REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 48 OF 2015

PETER K. KABAU .....1ST CLAIMANT

RAJAB SUMBA .....2ND CLAIMANT

SAMWEL AWINO.....3RD CLAIMANT

-VERSUS-

RILEY SERVICES LIMTED..... RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

1. INTRODUCTION

1. In a Memorandum of Claim dated 16th February, 2015 the Claimants pray for:-

   (a) A declaration that the Claimants have been unfairly terminated.

   (b) Reinstatement to their previous employment or

   (c) In the alternative to (b) above compensation for unfair termination.

   (d) payment of all their terminal benefits.

   (e) Payment of all sums calculated as underpayment in salary and other allowances.

   (f) Costs of this claim.

2. Along with the Statement of claim were filed verifying affidavits sworn by all the Claimants, a list of documents and copies thereof.

3. Upon service, the Respondent entered appearance on 16th April, 2015 and filed a Statement of response on 19th July, 2017. Along with the response were filed copies of several documents.

4. This cause came up in court for hearing on 17th November, 2021 when the 1st Claimant, PETER KABAU (CW1), testified on his own behalf and on behalf of the other Claimants. On the same date JONATHAN MUSOMBA (RW1) testified for and on behalf of the Respondent.

5. By consent of counsel for both parties written submissions were filed, Claimant's on 18th and Respondent's on 25th January, 2022.

II CLAIMANTS' CASE

6. In a nutshell, the Claimants' cause is that they were all employees of the Respondent (the 1st Claimant being a supervisor) working as security guards.

7. It is alleged that on or about 19th February, 2012 theft occurred at the premises of one of Respondent's clients whereby goods belonging to UNGA FARM CARE LIMITED, a client of the Respondent, were lost while the Claimants were on duty. The Respondent took the view that the Claimants were involved in the said theft.

8. The Claimants were subsequently jointly charged with the said theft or related charges in **Nakuru CMCC No. 651 of 2012** but they were subsequently acquitted or discharged. They pleaded their innocence even during the trial in the testimony of CW1.

9. The Claimants allege that they were not issued with notices of termination, that they were not given a hearing, were not allowed back to work, and that they have not been paid their dues. The Claimants' case is that they have been constructively terminated unfairly and unlawfully and hence their prayers as set out above.

III. RESPONDENT'S CASE

10. The Respondent admits that the Claimants are its former employees but categorically states that all the three Claimants were fairly and procedurally dismissed summarily for gross misconduct in that they engaged in criminal conduct, whereby 245 bags of Indian Soya maize meal valued at Kshs.3,000/= per bag were illegally offloaded /stolen from the businesses premises of Unga Limited, a client of the Respondent.

11. The Respondent alleges that the Claimants acted in collusion and later on shared the proceeds of the crime after disposing the stolen goods.

12. The Respondent further alleges that the 1st Claimant was not a good employee as he had allegedly sexually harassed a female colleague at work as a result of which he had earned a warning.

13. The Respondent has advanced that the Claimants were lawfully and procedurally dismissed and issued with letters of summary dismissal based on their gross misconduct and the Respondent prays that the entire claim by the claimants be dismissed with costs.

IV ISSUES FOR DETERMINATION

14. Upon sifting through the pleadings, considering the evidence adduced from both sides, and the written submissions by Counsel for both parties, this court considers the following to be the issues for determination:-

(i) Was the dismissal of the Claimants by the Respondent unfair and unlawful?

(ii) If (i) above is in the affirmative are the Claimants entitled to the reliefs sought?

(iii) Costs.

V. DISMISSAL

15. Both sides agree that after the alleged theft took place on the night of 18th/19th February, 2012 the Claimants never worked for the Respondent again. On the one hand the Claimants allege that they were not re-admitted to their place of work after release from police custody. On the other hand, the Respondent alleges that it summarily dismissed the claimants for gross misconduct and issued them with summary dismissal letters which the Respondent produced as exhibits. The respondent further alleges that the Claimants' dues were calculated and cheques drawn but the Claimants failed and or refused to collect them.

16. The Claimants have categorically denied involvement in the alleged theft of the property of UNGA LIMITED, a client of the Respondent. To fortify their position, they have through CW1 testified that they were acquitted in **Nakuru CMC Criminal Case No. 651 of 2012**. Although the proceedings in that criminal case were not produced as exhibit in this cause, the Respondent has not denied that the Claimants were acquitted or discharged of the theft charges.

17. It is also not clear what charges the Claimants were facing in the criminal case. Were they accused of theft, criminal negligence, or neglect of duty?

