



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 355 OF 2018

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

CMC MOTORS GROUP LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The parties are in a recognition and collective agreements. The claimant filed the suit on behalf of its member (the grievant) one Nicky Sammy Wambua. The claimant alleged unprocedural, unlawful and unfair summary dismissal of the grievant. The memorandum of claim was filed on 30.05.2018 through Rose Auma Omamo, the claimant's General Secretary.

The claimant's case is as follows. The respondent employed the grievant on 15.08.2008 as a stores clerk grade VI with a salary of Kshs. 24,386.00 and house allowance of Kshs. 4,259.00 per month. It is alleged that the respondent unprocedurally, unlawfully and unfairly dismissed the grievant summarily on 03.03.2017. The letter stated that the grievant had used spare parts from outside the respondent's provision to repair a customer's motor vehicle and the customer had returned and the vehicle had broken down thereafter. The grievant had replied to the allegations but failed to attend the disciplinary hearing which had been scheduled for 24.02.2017. The letter of summary dismissal stated that the grievant's conduct had been found to be a serious breach of honesty and was no longer in the interest of the respondent to be retained and was being dismissed summarily effective 03.03.2017. The letter stated that the grievant would be paid salary up to 03.03.2017; salary for 58 days of earned leave up to 28.02.2017; and leave travel allowance for 11.5 days. Further, as at dismissal he earned Kshs. 58,506.00 in basic salary and Kshs. 9,830.00 per month and served 8 years and 7 months. Parties engaged in the statutory conciliation per the Labour Relations Act but there was no amicable resolution – because the respondent refused to appear before the conciliator. The claimant pleads that the grievant's summary dismissal was unfair because the claimant was not accorded due process as he was not heard per section 41 of the Employment Act, 2007 and due process per Article 50 of the Constitution was not accorded to the claimant.

The claimant prayed for reinstatement of the grievant or payment of terminal dues per exhibit 11 being:

- 1) 2 months' gross salaries notice pay Kshs. 136,672.00.
- 2) Gratuity Kshs. 309,790.00.
- 3) Annual leave not taken for 7 months, 13.4 days Kshs. 29,324.00.
- 4) Leave traveling allowance Kshs. 6,800.00.
- 5) Baggage allowance 100% basic Kshs. 58,506.00.
- 6) 12 months' compensation Kshs. 603,984.00.
- 7) Certificate of service.
- 8) Costs of the suit

The material on record shows that the grievant conveyed by email to the respondent that he could not attend the disciplinary hearing because he had lost his father and was attending the funeral.

The respondent filed on 12.07.2018 the response to the memorandum of claim.

The respondent pleaded that the claimant was employed as Part Sales Executive Director at a monthly salary of Kshs. 58, 506.00 and house allowance of Kshs. 9, 830.00. Further on 05.01.2017 the respondent received a formal complaint from Service Manager in Mombasa that a customer one Bernard Trompel had reported that his motor vehicle VW Toureg KCA 330A, had previously been repaired by the respondent's CMC Mombasa had been fitted with defective parts as per re-examination by DT Dobie Mombasa. The Customer confirmed that grievant had handled the vehicle and even provided the WhatsApp communication between the claimant and the customer. The grievant was suspended from duty and given a chance to reply to the allegations and the grievant replied on 07.01.2017. he was invited for disciplinary hearing on 21.02.2017. on 21.02.2021 he was invited to the disciplinary hearing accompanied with a colleague or trade union representative. He failed to attend on account he was attending the father's funeral. The disciplinary committee reviewed all the record about the case and recommended that the grievant be dismissed summarily. The grievant sold defective spare parts to the customer contrary to respondent's policy; he demanded direct cash payment from the customer contrary to the respondent's policy; and deliberately misleading the customer by fitting the car with defective parts. The claimant was given an opportunity to appeal if he was aggrieved with the decision on summary dismissal but he never appealed. On 30.04.2015 the respondent had issued a circular to warning staff against directly receiving cash from customers. The grievant's shop manager contested the summary dismissal demanding reinstatement in 7 days yet the grievant had not exhausted the appeal process and the respondent advised he appeals. On 18.04.2018 the Shop Manager called the respondent to convey that the grievant would not appeal. The matter went for conciliation but the respondent tried in vain to meet the conciliator to explain the reasons for the termination. The grievant's termination was in accordance with rules of natural justice and sections 41 and 45 of the Employment Act, 2007. He was paid terminal dues and given a certificate of service.

The respondent prayed that the claim be dismissed with costs.

The parties opted not to call witnesses and the suit be decided upon the documents, pleadings and final submissions filed for the parties. The Court has considered all the material on record and returns as follows:

- 1) There is no dispute that the respondent and the grievant were in a contract of employment as well as that the parties were in a valid CBA and recognition agreement.
- 2) The contract of employment was terminated by the letter of summary dismissal dated 03.03.2017.
- 3) The termination was in accordance with due process of a notice and a hearing per section 41 of the Act. The grievant received the show-cause notice, he replied, he was invited to the disciplinary hearing, dismissal issued, and there was right of appeal but the claimant did elect not to appeal. The Court considers that if the grievant indeed questioned his dismissal upon deficiency of not being heard orally by the disciplinary committee, then he'd have raised the issues on appeal. The procedure cannot be faulted in that regard.
- 4) The reason for termination has been established by the respondent in accordance with sections 43 and 45 of the Act. The respondent has exhibited the WhatsApp communication between the customer and the grievant. On balance of probability, the reason for termination existed as at termination and it related to the claimant's conduct and the respondent's operational requirements. In any event, by pleadings and evidence or even submissions, the claimant has not attacked the reason for termination but only raised issue with procedure.
- 5) The Court finds that the termination was not unfair or unlawful both in substance and procedure. The claimant has failed to establish justification for reinstatement or compensation for unfair termination. The respondent failed to cooperate with the conciliator and each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE