



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO. 178 OF 2018

BARNABAS KIPKETER NGENO.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF UASIN GISHU.....1ST DEFENDANT

THE COUNTY PUBLIC SERVICE BOARD

UASIN GISHU COUNTY.....2ND DEFENDANT

J U D G E M E N T

1. By a statement of claim filed on 4th May, 2018 the claimant averred among others that:

a) At all material times to this claim, the Claimant was an employee of the respondents working as a driver and/or a plant operator from the year 1997 to 2016 when he was wrongfully dismissed from service.

b) The claimant avers that during the period he worked for the respondents, he was a diligent worker who never had any disciplinary issue and/or any issues with his supervisors and/or fellow workers.

c) On or about 17/6/2003, the claimant herein was appointed to the post of plant operator III by the County Council of Wareng. The claimant avers that the Wareng County Council became known as the county government of Uasin Gishu in 2013 due to the introduction of decentralized system of government in the 47 counties in Kenya.

d) The claimant was subsequently promoted to the position driver III with salary scale of 16 on or about 6/3/2012 with the following benefits and allowances;

i) Basic salary Ksh. 32,790/= per month

ii) Rental house allowance..... Ksh. 16,000/= per month

iii) Commuter allowance Ksh. 2,000/= per month

iv) Leave travel allowance Ksh. 4,000/= per month

v) Annual leave of 28 days per annum

e) On or about 31st October, 2015 while the claimant was in the course of his employment, he was instructed to take 400 litres of diesel to Kapkures Primary School, Ng'enyilel ward which fuel was to be used to fuel a dozer at the said school. He was in the company of one Mr. Kigen in a pick up with two drums each of 200 litres of diesel.

f) To the claimant's utter shock and surprise, some individuals intercepted the pickup upon the claimant's arrival at Kapkures Primary School, Ng'enyilel ward. The said individuals claimed to have received a phone call from the office requiring the claimant herein and the said Mr. Kigen to await the office administrator before surrendering the 400 litres of diesel.

g) At around 2pm, the office administrator arrived at the site claiming to have received a phone call to the effect that a vehicle belonging to the institution had sold out diesel to some individuals. The said administrator took out a piece of stick and dipped it into the drums then claimed that 20 litres of diesel had been stolen from each drum, making a total of 40 litres.

h) The claimant claims that the allegations of theft was unsubstantiated and baseless as the administrator relied on hearsay without solid evidence on the said allegations. Also, the said administrator failed to use a practical way of measuring the subject diesel.

i) Subsequently, on or about December, 2015 the claimant herein was unfairly and wrongfully suspended from work for an indefinite period on account of theft by public servant. This was despite the claimant having showed cause vide a letter dated 19/11/2015 why he should not be dismissed from service.

2. The respondent on its part averred that:

a) In response to paragraph 4 of the statement of claim, it is not in issue that the claimant was employed by the 1st respondent although such employment commenced on the 1st July 2003 as a plant operator III.

b) The respondents admit the contents of paragraph 8 of the claim in so far as the same describe the claimant's assignment for 31st October, 2015.

c) In response to paragraph 9 of the statement of claim, the respondents would like to state the claimant was well aware that the individuals mentioned above were security personnel at the said institution and were instructed by the County Administrator to impound the vehicle until the administrator arrived.

d) The respondents deny the contents of paragraph 10 of the statement of claim and further avers that the claimant himself knew or ought to have known that the piece of stick was a measuring stick.

e) In further response to paragraph 11 the respondents avers that the same method of measuring is used at the point of dispatch of the Petrol and is a normal practice in the petroleum industry.

f) From the state of events that culminated from the above paragraph and in the spirit of justice and fairness, the claimant was served with a show cause letter dated 5/11/2015 from the 1st respondent's Chief Officer in charge of Roads, Transport and Public Works.

g) The above letter indicated to the claimant that he was required to reply to the letter within 14 days which he duly replied vide a letter dated 19/11/2015 stating no reasonable defense.

h) Further to the proceedings above, the claimant was thereafter suspended from employment pending the completion of investigations regarding his conduct.

i) The respondents having had conducted thorough investigations came to a conclusion that the claimant had breached the tenets of employment law and in particular stealing by servant which amounts to gross misconduct and as such was dismissed from employment.

3. At the hearing, the claimant stated among others that he recorded a statement on 19th April, 2018 which he adopted as his evidence in chief. He also relied on the documents filed with the claim.

4. The claimant stated that he was dismissed on allegations of selling fuel. He denied knowledge of any investigation prior to dismissal. He further stated that Mr. Sawe used a stick which he dipped in the tank and claimed 40 litres was missing. Sawe then ordered them to off-load the fuel to the Bulldozer tank. According to him, the bulldozer tanks capacity was 400 litres.

5. Mr. Ngeno further stated that he went for a disciplinary hearing and was asked questions which he responded to. He was later told to go home and would be called. He denied writing any apology letter and further stated that he was suspended for six months before he was dismissed.

6. In cross-examination he stated that he was instructed to take fuel to Kapkures Primary School and that it was not his first time to be instructed to deliver fuel. It was his evidence that one had to present his fuel requisition book for recording of quantity of fuel. The contents were measured by a machine but on delivery there was no verification of quantity. He stated that he was stopped by a Ward Administrator who was his supervisor and he used a blue gum stick to measure the fuel. This according to him was not a measuring stick.

7. Mr. Ngeno further stated that he received a show cause letter and attended the disciplinary hearing. He was thereafter issued with a dismissal letter and informed of his right of appeal. He appealed to Public Service Commission but never got the outcome of the appeal. He further stated that he never complained to anyone about the method used to measure the fuel.

8. The respondent's first witness Ms. Anne Koech stated that she worked for the respondent as Chief Officer in charge of Public Service Management and that she recorded a statement on 25th November, 2019 which she relied on as her evidence in chief. She stated that the claimant was a former employee of the respondent having been employed in 2003 as a Plant Operator III by former Wareng' County Council. In 2012 he was redesignated and promoted as a driver. He worked until 2016 when he was dismissed.

9. According to her the claimant was dismissed over allegations of siphoning fuel. Investigations were done and he was issued with a show cause letter. It was her evidence that immediately the matter was discovered the claimant wrote an apology.

10. The claimant was however suspended and later called for a disciplinary hearing on 10th February, 2016. The claimant attended and was

heard. The committee thereafter compiled their report in which they recommended dismissal to the County Public Service Board. The recommendation was adopted and forwarded to Public Service Commission. The Public Service Commission approved the dismissal and the same was communicated to the claimant and informed of his right of appeal. He appealed but the appeal was disallowed.

11. In cross-examination she stated that she was aware that investigations were conducted however the investigation report was not filed in Court. She further stated that the minutes of the disciplinary hearing were not filed in court.

12. For the hearing, the claimant was informed to be accompanied by a witness and or a union representative. It was her evidence that a report was received from the transport officer who assigned the claimant the fuel. Further, the claimant was suspended on 15th December, 2015 and was not paid any salary during the suspension.

13. The respondent's second witness Mr. Wilson Kipkemboi Sawe stated that he worked for the respondent as the sub-County Administrator for Turbo. At the material time he worked as Chief Officer for Devolution and Public Administration.

14. On 31st October, 2015, 2015 he was in his neighborhood visiting a neighbour who had been unwell. Coming out he saw a pickup bearing a green number plate carrying two drums. This caught his attention since the pick-up was coming out of an area notorious for fuel adulteration and siphoning. The pick-up speed away upon noticing him.

15. It was his evidence that he then contacted Mr. Kimungi and enquired whether there was any construction nearby which required refueling and he confirmed to him that there was one in the next Ward. Mr. Kimungi further confirmed that there was a bulldozer which required to be fueled and that he had sent the claimant and another with two drums of fuel. Mr. Kimungi then instructed him to ensure the Dozer was not fueled until the quality of the fuel is ascertained. It was his evidence that he went where the Dozer was and met the claimant and his colleague. They denied adulterating the fuel. He then dipped a stick in both drums. In the first drum the contents were slightly above $\frac{3}{4}$. The second drum was full. It was his evidence that at this point the claimant conceded that they siphoned fuel and sold at the adulteration point. They admitted selling 40 literes at Ksh. 3,000/= . They handed over the money to him and begged for forgiveness but he told them he had already reported the issue to the claimant's department.

