



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 305 OF 2017

JUMA MWANZA.....CLAIMANT

VERSUS

H. YOUNG & CO. (E. A) LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant avers that he was employed by the respondent as a driver, with effect from 5th September, 2016 until 7th November, 2016, when he was summarily dismissed following allegations that the fuel seal of the machine, he was operating, had been tampered with. He denied the allegations and termed his dismissal as unjustified, unlawful, illegal and in breach of his employment contract. As such, he seeks against the respondent the sum of Kshs 675,705/= being notice pay, severance pay, service pay, unpaid leave days, transport allowance and compensatory damages.

2. In its defence, the respondent stated that the claimant by his acts and/or omissions was involved in the destruction of its property contrary to his employment contract thus it had a right to summarily dismiss him from employment pursuant to section 44(g) of the Employment Act.

3. The matter proceeded for trial on 7th October, 2021 when the claimant's case was taken and later, on 11th November, 2021 when the defence closed its case.

Claimant's case

4. At the commencement of the hearing, the claimant adopted his witness statement to constitute part of his evidence in chief. He also produced the documents filed together with his claim as exhibits before court.

5. It was his testimony that during the month of November, 2016, there were allegations that he had tampered with the fuel seal of the machine he was operating. That he denied the allegations and the offense was investigated by the internal security department of the respondent company but he was not found to be culpable. He stated that he was later served with a letter dismissing him from employment, which according to him, was unfair and unprocedural.

Respondent's case

6. The respondent called oral evidence through Ms. Serah Wangethi who testified as RW1. She introduced herself as the respondent's Human Resource Manager and adopted her witness statement and the documents filed on behalf of the respondent, to constitute part of her evidence in chief. The said documents were also marked as exhibits.

7. She averred that on 3rd November, 2016, the respondent's security officer Mr. Francis Gitonga, carried out investigations to establish the condition of all the machines and vehicles operated by the employees. That according to reports from the investigation, all machines were intact except the MG20, whose fuel seal had been tampered with and further investigations revealed that 40 litres of fuel had been drawn. That the said MG20 was at all times being operated by the claimant who had the responsibility of its safety and security of its contents. RW1 further told court that the claimant was given an opportunity to explain himself vide his statement of 5th November, 2016 but the same was found to be unsatisfactory. That as such, the respondent concluded that the claimant was directly or indirectly responsible for the tampering of the seal and loss of fuel hence his summary dismissal. She further stated that the claimant was paid his terminal dues upon dismissal.

Submissions

8. Both parties filed written submissions upon close of the hearing. On his part, the claimant submitted that his termination was unfair as the same was without a valid reason and was not in compliance with fair procedure. He buttressed his submissions on the cases of **Mary**

Mutanu Mwandwa vs Ayuda (2013) eKLR and Jared Aimba vs Fina Bank Limited (2016) eKLR.

9. On its part, the respondent submitted that the claimant fundamentally breached his employment contract on account of dishonesty and negligence, hence as an employer it had a right to summarily dismiss him pursuant to section 44(3) of the Employment Act. It placed reliance on the case of **Thomas Sila Nzivo vs Bamburi Cement Limited (2104) eKLR**. The respondent further submitted that the claimant failed to utilize the opportunity granted to him to tender his defense as he failed to acknowledge receipt of and respond to the letter containing the allegations. The respondent further submitted that a hearing need not be oral and on this issue, he invited the court to consider the determination in the case of **Jacob Oriando Ochanda vs Kenya Hospital Association limited t/a Nairobi Hospital (2019) eKLR**.

Analysis and determination

10. Arising from the pleadings by both parties, the evidence on record and written submissions, this court is being called to resolve the following questions;

- i. Whether the respondent had valid and fair reasons to dismiss the claimant from employment?**
- ii. Whether the claimant was given a fair hearing prior to this dismissal from employment?**
- iii. Is the claimant entitled to the reliefs sought?**

Whether the respondent had valid and fair reasons to terminate the employment of the claimant?

11. Under the Employment Act, it is mandatory for an employer to prove that it had valid and fair reasons to terminate the employment of an employee. This is also known as substantive justification and is provided for under sections 43(1) and 45(2) (a) and (b) of the Employment Act (Act).

12. **Section 43(1)** of the Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair, while **section 45 (2) (a) and (b)** provides that a termination of employment is unfair if the employer fails to prove-

- a) that the reason for the termination is valid;**
- b) that the reason for the termination is a fair reason-**
 - i. related to the employee's conduct, capacity or compatibility; or**
 - ii. based on the operational requirements of the employer;...**

13. The test of fairness and validity is quite subjective and is dependent on the circumstances of each case.

14. The reason for the claimant's dismissal is captured in his letter of summary dismissal which reads in part;

"It has been noted that the fuel seal of the machine you operate, MG20 had been tampered with and on further investigations it was noted that there was a huge discrepancy of fuel on the same machine. When requested to explain how the above issue came about, you were unable to clarify the findings on the ground. The Employment Act section 44(c) states: if an employee commits, or on reasonable and sufficient ground is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property he is liable for summary dismissal. Thus, the management has been left with no alternative but to terminate your service summarily effective Monday, 7th November, 2016..."

15. Essentially, the reasons for the claimant's dismissal was founded on suspicion of theft hence bordered on criminality. The allegations were refuted by the claimant.

16. The handwritten investigation report which was prepared by the respondent's security officer, Mr. Francis Gitonga states as follows;

"...I started my investigation in all vehicles and machines Shovel (SH-12) everything was intact and fuel okay, grader MG20 the seal was tampered with serial no HY0262281 and so the fuel attendant was to take the measurement and when he return(sic) to industrial plot do calculation and give me feedback. We proceeded to the (illegible) seals were intact and fuel system not tampered with including also the excavator. Today, on 4th November, 2016, he came at 6:32 am and he informed me that the fuel which was stolen after the calculation was 40 litres from MG20 which is being operated by one Juma Mwanza Company (illegible). The seal which was tampered with is in the custody of the fuel manager.

FINDINGS AND RECOMMENDATIONS

According to the findings I have unearthed the crime which could have been concealed if I had not made quick action after receiving the information from my informer. Bearing the weight of the offence committed by the operator namely Juma Mwanza, I recommend that he be dismissed forthwith and Mocam Security guard company meet the expenses of lost fuel and guards be changed immediately of which I have done already. Also the attendant to submit fueling sheet to me to be able to monitor the fuel usage of the machine daily." Underlined for emphasis

17. From the above investigation report, the following issues are discernible;

- a) **The machines and vehicles of the respondent were parked within the same yard;**
- b) **Mr. Gitonga received information on the tampering of the fuel seal from an informer;**
- c) **The said place was under security (Mocam Security) with guards stationed; and**
- d) **After the incident, the said guards at the yard were changed.**

18. On the same note, several questions remain unanswered;

- a) **What was the probable time when the fuel seal was tampered with; was it before or after the machine was parked at the yard by the claimant;**
- b) **When did the informer ascertain that the fuel seal of the machine MG20 had been tampered with?**
- c) **Whether the guards at the parking yard recorded statements over the incident, since they were engaged by the respondent to guard its machines and vehicles while parked at the yard; and**
- d) **Was there a system by the respondent, of ensuring that the fuel seals of the machines and the vehicle were intact at the time a driver drives in or out the parking yard?**

19. It is also instructive to note that the said Mr. Francis Gitonga never testified before court hence these lingering questions remained unanswered. What presents before me is therefore a case of high suspicion against the claimant without any tangible proof save the fact that he was the one operating the machine MG20 at the time. I am also mindful that the standard of proof in such cases is on a balance of probability as opposed to beyond reasonable doubt.

20. I will therefore draw guidance on the issue from the determination in the case of **Bamburi Cement Limited vs William Kilonzi [2016] eKLR** where the learned Judges of the Court of Appeal held thus: -

“The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer.”

21. From the report of Mr. Gitonga, the claimant was not in charge of the machine 24/7 (round the clock) since he would park it at the yard at some point. While parked, the machine was supposed to be under the guard and watch of the security guards stationed therein. There was therefore a gap between the time the claimant would park the machine at the yard and the time he would pick it up.

22. In the circumstances, was there a likelihood that the seal was tampered with and fuel lost while the machine was in the hands of the claimant? The answer is yes. Was there a probability that the seal was tampered with and the fuel siphoned while the machine was parked at the yard? The answer is also yes.

23. This therefore presents a 50:50 scenario which required more investigations from the respondent’s end. In particular, Mr. Gitonga ought to have received statements from the guards who were in charge of the yard. Indeed, it was apparent that he had his own suspicions against the guards at the yard hence his recommendation that the Mocam security guard company meets the costs of the lost fuel and the security guards be changed.

24. It would thus seem that the only reason for the claimant’s dismissal was on account that he was the one tasked with operating the machine at the time. Besides that fact, there was no other evidence against him. However, the respondent overlooked all the other factors especially the fact that the machine was not in the hands of the claimant 24/7 and opted to dismiss him. As such, the circumstances leading to the claimant’s dismissal brings to the fore many gaps which I have enumerated herein.

25. Taking into totality the circumstances herein, the evidence presented and the applicable standard of proof, I arrive at the conclusion that the dismissal of the claimant was not based on valid grounds hence was wrongful.

26. That takes me to the next issue for determination and that is whether the claimant was given a fair hearing prior to his dismissal from employment.

Whether the claimant was given a fair hearing prior to this dismissal from employment?

27. The respondent has stated that the claimant was given an opportunity to render a written explanation in respect of the allegations levelled against him. However, the said written explanation was not presented before court in evidence. The respondent further submitted that the requirement of an oral hearing is not mandatory once an employee has rendered a written explanation.

28. The requirement for fair procedure is generally provided for under **section 45 (2) (c)** of the Act. **Section 41** provides the details and specific requirements that must be complied with in order for a termination to pass the fairness test. Subsection (2) is relevant in this case as

it relates to summary dismissal. It provides as follows;

“(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.” Underlined for emphasis

29. It is notable that the above stated provision is couched in mandatory terms as was further amplified by the Court of Appeal in the case of **Janet Nyandiko vs Kenya Commercial Bank Limited [2017] eKLR**, as follows: -

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

30. As regards the necessity of an oral hearing, the Court of Appeal in the case of **Kenya Ports Authority vs Fadhil Juma Kisuwa [2017] eKLR** reckoned as follows;

“It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.”

31. The court gave more clarity to the issue in the case of **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR** in the following manner;

“Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with... The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held.” Underlined for Emphasis

32. In this case, I will adopt and reiterate the findings in above case for the reason that, the allegations leveled against the claimant had the likelihood of depriving him of his livelihood and which likelihood actually came to pass. Consequently, an oral hearing in the presence of a fellow employee or shop floor union representative was necessary.

33. In absence of any hearing as required under section 41 of the Act, the court arrives at a finding that the claimant’s dismissal was unprocedural hence unlawful.

34. Is the claimant therefore entitled to any of the reliefs sought?

Available Reliefs

One month’s salary in lieu of notice

35. As I have found that the claimant’s dismissal was wrongful and unlawful, the court awards him one month salary in lieu of notice pursuant to section 35 (1) (c) of the Act.

Compensatory damages

36. The claimant has prayed for compensatory damages in the sum of **Kshs 535,764.00**. As I have found that the claimant’s dismissal was wrongful and unlawful, I will award him compensatory damages equivalent to two (2) months’ gross salary, noting that the employment relationship was quite short-lived as it lasted only 2 months.

Service Pay

37. The claimant has sought service pay in the sum of **Kshs 22,323/=**. **Section 35(6)** of the Act only provides for service pay where employees are not members of any pension scheme, provident fund or the National Social Security Fund (NSSF). From his pay slip for October, 2016, the claimant was a contributor to the NSSF and deductions towards the fund were being effected from his salary. In light thereof, he falls within the ambit of exclusions stipulated under section 35 (6) (d) of the Act hence the claim under this head falls.

Severance Pay

38. This relief is denied as the same is only payable to employees whose termination is pursuant to section 40 of the Employment Act, which was not the case herein.

39. The employment relationship having been admitted, the claimant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

Orders

40. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month's salary in lieu of notice	45,831.00
Compensation equivalent to 2 months' gross salary	91,662.00
Total	<u>137,493.00</u>

41. The award, shall attract interest at court rates from the date of Judgment until payment in full.

42. The respondent shall also bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mburia
For the Respondent Mr. Amukhale
Court assistant Barille Sora

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 had 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 Civil 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.

STELLA RUTTO

JUDGE