



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 671 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

EDWIN ALALA..... CLAIMANT

VERSUS

AMIRAN KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Vide his statement of claim dated 21st April, 2016 and filed in Court on 22nd April, 2016, the claimant avers that his employment was unfairly and unlawfully terminated by the respondent, a registered limited liability company.

2. He avers that he was employed by the respondent on or about 25th February, 2008 in the capacity of a Workshop Mechanic, a position he held until the termination of his services on 19th November 2015. At the time of separation, he was earning a monthly salary of Kshs.46,413/-.

3. The Claimant maintained that at all times during the subsistence of his employment relationship with the Respondent performed his duties diligently and to the Respondent's satisfaction until 13th October, 2015 when he was first suspended from duty on account of an alleged theft that occurred at the Respondent's premises between 19th September, 2015 and 20th September, 2015.

4. The Claimant contended that he was terminated following a disciplinary process which he termed as unfair as he was condemned unheard against the principles of natural justice.

5. He further contended that the Respondent failed to conduct independent investigations on the allegations levelled against him prior to his termination and that no criminal proceedings were initiated by the Respondent on account of the alleged theft.

6. Aggrieved by the termination of his employment the Claimant filed the instant Claim seeking the following reliefs:

(a) *Kshs.713,213/- comprising of the following: -*

i) Kshs.556,956/- as compensation for wrongful termination as per Section 49(1)(c) of the Employment Act, 2007.

ii) Kshs.46,413/- as one month's salary in lieu of notice.

iii) Kshs.109,844.10/- for seventy one (71) leave days remaining.

(b) Certificate of Service as per Section 51 of the Employment Act, 2007.

(c) Reinstatement or salary up to retirement age.

(d) Costs

(e) Certificate of Service

(f) Interest in at Court rate

(g) Any other relief that this Court deem fit and just to grant.

7. The Respondent in its Response to the Claim dated 24th May, 2018 and filed in Court on 4th June, 2018 admits that it engaged the Claimant from 25th February, 2008 to 19th November, 2015 when it terminated his employment on account of a breach of the employment contract.

8. The Respondent maintained that due process was followed and that the termination was fair noting that the Claimant was accorded an opportunity to make his representations contrary to his contention that he was condemned unheard.

9. It is further the Respondent's contention that it had a valid reason for the summary dismissal of the Claimant's employment being the alleged theft at its premises.

10. The Respondent maintained that the Claimant was paid all his dues at the time of separation and therefore has no claim as against it. It is on this basis that the Respondent urged this Court to dismiss the Claim with costs to the Respondent.

Evidence

11. The suit preceded for hearing on 6th July, 2021 with the Claimant testifying on his behalf and Gerald Kisule Muema, the Human Resource Manager of the Respondent testifying on behalf of the Respondent.

Claimant's Case

12. The Claimant adopted his witness statement dated 21st April, 2016 as his evidence in chief. In his statement the Claimant reiterates the averment made in his Statement of Claim.

13. The Claimant testified that on 19th and 20th September, 2015 he was on duty at the Respondent's premises. That he received a call on 21st September, 2015 informing him that some items being polythene for green house and chemicals were lost.

14. The Claimant testified that he was not aware where the lost items were stored and that there were different custodians of the Respondent's stores in the various departments. That he could therefore not be held responsible for the loss.

15. The Claimant testified that he was invited for a disciplinary hearing following the theft incident and that at the hearing he was accorded a chance to make his representation.

16. The Claimant termed the termination unfair as he was the only member of staff whose services were terminated yet there were a total of four security personnel at work on the date of the alleged loss.

17. The Claimant testified that he was not paid any terminal dues at the time of separation. He urged this Court to allow his Claim as prayed.

18. On cross examination, the Claimant stated that he had in his possession the key to the Respondent's back gate and that all goods were removed from the premises through the back gate. He admitted that he was the last person to lock the gate on the alleged date of loss.

19. The Claimant further admitted that one of his duties was to ensure that nobody gets in and out through the Respondent's back door.

20. He further admitted that he was issued with a letter of dismissal but declined to sign the same as he did not agree with the reason for his termination as contained therein which was negligence that led to loss of property.

