



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA

ELR CAUSE NO. 34 OF 2017

(FORMERLY OF KISUMU NO. 349 OF 2016)

KENNEDY OCHIDI.....CLAIMANT

VERSUS

ONE ACRE FUND.....RESPONDENT

J U D G E M E N T

1. The Claimant by memorandum of claim dated 9th December 2016 sought the following orders:-

- a. A declaration that the Claimant's termination was both unfair and wrongful.
- b. Kshs 25,705/- being his deducted salary for the month of November 2016.
- c. General damages
- d. Exemplary damages
- e. Costs of the suit
- f. Any other relief this Honourable court may deem fit to grant

2. Together with the claim, is Affidavit verifying the memorandum of claim sworn on 9th December 2016 by Claimant, Claimant's list of witnesses and his statement of Claimants list of documents all dated 9th December, 2016 and the bundle of documents under the list.

3. The Respondent entered appearance and filed memorandum of defence dated 26th January 2017 together with list of Respondent's witnesses statement by Beatrice Macksallah and Respondents list of documents all of same date. The Respondent also filed with defence the bundle of documents.

4. The matter was heard on the 28th October, 2021 with representation by counsel Kundu for Claimant and Makokha for Respondent who by consent requested and the court agreed to have the claim canvassed by way of written submissions. The documents were admitted.

5. The parties have filed written submissions. The claimant's written submissions are dated 10th November 2021 and filed in court on the 19th November 2021. The Respondent's submissions are dated 30th October 2021 and filed on the 1st December 2021.

The Claimant's case

6. The Claimant states in his statement dated 9th December 2016 that he was employed by the Respondent on the 30th March 2011 at starting monthly salary of Kshs.6,000/-. That his was a permanent contract of Employment. That he worked till 28th October 2016 when he was summarily dismissed from employment. That there was an incident of theft. That on 17th September 2016 around 9.15 am he had been called by one Joyce Nyongesa who is a Research Manager at One Acre Fund the Respondent to say she was with a visitor for Wema Company who needed to inspect the seeds in the warehouse. That he called John Sabwa and Andrew Wanyonyi the logistic Manager to ask them about the visit whilst doing so he was at the warehouse. That the logistics Manager Andrew Wanyonyi told him that he did not have information of the said visit and told him to close the warehouse until they had communicated.

7. That he closed the warehouse and left for home as it was a weekend (Saturday). That on Monday 19th September 2016 while he was reporting on duty at his workstation around 7.15 am he was informed by the Cereals Board Security Personnel one Violet that she had seen boxes outside the door of his work station. That the Respondent usually has a KK security guard during the day and not at night and they usually open the warehouse together as they also have a spare keys that at the said side door there were boxes, knife hacksaw blade, blue bag and metal rod. that he noticed there was a breakage at the side door. That he called his supervisors Andrew Wanyonyi and John Sabwa and informed them about the breakage and they came to the scene and saw the breakage and advised him to report to police which he did OB NO. 27/19/9/2016 1007 hours. That the following day he was told to handover the store to allow his employer do investigations. That he was to report on 21st October 2016 but on reporting he was called by the Human Resource and sent on temporal leave on claim that he was to pave way for investigations from 24th October 2016. That the Human Resource told him to write a report on 26th October 2016 on the warehouse and that on 27th October 2016 he was to go for a hearing with the employer. He was told to come on 28th October 2016 when he was given a termination letter with the allegations that face him herein.

8. That he does not know how they arrived at the figure of Kshs. 1,262,995/- because it is accusing him falsely.

9. The Claimant filed his appointment letter dated 30th March 2011, summarily dismissal letter date 28th October 2016 Certificate of Service dated 28th October 2016, salary adjustment letter dated 30th April 2013, show cause letter an temporal leave dated 24th October 2016 and demand letter by Situma & Company Advocates, addressed to the Respondent dated 31st October 2016.

10. THE DEFENCE CASE.

The Claim is denied. The witness statement of defence is by Beatrice Macksallah dated 26th January 2016. The witness stated she was the Human Resource Manager of Respondent since 2011 and stated her duties. The witness stated she knew the Claimant who had been employed as Ware house associate at Bungoma warehouse on 30th March 2011 and listed his duties. That on 17th September 2016 the Claimant went to the Respondent's Bungoma Warehouse which he opened allegedly to allow visitors from Wema Company to inspect seeds. That when he called the Supervisor and Logistics Manager he was informed the office and Management did not have any information concerning the seed inspection by Wema Company and was advised to close the Warehouse as it was a Saturday which is not a normal working day.

11. That the Claimant closed the Warehouse but failed to properly arm the alarm system. That normally when the alarm system is armed properly the Claimant would receive a message on his phone informing him that everything was in order. That as the Claimant had a special code to use to arm the alarm, he could have noticed that something is not right when he failed to receive a notification from his mobile phone.

