



REPUBLIC OF KENYA



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**Mghoi v Shreeji Enterprises (K) Limited (Cause E060 of 2023)
[2023] KEELRC 3073 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3073 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E060 OF 2023
M MBARÚ, J
NOVEMBER 16, 2023**

BETWEEN

VENCENSUS KILLO MGHOI CLAIMANT

AND

SHREEJI ENTERPRISES (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent in the year 2018 as a weighbridge operator and clerk making delivery notes for cargo loaded in trucks at the Miritini and Mazeras depots. on 30 December 2022 while the claimant was at work, the human resource manager, Mark Otieno interdicted the claimant and also directed him to write his explanation by showing cause why disciplinary action should not be taken against him for stealing 60 liters of fuel from motor vehicle registration No. KBV 770Z. The respondent also made a report at Rabai Police Station where the claimant was arrested and released on personal bond.
2. On 4 January 2023 the claimant replied to the notice issued and indicated that he did not know anything about the alleged disappearance of fuel.
3. The claimant was invited to a disciplinary hearing and he attended but on 9 January 2023 he was served with notice of summary dismissal over the allegations. The respondent allowed him 5 days to lodge an appeal which he did on 11 January 2023 and asked to be supplied with the disciplinary proceedings and decision which was not done.
4. Following his interdiction, the claimant was not paid his salaries for days worked at Ksh. 16,606.80 or issued with a Certificate of Service.
5. The claim is that there was unfair termination of employment on the reasons that his arrest was instigated by the respondent to justify termination of employment, his interdiction was over false



allegations of theft and the withholding of his salaries is wrongful and unfair. The claim is for the Following dues;

- a. compensation for the balance of contract January to September 2023 at Ksh. 55,356 x 9 = Ksh. 498,204;
 - b. compensation for days worked Ksh. 16,606.80;
 - c. compensation for overtime worked in 2009 - 2020 for 4 hours per day Ksh. 137,970;
 - d. compensation for work on alternate Sundays from July 2018 to 9 January 2023 Ksh. 931,061.20;
 - e. compensation for work during public holidays from July 2018 to January 2023 Ksh. 2,330,892.11;
 - f. compensation for unfair termination of employment Ksh. 664,272;
 - g. Certificate of Service;
 - h. an order of reinstatement without loss of benefits;
 - i. costs of the suit.
6. The claimant testified in support of his claim he was employed by the respondent in mid-2018 working from 8AM to 9PM without payment of overtime, public holidays. On 23 December 2022 he was instructed by the head of department, Clinker Department Mr. Ramu Pili to siphon fuel from one of the vehicles Registration No. KBV 770Z so that the fuel could be used in another vehicle KBX 120L and he did as instructed in the presence of Texas Security personnel, Mr Twalib and Alex who are respondent's employees and driver of KBX 120L.
7. The claimant also testified that later, Mr Ramu directed him to remove this fuel from vehicle KBX 120L since it had 20 liters of fuel and he took a 200 litre drum and drained the fuel but did not manage to siphon it completely and he did inform his supervisor. The claimant's estimates are that the vehicle had 60 liters and he had managed to siphon 60 liters.
8. After the claimant completed his work, some 20 liters of fuel were found by a private security guard outside the working area by Mr Katana and an unknown rider. Katana was interrogated to state which vehicle had been siphoned and he stated they the
9. respondent should ask the claimant but the claimant had only siphoned fuel as instructed by his supervisor. The respondent has installed CCTV cameras at its premises and should find out what happened. Katana and the rider were caught 3 hours after the claimant had finished his duties and he did not state where the fuel had been siphoned from or the vehicle.
10. Mr Naresh for the respondent directed that all those who were involved in the matter should be reported at Rabai Police Station. The claimant was arrested together with Katana and the rider but he was not charged with any offence. He was issued with notice to show cause and called for a disciplinary hearing and upon which he got notice of summary dismissal which was wrongful and not justified since he had only done as instructed and his claim should be awarded.
11. In response, the respondent's case is that the claimant was first employed as a clerk on a 6 months' contract from 28 March 2018 to 30 September 2018 at a gross wage of Ksh. 23,000 per month. Employment was then confirmed on a one-year contract commencing 1st October 2018 to 30 September 2019 at a gross wage of Ksh. 23,000 per month.



