the section and unfamiliar with procedure.

46. Consequently my finding is that the defendant's decision to dismiss the plaintiff was justified and not unlawful.

47. The suit is dismissed for want of merit with costs to the defendant.

DATED, SIGNED and DELIVERED at **ELDORET** this 5th day of July 2018.

H. A. OMONDI

JUDGE