



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 622 OF 2015**

**JOAN KOECH .....1<sup>ST</sup> CLAIMANT**

**CHARITY GUAMA.....2<sup>ND</sup> CLAIMANT**

**JOHN K. MUTAL.....3<sup>RD</sup> CLAIMANT**

**ERIC ASEBE.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**SWISSPORT KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants' case is contained in the Amended Memorandum of Claim filed on 17.7.2015 in which they averred that they were unfairly dismissed from employment by the respondent on 27.5.2015. Consequently, they prayed for the following reliefs:

**a) Reinstatement to their work place**

**aa)Declaration that the entire disciplinary process was unprocedural and unfair**

**ab)Damages for unfair and wrongful termination**

**ac)Certificate of service**

**b) Payment of outstanding allowances and unpaid salaries for the month of May, 2015**

**c) General Damages**

**d) Costs of this suit**

**e) Interest on (c) and (d) above court rates**

**f) Any other remedy**

2. The Respondent filed her defence on 6.11.2015 in which she denied the alleged unfair termination and averred that following investigations conducted by Kenya Airports Authority, the Claimants together with 10 others who were engaged in handling of British Airways aircrafts, were found to have been involved in pilferage of the Airlines' passengers' property hence their airport passes were withdrawn. It further averred that pursuant to court's direction, she served the Claimants with show cause letters and thereafter invited them to a fair disciplinary which the claimants attended in the company of union officials. Finally, it averred that the claimants refused to say anything in answer to the charges citing this case and consequently, it proceeded to dismiss them. It therefore prayed for the suit to be dismissed with costs.

3. The matter proceeded to full hearing when both parties gave evidence and thereafter the parties filed written submissions.

**Claimants' case**

4. Erick Asebe Wanyama, the 4<sup>th</sup> Claimant testified as Cw1 and adopted his Witness Statement dated 17.4.2015 as his evidence-in-chief. He

told Court that he was employed vide a letter of appointment dated 18.1.2013 and he had good relations with his employer until when he was locked out of the office following allegations of theft and investigations by the Kenya Airports Authority (KAA). He further stated that he never saw the investigation report and when KAA was enjoined in the suit it said it had nothing against him.

5. Cw1 further testified that on 17.4.2015, the Court directed the Respondent to reinstate him but she declined even after KAA returned his airport pass and instead it served him with a show letter and thereafter summoned him to a disciplinary hearing. However, he contended he attended the hearing with a union official and informed the committee that the case was pending in Court and he had nothing to say. Thereafter, he received the termination letter dated 26.5.2015 and all he was paid was his outstanding dues including his May 2015 salary but there was no salary in lieu of notice. Therefore, he prayed that the Court do award him certificate of service, salary in lieu of notice, 12 months compensation and costs of the suit.

6. Upon cross-examination, he admitted that the Respondent alleged that there were investigations by KAA which recommended for withdrawal of passes from suspected employees; that his name was in the list of employees whose passes were withdrawn; that vide the letter dated 6.5.2015, the Respondent, informed him that his employment was to be terminated because his airport pass had been withdrawn by KAA on the basis of the investigation report which has a result of a compliant by British Airways; that paragraphs 2 and 4 of the letter referred to Clause 42.2 of the Collective Bargaining Agreement which provided that the employer would give 30 days' notice to secure the airport pass if withdrawn; and that the letter indicated that unless he secured an access pass from KAA his services would be terminated.

7. Cw1 could not recall whether he responded to the said letter but confirmed that he received the show cause letter dated 14.5.2015 which indicated the complaint by British Airways on pilferage of goods, and he responded on 21.5.2015 denying the offence by stating that he could not give a concrete response to the matters of 24<sup>th</sup> and 25<sup>th</sup> August 2014, 23<sup>rd</sup> September 2014, 21<sup>st</sup> and 31<sup>st</sup> October, 2014. Further, he could not recall if he served his response to the respondent.

8. He admitted that the show cause letter implicated him because he was the security officer when goods were pilfered from the British Airways flights. He admitted that he was invited to a disciplinary hearing by the letter dated 25.5.2015 and he was given the right to attend the hearing with a fellow employee; that he attended the hearing on 26.5.2015 with his union representative Mr. Ndiema; that the reason for the intended termination was explained to him but he refused to respond to the charges because the matter was pending in court; and that he signed the attendance and the minutes of the disciplinary hearing. He confirmed that the termination letter dated 26.5.2015 cited the reason for the termination as negligent performance of his duties.

