



Transport Workers Union v Green Hills Investment Limited (Cause 58 of 2016) [2023] KEELRC 1896 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1896 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 58 OF 2016**

**L NDOLO, J
JULY 27, 2023**

BETWEEN

TRANSPORT WORKERS UNION CLAIMANT

AND

GREEN HILLS INVESTMENT LIMITED RESPONDENT

JUDGMENT

Introduction

1. The subject of this dispute is the separation of the Claimant's member, Vincent M. Abwanzu (the Grievant) from the Respondent's employment. The claim is brought by the Claimant Union on behalf of the Grievant.
2. In a Memorandum of Claim dated 18th January 2016 and filed in court on 21st January 2016, the Claimant accuses the Respondent of unlawfully terminating the Grievant's employment and withholding his terminal dues.

The Respondent's defence is by way of Reply dated and filed in court on 18th February 2016

3. At the trial the Claimant called the Grievant and the Respondent called Maina Valentine.

The Claimant's Case

4. The Claimant states that the Grievant worked for the Respondent as a driver from 1st April 2004 until 8th February 2013, when his employment was terminated, on allegations of involvement in fraudulent activities, while procuring diesel for the Respondent's generator.
5. The Claimant maintains that the Grievant as a driver, had no role in the purchase of diesel.
6. The Claimant accuses the Respondent of intimidating the Grievant by making a report to the police.



7. The Claimant claims the following on behalf of the Grievant:
 - a. Pay in lieu of notice.....Kshs. 30,569
 - b. 11 days wages for February 2013.....12,925
 - c. Pending leave days (22.5 days).....26,454
 - d. 9 years' service pay.....158,724
 - e. 12 months' salary in compensation.....367,908
 - f. Certificate of service

The Respondent's Case

8. In its Reply dated and filed in court on 18th February 2016, the Respondent admits having employed the Grievant as a driver from 1st April 2004 to 8th February 2013, as pleaded in the Memorandum of Claim.
9. The Respondent however states that it was not aware of the Grievant's membership in the Claimant Union. The Respondent therefore puts to question the Claimant's mandate to represent the Grievant.
10. The Respondent denies the assertion that the Grievant was unfairly dismissed from his employment. The Respondent states that the reason for the termination was well founded in law. In this regard, the Respondent avers the following:
 - a. That following internal inquiries, the Respondent discovered that there were significant disparities in the records relating to the actual purchased fuel stocks and the documented diesel fuel stocks for the period between November 2012 and February/March 2013;
 - b. That while the Grievant may not have actually handled the purchase of diesel on behalf of the Respondent, he was the one tasked with ferrying any such consignment either to the Respondent's loading zones or to other designated areas;
 - c. That the Grievant was always tasked with accompanying the purchasers of the diesel and was therefore well known to them;
 - d. That in order to facilitate the transparent investigation of the fraudulent loss of diesel fuel worth about Kshs. 5,800,000 the Respondent terminated the Grievant's employment under Section 44(4)(g) of the *Employment Act*, following the existence of sufficient grounds that pointed to his involvement in the commission of a criminal offence to the detriment of the Respondent's property.
11. The Respondent denies the Claimant's averments that the Grievant was threatened or intimidated. The Respondent claims that the Grievant attended a meeting at the Managing Director's office on 7th February 2013, in order to show cause why his employment should not be terminated in view of the fraudulent activities involving procurement and subsequent ferrying of stolen diesel fuel.
12. The Respondent states that it is not aware of a report of the fuel theft made to the police on 13th February 2013

Findings and Determination

13. There are two (2) issues for determination in this case:



- a. Whether the Grievant's dismissal was lawful and fair;
- b. Whether the Grievant is entitled to the remedies sought.

The Dismissal

14. The Grievant's dismissal was communicated by letter dated 8th February 2013 stating as follows:

“Dear Mr. Abwanzu

RE: Summary Dismissal

Our meeting in the Managing Director's Office dated 7th February 2013 refers.

We have established that you have been involved in fraudulent activities while procuring diesel oil. Considering the facts and circumstances leading to full investigations and you having to explain your actions, we are of the view that you have portrayed a behaviour which is unethical and not acceptable to the organization.

Under the circumstance, the Management is faced with no alternative but to summarily dispense you of your employment (sic) as per the provisions of the Employment Act Cap 226 Section 44 Clause 4(g).

Consequently, your last working day has been computed as 8th February 2013 and your dues computed as follows:-

1. Net salary upto and including 8th February 2013.
2. 22.5 Days in lieu of leave days accrual.
3. Less all loans and advances, if any.

You will be required to return all the Company property in your possession upon which the above dues will be paid to you, if any.

Sincerely

(signed)

Hamed Ehsani

Managing Director”

15. The Respondent's case is that the Grievant was dismissed for involvement in fraudulent activities in the purchase of diesel. It is common cause that the Grievant worked as a driver and that he had no role in the purchase of diesel. It is therefore unclear as to how he could be implicated in any fraudulent activities in this regard.

16. This position is confirmed by an investigation report dated 13th September 2013, produced by the Respondent, which drew the following conclusion:

“From our investigation we can say there was collusion between the various staff in the department to defraud Market Masters Ltd.

On the other hand there were flaws from the management in that supervision was not thorough. Proper segregation of duties was not there. The accounting system was not properly configured where we realized there were no stock records kept for the diesel purchased.



This made it impossible for any proper stock control process.”

17. In the result, I have no difficulty in arriving at the conclusion that the Respondent had no valid reason for terminating the Grievant’s employment as required under Section 43 of the Employment Act.
18. Moreover, the Respondent did not adduce any evidence to confirm compliance with the procedural fairness requirements set by Section 41 of the Act.
19. In the circumstances, I find and hold that the Grievant’s dismissal was wrongful and unfair and he is entitled to compensation.

Remedies

20. I therefore award the Grievant twelve (12) months’ salary in compensation. In making this award, I have considered the Grievant’s long service and the Respondent’s unlawful conduct in bringing the employment to an end.
21. I further award the Grievant one (1) month’s salary in lieu of notice as well as salary for 11 days in February 2013.
22. In the absence of records to show exhaustion of the Grievant’s leave entitlement, I will allow the claim for leave pay. Similarly, because there was no evidence that the Respondent remitted any pension dues on the Grievant’s account, I will allow the claim for service pay.
23. In the end, I enter judgment in favour of the Grievant as follows:
 - a. 12 months’ salary in compensation.....Kshs. 366,828
 - b. 1 month’s salary in lieu of notice.....30,569
 - c. Salary for 11 days in February 2013 (30,569/30* 11).....11,209
 - d. Leave pay for 22.5 days (30,569/30* 22.5).....22,927
 - e. Service pay for 9 years (30,569/30*15*9).....137,561Total.....569,094
24. This amount will attract interest at court rates from the date of judgment until payment in full.
25. I make no order for costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ndege (Union Representative) for the Claimant

Mr. Ng’ang’a for the Respondent

