



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2172 OF 2017**

**MARTIN MWANZIA NGUMU.....CLAIMANT**

**VERSUS**

**MULTIPLE HAULIERS (E.A.) LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant instituted the suit herein vide a claim dated **23<sup>rd</sup> October 2017**. Pursuant to leave granted by the court on **27<sup>th</sup> May 2021**, he filed an amended claim dated **31<sup>st</sup> May 2021**. Through the amended claim, the claimant avers that he was arrested and charged in criminal case No. 3487 of 2012 at the Naivasha law courts for the theft of the respondent's motor vehicle registration No. KBC 987Y/ZC9096.
2. The claimant avers that he was later acquitted of the said charges but nonetheless, the respondent refused to reinstate him back to work, thus he termed the said refusal as amounting to unlawful termination from employment. As a result, he seeks from this court severance pay, compensatory damages, notice pay, leave allowance, salary for the period he was charged until the date of his acquittal.
3. The claim was opposed by the respondent through its Response to the Statement of Claim dated **19<sup>th</sup> April 2018** through which it denied the claimant's allegations in toto. The respondent has admitted that following the theft of its motor vehicle, the claimant was charged in a criminal court and was later acquitted of the charges preferred against him. It has however denied promising the claimant reinstatement upon acquittal. Consequently, the respondent has asked the court to dismiss the claim with costs.
4. The matter proceeded for trial on **2<sup>nd</sup> December, 2021** and the claimant testified in support of his case, while the respondent opted not to call oral evidence but instead, opted to rely on its defence.

**Claimant's case**

5. The claimant adopted his witness statement dated **31<sup>st</sup> May, 2021** together with the bundle of documents filed together with his claim. He asked that the same be admitted as part of his evidence in chief. The documents were also produced and marked as exhibits before court.
6. It was the claimant's testimony that he was employed by the respondent as a clerk sometimes in August 2008 but was not issued with a contract of employment. That he was in charge of the respondent's trailers and his work station was at Naivasha. That on the night of **26<sup>th</sup>/27<sup>th</sup> November, 2011**, one of the respondent's trailers went missing and subsequently, he notified its head office at Nairobi, as required. That the driver of the missing trailer also reported the incident at Naivasha police station. That the trailer was later tracked to Kamandula and the security team ascertained that its HFO had been tampered with.
7. That he was later arrested and charged in criminal case No. 3487 of 2012 at Naivasha Law courts and was later acquitted of the criminal charges sometimes in 2015. That while he was out on bond, he reported to the respondent's offices, whereupon he was verbally informed that he would be reinstated upon acquittal from the criminal charges. That consequently upon acquittal, he reported to the respondent's head offices at Nairobi to follow up on his reinstatement to work, but his efforts were in vain. He further told court that he was not issued with a letter dismissing him from employment.

**Respondent's case**

8. As stated herein, the respondent did not call oral evidence but instead, elected to rely on its defence statement. In a nutshell, the respondent's defence is that the claimant does not have a justifiable claim against it. That the claimant has not substantiated before court that he was promised reinstatement to work upon acquittal. The respondent further avers that the claimant's dues were settled and at no particular time was he duped or coerced to accept a lesser amount than what was due to him. That indeed, the claimant acknowledged receipt of the money paid out to him thus further confirming that he was satisfied with the same.

## Submissions

9. Both parties filed written submissions with the claimant submitting that the respondent did not rebut his evidence as regards the manner in which his employment was terminated. He further submitted that he was not taken through a disciplinary hearing hence his termination was unfair, unprocedural and illegal. In support of his submissions, he has cited the case of **Nairobi Civil Appeal No. 87 of 2018 Cooperative Bank of Kenya Limited vs Sammy Kimeli Yator** and **Kenfreight (E.A) Limited vs Benson K. Nguti(2016) eKLR**. He further submits that he has proved his case on a balance of probability hence he has urged the court to allow his claim.

10. On its part, the respondent submits that the claimant's actions led to breach of a fiduciary duty to the respondent's client. That the fact that the claimant was arrested and charged with the offence of stealing before a criminal court proves that the reasons for summary dismissal were well founded. That further, the claimant had failed to prove that he reported his acquittal to the respondent. It was also the respondent's submission that the criminal trial was not a bar to it conducting its own internal process and consequently taking its own appropriate action in the circumstances. On this score, the respondent invited the court to consider the findings in the case of **Mutua Musau vs Barclays of Kenya Limited [2016] eKLR, BIFU vs Ukulima Sacco Ltd, ELRC No. 1109 of 2011** and **Thomas Sila Nzivo vs Bamburi Cement Limited [2014] eKLR**.

## Analysis and determination

11. Upon consideration of the issues arising from the pleadings, the testimonies before court and the submissions on record, this court is being called upon to determine the following issues;

a) **Was the claimant's termination unfair and unlawful?**

b) **Is the claimant entitled to the reliefs sought?**

### **Was the claimant's termination unfair and unlawful?**

12. In order to prove fair termination under the Employment Act, two elements must be proved from the employer's end, that is, substantive justification and procedural fairness. I will proceed to address the two elements separately.

#### **(a) Substantive justification**

13. *Section 43(1) and 45(2) of the Employment Act, requires the employer to establish that it had valid and fair reason to cause the termination of employment. As such, the onus of proving that there exists a substantive justification for termination, lies with the employer.*

14. **Section 43** of the Employment Act provides for substantive justification in the following manner -

***"[43(1)] In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the 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 reason or reasons for termination of a 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."***

15. It is not in dispute that one of the respondent's trailers went missing, while the claimant was stationed at Naivasha, and that he was charged with a criminal offence in connection with the same. It is apparent that his arrest and subsequent criminal trial, triggered his eventual disengagement from the employment relationship with the respondent.

