



**Lwungi v Agro-Irrigation Pump Services Limited (Cause 547 of 2016)  
[2022] KEELRC 12705 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12705 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 547 OF 2016  
M MBARŪ, J  
JUNE 30, 2022**

**BETWEEN**

**AGGREY CHORE LWUNGI ..... CLAIMANT**

**AND**

**AGRO-IRRIGATION PUMP SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. In the year 1998 the respondent employed the claimant as a salesman and on 11<sup>th</sup> November, 2015 the respondent caused the claimant to be arrested at Embakasi police station. The next day the claimant reported to work and was handed a letter indicating that he had resigned but he refused to sign. He was then sent away and to date he has never been issued with letter terminating employment.
2. The respondent claimed that on 11<sup>th</sup> November, 2015 he had demanded for Ksh.100, 000 from a customer and when the director searched him the money was found in his pockets which he took. Such money was from sales of maize the claimant had earned.
3. On 12<sup>th</sup> November, 2015 upon police investigating the matter and the claimant was released without any charges he reported on duty and was being to sign a resignation letter and that he would not engage in a similar business for a year which he declined leading to termination of employment.
4. The claim is that there was unfair termination of employment and is claiming the following dues;
  - a. Salary from November, 2015 to March, 2016 ksh.219,438.50;
  - b. Notice pay ksh.43,856.70;
  - c. Service pay for each year worked ksh.789,960.00;
  - d. 12 months compensation Ksh.526,640.40;
  - e. Money taken from the claimant ksh.100,000;



- f. Leave days in the year 2015 for 30 days Ksh.43,886.70;
  - g. Leave travelling allowance Ksh.10,971.60; and
  - h. Costs.
5. The claimant testified that he was unfair terminated from his employment when the respondent directed alleged that he had taken Ksh.100,000 from a customer after selling pipes. The police statement filed indicating that he had admitted to such matter is not true and he did not sign it. The customer Hamza had ordered for pipes and an invoice issued for 2250 pipes which were assorted but the receipt was for 250 pipes. The claimant did not admit to holding 473 pipes. The police wrote the statement for him which says that the claimant hoarded 473 pipes which were not true. The police released him without preferring any charges.
6. The claimant also testified that after his arrest he never went back to work. He later got letter dated 25<sup>th</sup> February, 2017 but he refused to sign it.
7. In 2015 the claimant took his annual leave of 10 days but was never paid his leave allowance.

### **Response**

8. In response, the respondent's case is that the claimant has failed to disclose material facts in his claim. He was employed on 14<sup>th</sup> April, 1998 until 12<sup>th</sup> number, 2015 after which date he absented himself from duty without permission and refused to attend duty.
9. On 11<sup>th</sup> November, 2015 the claimant was reasonably suspected to have committed a criminal offence and acts which would have caused substantial loss to the respondent's business when he carelessly and improperly performed his duties contrary to the employment contract. In an attempted scheme of conspiracy to defraud and obtain money by false pretences, the claimant dishonestly and knowingly with intent to steal from the respondent, concealed from an invoice which he raised from the respondent's client and gave unlawful discounts without prior consent of the respondent.
10. The claimant received a cheque from the client for the amount invoiced ksh.810, 000 which he accounted for but failed to account for or issued a receipt for a further Ksh.100, 000 which he received from the client.
11. The respondent received a complaint from the client which prompted the respondent directors to interrogate the claimant leading to uncovering of theft and fraudulent actions. Upon searching the claimant, he was found to possess ksh.100, 000 hidden in his socks which he could not account for or explain the source prompting the respondent to call the police for investigation.
12. The actions of the claimant constitute breach of trust, contract of employment and led to summary dismissal.
13. While the claimant was in police custody, his wife visited the respondent and pleaded for pardon and the charges were withdrawn. The claimant had admitted to the theft and on humanitarian grounds the charges were withdrawn but he never reported back to work and has since deserted duty only to file suit and the claims made are not justified and should be dismissed with costs.
14. In evidence, the respondent called Dinish Halai the director and who testified that the claimant was a salesman doing sales and preparing invoices and delivery note and on 11<sup>th</sup> November, 2015 at 2pm he saw a customer parked for a long time. He was waiting for a vehicle to be loaded and when he went to check he found one employee Njagi loading pipes and when he asked for the invoice he noted the



volumes and amounts were not tallying and on further interrogation, Njagi run away and has never been found since.

15. Mr Dinish testified that the client, Hamza had told him that he was given discounted pipes by the claimant and paid ksh.100, 000 which amount was put in the left socks of the claimant. He had paid the rest through cheque. They both went to the claimant and upon a search, the amount was found on him and he could not explain how such amount was hidden save to say he had old maize back at home. The police were called and arrested the claimant but the wife came and pleaded for mercy due to family circumstances and that the claimant was the sole bread winner.
16. Hamza wrote a statement with the police and admitted to giving the claimant the Ksh.100, 000 for pipes and the claimant was also made to write a statement and admitted to having the cash found on him. He had sold extra pipes to Hamza and was paid in cash found on him.
17. On humanitarian grounds, the respondent opted to withdraw the charges against the claimant but he refused to resume duty. The respondent wrote to the county labour office with regard to the claimant's absence from duty.
18. At the close of the hearing, both parties filed written submissions which have been put into account.
19. An employer has the right to dismiss an employee from his employment for breach of contract and for gross misconduct. where an employee is found to have committed a criminal offence or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detrimental of his employer or his employer's property, summary dismissal is allowed in terms of Section 44(4)(g) of the [Employment Act](#), 2007 that;
  - (g) 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.
20. The safeguard to the employee is that notice must issue and the employee allowed giving his representations pursuant to Section 41(2) of the [Employment Act](#), 2007.
  - (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.
21. In this case, the claimant does not contest that following a transaction with a customer, Hamza on 11<sup>th</sup> November, 2015 he was confronted by the director Mr Dinish and he was found with ksh.100, 000 in cash in his left sock. He was arrested by the police at Embakasi police station. The police took a statement from him which details the events at the shop floor to the effect that the customer gave him ksh.100,000 and he stuffed it in his right foot sock and that;

... I wish to state that these deals happen maybe once or twice a month, I usually benefit from discounting. The monies I collected from customers are usually divided between me, Njagi and the loaders. ...
22. This is an official record from the police. This statement was filed together with the respondent's response in terms of Rule 13 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016 which allow a respondent to file its evidence when responding to a claim. No objections were made to these records.



23. The claimant on his own admission, he obtained discounts from customers without the knowledge of the employer. On 11<sup>th</sup> November, 2016 he was found with monies obtained from such proceeds. He breached a fundamental condition of his duty as a salesman. Such a position called for trust and confidence as held in *Violet Kadala Shitsukane v Kenya Post Savings Bank* [2020] eKLR that;
- "... The respondent [the employer] had reasonable grounds for dismissing the appellant [the employee] for failing to adhere to operational procedures contrary to the laid down policy of the respondent. Even though there was no evidence to suggest that she benefited from or participated in the fraud, the fact that her password was used was sufficient for the respondent, in view of its nature of business, to lose faith and trust in the appellant. We emphasize that the standard an employer deploys in dealing with employee fraud and theft is not the criminal standard of proof.
24. When trust is lost due to the conduct of the employee over matters that are criminal in nature, summary dismissal for such gross misconduct is justified. See *Evans Kamadi Misango v Barclays Bank of Kenya Limited* (2015) eKLR.
25. With regard to application of Section 41(2) of the *Employment Act*, 2007 the claimant testified that after leaving the police station he went back to work and issued with a letter indicating that he had resigned and that he would not work in similar business for a year and he refused to sign the letter. He left employment. Mr Dinish for the respondent on the other hand testified that the claimant never resumed duty after he left the police station. After the claimant failed to report to work, he was called and he made a report to the Labour Officer in terms of Section 18(5) (b) of the *Employment Act*, 2007 that;
- (5) Upon the termination of a contract of service—
- ...
- (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
26. The respondent sent notice to the Labour Office with regard the absence of the claimant. Such is lawful and acceptable in lieu of the claimant attending.
27. Termination of employment became complete with the notice to the Labour Officer. The same is found justified and for lawful cause.
28. Notice pay and compensation are remedies not available in a case of justified summary dismissal.
29. The claim for salary from November, 20115 to march, 2016 is for a period the claimant was out of work. Upon summary dismissal for lawful cause, the employee is only paid all moneys, allowances and benefits due to him up to the date of his dismissal.
30. On the claim for service pay, the claimant filed his payment statement attached as "AC5" and therein are various statutory deductions including payments of NSSF and NHIF. Pursuant to Section 35(6) of the *Employment Act*, 2007 service pay is not due.



31. On the claim for monies taken from the claimant, on the evidence above, the police statement that the claimant obtained such monies fraudulently from a customer of the respondents for sale of goods at a discounted rate without approval by the respondent, such monies do not belong to the claimant. He cannot claim what he never owned.
32. On the claim for leave at 30 days, under section 28 of the *Employment Act*, 2007 the claimant was entitled to 21 days of annual leave. He testified that he had 10 days of annual leave pending. Such shall be tabulated at the shop floor and paid if due.
33. Leave travelling allowance is not contractual or based on any law. The claimant has not produced a private contract, treaty or agreement to justify such a claim.
34. Accordingly, the claims made are without merit and are hereby dismissed in their entirety. Costs to the respondent.

**DELIVERED IN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Peter Kigotho

..... and .....