12. That on 19th September 2016 when the Claimant reported on duty it was noted several items were missing and lists the same. That on 20th September 2016 the Claimant was sent on leave to enable the company carry out investigations and ascertain exactly what caused the break in and whether any body was culpable. That after investigations were carried out the Claimant was served with a show cause letter dated 24th October 2016 and was required to respond and show cause why disciplinary action should not be taken against him. The Claimant responded and was invited to appear for disciplinary proceedings on 27th October 2016 and requested to appear with a representative of his choice if he so wished.

13. That upon hearing the Claimant it transpired he was negligent and failed to arm the alarm system in accordance with lad down procedure. He was therefore lawfully dismissed from duty for having been negligent that resulted to the Respondent losing goods valued at kshs.1,288,700/-. That the Respondent followed procedures in the Employment Act and its Human Resource Guidelines. That the Claimant had not been performing satisfactorily and cites previous incidents of being placed on probation and warning issued on 15th January 2015 and urges case be dismissed.

14. The Respondent filed list of documents being probation letters dated 14th December 2012, 13th June 2014, and 30th August 2016, employee warning report dated 5th January 2014, temporal and annual leave dated 24th October 2016 summary dismissal letter dated 28th October 2016, Indemnity contract dated 30th November 2013, Handover dated 20th September 2016 fraud and negligence training dated 20th June 2013, KK security company report (not filed) and HR disciplinary hearing notes taking guide dated 20th June 2013.

15. The parties filed written submissions. The Claimant's written submissions are dated 10th November 2021 and filed on 129th November 2021, the Defence written submissions are dated 30th October, 2021 and filed 1st December 2021

DETERMINATION.

Issues for determination .

16. The Respondent identified the following as issued for determination .

- a. Whether the summary dismissal was justified
- b. Whether the Claimant is entitled to reliefs sought

17. The Claimant did not specify the issues for determination. The court having considered the case by both parties is of the opinion that the issues placed before it for determination are follows:-

- a. Whether the summary dismissal of Claimant from employment by the Respondent was unfair and wrongful?
- b. Whether the Claimant is entitled to the reliefs sought.

18. THE LAW

Section 43 (1) of the Employment Act provides that in any claim arising out of the termination of contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. 2) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee Under Section 44 (2) of the Employment Act provides that subject to the provisions of this section no employer has the right to terminate a contract of service without notice or with less notice than that which the employee is entitled by any statutory provision or un contractual terms.

Section 45 of the Employment Act provides for unfair termination

45(1) no employee shall terminate the employment of an employee unfairly.

45(2) A termination of employment by an employer is unfair if the employer fails to prove-

- a. That the reason or the termination is valid
- b. That the reason for the termination a fair reason if-
 - i. Related to the employee's conduct, capacity or compatibility
- c. Based on the operational requirements of the employer and
- d. That the employment is terminated in accordance with fair procedure.

Section 45(5) of the Act provides the criteria to apply in considering if termination was just and equitable being:-

- a. The Procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of appeal against the decision.
- b. Conduct and capability of the employee upto the date of termination.
- c. The extent to which the employer has complied with any statutory requirements connected with there termination including the issuance of certificate of service under Section 51 and procedural requirements set out under Section 41.
- d. The previous practice of the employer in dealing with the type of circumstances which led to the termination
- e. The existence of any previous warning letters issued to the employee. Section 41 provided for the termination procedure.
- f. 41(1) An employer shall before terminate the Employment of an employee on grounds of misconduct prior performance or physical incapacity explain to the employee in a language the employee understands the reason for which the employee is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during his explanation.

Section 41 (2) of the Employment Act provides that, 'an employer shall before terminating the employment of an employee or summarily dismissing and employee under Section 44 (3) or (4) of the Act hear and consider any representation which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee under sub section (1) make.

1. The court holds that section 41 of the Employment Act is couched in mandatory terms. This was so held by the Court of Appeal in *Postal Corporation of Kenya -vs- Andrew K . Tanui (2019)* where the court pronounced itself on procedural fairness as herein under:-

- i. Four elements must thus be discernable for the procedure to pass muster:-...**
- ii. The reason or which the employer is considering termination**
- iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and**
- iv. Hearing and considering any representation made by the employee and the person chosen by the employee.'**

ANALYSIS AND FINDINGS

Whether the summary dismissal of the Claimant from employment by Respondent was unfair and wrongful.

19. The court is guided by the criteria under Section 45 (5) of the Employment Act. On the existence of valid reasons from the dismissal, section 43 of the Act states that the reason is one which the employer at time of termination of contract genuinely believed to exist and left to the termination. The notice to show cause by the Respondent to the Claimant dated 24th October 2016 indicates reason for show cause as negligence by Claimant in area of his operation as the Warehouse Associate of Bungoma Warehouse resulting to One Acre Fund losing properties worth over a million Kenya shillings. This is the same reason indicted in letter of summary dismissal dated 28th October 2016 (APP-ii). Under Section 44 (a) (c) of the Employment Act the reason of negligence is a ground for summary dismissal. The Claimant states he was not negligent as he had set all alarms. Fact is there was break in and the Claimant admits the same and even reported to the police.