Respondent's Case

21. RW1 GERALD KISULE MUEMA sought and was allowed by the Court to have the witness statement by Eric Osinde dated 10th October, 2017 adopted as his evidence in chief together with the list and bundle of documents.

22. On cross examination RW1 testified that the Respondent lost six jambo rolls from its yard and chemicals that were at one of its stores. He further testified that the keys to the stores were in the custody of the stores' manager.

23. RW1 further stated that there were CCTV cameras, which were manned by the security company. He testified that the cameras were switched off at the time of the theft.

Claimant's Submissions

24. It is the Claimant's submission that his termination was unlawful, unfair and that fair procedure was not followed.

25. He argued that he had nothing to do with the alleged theft as the Agricultural chemicals were stored in the Chemfert Department and that he had no access whatsoever to the same. He further submitted that the jambo rolls are very heavy and would require fork lifting and manpower to ferry out of the Respondent's premises, which resources were not available to him.

26. He further submitted that the Respondent neither made a report of the alleged theft nor was he charged for the alleged loss.

27. On the disciplinary hearing, the Claimant submitted that the minutes thereto do not clearly bring out the issues that came up at the hearing. He termed the hearing as a sham and that it was conducted only to fulfil the requirement of a hearing being conducted.

28. It is the Claimant's contention that no theft took place at the Respondent's premises and that it was just a cover up to justify his termination. It is on this basis that the Claimant submitted that the reason for termination was invalid and the termination was unfair in the circumstances. He relied on the provisions of Section 45 of the Employment Act, 2007 and the decision in the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**.

29. The Claimant further submitted that he has made a case for unlawful and unfair termination and as a result is entitled to the reliefs sought in his Claim. To buttress this argument the Claimant relied on the provisions of Sections 35(5) and 49 of the Employment Act and Section 12(3)(viii) of the Employment and Labour Relations Court Act.

Respondent's Submissions

30. The Respondent on the other hand submitted that the Claimant's summary dismissal was lawful and fair. It is further its submission that due process as provided under Section 41 of the Employment Act, 2007 was followed. For emphasis the Respondent relied on the cases of **Postal Corporation of Kenya v Andrew K. Tanui (2019) eKLR** and the Supreme Court decision in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others, S.C Application No. 2 of 2011**.

31. It is the Respondent's submission that it indeed had a valid and lawful reason, being the alleged theft of its properties attributing the same to the Claimant's negligence, as required under Section 45 of the Employment Act, 2007. For emphasis the Respondent relied on the Court of Appeal decision in the case of **Jacob Orlando Ochanda v Kenya Hospital Association Limited T/A Nairobi Hospital (2019) eKLR** where the Court held that the termination of the Appellant was valid as he casually and negligently performed his duties in this case being the delivery of fuel thus leading to loss suffered by the Respondent. The Court continued to make a finding that there were reasonable and sufficient grounds for suspecting the Appellant participated in the commission of a crime.

32. The Respondent submitted that the Claimant was given sufficient notice and a fair hearing conducted as required under Section 41 of the Employment Act, 2007 as evidenced by the Claimant's own admission at the hearing. It further urged this Court to be guided by the decisions in the cases of **Mary Mutanu Mwendwa v Ayuda (2013) eKLR** and **David Gichana Omuya v Mombasa Maize Millers Limited (2014) eKLR** and make a similar finding in this case.

33. The Respondent submitted that it has proved that it had valid reasons for the Claimant's termination as required under Sections 43, 45 and 47 of the Employment Act, 2007 and that the Claimant failed to adduce evidence to support his assertion that the termination was unlawful and unfair. The Respondent relied on the case of **Kenya Revenue Authority v Reuwel Waitaha Gitahi & 2 Others (2019) eKLR**.

34. On reliefs sought the Respondent submitted that the Claimant having failed to prove his case is not entitled to the grant of the reliefs same.

35. With regard to the claim for reinstatement, the Respondent submitted that the Claimant has failed to satisfactorily prove that the termination was unfair and unjustifiable to warrant the grant of the order. It is further the Respondent's submission that the three year period from the date of termination has since lapsed and therefore such a relief cannot be awarded. To buttress this argument the Respondent relied on the case of **Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union (2017) eKLR**.