16. In its defence, the respondent has averred that it did not promise the claimant reinstatement upon his acquittal. It can thus be inferred that its failure to reengage the claimant, stemmed from the theft of its motor vehicle from Naivasha, where the claimant was stationed at the time. Nonetheless, it has not adduced any evidence pointing to the fact that the claimant was responsible in one way or the other for the theft of its motor vehicle.

17. It is not lost to the court that an acquittal in a criminal trial does automatically absolve an employee from any disciplinary action by an employer. Nonetheless, the respondent was bound to prove that the reason for the claimant's dismissal was fair and valid. It did not need to prove the same beyond reasonable doubt as in criminal cases. All it was required to do was establish proof on a balance of probability, which is the requisite standard of proof in such cases.

18. In addition to the foregoing, there was no indication from the respondent's end that the claimant was negligent at all in his performance of duty hence the loss of the truck.

19. As a matter of fact, the respondent did not present its actual allegation against the claimant, if at all. As it is, it is not clear whether the respondent's complaint against the claimant was on account of negligence on his part or was on suspicion of theft.

20. Whichever the case, all the respondent needed to prove before court was that it genuinely believed that there were reasonable and sufficient grounds to suspect that the claimant was directly or indirectly involved in the theft of its motor vehicle either on suspicion of theft or for negligence. In this case no evidence was tendered at all and no indication was given as to the real allegation against the claimant by the respondent.

21. In light of the foregoing, the court finds that the respondent has not proved that it had a fair and valid reason to terminate the claimant's employment.

**(b) Procedural fairness**

22. Procedural fairness entails the process an employee is subjected to, prior to termination from employment. The same is broadly provided for under section 45 (2) (c) of the Employment Act while the details are stipulated under Section 41 in the following manner:

***“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the 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 representative of his choice present during this explanation.***

***(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.”***

23. In the instant case, the claimant avers that he was not issued with a notice to show cause nor was he subjected to a disciplinary hearing. Notably, the respondent did not rebut this allegation. The respondent averred in its defence that the claimant's charge before a criminal court was a confirmation that he was liable for summary dismissal under section 44 of the Employment Act.

24. The respondent has rightfully submitted that the pending criminal trial was not a bar to an internal disciplinary process. It is therefore not clear why it did not subject the claimant to its own internal process. If at all it had reasons to believe that the claimant was involved or was to blame for the theft of its truck in any way, nothing prevented it from commencing a disciplinary action against him. As it was, its hands were not tied at all and it had the unfettered discretion as an employer to undertake whatever disciplinary action it deemed fit against the claimant.

25. It would therefore seem that the respondent let go of the claimant once he was charged before a criminal court, with no further reference to him.

26. It is worthy to note that the provisions of section 41 of the Employment Act are mandatory regardless of the nature of the misconduct by the employee. In this case, it is obvious that the respondent did not subject the claimant to fair procedure. It merely stated in its defence that the claimant was not promised reinstatement upon acquittal. Granted, it did not have to reinstate him to employment automatically. However, it was duty bound to grant the claimant an opportunity to respond to any allegations it may have had against him and which may have resulted in him being terminated.

27. On this score, I am guided by the determination by the Court of Appeal in the case of **National Bank of Kenya vs Anthony Njue John [2019] eKLR**, where it was held 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 levelled against him by the employer.”***

28. In view of the foregoing determination, which I fully adopt and reiterate and taking into account the lapses apparent on the side of the respondent, I cannot help but find that the claimant's termination fell short of the requirements stipulated under sections 45(2) (c) and 41 of the Employment Act.

29. Against this background the court comes to the conclusion that the claimant's termination from employment was unfair and unlawful as the respondent failed to prove that it had a valid and fair reason to terminate him and further, did not accord him procedural fairness, in so doing.

30. Having found as such, what reliefs then avail to the claimant?

**Reliefs**

31. As I have found that the claimant's termination was unfair and unlawful, I will award him six (6) months' gross salary as compensatory damages.

32. The claimant is also awarded one month salary in lieu of notice.

33. As regards the claim for severance pay, the same is denied as it is only payable pursuant to termination through redundancy, which was not the case herein.

34. The claim for leave allowance is similarly denied as there is no evidence of entitlement to the same.

35. The claimant has also prayed for salary arrears between the period he was charged to the date of his acquittal. The same is not payable as

he has admitted that he did render any services to the respondent during the said period. He would only have been entitled to the same had he proved that he actually worked, but was not remunerated accordingly. An award of the same would amount to unjust enrichment as was held in the case of **Elizabeth Wakanyu Kibe vs Telkom Kenya Limited (2014) eKLR**.

### **Conclusion**

36. In the final analysis, I enter judgment in favour of the claimant against the respondent for the sum of **Kshs 140,000/=** being;

**a) Compensatory damages in the sum of Kshs 120,000/= which sum is equivalent to 6 months gross salary.**

**b) One month's salary in lieu of notice being Kshs 20,000/=.**

37. The award will be subject to interest at court rates from the date of judgment until payment in full.

38. The respondent shall also bear the costs of this claim.

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

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**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For Claimant            Mr. Ongegu

For the Respondent    Mr. Chasia

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**