12. The claimant was then on a one year contract the last covering 1st October 2022 and was expected to end on 30 September 2023 at a wage of Ksh. 24,350 plus Ksh. 3,653 house allowance per month.
13. The claimant's employment was lawfully terminated on 9 January 2023 for gross misconduct after being allowed a hearing on the show cause notice and the due process. He lodged his appeal after being issued with written proceedings and a ruling of the disciplinary process.
14. The claimant worked for 9 days in January 2023 and his salary of Ksh. 13,467.50 was paid but he refused to accept which remains uncollected together with the Certificate of Service. The claims made with regard to Mr Katana are unknown to the respondent and without relevance to this case. There was no breach of contract as alleged and the terminal dues claimed are without justification. Each contract ended on its terms and
15. the claimant signed a discharge voucher with no complaints or objections and the claim should be dismissed with costs.
The respondent also filed work records.
16. During the hearing, the respondent remained absent. No evidence was called.
17. At the close of the hearing parties were directed to file written submissions. Only the claimant complied and submitted that his employment was terminated wrongfully and unfairly, he was not accorded the due process and Mr Katana was couched to falsely accuse him to justify the summary dismissal. His evidence was not challenged by the respondent who failed to attend court. His appeal was not facilitated when the respondent failed to issue him with the disciplinary proceedings or the ruling with regard to the summary dismissal. The claimant relied on the following cases, Abigail Jepkosgei Yator & another v China Hanan International Company Limited [2018] eKLR; Michael Mwaura Njoroge v Peter Kamau Munene & Beatrice Kori (Interested party) [2016] eKLR and the claims made should be allowed with costs.

Determination

18. In response, the respondent has filed various employment contracts with regard to the employment of the claimant;
 - contract dated 28 May 2018; contract dated 1st October 2018; contract dated 7 July 2019;
 - contract dated 6 October 2020;
 - contract dated 15 November 2021;
 - contract dated 11 October 2022 covering the last contract starting on 1st October 2022 to 30 September 2023.
19. Each contract had a discharge certificate. Such certificate is allowed save, the same cannot be used to deny the employee any lawful terminal dues at the end of employment in terms of Section 35(4) of the [Employment Act](#), 2007 (the Act) requires that;
 - (4) Nothing in this section affects the right—
 - a. of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - b. of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.



20. A discharge voucher per se does not absolve an employer from statutory obligation and that cannot preclude the court from enquiring into the fairness of a termination of employment as held in the case of *Thomas De La Rue v David Opondo Omutelema* [2013] e KLR that;

We would agree with the trial court that a discharge voucher per se does not absolve an employer from statutory obligation and that it cannot preclude the Industrial Court [Employment and Labour Relations Court] from enquiring into the fairness of a termination. That is however, as far we are prepared to go. The court has in each and every case to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.

21. And in the case of *Costal Bothers Limited v Kimathi Mithika* [2018] eKLR the court held that;

Whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim depends on the circumstances of each case.

A court faced with such an issue, in our view, should address its mind firstly upon the import of such a discharge/agreement; and secondly whether the same was voluntarily executed by the concerned parties”

22. The claims made should therefore be assessed and addressed on the merits. Discharge vouchers should not apply generally to negate any lawful dues to the employee even in a case of summary dismissal in terms of Section 18 of the Act. Any terminal dues claimed by an employee should be assessed via-avis the applicable law or Wage Orders.

23. However, on the written contracts regulating employment, each employment term started and ended as agreed by the parties. Each formed the basis of a new employment relationship different from the other.

24. The claimant filed this claim on 30 June 2023. In terms of Section 90 of the Act, he can only make claims going back 3 years and no more.

This goes back to June 2020.

25. Any claims outside the contract covering the period covered under the term running from dated 6 October 2020 are time barred. These ought to have been addressed as continuing injury within the meaning of Section 90 of the Act which is not the case here. Based on the fixed term contracts, the claims up for assessment will only cover such period.

26. The claim is that on 30 December 2022 the claimant was issued with a notice to show cause why he had stolen diesel of 60 liters from motor vehicle registration No. KBV 770Z. He was suspended from duty and directed to respond by 4 January 2023 and to attend disciplinary hearing.

In his response, the claimant explained that;

... on 23 December 2022 he was called by Ramu to siphon 20 liters of diesel from KBV 770Z which had around 60 liters but he found two drivers of KBX 020L and KBX 120L He was the one assigned but since he was not around KBX 020L I was given the job. After siphoning the fuel, I informed Mr Ramu of this two drivers ...

27. In his evidence in court and written statement, the claimant testified to the fact of siphoning fuel from one vehicle to the next. That he was under the instructions of his manager, in the presence of Mr Ramu,



- Alex and Twalib. He confirmed that for his conduct, he was arrested at Rabai Police Station and later released on personal bond.
28. Under Section 44(4)(e) of the Act, an employee is required to obey lawful and proper commands and directions of the employer. The words lawful and proper commands and directions of the employer do not include any criminal conduct or illegal and illegitimate commands and directions. The employee has the right to decline engaging in any unlawful and improper commands even though these may come from the
 29. employer. A defence that, the matters of instruction were illegal and improper stands and the claimant had the justification to decline the instruction or command to siphon fuel from one vehicle to the next, if at all.
 30. For his conduct, admitted in court, the Claimant was summarily dismissed fairly, after being accorded a hearing on 9 January 2023. There was ample evidence to support the charge of fuel siphoning coupled with his own admission in the response dated 4 January 2023 and in court on 9 October 2023.
 31. Dismissal was fair. There were valid grounds to justify the decision. Procedure taken to address the matter was fair. The Respondent observed minimum standards of fairness, under Sections 41, 43, and 45 of the Act. Termination of employment was fair.
 32. In the letter dated 9 January 2023, the respondent offered to pay the claimant for days worked together with annual leave days accrued and issuance of a Certificate of Service. Hence, on the claim for reinstatement without loss of any benefits, the summary dismissal found justified, such remedy is not available to the claimant.
Equally, notice pay or compensation cannot issue in such matter.
 33. On the claim for the balance of contract term, having committed gross misconduct of siphoning fuel, the sanction of summary dismissal was justified.
 34. On the claim for overtime pay for the period of 2019 to 2020, based on the term contracts, claims going back from June 2020 are time barred and the court is without jurisdiction to address. These ought to have been addressed within the meaning of Section 90 of the Act.
 35. With regard to claims for work on every alternate Sunday from the year 2018 to January 2023, the claimant was not at work from 30 December 2022 when he was suspended pending his response and attendance to show cause and disciplinary hearing. In his evidence and written submissions, he does not allocate which Sundays he was at work from October 2020 under his term contract. While on suspension, The 1st January 2023 was a Sunday, The 8 January 2023 was on a Sunday, 2nd October 2022 was a Sunday at the beginning of the term contract.
 36. The alleged alternate Sundays at work became relevant to address and allocate. The general claim in this regard cannot apply.
 37. On the claim for compensation for work during public holidays from July 2018 to January 2023, public holidays are all gazetted by the Minister. These are not general. 6 public holidays claimed in the year 2018, 12 days in 2019, 13 days in 2020 are not particularized. All such days should be outlined for the assessment.
 38. Despite the respondent not calling any witness, on the work records filed, the court finds the claim herein is without merit and is hereby dismissed in its entirety. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16 DAY OF NOVEMBER 2023.



In the presence of:

Court Assistant: Japhet Muthaine

M. MBARÚ JUDGE

..... and