16. In cross-examination Mr. Kipkemboi stated that he was in charge of Public Service Delivery and Coordination of County Government functions. It was his evidence that he picked a random stick to measure the level of the fuel. He stated that he knew the procedure for measuring fuel and that there was a fuel dispenser measuring fuel being dispensed.

17. Concerning, the confession, he stated that the claimant and his colleague Mr. Misoi wrote the apology letters in his presence. According to him the handwriting was Mr. Ngeno's. the signature on the letter was however different from the one in the verifying affidavit.

18. Under section 43 of the Employment Act, in a claim for termination of a contract, the employer shall be required to prove the reason or reasons of termination and where employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.

19. The claimant herein and his colleague Mr. Misoi were accused of siphoning fuel from one of the drums they were Ferring to Kapkures Primary School in Ngenyilel ward. The siphoning is claimed to have taken place at Mansuri village Tapsogoi. An area, according to the respondents, was notorious for fuel siphoning and adulteration.

20. From the evidence, the respondent's witness Mr. Wilson Kipkemboi Sawe who claimed to have seen the claimant and Mr. Misoi drive out of Mansuri area did not actually see them drive into the area. He stated that he asked a young boy nearby who confirmed to him that the respondent's vehicle ferrying the diesel was coming Mansuri Centre. To confirm if fuel had been siphoned, Mr. Kipkemboi Sawe informed the Court that he used a stick he plucked from a blue gum and inserted in the drums and found that one was $\frac{3}{4}$ full and another was full hence not tampered with. Mr. Kipkemboi therefore concluded that some 40 litres of fuel had been siphoned.

21. Mr. Kipkemboi further stated that the claimant and Mr. Misoi admitted to him siphoning 40 litres of fuel and selling the same for Ksh.3000 which they handed over to him.

22. In his brief dated 3rd November, 2015 to Chief Officer, Roads and Public works, Mr. Kipkemboi Sawe stated that he also took an audio recording of the conversation between himself and Mr. Misoi.

23. It is noteworthy that neither the minutes of the disciplinary hearing nor the investigation report was produced before the Court for perusal to see what other evidence apart from the evidence of Mr. Kipkemboi, was available against the claimant and his colleague.

24. The claimant retracted the alleged confession and apology hence it was important for the respondent to produce other evidence to support the allegations against the claimant. It could have been useful to table the investigation report to see if any effort was made to visit Mansuri where the claimant and Misoi were alleged to have siphoned the fuel and effort made to interview witnesses.

25. The evidence before the court including allegation by Mr. Kipkemboi to the effect that he used a blue gum stick to establish that 40 litres of fuel had been siphoned from one of the drums does not meet the threshold contemplated under section 43 of the Employment Act.

26. To this extent the Court finds and holds that the respondent herein has failed to discharge the burden cast upon it by section 43 of the Employment Act with the consequence that this court returns a verdict that the termination of the claimant's service was unfair within the meaning of section 45 of the Employment Act.

27. The claimant from the evidence was 58 years when he got terminated and had worked for the respondent for fifteen years by the time he

got terminated. The claimant was therefore about to retire hence his prospects of getting another job were low. For this reason, an award of ten months salary as compensation for unfair termination would be reasonable.

28. The claimant laid a claim for unpaid leave and severance or gratuity pay. With regard to unpaid leave, the claimant never led any evidence to support this allegation and for which years he never went on leave and for how many days.

29. Concerning gratuity and severance pay. The claimant was not declared redundant hence the issue of severance pay does not arise. Regarding gratuity, the claimant from his payslip attached to his bundle of documents, was a member of NSSF and from the evidence, a member of the respondent's pension scheme. No collective Bargaining Agreement or contract was produced to show that in addition to these, he was entitled to gratuity.

30. It was not contested that the claimant was not paid salary for the six months he was on suspension.

31. In conclusion the Court awards the claimant as follows.

a) One months salary in lieu of notice.....32,790

b) Six months salary not paid during suspension.....196,740

c) Ten months salary as compensation for **unfair termination.327,900**

557,430

d) Costs of the suit

e) Items (a) (b) (c) to be subject to taxes and statutory deductions and any payment made to claimant as terminal dues upon dismissal.

32. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY, 2022

Abuodha Nelson Jorum

Judge ELRC