20. The Respondent witness Beatrice Macksallah in her statement dated 26th January 2016 states the Claimant was negligent as he failed to arm the alarm system in accordance with the laid down procedure. Parties admitted documents as filed. In the disciplinary proceedings of 27th October 2016, it is recorded that the Claimant had stated he decided to arm using the keypad as his phone had no credit and could not use it to arm the warehouse. It was stated if he had armed, he would have received alert on phone. The Claimant is recorded to have admitted to have made a mistake saying it was his first saying it was his first time to use the keypad.

21. The court finds that the reason for dismissal was valid. Even where there is valid reason procedural fairness must be complied with. The Claimant was given a show cause letter, he responded vide letter dated 26th October 2016. He was invited to hearing which must have been orally communicated as no notice is attached. Minutes of the hearing are attached. There is no evidence on record other than the statement of Respondent's witness that he was informed of his right to be accompanied by a person of choice or shop floor union representative. The Court of Appeal in *Postal Corporation of Kenya -vs- Andrew K. Tanui* has pronounced itself on procedural fairness as herein under:-

i. Four elements must thus be discernable for the procedure to press master:-

ii. The reason or which the employer is considering termination

iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made and

iv. Hearing and considering any representation made by the employee and person chosen by the employee".

22. The court finds that relying on documents on record the employer in failing to give notice of hearing stating right employee to be accompanied by person of his choice to the hearing breached the mandatory terms of section 41 on procedural fairness. On perusal of the minutes the right to be accompanied or even the issue is not mentioned. To that extent the court finds there was no procedural fairness.

23. The Respondent submits that on failure to appeal, the Claimant cannot claim the procedure was unfair. That the Claimant was given right to appeal against the decision within 30 days but chose not to indicating acceptance of the decision. On these submissions, the court finds that submissions are not pleadings on facts. The witness statement and Response do not disclose the Claimant was informed of right to appeal within 30 days. This is also not in the proceedings. In any case the day after the hearing of 27th October 2016 the Claimant was issued with letter of summary dismissal dated 28th October 2016. The court finds that the termination process was unfair for reasons given above.

24. Whether the Claimant is entitled to reliefs sought:-

a. Declaration that the Claimant's termination was both unfair and wrongful

The court finds that whereas the reason for termination existed there was no full compliance with termination procedural criteria under Section (41) of the Employment Act. The termination was thus unfair. The Claimant is entitled to compensation for the unfair termination under section 49 of the Employment Act. The court found that the Claimant contributed to his summary dismissal for breach of operation requirements to arm the alarm at the warehouse hence negligence, that the employer complied with some of the criteria in procedural fairness including issuance of certificate of service and consequently the court finds an award of the equivalent of 3 months gross monthly salary adequate compensation to the claim under this head. Thus Kshs. 25,705/- x 3 total award of the sum of Kshs. 77,115/-.

b. Kshs.25,705/- being his deducted salary for the month of November 2016. The witness statement of Respondent's witness Beatrice Macksallah does not explain the offset of the earned salary of kshs.25,705/- yet in defence it is stated the deduction was towards the off-setting alleged loss of kshs.1,288,700/- incurred due to the Warehouse break in.

25. The court finds that there is no evidence produced of the audit and valuation of the stolen property itemized by the Respondent. Section 19 of the Employment Act which allows deduction of wages does not have any provisions which would permit an employer to deduct or withhold entire wages as a disciplinary step or sanction under disciplinary process as in the instant case. Only instance which salary can be withheld is under Section 80 of the Employment Act during a period when the Employee participates in an illegal strike action. This position was upheld in *Peterson Ndung'u & 5 others -vs- Kenya Power & Lighting Company Limited* (2014) eKLR by my brother Justice James Rika. I have found no evidence of audit and valuation of property lost and consequently it was premature and irregular to withhold the salary of the Claimant outside the provisions of Employment Law. I award **Kshs. 25,705/-** being the withheld salary.

26. On general damages and exemplary damages the court agrees with Respondent's submissions that they are not available remedies for breach of employment contract. Compensation for unfair termination is restricted to the remedies under Section 49 of the Employment Act.

CONCLUSION AND DISPOSITION

27. The court held the termination of Claimant's contract was unfair and the withholding of his salary irregular. I now enter judgement as follows:-

(i) Notice pay of Kshs. 25,705/-.

(ii) Compensation for unprocedural termination of 3 months salary @kshs.25,705/- total award of kshs.77,115/-.

(iii) Payment of kshs.25,705/- being withheld salary.

The above sums (i, ii and iii) to be paid subject to statutory deductions

(iv)The Claimant is awarded costs in the claim and interest on the awarded sum at court rates from date of judgement.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF FEBRUARY, 2022

J. W. KELI,

JUDGE.

In the presence of:-

Court Assistant : Brenda Wesonga

Claimant: Absent - (Kundu Advocate on record)

Respondent:- Makokha