36. On payment of terminal dues, the Respondent submitted that it has at all times been ready to settle the Claimant's dues. However, it maintains that the Claimant is guilty of delaying the process as he has never presented himself to the Respondent to collect his dues and subsequently clear with it.

37. In conclusion the Respondent urged this Court to find that the instant Claim is devoid of merit and to dismiss it with costs to the Respondent.

Analysis and Determination

38. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties, there is no dispute that the Claimant was employed by the Respondent from 25th February, 2008 until 19th November, 2015. It is further not in dispute that the Claimant's termination was as a result of an alleged theft that occurred at his place of work. The issues for determination therefore are:

- a. Whether the termination of the Claimant's employment was valid both procedurally and substantively;
- b. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

39. Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

40. The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The Section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Reason for Termination

41. In the letters of suspension dated 13th October, 26th October and 2nd November 2015, the reason given for the suspension from duty is “investigation regarding the company losing Polythene Sheets (Sun Covers) matter”.

42. In the letter inviting the Claimant for disciplinary hearing, the reasons given are as follows –

“At this hearing, we shall consider the following allegations for the violation of the companies' code of conduct

- While on duty, goods were stolen from the company premises.
- Not reporting such an occurrence immediately to your superiors.”

43. In the show cause letter dated 13th November 2015, the Claimant was addressed as follows –

“**Private**

13th November 2015

Edwin Alala

C/O Amiran Kenya Limited,

Nairobi

Dear Edwin,

SHOW CAUSE LETTER

As you are aware, the company lost goods from 19th to 20th September in which you being the custodian whereby the company had bestowed on you to protect its assets. On these very dates, you were on duty when theft occurred and yourself being the main custodian of the key which no one else in the company has possession and the key itself cannot be duplicated.

The company premises was not broken into or there was no attack whatsoever to anyone within the compound.

It is on the above grounds that I find you accountable for such occurrence you being the custodian of the key and yourself being on duty.

You are therefore required show cause why disciplinary action should not be taken against you for the afore mentioned offence.

Your reply should reach the undersigned by 3.00 pm on Monday 16th November 2015 upon receipt of this letter.

Yours Sincerely

SIGNED

Eric Osinde

Head of Human Resource”

44. In his reply the Claimant raised the following grounds in his defence –

1. **“Spare keys;** as mentioned on show cause letter, the keys of the company cannot be duplicated but i strongly believe beyond reasonable doubt that we have spare keys within the company premises thus making me not only the custodian of the keys.

2. **CCTV cameras:** it is evident that Amiran Kenya limited has CCTV cameras installed all over the premises, thus make me require CCTV footage and video clip showing me Edwin Alala on the alleged lost goods act doing the operations on the mentioned dates in the show case letter (19th & 20th sept 2015)

3. **24 hours security personnel;** its true and beyond reasonable doubt that Amiran Kenya limited has security premises thus making me challenged the disciplinary action on the grounds that, alleged company lost goods can't be concealed/hidden in pocket but requires a lot of measures to be put in place, including gates opening, trucks to carry the goods and this should have involved the security personnel's.

4. **lost goods tones/weight;** the alleged goods lost are so high in weight/tones thus requires a lot of measures to be put in place before the act, which includes forklift to lift the goods, trucks to carry them and manpower for the activity and specialists to operate the machines.

My knowledge and understanding is in mechanics and driving not on CCTV'S, operating forklifts and driving trucks.

5. **integrity;** having worked with Amiran Kenya for more than ten years and being key custodian for more than five years even when the CCTV cameras had not been installed within the premises, I challenged the allegations on me on my trustworthy and loyalty to the company for all this period.”

45. The minutes of the disciplinary committee are reproduced below –

“MINUTES OF DISCIPLINARY CASE ON EDWIN ALALA HELD ON 18TH NOVEMBER 2015

Present

1. Godfrey Omondi - Deputy Head of Administration
2. Eric Osinde - Human Resource Manager
3. Julius Obonyo - Security Officer
4. Edwin Alala - Mechanic

A disciplinary hearing meeting was held on 18 November 2015 with Edwin Alala as a result of being on duty and goods were stolen from the premises. Edwin was accorded the right to come with a witness of his choice to be accompanied at the meeting by a work colleague not acting in any legal capacity for the disciplinary hearing and he opted not to come with a witness during the hearing.

Meeting Minutes

The following was discussed during the meeting:

Edwin Alala (Mechanic) was accorded an opportunity to explain to the committee while he was on duty on 19 & 20 September 2015, six jumbo rolls and agricultural chemicals disappeared from the premises while he was the custodian of the keys to the main gate in Amiran Kenya premises.

The following were the proceedings:

ü Edwin confirmed that on 19 September 2015 he was not on official duty but he reported to Amiran Kenya at 12.00 pm premises to confirm the fleet of vehicles and lock the gate. He further confirmed that he locked the gate at 8.00 pm.

ü The panel further inquired why he went to watch football on 20 September 2015 while he was meant to be on duty.

ü Edwin explained that on 20 September 2015 he reported to duty and he was tasked to lock the gate as usual as he was the main custodian of the keys and ensuring safety of Amiran belongings. At 7.00 pm same day, he released the security personnel (Wells Fargo) at the main gate and decided to watch a football match away from the business premises while awaiting the security person who does overnight shift to arrive.

ü Edwin admitted that he went to watch football and he failed on his responsibility not to wait for the night guard from Wells Fargo to come to Amiran premises and lock the main gate as is the practice.

RECOMMENDATION

Upon deliberations, it was agreed that:

ü Edwin Alala to be summarily dismissed.

Signed as true representation of the hearing meeting by

SIGNED”

Godfrey Omondi

Eric Osinde

Julius Obonyo”

46. In the letter of summary dismissal, the reasons for dismissal are stated at paragraph 2 thereof. The letter is reproduced below –

“19th November, 2015

REF: 001/11/2015

Edwin Alala

Payroll No. 523

Administration Department

Amiran Kenya Limited

Dear Edwin,

RE: SUMMARY DISMISSAL

This refers to the issues brought to the attention of the HR Department and which were subject to a disciplinary hearing on 18th November, 2015 as follows;

On 19th & 20th September 2015 goods were stolen from the company premises while you were on duty. The goods in question were six jumbo rolls from the Greenhouse Department and chemicals from the Chemfert Department.

Your written response to the show cause notice and your defense during the disciplinary hearing was not satisfactory in explaining why you were on duty and goods were stolen from the company premises. You also did not have any witnesses to confirm your version.

Management has reasonable and sufficient grounds to believe that your conduct and intentions were in fundamental breach of your obligation as per your employment contract, procedures and the Law. Your actions betrayed the trust bestowed on you by Amiran Kenya Limited by neglecting your duties leading to the loss of six jumbo rolls and chemicals without any clear reason.

As such, guided by the Employment Act, 2007, Section 44,

sub section 4(c), a decision has been made to dismiss you from duty effective 19th November 2015. Upon presenting a duly signed clearance form, the following payments will be processed for you less all statutory deductions:

- Salary up to 19th November, 2015
- Encashment of leave accrued but not utilized as at 19th November, 2015

Yours Sincerely

SIGNED

Eric Osinde

Head of Human Resource”

47. No investigation report was produced by the Respondent. No witness statements from any person was produced. The Claimant was never informed of the lost chemicals from the stores in either the suspension or show cue letters. He was never given an opportunity to respond to the same. The letters for suspension refer to polythene sheets while the show cause letter refers to “lost goods”. Indeed, no evidence was produced to prove that there was any loss of goods at all.

48. In this letter of appointment, the Claimant was employed as a workshop mechanic. His duties are given as follows –

“GENERAL DUTIES:

1. You will work under the instructions of the Operation Departments or any Senior Manager when necessary.

2. You are required to attend to all/any mechanical faults on all vehicles, adhere to all service due dates for the Company's full fleet of Motor Vehicles.

3. It is your duty to maintain the company cars in line with safety measures.

With reference to the above you will during the whole of your service to the company, conform to laid down regulations that are in force from time to time. You will diligently and faithfully prepare the duties of your post as shown and directed by your senior managers and such duties within the scope of your abilities which the company may call you to perform from time to time and to perform the same devotedly, the whole of your time, attention and abilities to the service of your company."

