



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1761 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

BENSON MAKORI OBIRI.....CLAIMANT

VERSUS

MASTER FABRICATORS LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant brought this claim before this court by his statement of claim dated 30th August, 2016.

The Respondent filed his response/statement of defence dated 26th January, 2017.

CLAIMANT'S EVIDENCE

2. The Claimant states he was employed by Masters Fabricators in November, 2013 as a Customer Relations Officer.

3. He says he was promoted to a workshop Manager and his salary rose from Kshs.30,000/= to Kshs.70,000/= per month.

He was given a car registration number KAL 095K and Kshs.5600/= per month as car allowance.

4. He says that allowance was way below the cost of hiring the car and had a shortfall of Kshs.28,400/= per month.

5. He further says that on 24th July, 2019 the Respondent under the pretext of fitting the car with a tracker took it away from the Claimant.

6. The Claimant states that in June, 2016 there were missing space parts and the Claimant reported the incident to Internal Security Manager. The Respondent sent nine employees to record statements at Industrial Area Police Station on 23rd June, 2016.

Three managed to record but even those who did not manage were not asked to go back to record their statement.

7. The Claimant says that on 25th June, 2016 the Respondents Managing Director D. S. Virdee and Julius Kibe the Security Manager asked some employees to attend investigations purportedly conducted by the Directorate of Criminal Investigations. He says only those with electronic and mechanic background were targeted.

He also says they were interrogated from 10.00a.m to past midnight without food or water or telephone communication.

8. He says he left to go for medicine and when he returned he found some people had been locked out of the gate. He was informed he was to be part of that team.

9. He says that the Managing Director announced he was sending the thieves home and the Claimant together with 9 other colleagues were ordered to go home and wait for a phone call.

10. On 28th July, 2016 he was called on phone and asked to report to office.

He says he found a group of 5 people including the Managing Director, Sales Executive, Human Resource Manager, Administrator and Stores Supervisor. He says the Respondent made recordings of their conversations without the Claimant's consent.

11. Claimant says he was accused of being tribal, stealing food and stealing Kshs.2,000/= and being a failure at work.

He says he was not told if this was disciplinary hearing. He says he denied all allegations and there was no tangible evidence. He was asked to go home and await communication.

12. On 6th August, 2016 Claimant received a short text to report to the office on 8th August, 2016. When he got there he says he got a termination letter and was asked to hand over.

He says he was paid for July, 2016 but not for August, 2016.

He says the Respondent also failed to pay prorata leave days, 3 months salary in lieu of notice and he says he was treated in a discriminatory, unlawful and unfair manner and as a result suffered loss and damages.

The same damages are enumerated in paragraph 45 of the memorandum of claim.

RESPONDENT'S CASE

13. The Respondent states that the Claimant was his employee and his last position was workshop manager responsible for coordinating link between the administration and workshop equipment and his last salary was Kshs.70,000/=.

14. He says that between 1st June, 2016 to 20th June, 2016 there was general suspicion of theft at the Respondent's premises and CCTV were not able to capture it.

He says that was after a theft matter was reported on 5th July, 2016. They say motor vehicle alternators and conductors worthy Kshs.1.7 million went missing.

15. The Respondent in his defence says 20 employees were interrogated including Claimant and some employees implicated the Claimant.

Some employees alleged Claimant had instructed them to take a final receipt of Kshs.1,500/= from Shell and fuel was never delivered to the Company.

The Claimant was also accused of having an order issued for purposes of selling engines at another building and apparently the matter was reported to the Human Resource Department.

16. Claimant was invited before a Disciplinary Committee on 28th July, 2016 at 2.30p.m accompanied by Peter Gitau his representative.

He was taken through the allegations brought against him.

17. On the issue of using company IPOs and fueling his personal car the Claimant blamed his juniors. He offered the same be recovered from his salary.

He also admitted having received money from garbage collection contrary to the code of conduct.

18. On the issue of theft at the workshop one employee claimed he lost items from his tool box including a drill machine and he reported to the Claimant who was the manager in-charge and he did not carry investigations.

Claimant in his defence says his colleagues who were in-charge of security were responsible for such matters.

19. One Patrick Nandhwa testified he was reporting directly to the Claimant and when asked why he was fueling the Claimant's car using the Respondent's LPO he said he was following instructions.

20. After the disciplinary hearing the Respondent relieved the Claimant of his employment vide a letter dated 8th August, 2016 which gave reason for termination being failure to discharge his duties diligently, compromise of integrity, misuse of authority and unequal treatment of workers.

21. The Respondent therefore avers that the Claimant's claim be dismissed with costs as the allegations against him have been proved by the Respondent.

22. The Claimant filed their submissions as directed by the court before 9th November, 2021. The Respondent did not file theirs.

ISSUES FOR DETERMINATION

23. (i) Was there a valid reason to dismiss the Claimant?

(ii) Was the right procedure followed?

(iii) Is the Claimant entitled to his prayers.

DETERMINATION

24. The Claimant was accused as per the termination letter dated 8th August, 2016 of

(a) Compromise of integrity i.e receiving a token from a garbage collector.

(b) Misuse of power i.e using company LPO to fuel his own car and

(c) Favours workers from his tribe.

The Respondent Claims the company lost parts worth more than 1.8 million due to Claimant's negligence in his supervisory roles.

25. The law of employment Section 45 (1) of the Employment Act provide that "no employer shall terminate the employment of an employee unfairly."

Section 45(2) provide that "termination of employment of an employee is unfair if he fails to prove that the reason of the termination is valid.

26. The court has considered the pleadings by the respective parties and the evidence adduced by the respective parties during the hearing as well as the submissions by the Claimant. The Respondent did not file their submissions. The accusations levelled against the Claimant are basically based on statements allegedly written by colleagues at work.

The allegations are that Claimant was guilty of loss of alternators and conductors. The court has regrettably found no authentic evidence adduced to show how the alternators were stolen from which vehicles and the exact losses.

The only reference to those alternators was by one Patrick Nandhwa who in his statement dated 19th July, 2016 said he found alternators missing. He does not give any testimony to connect the Claimant with the theft. He however said he took a receipt of Kshs.1,500/= and took fuel from Shell Petrol Station and he then admitted he was being misused by the Claimant.

He also says the Claimant was organizing to sell engines to another building but they reported the matter to the Human Resource and so the transaction was aborted.

27. The said statement is not verified and is not indicated to whom it was recorded before. The writer was not called to give evidence in court.

The same Nandhwa was also present at the disciplinary meeting held on 28th July, 2016 and he is reported to have admitted he so used company's LPO to fuel Claimant's car. The witnesses also did not sign the minutes.

28. Joseph Kasee also said he accompanied Nandhwa to take the fuel but he did not specifically say whose car it was they put the fuel. Again Kasee did not sign the minutes neither did the Claimant.

29. The Claimant in the disciplinary meeting says he used his car to go to general motors and he fueled it at 500/=. He says the workers used his car and may have fueled it. He is reported to have told the Respondent to recover it from his salary. Once again the minutes are not signed by the Claimant.

30. As for taking money from the garbage collector he says he was given lunch and it was not a bribe.

The Claimant says he delegated his work and did not find any failure on his part as long as there was a worker manning a section.

31. The court has considered all the evidence given by the Respondent and unfortunately finds there are no valid and proved reasons given to connect culpability on the Claimant. There are just allegations of loss of spare parts but no details or proof of the amount lost.

As for fueling his car two colleagues are said to have admitted they fueled the car but again they have not testified but Respondent only produced the copies of their statements. It is not clear how and under what circumstances the statements were produced. It is not even evident who the authors are. Those statements cannot be substantiated or verified without evidence of their maker.

32. The Claimant is even accused of having favoured workers from his tribe. There is no evidence that any worker reported an incident of discrimination by the Claimant on the basis of his tribe.

33. The reasons given as to why the Claimant was summarily dismissed from his employment fail the fairness test as in the **CASE OF**

WALTER OGAL ONURO VS TEACHERS SERVICE COMMISSION CAUSE NO.955 OF 2011 where it was held that for termination to pass a fairness test, it ought to be shown that there was not only substantive justification for the termination but also procedural fairness. Furthermore Section 43 of employment act provide that the employer has duty to prove the reasons for termination of employment are fair and where the employer failed to do so the termination is found to be unfair.

34. In **JEREMIAH OCHIENG PONDE & 3 OTHERS VS BORDELESS TRACKING SYSTEMS LIMITED (2016) eKLR** it was expressed "The allegation that the Claimant was involved in fraudulent activities does not constitute a valid and a fair termination reason under the Employment Act. The exact role played by the Claimant was not made manifest in the face of the court. The Respondent's witness Mr. Readon merely restated in general terms the contents of termination letter that the Claimant was involved in suspicious activities.

There were police officers called whose investigations did not result in prosecution. Whereas the employer was at liberty to act independently without waiting for the outcome of police investigations the decision to terminate was required to be based on valid and fair reasons established through an internal investigation process.

The absence of a criminal prosecution would suggest there was no substance to the allegation. Mere suspicion is not sufficient to justify termination."

35. I do associate with the observations in the above case and therefore find the Respondent did not establish a valid reason to terminate the Claimant's employment.

36. As for procedural fairness the act provides in Section 41 (1) that

"subject to Section 42(1) of an Employment Act the employer shall before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representing of his choice present during this explanation."

37. The Claimant says that he was forced by the Respondent to go on leave and was recalled on 28th July, 2016 where he was forced to join a hearing with five people present including the Managing Director, Sales Executive, Human Resource Manager and Administrator and Stores Supervisor.

He says the meeting was recorded without his consent and he was not given opportunity to respond. He says there was nothing tangible on the accusations and he declined the allegations of being tribal, stealing food, receiving Kshs.2,000/= and being a failure at work. He says he was told to go home and wait response and on 8th August, 2016 he got the dismissal letter.

38. Clearly there is no letter inviting the Claimant to the disciplinary meeting and explaining his wrong doing. He is not even advised to bring an employee or shop floor union representative as his witness.

The procedure set out in the above Section 41 of the Employment Act is mandatory and the court is convinced the Respondent failed to follow that procedure.

The failure to follow the procedure set out in Section 41 makes the termination unprocedural even if there is a valid reason to terminate employment which in this case is also not proved.

39. Even if there was one Peter Gitau who is described as a employee representative, present at the disciplinary hearing, it is not clear if he was invited by the Claimant.

As already alluded hereto the minutes of the disciplinary meeting were not signed by the Claimant and the other so called witnesses. The whole process is tainted with irregularities and the court has no choice but find that the Respondent failed in the fairness test stipulated in Section 41, 43 and 45 (1) to 45(2) of the Employment Act. Judgement is therefore entered in favour of the Claimant.

RELIEFS AWARDED

40. The three months salary in lieu of notice as prayed in paragraph 45 of the memorandum of Claim is declined as the Claimants letter of employment dated 15th November, 2016 provide for one month. He is awarded Kshs.70,000/=.

(ii) General damages are awarded @ 3 months and subsequently the prayer for 240 months compensation can only be regarded as effort to get unfair enrichment and is not justified.

It is declined and therefore 3 months is awarded Kshs.210,000/=.

(iii) Salary upto 9th August, 2016 is awarded Kshs.14,000/=

(iv) Outstanding leave days declined for lack of particulars.

(v) Loss of user of motor vehicle and over expenditure of vehicle KAL 09K not awarded for lack of proof.

CONCLUSION

The total sum of the award to the Claimant is Kshs.294,000/= less any sums paid hereof.

Costs will be awarded to the Claimant.

Interest is also to accrued until full payment from date of this judgement.

Finally Claimant is to be issued with the certificate of service.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE