



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1940 OF 2016

OMBACHI STANLEY.....CLAIMANT

VERSUS

TANDU ALARM SYSTEMS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant instituted the matter herein vide a claim dated **16th September, 2016** through which he avers that his termination was unlawful, unconstitutional and wrongful, in that the respondent did not provide any evidence to support the charges against him. Consequently, he seeks compensatory damages, service pay and one month's salary in lieu of notice.

2. The claim was opposed by the respondent who filed a response to the claim together with a Counter Claim. The respondent denied the allegations set out in the claim and contended that the claimant was summarily dismissed from employment following several violations in breach of his employment contract. The respondent further counterclaimed against the claimant the sum of **Kshs 40,299/=**, being unaccounted for fuel, amounting to 612 litres.

3. The claimant filed a response to the counterclaim where he denied the allegations in toto. He avers that he was not afforded an opportunity to respond to the allegations against him. He also questioned the authenticity of the report by the respondent in that he was not mentioned in the initial forensic investigation report and that the investigation was not conducted on the designated routes where he plied and that the report assumes that he was in control of the vehicle at all times while indeed it was shared with other drivers.

4. The matter proceeded for hearing on 18th October, 2021 and both parties called oral evidence.

Claimant's case

5. The claimant adopted his witness statement together with the bundle of documents, which were filed with the claim, to constitute part of his evidence in chief. The documents were also produced as exhibits before court.

6. It was the claimant's testimony that he was employed by the respondent with effect from **4th April, 2014** as an operational driver. That he served as such until **4th April, 2016** when his employment was terminated following accusations that he was part of a conspiracy to defraud the respondent company during fueling of the motor vehicle assigned to him. That the motor vehicle assigned to him at the time was a Ford Ranger registration number KAY 218L. He further testified that the said motor vehicle was old and was not serviced as required hence its fuel consumption was high.

7. It was also his testimony that he was not the only driver assigned to drive the said motor vehicle hence the loss was not wholly attributable to him.

8. He admitted being issued with a notice to show cause why disciplinary action should not be taken against him and a notice inviting him for a disciplinary hearing but added that he was not furnished with any document to enable him defend himself. He further stated that he was not given an opportunity to cross examine his accusers during the disciplinary hearing. He further averred that no criminal charges were preferred against him for the alleged fraud.

9. During cross examination, the claimant admitted that he knew the allegations against him were in respect of fuel and that he did not lodge an Appeal against his dismissal since the same would have been considered by the same person(s) who dismissed him.

Respondent's case

10. The respondent called oral evidence through Mr. Martin Haylock and Mr. Michael Mulobi both of who testified as RW1 and RW2 respectively.

11. At the outset, Mr. Haylock adopted his witness statement as well as the bundle of documents filed on 3rd March, 2017 on behalf of the respondent, to constitute part of his evidence in chief. He also produced the said documents as exhibits before court. He identified himself as the respondent's Managing Director.

12. It was Mr. Haylock's testimony that the claimant had been cited for a number of disciplinary issues. That at one time he absconded duty and on another occasion, he caused an accident on the road. He further told court that sometimes in late 2015/2016, the respondent's accountant raised some issues in respect of fuel consumption in that, the fuel drawn was not correlating with the mileage covered by the motor vehicles. That this necessitated investigations which incriminated the claimant. As such, the claimant was issued with a notice to show cause why disciplinary action should not be taken against him but since his answers were unsatisfactory, he was taken through a disciplinary hearing and thereafter dismissed from employment.

13. Mr. Mulobi who testified as RW2, identified himself as the respondent's Transport Manager. He also adopted his witness statement dated 3rd March 2017, to constitute part of his evidence in chief.

14. Mr Mulobi told court that the motor vehicle in question would ordinarily go for 10kms/liter and that as per the respondent's policy, it would be fueled when the fuel level had dropped to a quarter (¼) tank. That the respondent's accountant noted that there was high fuel consumption in several motor vehicles including the one assigned to the claimant. As such, the motor vehicles were fueled and driven for a distance of 10 kilometers, so as to establish the number of kilometers covered per vehicle per kilometer. He referred the court to the forensic audit report which was produced as an exhibit and which provided an indication of the fuel drawn, projected kilometers, the actual kilometers and the variance. That the motor vehicle in question was serviced regularly and it was not possible for it to consume the fuel as alleged by the claimant. That every driver who had fueled a motor vehicle assigned to him and discrepancies noted, was issued with a show cause letter.

15. In cross examination, he stated that together with the respondent's Quality Audit Officer, they undertook the exercise of ascertaining how much each motor vehicle consumed per kilometer.

Submissions

16. Both parties filed written submissions upon close of the hearing, with the claimant submitting that his termination was unfair and unlawful as the process stipulated under **section 41 (1) of the Employment Act** was not complied with. He further urged that the respondent had failed to inform him of his right to have another employee or shop floor representative present during the disciplinary hearing and that he was not provided with the material evidence or witness statements used against him. He relied on the several authorities including **Jared Aimba vs Fina bank Limited (2016) eKLR**, **Kenya Union of Commercial Food and Allied Workers vs Meru North farmers Sacco Limited (2014)** and **Rebecca Ann Maina & 2 others vs Jomo Kenyatta University of Agriculture and Technology (2014)eKLR**. He summed his submissions by stating that he had proved his case on a balance of probabilities.

17. On its part, the respondent submitted that the claimant's dismissal was in accordance with his employment contract and the provisions of section 41 of the Employment Act, 2007. That the claimant was issued with a notice to show cause and invited for a disciplinary hearing, which he attended. The respondent invited the Court to consider the findings in the case of **Mkala Chitavi vs Malindi water & Sewerage Co. Ltd 92013) eKLR**. The respondent further submitted that the claimant was afforded a chance to appeal the dismissal but opted not to do so, thereby confirming that the termination was fair. It urged the court to consider the case of **Thomas Sila Nzivo vs Bamburi Cement limited (2014) eKLR**.

Analysis and determination

18. From the pleadings, the evidence and the submissions on record, this court is being called upon to determine the following questions;

a. Whether the claimant's termination was unfair and unlawful?

b. Whether the claimant entitled to the reliefs sought?

c. Is the counter claim justified?

Unfair and unlawful termination?

19. The claimant has termed his termination as unlawful, unconstitutional and wrongful on account that the respondent did not provide any evidence to support the allegations levelled against him. On the other hand, the respondent states that the claimant's dismissal from employment was pursuant to breach of his employment contract.

20. The parameters of determining whether a termination from employment was fair and lawful are stipulated under sections 43, 45 and 41 of the Employment Act (Act).

21. From the foregoing provisions, it is discernable that an employer must satisfy two requirements, that is substantive justification and procedural fairness. The same was well summarized by the Court of Appeal in the case of **Janet Nyandiko vs Kenya Commercial Bank Limited [2017] eKLR**, as follows;

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the

employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize 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 any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

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."

22. With the above summary mind, I will proceed to consider each of the two limbs separately.

(i) Substantive justification

23. Substantive justification entails prove of the reasons for an employee's termination. Further, such reasons ought to be fair and valid in terms of section 45(2) (a) and (b) of the Act.

24. In the instant case, the claimant was charged with an attempt to defraud the respondent during fueling of the motor vehicle assigned to him. This can be ascertained from his letter of dismissal which reads in part;

"...Further to the disciplinary hearing held at the head office on the subject of fuel irregularities at the company. Through forensic investigation on the consumption of company vehicles. Between the month of December and mid-March 2016 the fuel consumption in litres of the company vehicles was noticed to be very high compared to kilometers covered. This brought more suspicion and the transport officer ventured into investigations and audited the vehicles as follows. The consumption of the vehicles against the audit results shows without any reasonable doubt that the figures which the drivers have been submitting are wrong and not applicable this clearly indicated a major fraud in the company. As per the Employment Act which states that "an employee commits or on reasonable and sufficient grounds is suspected of having committed, criminal offence against or to the substantial detriment of his employer property..."

25. The respondent shored up its defence by providing copies of the motor vehicle fueling sheet, forensic investigation report on the fuel consumption of the Motor Vehicles audited and the forensics audit report on the consumption of fuel by motor vehicle registration number, KAY 218L, which was assigned to the claimant at the time as well as copies of receipts issued after fueling the vehicle.

26. According to the forensic audit conducted by the respondent, the claimant had submitted returns that indicated that the motor vehicle was consuming 1litre of fuel for every 3 km covered, while the investigations revealed that the normal consumption rate expected of the said motor vehicle was 11 km per litre.

27. The claimant contended that the motor vehicle had a high rate of consumption as it was not serviced as required. He further stated that he was not the only driver assigned to drive the said motor vehicle hence any high consumption could not be wholly attributed to him.

28. The motor vehicle fueling sheet which was produced in exhibit by the respondent indicated the consumption rate per litre by the motor vehicle registration number KAY 218L, as ranging from 2.4 kilometers per litre to 8.2 kilometers per litre. Specifically, it is notable that between 25th February, 2015 to 15th March, 2016, the said motor vehicle was driven by and fueled by the following drivers including the claimant; Stephen Nyaga, Willis Omondi, Julius Mbatha, Geoffrey Okal, Luka Amuli and Charles Kwaka while the fuel consumption during that period ranged from 2.4 kilometers per litre to 4.8 kilometers per litres.

29. According to the motor vehicle fueling sheet, the fuel consumption on the motor vehicle, KAY 218L was 8.2 kilometers per litre, on 19th March, 2016, when RW2 took it for a road test so as to ascertain its actual consumption. This was a variance from the consumption reported by the claimant and his colleagues.

30. Further, it is notable from the forensic report that all the drivers were implicated. It states as follows; *"...The vehicle had been fueled 35 litres to full tank, this is contrary to what the drivers normally indicate in the fueling sheet that the vehicle takes 65-67 litres full tank..."* The report further states that; *"The consumption of the two vehicles KCA 240Z and KAY 218L against the audit results shows without any reasonable doubt that the figures which the drivers have been submitting are wrong and not applicable. This clearly indicates a major fraud to the company."*

31. Therefore, the claim by the claimant that he was not the only driver handling the said motor vehicle cannot act as a good defence in this instance.

32. Indeed, the forensics report states that on 15th March, 2016, when RW2 ambushed the said motor vehicle while being driven by one Geoffrey Okal, the same was fueled at 35 litres to full tank and the same was corroborated by the motor vehicle fueling sheet which

translates the consumption rate at 6.6 kilometers per litre.

33. It is on the basis of the findings from the investigations that the respondent took disciplinary action against the claimant.

34. As per the claimant's employment contract, part of his terms of contract stated as follows: "you are directly responsible to the company transport manager for the efficient and economic operation of company vehicles in support of the company's guard group employed within Nairobi."

35. Therefore, it follows that the claimant was to ensure efficiency and economical operation of the motor vehicles. As such, when the respondent became suspicious of the manner in which the claimant and his colleagues were reporting on the consumption of the said motor vehicles, it had reasonable grounds to commence disciplinary action against him.

36. Section 43(2) of the Act provides that;

"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".

37. As such, the reasons for which an employee's employment is terminated are those reasons an employer genuinely believed to exist, hence the standard of proof is on a balance of probability and not beyond reasonable doubt.

38. In the instant case, the respondent was doubtful of the reports tendered by the claimant in respect of the consumption of the motor vehicle in his hands. The ensuing investigations, pointed to the fact that the reports were not accurate. This inaccuracy suggested some level of dishonesty on the part of the claimant.

39. In the Canadian case of *Mc Kinley vs B.C.Tel. (2001) 2 S.C.R. 161* it was held as follows;

"Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

40. As stated herein, the claimant was assigned to drive the motor vehicles belonging to the respondent. As such, he was entrusted with fueling the said motor vehicle and accounting for the mileage consumed. It is therefore without a doubt that honesty was key in sustaining the said employment relationship. Once there was doubt and suspicion as could be discerned from the fueling schedule and the forensic audit report, the trust the respondent had in the claimant faltered.

41. Moving forward, it would have been difficult for the respondent to entrust the claimant with the same responsibility as before. As such, the claimant's conduct had given rise to breakdown of the employment relationship.

42. In the circumstances, the respondent had a fair and valid reason to terminate the claimant from employment, and I so find.

43. In arriving at this determination, I am persuaded by the finding of *Ngcobo, JA. in Nampak Corrugated Wadeville vs Khoza (JA 14/98) [1998] ZALAC 24* to the effect that:

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

44. The next question for determination is whether the claimant was subjected to procedural fairness.

(ii) Procedural fairness

45. Procedural fairness entails the process an employee is subjected to prior to termination of employment. This is generally provided for under section 45(2) (c) while the details of the process are stipulated under section 41 of the Act. This process involves notifying the employee the reason for which the employer is considering termination. The employee is also entitled to have another employee or a shop floor union representative of his choice present during this explanation.

46. In this case, the claimant was issued with a notice to show cause why disciplinary action should not be taken against him. He responded to the show cause letter through which he denied the allegations levelled against him. Subsequently, he was invited for a disciplinary hearing which he attended.

47. The claimant has contended that he was not given the forensic or the audit reports at the hearing of his case. However, he does not indicate whether he requested for the same and his request denied. It was incumbent upon the claimant to request for the evidence against him if at all he felt that he needed the same. From the claimant's response to the show cause letter, his request was only that the respondent's

MD be present to hear his side of the story. There was no request for access to any evidentiary material.

48. The claimant has further averred that he was not informed of the right to have another employee or shop floor representative present during the hearing. The disciplinary minutes which were produced in evidence, indicate that the claimant confirmed that he was comfortable without a representation. Coupled with the foregoing, he appended his signature on the same minutes as a confirmation that the same were a true record of the proceedings.

49. On this score, I am guided by the Court of Appeal's decision in the case of **Violet Kadala Shitsukane vs Kenya Post Savings Bank [2020] eKLR**, where the learned Judges opined that;

“Since the question was not before the Judge, we do not intend to address it, save to state at this point that section 41 of the Employment Act, upon which this argument is drawn, only entitles an employee at the disciplinary hearing to invite another employee or a shop floor union representative of his or her choice, if he or she wishes..... that it is the employee's duty to avail to the employer the names of those he or she would like to attend the hearing; and that the court cannot impose them on the employee.”

50. It was therefore upon the claimant to notify the respondent of his wish to be accompanied and provide the name of such person. Besides and going by the minutes which the claimant did not dispute, the choice was open to him but he opted not to be accompanied. It is notable that he did not challenge the accuracy of the minutes to that extent. I therefore find the claimant's argument to that end to be an afterthought.

51. **Further, in the case of Paul Waa Mwaponda vs Ola Energy Kenya Limited (Formerly Known as Libya Oil Kenya Limited) [2019]** the Court found that where in a disciplinary hearing the employee has waived his right to have a fellow employee present and the employer followed the laid down procedure under Section 41, the termination is deemed to be lawful and fair.

52. The upshot of the foregoing is that, I am persuaded that the claimant was afforded a fair hearing.

Is the counter claim justified?

53. The respondent has counterclaimed against the claimant the sum of Kshs 40,209/=, being the 612 litres of fuel unaccounted for. However, the same was not justified since the respondent did not properly correlate the invoices and the amount of fuel claimed against the claimant.

54. The respondent ought to have gone a step further and justified the 612 litres as well as the invoice amounts against the claimant. Further, there was no prevailing price schedule provided as being applicable during the material time, so as to justify the sum in the counterclaim. It would appear that the figure of Kshs 65.70 was plucked from the air as it was not backed by further evidence.

55. In this case, the respondent merely annexed the invoices but failed to provide any proper explanation to correlate each payment against each invoice, hence prove its case against the claimant. The court will not grope in the dark. In absence of such an explanation and justification, the counterclaim is dismissed.

Orders

56. In the final analysis, I find that the claimant's dismissal was neither unfair nor unlawful hence he is not entitled to the prayers sought and in the premises, I dismiss the claim in its entirety and make no orders as to costs.

57. Similarly, the counterclaim is dismissed as the same has not been justified.

58. Each party will bear its own costs.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Wandurwa

For the Respondent Mr. Omondi

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