49. There is no letter giving the Claimant additional responsibility as custodian of the keys to the gate or to open and close the gate. Indeed, the Claimant stated that this was his side hustle and that is why he went to close the gate on 19th October 2015 when he was not on duty which he did at 8 pm. That on 20th he closed the gate at 7 pm because he was going to watch football. That at the time he left, three security guards were on duty but one was yet to report.

50. The Claimant testified that he was never told what quantities of the polyethene and chemicals were lost. He further testified that he did not know where the goods were stored and that they were in different places. He did not have the keys to the stores. He further wrote in his response to notice to show cause that the goods were so heavy that they needed a crane to lift and a lorry to carry, yet the security guards who worked round the clock with four during the night and another for during the day were never made to write statements of what transpired on the material dates.

51. The Respondent also did not give any explanation of why the CCTV cameras were off or who switched them off on the material dates, although the Claimant raised this issue in his response to the notice to show cause.

52. Further, although the Transport Manager was said to have duplicate keys to the gate, he was never called to testify. Nor did the Respondent state why he was not required to explain the theft or even write a statement.

53. The Claimant stated that he had been an employee of the Respondent for 10 years and had held the keys to the gate for five years without incident. He further produced a letter of appreciation signed by a MR. YARON GOREVICH, Head of Administration, Amiran Kenya Limited in which he was appreciated as follows –

"TO: MR. EDWIN ALALA

APPRECIATION LETTER

I would like to appreciate your awareness and your responsible action that you have taken by informing immediately the suspicious matter to management.

Your alert contributed to reveal misconduct activities in the company and made us, Amiran Management to be proud to have you as one of Amiran family."

54. This is an indication that the Claimant was a trustworthy person.

55. From the foregoing, I find that the Respondent did not prove that there were valid reasons to summarily dismiss the Claimant from service. I further find that the Respondent did not comply with fair procedure as set out in Section 41 of the Employment Act. I therefore find the summary dismissal of the Claimant unfair both substantively and procedurally.

Whether the Claimant is entitled to the reliefs sought

56. Having found that the termination of the Claimant's employment was unlawful and unfair he is entitled to the following reliefs:-

(i) 12 months compensation due to unfair termination Kshs.556,956/-

57. Taking into account the claimant's length of service and the Respondent's conduct it is my view that an award of 12 months' salary as compensation in the sum of (35,000 x 12) **Kshs.420,000/-** is reasonable in the circumstances of this case after considering all the factors under Section 49(4) of the Employment Act.

(ii) Kshs.35,000 being one month's salary in lieu of notice

58. Having found that the Claimant was unfairly terminated, he is entitled to this relief by dint of Section 36 and 49(1) of the Employment Act, 2007. I thus award him the sum of **Kshs.35,000** being one month's salary in lieu of notice.

(iii) Kshs.109,844.10 being seventy one (71) leave days remaining

59. The Claimant maintained that he is entitled to pay in lieu of annual leave earned having not proceeded on leave during the subsistence of his employment with the Respondent. The Respondent did not adduce any evidence to rebut this assertion. I therefore find that the Claimant is entitled to compensation under this head.

(iii) Issuance of a certificate of service

60. The claimant is entitled to certificate of service by dint of Section 51 of the Employment Act, 2007.

(iv) Reinstatement or salary up to retirement

61. The Claimant is not entitled to this relief as the same is only available within 3 years from the date of an employee's termination as provided under Section 12 (3) (vii) of the Employment and Labour Relations Court Act.

(iv) Payment of salary up to retirement age

62. Compensation under this head is untenable. The Claimant cannot be awarded remuneration for the unserved period as an employee cannot enjoy remuneration which he has not worked for. Further, awarding such a relief would amount to unjust enrichment by the Claimant which should not be encouraged by this Court. I rely on the cases of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** and **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR**.

63. The Claimant is awarded costs and interest from the date of Judgment until payment in full.

64. In conclusion judgment is entered in favour of the Claimant against the Respondent in the following terms:

- (i)..... 12 months' compensation for
unfair termination..... Kshs.420,000.00
- (ii) One month's salary in lieu of notice..... Kshs.35,000.00
- (iii) leave days not taken 71 days..... Kshs.109,844.10

Total..... Kshs.564,844.10

65. The respondent shall pay claimant's costs for the suit.

66. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE