



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1944 OF 2016

JOSEPH KINUTHIA MIGUONGO.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide his claim dated 20th September 2016 seeking recompense for the alleged unlawful/unfair termination of employment and the non-payment of compensation damages. He averred that he was employed by the Respondent on 24th February 2014 as a driver and that while in the course of his employment he served the Respondents diligently and to their satisfaction. The Claimant averred that his last salary was Kshs. 25,584/- per month. He averred that on 16th December 2015 he reported to work as usual but he was unable to proceed with his duties as he noticed the safe lock of the vehicle he was assigned to drive was faulty. He reported to the Respondent's Operations Manager one Mr. Francis Kamande about the faulty lock and Mr. Kamande insisted that the Claimant should carry on regardless of this. The Claimant averred that he respectfully indicated to the manager that due to security concerns, the repairs be conducted to ensure accountability and safety of the money to be transported. The Claimant stated that he insisted that he instead opted to be assigned another vehicle for the faulty lock to be repaired. For this he was forced to go to the Respondent's Planning Officer Mr. Felix who was able to repair the car and duties finally resumed. The Claimant averred that on 17th December 2015 he received a letter from the Respondent to attend a disciplinary hearing in which the Respondent resolved to terminate his services immediately. The Claimant averred that the disciplinary meeting he attended was a farce as he was not given any show cause letter detailing the charges he faced, he was denied a right to present any witnesses towards his defence and was not given an opportunity to interrogate any witnesses or evidence tabled against him. The Claimant averred that he never received any communication from the Respondent despite several requests for appeal and follow up for the same. He averred the action of terminating his employment was unfair, unlawful and against the provisions of the Employment Act, the Constitution of Kenya and the tenets of fair labour practice. The Claimant averred that arising from the unlawful and unfair termination he was entitled to payment of his terminal dues and compensatory damages being one month's salary in lieu of notice – Kshs. 25,584/-, prorated leave for 6 months – Kshs. 15,800/- and the maximum 12 months compensation under Section 49 of the Employment Act – Kshs. 307,008/-, interest on the sums claimed as well as costs of the suit.

2. The Respondent in its defence averred that the Claimant was its driver from 24th February 2014 to 18th December 2015. It averred that the Claimant, whose position required utmost trust and responsibility as a driver, was lawfully terminated from employment for gross misconduct due to unprofessional activities detrimental to the Respondent's operations and image contrary to the terms of contract of service and his legal obligations as an employee under the Employment Act, No. 11 of 2007. The Respondent averred that the Claimant whose position required utmost trust and responsibility on 16th December 2015 failed to heed to his outright instructions from the operations manager through insubordination, failing and/or refusing to operate the motor vehicle assigned to him and failing to ferry cash to the designated area. The Respondent averred that on 17th December 2017 it wrote to the Claimant informing him of the termination on account of insubordination and gross misconduct in accordance with the Employment Act and a notice to show cause why disciplinary action should not be taken against him. The Respondent averred that the Claimant was thereafter on 17th December 2015 invited to a disciplinary hearing where his explanation was heard in regard to his adamancy to operate the assigned vehicle and while his reasons were unsatisfactory, his contract of employment was terminated. The Respondent averred that upon the conclusion of the disciplinary hearing, the disciplinary panel recommended the termination of the Claimant on account of insubordination which amounts to gross misconduct. The Respondent averred that subsequently the Claimant exercised his right of appeal and was invited for the appeal hearing committee and the panel upheld its earlier decision to terminate the Claimant's services for insubordination. The Respondent averred that upon dismissal his dues were computed and that this suit is therefore unnecessary as the Claimant had been paid. The Respondent averred that the claims detailed in the memorandum of claim have no factual or legal basis and are only intended to mislead the court. The Respondent thus urged the dismissal of the Claimant's claim with costs.

3. The matter was heard and the Claimant testified that he was employed as a driver on 24th February 2014 and was later elevated to position of team leader. He said that when he reported to work on 16th December 2015 he was assigned to carry cash to the Central Bank of Kenya and while checking the car he noticed the lock had only one rivet. He reported to Mr. Kamande who told the Claimant to go to Central Bank then come back. He stated that he told the manager that the lock has to be repaired before leaving for Central Bank for the safety of the cash.

He testified that Mr. Kamande told him to go to Central Bank with the defect but he insisted the safe has to be repaired. He stated that he went to Mr. Oluoch who fixed the lock and after that took the cash to Central Bank. He said that on the morning of 17th December 2015 he was informed of a disciplinary hearing and he got a notice to show cause. He stated that at the disciplinary meeting they just concluded he had to be dismissed and he was given the termination letter on 18th December. He stated that he got a chance to appeal but did not have a hearing and he said the decision to dismiss him was unfair. He thus sought damages as enumerated in his claim.

4. In cross-exam he testified that he earned Kshs. 22,100/- less house allowance and with house allowance amounted to Kshs. 26,160/-. He stated that his position as team leader was over 3 policemen and that he reported to his seniors as the lock system was faulty. He stated that he had to stop to have the lock repaired first. He testified that Mr. Kamande said that thought the lock was loose he could drive with it that way. He stated he was transporting cash and could not go with a faulty lock. He said he was not called for the appeal and that the procedure was unlawful.

5. The Respondent's witness Mr. Wilbur Munoko testified that the Claimant failed to heed the instructions of the Operations Manager. The instructions were that the Claimant who said he had found a loose lock should deliver the cash to Central Bank. He testified that the Operations Manager inspected the lock before giving the instructions and that the Claimant was told the safe was okay for the delivery. He testified that the Claimant refused and incited the security officers not to work. He testified that the money was delayed and they received a complaint from the client and as a company initiated the disciplinary process. He stated that show cause was issued on 17th December 2015 and it gave reasons and awaited his reply. He stated that the Claimant attended and was represented by 3 Union shop stewards and he signed the disciplinary hearing attendance. He said insubordination is gross misconduct liable to summary dismissal and that the action of the Claimant amounted to gross misconduct. He said the Claimant was given an opportunity to respond to the show cause and defend himself at the disciplinary hearing. He testified the Claimant insisted he had not been insubordinate but had refused to take the instructions of the Operations Manager. For this the Respondent gave the Claimant a termination letter dated 18th December 2015. He said the Claimant had 7 days to appeal and wrote an appeal which as per the disciplinary code can be made on three grounds. He stated that if the penalty is harsh, if procedure is not followed and one must state what part of procedure was disregarded and thirdly, if there is new evidence or a new witness. He stated that the employees are privy to these conditions. He testified that the Claimant's letter did not contain any of these 3 grounds of appeal. He stated that the outcome of the appeal was communicated. He stated that the Claimant cleared with the Respondent and terminal dues paid in full.

6. In cross-examination he testified that the responsibility of the Claimant as a team leader was to be in charge of the vehicle he was assigned plus the occupants. He stated that the Claimant was not to proceed if faulty lock was noted and the Claimant was required to report to the Operations Manager. He said that the Claimant reported to the Operations Manager who looked at the safe and it was loose but he instructed the Claimant to go on the journey. He testified that the complaint by the client was to the Respondent but it was not availed to Court. He said it was wrong to say that the Claimant did the right thing by refusing to take the vehicle with faulty lock. He stated that the Claimant was given ample time and was to respond the same day. He said the same day response was ample time and that the people who represented the Claimant at the hearing were people of the Claimant's choice. He testified that the eyewitness was the ATM Manager and that the minutes of the disciplinary meeting are contained in the form before the Court. He said that the Claimant was called to the appeal hearing and the appeal did not take off as the Claimant did not meet the threshold. He stated that the Respondent followed due procedure before termination and the Claimant was given sufficient time to respond and he had the whole day which was enough.

7. In re-examination the Respondent's witness testified that the Claimant was represented by shop stewards who are officials of the Union who represent all unionized staff in their cases. He said that it was in order for the Operations Manager to give the greenlight to deliver the cash. He stated that the Operations Manager assessed the lock and found it fit to proceed. He said the lock was loose but not faulty. He stated that the employee has to adhere to instructions. He testified that if the employee was dissatisfied he could refuse to sign but if he signed the disciplinary form he accepts the process was free and fair. He stated that if the employee is dissatisfied with representation he can decline and the reasons for the failure to sign are recorded. He stated that the Claimant never complained that the time given for the disciplinary process was not sufficient and there was therefore no reason not to continue. That marked the end of oral testimony and parties were to file submissions.

8. The Claimant filed his written submissions and he submitted that the issues for determination were whether there were valid reasons for the Respondent to terminate the Claimant's contract, was the disciplinary process applied fair/and or procedural, and finally, whether the Claimant is entitled to the prayers sought in his claim. He submitted that Section 43 of the Employment Act requires that there be valid reasons to dismiss an employee which reasons must be established at the time. The Claimant submitted that during the disciplinary hearing the Respondent did not establish valid reasons as there was no elaboration as to what act exactly amounted to insubordination. The Claimant submitted that the Respondent's eyewitness, the ATM Manager was not brought to testify on its behalf nor did it provide the complaint from its client against the Claimant. The Claimant submitted that there were no valid reasons for the termination of the Claimant's services. The Claimant relied on the case of **Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR**. The Claimant submitted that the provisions of Section 43 of the Employment Act are couched in mandatory terms. He cited the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** where it was held that where an employer fails to follow these mandatory provisions, whatever the outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The Claimant submitted that he was not accorded a hearing as contemplated under Section 41 of the Employment Act. The Claimant submitted that the provisions of Section 45 of the Employment Act bars an employer from terminating the services of an employee except if there is a valid reason and that the same is through a fair procedure. If an employee is not heard the termination is *ipso facto* unfair. The Claimant submitted that the disciplinary process breached due process and that Articles 41 and 47 of the Constitution as well as Sections 41, 43 and 45 of the Employment Act and the customary practices governing good labour practice and the general principles of human rights were disregarded. The Claimant submitted that his dismissal was despite his following the training afforded him by the Respondent and his responsibilities as a team leader which duty he did to the best of his ability. The Claimant urged the grant of the relief sought and in addition cited the cases of **Donald Odeke v Fidelity Limited [2012] eKLR**, **Nicholas Daniel Onderi v Mombasa Maize Millers Limited [2013] eKLR** and **Magdalene M. Ngea v National Cereals and Produce Board [2017] eKLR**.

9. The Respondent in its written submissions submitted that the Claimant conceded to not following instructions given to him by his supervisor the Operations Manager and that his dismissal was therefore lawful and justified. The Respondent submitted that the Claimant's claim was an attempt at unjust enrichment as his terminal dues were calculated and paid after the dismissal. The Respondent submitted that this fact was admitted by the Claimant in cross-examination. The Respondent submitted that the Claimant was heard before the dismissal and

that the issues for determination were whether the reason for dismissal was disclosed to the Claimant, whether the Claimant was granted a fair hearing before dismissal, whether the termination was wrongful and unfair, and whether the Claimant is deserving of the prayers sought. The Respondent submitted that as to whether the reasons for dismissal were disclosed to the Claimant, it submitted that Section 35(4)(b) and 44 of the Employment Act give an employer the right to terminate services of a person who is deemed to have engaged in activities detrimental to the employer's activities. The Respondent submitted that the Claimant was granted a fair hearing before his dismissal as he was given a show cause and a notice to attend a disciplinary hearing in compliance with Section 42(2) of the Employment Act. The Respondent submitted the Claimant even acknowledged receipt of the notification and the show cause. The Respondent submitted the Claimant was represented at the hearing in compliance with Section 41(2) of the Employment Act. The Respondent submitted as to whether the termination was wrongful or unfair, that the provisions of Section 17(a) and (g) of the Employment Act (now repealed) clearly gives the employer the right to summarily dismiss the services of a person who is deemed to have engaged in activities detrimental to the employer's activities. The Respondent submitted that insubordination is a gross misconduct and unprofessionalism in breach of the company's policy and is sufficient ground for termination of employment summarily. The Respondent submitted that the Claimant's contract of service also bound him to abide the company's regulations or instructions and a persistent breach is sufficient cause for summary dismissal. The Respondent submitted that the Claimant was underserving of the prayers he had sought in his claim. The Respondent submitted that the reliefs sought do not lie based on the evidence tendered in Court. The Respondent cited the case of **Vincent Abuya Obunga v Mast Rental Services Limited [2019] eKLR**. The Respondent thus urged the dismissal of the Claimant's claim with costs to the Respondent.

10. Where dismissal occurs for gross misconduct, the provisions of Section 41, 42, 43, 44, 45 and 47 of the Employment Act come to the fore. A hearing must be conducted and the procedure adopted must be fair, there must be a valid reason for the dismissal and the employer is bound to adhere to the requirement to hear the employee and any witness he may avail. The employer is not barred from dismissal where it establishes there was misconduct. The Claimant herein was accused of disobeying lawful instructions issued to him by the Respondent's Operations Manager one Mr. Francis Kamande. The Claimant is stated to have found a loose safe lock and because he was transporting cash declined to leave with the lock in that state and insisted on having it repaired first. The Claimant was taken through a disciplinary hearing the next day and issued with a dismissal letter on the day following the hearing. His notice to show cause was given on the morning of 17th December 2015 and he was heard later that day before the dismissal letter of 18th December 2015. Was this in keeping with the dictates of the law? The period between the levelling of accusations and the disciplinary hearing depends mainly on the work done and the allegations at hand. In the case of the Claimant, issuing a show cause letter in the morning and conducting the hearing in the afternoon was not in my view fair in the circumstances. The Claimant would have had no time to prepare a response or even prepare a defence and obtain witnesses. The Respondent seems to have been keen to dismiss as the Claimant was accused of misconduct when he sought to ensure the cash in transit vehicle was safe to ferry the precious cargo. He ought to have been commended as the loose lock could have led to breach of the safe. Instead he was vilified and dismissed for failing to disregard the safety concerns he had. If the vehicle had been the subject of a robbery it is clear the Claimant would have been to blame since he is to ensure the safety of the crew in his vehicle and the cash secured in the car. A loose rivet on the safe door would not qualify as secure carriage of cash. The Claimant's dismissal was therefore unfair and unlawful as there was no valid reason for the dismissal. If disobedience of an asinine request to move money in a defective safe is misconduct then the term misconduct has a new meaning at the Respondent. Misconduct is defined in **Black's Law Dictionary, Tenth Edition** as a **dereliction of duty, unlawful, dishonest or improper behavior**. The Claimant was acting in the best interest of the Respondent's client and by extension that of the Respondent whose reputation for safe carriage of cash would have suffered had there been success at breaching the safe. In the premises the Claimant is entitled to relief for the unfair and unlawful dismissal. It is alleged the Claimant was paid his terminal dues but there was no proof of payment of these dues. In the final analysis the Claimant is entitled to:

- i. One month's salary in lieu of notice – Kshs. 25,584/-.
- ii. 12 month's compensation for the unlawful and unfair dismissal from employment = Kshs. 307,008/-.
- iii. Costs of the suit.
- iv. Interest at Court rates on i) and ii) above from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2021

Nzioki wa Makau

JUDGE