18. No evidence was adduced from **UNGA LIMITED**, the complainant in the criminal case, to confirm exactly how the criminal case ended. What is not in dispute is that after the alleged theft the Claimants lost their jobs with the Respondent. The contest is whether the manner in which the claimants lost their jobs was fair and lawful.

19. This court (ELRC) has emphasized on the need for both substantive and procedural fairness in termination of employment in whatever manner may it be through summary dismissal, redundancy, or any other method – see the holdings in **Mary Chemweno Vs Kenya Pipeline Company Ltd (2017) eKLR, Loice Otieno Vs Kenya Commercial Bank Ltd (2013) eKLR,** and **Walter Anuro Vs. Teachers Service Commission (2012) e KLR.**

20. **Section 43 of the Employment Act** (the Act) places a burden on the employer to prove the reason for termination and **Sections 41, 45** and **47** fortify the cardinal importance of both substantive and procedural fairness in termination in whichever way.

VI SUBSTANTIVE FAIRNESS

21. It is by now clear that while the Claimants allege that they were constructively dismissed, by the Respondent refusing to admit them back to work after the arrest and charging in court, the Respondent alleges that the Claimants were summarily dismissed for gross misconduct.

22. In his testimony **CW2** on his own behalf and on behalf of the other two Claimants did not inform the court whether they received the letters of summary dismissal. On the other hand, **RW1** for the Respondent stated that the Claimants were handed the said letters and produced the same as **exhibits A, D**, and **E**.

23. The letter of dismissal to the 1st Claimant, exhibit A, is dated 22nd February, 2012 while those to the 2nd and 3rd Claimants, exhibits D and E, are both dated 28th March, 2012.

24. This court has given due consideration to the evidence adduced by both sides, both oral and documentary, and has come to the conclusion that the Claimants were summarily dismissed in accordance with the letters mentioned above.

25. **Section 44(1)** of the **Act** provides as follows:-

> ***"Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employeee is entitled by any statutory provision or contractual term."***

Section 44(2) of the **Act** provides as follows***:-***

"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 to which the employee is entitled by any statutory provision or contractual term.

26. **Section 44(4**) provides for matters that may amount to gross misconduct to justify the summary dismissal of an employee for lawful cause. Section 44(4)(g) specifically provides that where "***an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property"*** the employer may rightfully and lawfully summarily dismiss such an employee for gross misconduct.

27. The letter of summary dismissal to the 1st Claimant dated 22nd February, 2012 alludes to two instances of gross misconduct on the part of the 1st Claimant. One is on the alleged theft on the night of 18th/19th February, 2012 which the Respondent concluded that all the Claimants were involved in. The second instance is an alleged case of sexual harassment against a female employee

28. Although the alleged female victim had allegedly recorded a statement with the Respondent in respect of the incident, she was not called as a witness in this cause.

29. The Respondent carried out an investigation in respect of the alleged theft led by **RW1** and came to the conclusion that all the three Claimants were in one way or another involved or connected to the theft. **RW1** prepared a report on the incident and the said report was produced as an exhibit. The Claimants recorded statements in respect of the alleged theft and they all denied involvement. Nonetheless, the complainant in the matter **UNGA LIMITED** reported the theft to police and all Claimants were arrested and charged in court in connection thereto.

30. On a balance of probability, this court is of the opinion that the Respondent had reasonable and sufficient grounds of suspecting that the Claimants had committed a criminal offence to its substantial detriment. **RW1** testified that after the alleged theft the Respondent lost the contract with UNGA LIMITED. This is the import, implication, and application of **Section 44(4)(g)** of the Act.

31. Flowing from the foregoing, this court holds that the Respondent has demonstrated that it had a good reason for summarily dismissing the Respondents to the standard required by **Section 43 of the Act**.

32. Like that of the 1st claimant, the letters of summary dismissal to the 2nd and 3rd Claimants both dated 28th March, 2012 indicate that they were dismissed for their alleged involvement in the theft. Clearly, the Respondent had a *prima facie* reason to summarily dismiss the Claimants notwithstanding, as the court has been informed, that the Claimants were acquitted or discharged of the charges by court for reasons that this court is not able to establish as the proceedings in the criminal case were not produced as exhibit.

VII. **PROCEDURAL FAIRNESS**

33. As expressed in Part VI of this judgment above all employees are entitled to substantive and procedural fairness before dismissal or termination. There are provisions in our laws that provide for procedural fairness including **Article 47 of the Constitution**, **Section 4** of the **Fair Administrative Actions Act, Sections 35, 41, 44,** and **45** of the **Employment Act,** rules of natural justice, and equity.

34. Some of the salient features of procedural fairness include the following:-

(i) An employee shall be informed of the charges or complaints against him/her in writing with clear specifity.

(ii) The employee shall be given ample/adequate time to respond thereto and be assisted with any documents or information that he/she may need to effectively respond to the charges, if such information or documents are in possession of the employer.

(iii) Where the employee needs interpretation services in responding to the charges, he/she should be afforded the same by the employer.

(iv) If upon response from the employee the employer decides that the matter shall proceed to hearing, the employee shall again be afforded all the above services and informed of the venue for the hearing on adequate notice.

(v) The employee shall be informed of his/her right to come along with an employee of his/her choice and a union representative if the employee is a member of a union.

(vi) An employee shall be allowed and given an opportunity to present his/her case and question any witness called, if he/she so desires.

(viii) The employee must be informed of the outcome of the disciplinary hearing and informed of his/her right of appeal and the procedure applicable.

35. The foregoing are some of the ingredients of fair hearing. This list is not exhaustive. Even where the disciplinary hearing does not conform 100% to the above steps, the procedure adopted shall be fair and reasonable to afford an employee an opportunity to defend himself/herself and demonstrate his innocence or otherwise.

36. Applying the foregoing principles to the facts of this cause it is clear that the Claimants were not subjected to fair hearing or fair procedural fairness before their dismissal. There is no evidence that the Claimants were served with clear statements of the

charges/complaints, there is no evidence that disciplinary hearings took place, there are no minutes of the disciplinary hearings, and there is no evidence that the claimants were given an opportunity to appeal against the decision of summary dismissal against them.

37. Counsel for Respondent has relied on **Kenya Revenue Authority Vs Meninija Salim Murgam (2010) eKLR** to the effect that a hearing need not be oral or physical and that letters exchanged between the employer and employee(s) may amount to a hearing. However, there is no evidence of such letters exchanged between the Claimants and the Respondent on the subject matter. There is no letter stating the charges/complaints and responses thereto.

38. The only evidence produced by the Respondent in this regard are statements recorded by the Claimants in regard to the alleged theft. That cannot amount to fair hearing as envisaged in law and the principles outlined above. While employers may not be expected to follow the rules of evidence and procedure applicable in a court of law nonetheless they are expected to apply rules of natural justice and reasonable fairness.

39. This court holds that while the Respondent had reasonable substantive reason for summarily dismissing the Claimants, it did not apply fair procedure in taking and enforcing the decision. In the circumstances, the summary dismissal of the Claimants by the Respondent was hence unlawful for want of procedural fairness.

VII. <u>RELIEFS</u>

40. A party to a cause is bound by the pleadings filed and the reliefs sought by the Claimants have been set out in the first page of this judgment as extracted from the Statement of claim. This court shall now proceed to consider each of the reliefs sought.

41. Prayer (a) is for declaration that the Claimants' termination (summary dismissal) was unfair. This court has already found that the dismissal was unfair for want of procedural fairness and same is hereby declared as such.

42. Prayer (b) is for reinstatement of the Claimants to their previous employment. While **Section 49(3) (a**) of the Act provides for reinstatement as one of the remedies that this court may grant, **Section 12 (3)(vii) of the Employment and Labour Relations Court Act** qualifies and clarifies the place of this remedy by providing that the same may only be granted within three (3) years of dismissal. The Claimants were dismissed in 2012, almost 10 years ago, and hence this remedy is not available to them in 2022.

43. However, in the alternative to prayer (b) above the Claimants pleaded for compensation for unfair termination (dismissal) in prayer (c). This remedy is provided for in **Section 49(1)(c) of the Act** and while assessing and arriving at a reasonable award under this head this court shall be guided by the factors set out in **Section 49(4) of the Act**. The award made shall not exceed the equivalent of twelve months wages based on the gross monthly wage or salary of the employee at the time of dismissal.

44. As noted elsewhere in this judgment the Claimants were dismissed summarily on suspicion of involvement in theft of property belonging to a client of the Respondent. Subsequently to the alleged theft, the claimants were arrested and charged in court for their alleged involvement. While this court has not had the benefit of perusing through the proceedings in the criminal trial, it is common ground that the claimants were not convicted. They were either discharged or acquitted.

45. Whatever happened in the Criminal case this court is inclined to take the view that a theft took place in the premises of UNGA LIMITED, a client of the Respondent, wherein the Claimants were on duty. It is logical and reasonable to conclude that the claimants were either negligent while on duty or that they took part in the theft.

46. This court holds that the Claimants, to a large extent, contributed to the misfortune that befell them in losing their employment with the Respondent. RW1 testified that after the alleged theft the Respondent lost the business from UNGA LIMITED. This court has already found that were it not for the procedural unfairness leading to the summary dismissal of the Claimants, the Respondent had reasonable grounds for dismissing them summarily.

47. Although an employee may not be a shareholder in the business of his/her employer, it is incumbent upon the employee, at all times, and in his/her own personal and financial interest in his/her continued employment, to guard and protect the property and lawful interests of the employer. If and where an employee engages in unlawful or sabotaging activities against his employer, and as a result the employee is terminated or dismissed, such an employee must shoulder his/her fair share of blame.

48. Had the Claimants been vigilant and professional in their duties they could not have lost their employment. It is this court's view that the Claimants were co-authors of their misfortune.

49. There is no evidence on record as to whether the Claimants were able to secure jobs after the dismissal and if they did how long it took them. There is no evidence on the situation in the security services industry and whether jobs are easy or hard to come by.

50. The Respondent offered to pay what it considered to be dues payable to the Claimant but the same were rejected by the Claimants.

51. In his testimony and his statement dated 26th March 2021, the 1st Claimant stated that he had worked for the Respondent for a period of over 12 years at the time of his dismissal. There is no evidence on record on how long the 2nd and 3rd Claimants had worked for Respondent at the time of dismissal.

52. Considering all the above scenarios and factors and applying the parameters provided for in **Section 49(4)** of **the Act,** this court is of the considered view that an award of three (3) months gross salary to each of the Claimants is fair and reasonable compensation. This is based on the finding that the claimants were not subjected to procedural fairness otherwise this cause should have been dismissed.

53. The last disclosed gross salary for the 1st Claimant as exhibited in the payslip for October, 2011 is Kshs.12,000/= and hence under this head he is awarded **Kshs.12,000 X 3 = 36,000/=.**

54. The last disclosed gross salary for the 2nd Claimant is Kshs.6,754/= as exhibited in the payslip for September, 2011 and hence his dues under this head is **Kshs.6,757/= X 3 = Kshs.20,272/=.**

55. There is no payslip availed in respect of the 3rd Claimant on record. There is no other evidence availed to enable this court to establish his last pay Nothing of help is to be found in the pleadings and hence this court is unable to make any award to the 3rd Claimant.

56. Prayer (d) "**is payment of their terminal benefits"** and prayer (e) "***payment of all sums calculated as underpayment in salary and other allowance.***" This court is unable to make sense of the same. What terminal dues? Where is the evidence on the same? Where is the calculation of the under payments in salary and other allowances?

57. **CW1**, the 1st Claimant, who testified on his own behalf and on behalf of the other Claimants, did not adduce any evidence in support of prayers (d) and (e). It is not enough to state or make an allegation in the pleadings. A party to a suit must tender evidence in support of the allegations in the pleadings to persuade the court to find in their favour and prove its cause. The Claimants failed to execute that duty.

58. However, this court notes that the Claimants were not issued with a notice before dismissal and hence they are legally entitled to one(1) month's gross salary *in lieu* of notice. The 3rd Claimant again misses out on this award as there is no evidence of what his gross salary was at the time of his dismissal.

VIII. <u>COSTS</u>

59. Costs follow events and the 1st and 2nd Claimants are awarded costs based on the awards made above.

IX. <u>DISPOSAL</u>

60. Disposal of this cause this court makes the following orders:

(a) A declaration be and hereby issued that the summary dismissal of the Claimants by the Respondent was unfair and unlawful for lack of procedural fairness.

(b) The 1st and 2nd Claimants are awarded the following:-

(i) 1st Claimant

- Compensation for unlawful Dismissal - **Kshs.36,000/=**

- One(1) months' salary *in lieu* of Notice- **<u>Kshs.12,000/=</u>**

TOTAL - <u>Kshs.48,000/=</u>

(ii) 2nd Claimant

- Compensation for unlawful Dismissal - **Kshs.20,271/=**

- One(1) months' salary *in lieu* of Notice- **<u>Kshs.6,757/=</u>**

TOTAL - <u>Kshs.27,028/=</u>

The awards in (b) (i) and (ii) above are both subject to statutory deductions.

(c) The 1st and 2nd Claimants are awarded costs based on the awards made. There is no order as to costs in regard to 3rd Claimant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2022.

.....

DAVID NDERITU

<u>JUDGE</u>