9. He reiterated that he was paid all his terminal dues through his bank and a payslip was issued to him. However, the particulars of the payment and the computation thereof was not given to him. He contended that he appealed against the dismissal and the Chief Executive Officer informed him verbally that the appeal was dismissed. He further confirmed that he never went back to the Respondent for clearance or to collect the certificate of service.

10. On re-examination, he admitted that he was given notice to secure another Airport pass or be dismissed and when his pass returned he was served with show cause letter and thereafter he was invited to the disciplinary hearing. He contended that there was no specific allegation of the pilfered items but a general allegation of lost electronics

11. John Kemboi Mutai, the 3<sup>rd</sup> Claimant testified as Cw2 and he also adopted his witness statement dated 17.4.2015. He testified that on 31.3.2015, he was turned away and he was not reinstated to work despite the Court's order; that he was invited to a disciplinary hearing on 25.5.2015 which he attended but refused to respond to the charges and told the committee that the matter was pending in Court. Thereafter he was served with a termination letter dated 27.5.2015 and his dues paid through his bank but they were less due to wrong computation because his basic pay was Kshs. 30,039 but was paid Kshs. 26,679 as his dues. He contended that he was treated the same as the 1<sup>st</sup> and 2<sup>nd</sup> Claimants.

12. On cross-examination, he testified that he was employed effective 1.3.2000 as a security officer and his role was the general security of property and passengers; that he was stopped from working on 31.3.2015 and was issued with several notices before termination.

13. He confirmed that the email dated 22.1.2015 provided a list of names which were being investigated but contended that he did not know the nature of the investigations and why his name was included in the email. However, he admitted that the security manager informed him that his pass had been withdrawn and that the investigations were done by KAA and not his employer.

14. He further admitted that the CBA required him to obtain another Airport Pass within 30 days and that he received communication from his employer notifying that if he did not secure the pass within 30 days he would be dismissed. He confirmed that he was given his pass back and thereafter he was served with show cause letter dated 14.5.2015 which he responded to by his letter dated 27.5.2015, the day he was issued with the termination letter.

15. He further confirmed that he had a meeting with Human Resource Manager (HRM) together with the other claimants but that they were not given anywhere to sign to indicate their attendance; that the HRM spoke about the show cause letters but they told her that the matter was still in court; that he was never shown the minutes of the disciplinary hearing but he appealed against the termination through the union; and that he never protested after being paid less dues because the matter was in court and also because the money was paid through the bank.

16. In re-examination, he testified that 30 days never lapsed before his pass was returned to him; that the letter dated 21.5.2015 was on new matters and not the issue of the pass; that KAA told the court that it had never ordered for withdrawal of his pass; that KAA never investigated him and the email dated 22.1.2015 was not addressed to him but it included the name of the 1<sup>st</sup> and 3<sup>rd</sup> Claimants.

#### **Respondent's case**

17. Fredrick Nambuya, the Respondent's Security Manager, testified as Rw1. He told Court that the respondent had a contract with the

British Airways to provide security services to property and people at the Airport. He further testified that the Claimants were on diverse dates engaged as security agents by the respondent. He also testified that the British Airways complained to KAA by the letter dated 27.2.2015 and copied the Respondent, that many passengers who were arriving in London would find that some of their items had been stolen. As a result, KAA wrote to the Respondent about the complaint and requested for facilitation of investigations by providing deployment and a duty roster.

18. He further testified that the respondent provided the information to KAA and upon review, a Report of the investigations was provided on 19.2.2015; that in the Report, KAA recommended for repossession of the Airport passes for the persons who were found responsible for the pilferage; that the 5 Claimants herein were in the list of the people found responsible for pilferage in KAA investigation report; that the investigations report indicated that the Respondent's employees were interviewed including the 2<sup>nd</sup> Claimant who explained how the pilferage was being done.

19. He testified that other officers of the Respondent were interviewed among them Vincent Nyangeri, a Security Officer who said that everything happens at the sorting area in the presence of the following the screener, Bravo III (the Security Agent), Papa II (the Scanner) and the Porter of the bags who work in collusion; that a bag is put in a container and is opened or taken to the adjacent ramp office and valuables are removed; and that he mentioned the 1<sup>st</sup> and 3<sup>rd</sup> claimants as the prime suspects.

20. Rw1 contended that the findings of the investigations implicated all the Claimants herein and the respondent complied with the recommendations in the investigations report by withdrawing the claimants' passes but it released them back to the Claimants and she disciplinary proceedings against them as directed by the Court. He confirmed that the Claimants were invited to a disciplinary hearing which they attended together with their union representative but they refused to respond to the charges against them.

21. On cross-examination, he testified that they acted on an email and letter dated 30.3.2015 from British Airways however it was not a complaint but a follow up letter on its earlier complaint.

22. He testified that the Claimants were dismissed on 27.5.2015 and explained that on 31.3.2015, they withdrew the Claimants passes following a request by KAA. He contended that the documents on record show that the Claimants were the main suspects and explained that he was not asked to give a statement to the investigator because he was new in the company.

23. He testified that he informed the Claimants the reasons for withdrawal of their passes and confirmed that the respondent never suspended the Claimants pending investigations by KAA. He further confirmed that all the Claimants were not interviewed and maintained that the Investigations Report recommended for immediate withdrawal of the Claimants' airport passes while British Airways by a letter dated 27.2.2015 demanded that the Claimants be barred from working on its operations. He denied knowledge that when KAA was the 2<sup>nd</sup> Respondent herein, it told the Court that it never instructed the Respondent to withdraw the Claimant's passes.

24. He confirmed that the notices of intention to terminate employment dated 6.5.2015 were without pay and the reason therein was the lack of airport passes; that the letter dated 21.5.2015 referred to the notice of intention to terminate dated 6.5.2015 which was superseded by the return of the passes and this does not mean that the Respondent was determined to dismiss them.

25. He referred to Clause 39 of the CBA on suspension and denied that the Claimants were suspended pending investigations. He testified that the Claimants' status in the duty roster were indicated as either absent or off-duty pending disciplinary process and that they were marked as absent after authorities withdrew their passes. He, however, testified that the respondent never withdrew their passes but only complied with the investigations report which gave her instructions to withdraw the passes.

26. He confirmed that the respondent never took the Claimants back to work after the Court ordered so because British Airways rejected them and also they had not secured other Airport passes. He maintained that the Claimants were heard before termination and the invitation to the hearing gave the Claimants the right to be accompanied by the union official or a fellow employee.

27. He clarified that the different shift allowances were because the pay depends on the night shifts one worked. He further clarified that the 29 days' pay was recovered from the claimants because they were absent during that period due lack airport passes which were returned to them on 20.5.2015 He contended copies of the Claimants' certificates of service were in court meaning that they never went to collect the same.

28. Upon re-examination, he stated that the basis of the show cause letters and disciplinary hearing was pilferage cases; that the Claimants and the Union were given a copy of the investigations report by KAA; that the Claimants never responded to the show cause letters at first but they did after a reminder was given; that the Court did not restrain the employer from disciplining the Claimants for misconduct but it ordered for the return of airport passes to the claimants; that the reason for their dismissal of the claimants was not withdrawal of passes but pilferage; and finally, the Claimants did not formally complain to the court or labour office that they were denied a Certificate of Service.

#### **Claimant's submissions**

29. The claimants submitted that they were constructively dismissed on 31.3.2015 when the respondent withdrew their Airport Passes on alleged pilferage of British Airways' customers. They contended that by the said withdrawal, the respondent made it impossible for them to access the workplace to discharge their contractual duties. They contended that the Respondent's refusal to grant them access to the work place as ordered by the Court can only be construed to mean summary dismissal.

30. They relied on **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** where the Court held that constructive dismissal has its roots under the doctrine of 'discharge by breach' and an employee is entitled to treat himself as discharged from further performance of his obligations where the conduct was a breach that goes into the root of the contract. They further relied on **Joseph Aleper & another v Lodwar Water and Sanitation Company Limited [2015] eKLR** where the Court cited the finding in the **Western Excavating case**

(supra).

31. They argued that their circumstances fell within the facets of the definition of constructive dismissal which are an employer makes a unilateral alteration or breach of the employment contract to the detriment of the employee and that the employer permits the employees working conditions to be intolerable. They relied on **Emmanuel Mutisya Solomon v Agility Logistics Cause 1418 of 2011** and **Benuel Mariera v Awand Enetrprises Limited Cause No. 191 of 2013** where the Court in the latter case held that a contract is deemed to have been constructively terminated where an employer by action or omission breaches the contract or makes it impossible for an employee to perform his contract.

32. They denied ever breaching the respondent's code of conduct and averred that they worked in adherence to the Memorandum of Agreement between the Respondent and the Kenya Aviation Workers Union.

33. They argued that they were neither called to record statements nor interviewed hence they were not accorded a fair hearing as mandated by the law. They relied on **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** where the Court cited section 41 of the Employment Act and held that an employer is under an obligation to hear and consider any representation by the employee before making a decision to terminate the employee.

34. They submitted that their termination of employment was done unlawfully for lack of compliance with the law. They relied on **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** that disputes of summary dismissal are to be subjected to the test of section 41 of the Employment Act. They further relied on **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that there must be both substantive justification and procedural fairness. They also relied on **Liz Ayany v Leisure Lodges Limited [2018]** and submitted that no reason was given for their dismissal.

35. They submitted that Clause 39.0.1 of the Memorandum of Agreement between the Respondent and their Union provides that where an employee commits an offence warranting investigation the company is to suspend the employee on half pay. They argued that the Respondent did not suspend them but summarily dismissed them thus it did not follow due disciplinary procedure on cautioning them.

36. They argued that they were not heard before the report titled '*Investigation on British Airways Pilferage cases*' dated 19.2.2015 was made, which recommendation that their passes be withdrawn. In their view the disciplinary process done later was an exercise in futility of a termination. Therefore, they submitted that they were constructively summarily and unfairly dismissed, and prayed that they be awarded the remedies under section 49 of the Employment Act.

37. Accordingly, they contended that they are entitled to 2 months' salary in lieu of notice, 12 months' salary for loss of income, their salaries for the month of May 2015, the monies unlawfully recovered by the Respondent on account of being absent on 7.4.2015, house allowance, laundry allowance, accrued leave days and service gratuity. They further submitted that they are entitled to a Certificate of Service under section 51 of the Employment Act as the Respondent wilfully neglected to issue them with one. Finally, they prayed for the costs of the suit.

#### **Respondent's submissions**

38. The Respondent submitted that the Court in **James Ondima Kabesa v Trojan International Limited [2017] eKLR** held that the employer is expected to observe rules of natural justice in giving a notice of the impending hearing and the grounds for the disciplinary hearing to enable an employee defend themselves. It submitted that it availed the claimants with an opportunity to defend themselves but they squandered the opportunity by declining to co-operate and respond to the show cause letters hence they cannot fault her.

39. It further submitted that the Claimants' acts of pilferage of its clients' property is criminal in nature and would occasion business loss to her in the event of contract cancellation by British Airways thus the decision to terminate them after fair disciplinary process. It maintained that the reason to act against the Claimants was valid based on the investigation report by KAA and the numerous complaints from the airline which the claimants never challenged.

40. It relied on **Alois Makau Maluvu v Cititrust Kenya Limited & another [2018] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where the Court held that the employer must have a valid reason for terminating employment of an employee and the employee must be accorded a hearing and his defence considered before the termination.

41. Finally, it submitted that the Claimants did not provide any reason as to why disciplinary action should not be taken against them after being served with a show cause letter or defend themselves during the disciplinary hearing and as it had every reason to believe the investigation validity of the finding of guilt against them in the investigations report. Therefore, it urged the Court to dismiss the claim with costs.

#### **Issues for determination and analysis**

42. Having carefully considered the pleadings, evidence and submission presented by the parties, it is clear that the claimants were employed by the respondent as Security Agents at the Jomo Kenyatta International Airport until 27.5.2015, when they were summarily dismissed for negligent performance of duty. It follows that the lengthy submissions by the claimants on an alleged constructive dismissal on 31.3.2015, are not based on pleadings and evidence before the court. The court cannot determine an issue which is raised by way of written submissions after the close of the hearing since it has the potential of prejudicing the opposite party. The Court of Appeal, in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** held that:

*“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce...”*

43. In this case the claimants' case turns on the fairness of the dismissal and their entitlement to a reinstatement and award of compensatory damages. Section 45 of the Employment Act provides that:

***“(1). No employer shall terminate the employment of an employee unfairly.***

***(2). A termination of employment by an employer 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; and***

***(c). that the employment was terminated in accordance with fair procedure.”***

44. Consequently, the issues for determination are:

***a. Whether the dismissal of Claimants was grounded on a valid and fair reason.***

***b. Whether dismissal was done in accordance with a fair procedure.***

***c. Whether the Claimants are entitled to the reliefs sought***

#### **Reason for the dismissal**

45. The reason cited for the summary dismissal of the claimants was that they negligently performed their duties as security agents which resulted to loss of clients' property and jeopardized the respondent's business. The basis of the said decision by the respondent was a complaint of pilferage of customers' goods received from the British Airways and the ensuing investigations by the KAA which yielded the investigations report dated 19.2.2015. According to the said report, the claimants were implicated as among the persons responsible for the pilferage of the property of British Airways' customers. It is also common ground that as a result of the said findings, British Airways blacklisted the claimants and notified the respondent that they should not be assigned to serve the airline.

46. It is notable that they were served with show cause letters to defend themselves in writing but they did not serve any response within reasonable time. Further, they were invited to disciplinary hearing and they attended with their union official, but again they refused to respond to the charges and therefore they did offer any defence to exonerate themselves. In the circumstances, I find that the respondent was correct in finding that the claimants ought to be dismissed for negligent performance of their duty and pilferage of client's property to its detriment contrary to section 44(4) (c) and (g) of the Employment Act. The said provision states that an employer is entitled to dismiss an employee summarily for the following misconduct:

***“(c). If an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;***

***(g). an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment to his employer or employer's property.”***

47. In this case the claimants did not exonerate themselves from the findings of the KAA investigator that they were among the persons responsible for pilferage. During the hearing herein the claimants admitted that they were the security agents on duty at the material time and dates when the pilferage was done. Consequently, I find they did not act diligently to protect the client's property from pilferage as required under their contract of service. Further, I find that the suspicion that the claimants were involved in the pilferage, was not farfetched, but it was based on reasonable and sufficient grounds.

48. In view of the foregoing finding and observation, I am satisfied that the respondent has discharged its burden of proof under section 43 and 45 of the Act by establishing that the reasons for dismissing the claimants from service was valid.

#### **The procedure followed.**

49. Section 41 of the Employment Act provides:

***(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.”*

50. In this case, the Claimants admitted in evidence that they were served with a show letter and thereafter invited to a disciplinary hearing in the presence of a representative of their choice. They further admitted that they attended the hearing in company of an official of their trade union but refused to respond to the charges levelled against them because the matter was in court. According to the respondent, the failure to respond to the charges amounted to squandering of the opportunity to defend themselves pursuant to a consent order recorded by the parties in court.

51. I have considered the evidence presented on the procedural fairness and also the consent order dated 20.5.2015. It is clear that the Respondent was directed by the court to return the Airport Passes to the claimants and retain them in employment pending conclusion of the disciplinary process. The respondent further undertook to carry out a disciplinary process against the Claimants afresh and in accordance with its Human Resource Manual, the CBA in force, labour laws and the Constitution of Kenya. Consequently, I find that the respondent had the permission of the court to take the claimants through disciplinary process while this suit was still pending in court, and as such the claimants had no valid reason to refuse to defend themselves during the disciplinary hearing.

52. In view of the foregoing matters, I am satisfied that the claimants were served with show cause letters to defend themselves in writing and again they were invited to an oral disciplinary hearing by the respondent as required under section 41 of the Employment Act but they deliberately refused to say anything in defence. Consequently, it is my holding that the respondent has discharged its burden of proof under section 45 and 41 of the Act by establishing that it dismissed the claimants in accordance with a fair procedure.

**c. Whether the Claimants are entitled to the reliefs sought**

53. In view of the finding herein above that the employer has proved that the reason for dismissing the claimants was valid and that a fair procedure was followed, I decline to make declaration that the entire disciplinary process was unprocedural and illegal

54. For the same reason I find that the claimants are not entitled to reinstatement to their employment or damages for unfair and wrongful termination und section 49 of the Employment Act.

55. The prayer for Certificate of Service is allowed since Rw1 produced copies of their Certificates of Service for each of the Claimants and blamed them for the failure collect the same.

56. The Claimants' sought payments of outstanding allowances and unpaid salaries for the month of May 2015. Cw1 and Cw2 admitted in their evidence that they were paid the said salary and allowances and they were given the payslips. They further stated that the other claimants were treated the same. I have confirmed from the said payslips, computations and cheques filed by the respondent that the claimants were paid basic salary up to and including 27.5.2015, house allowance, laundry allowance, notice pay and accrued leave up to and including 27.5.2015.

57. The Claimants, in their Amended Claim, did not particularize the outstanding allowances and salary sought but have attempted to do so in their submissions. As held herein above, parties are bound by their pleadings and submissions do not constitute pleadings. Therefore, the prayer for the outstanding allowances and salary must fail for lack of particulars and evidence, but also because of the overwhelming evidence on record, that show that the claimants were paid their rightful salary and allowances for the days worked upto 27.5.2015.

58. The claim for general damages also fails since it is unsupported by the pleadings and evidence.

59. In the end, save for claim for Certificate of Service, the suit is dismissed with no costs.

**Dated and delivered at Nairobi this 11<sup>th</sup> day February, 2021.**

**ONESMUS N MAKAU**

**JUDGE**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**