



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC NO. 357 OF 2017

THOMAS MOGERA SIOGE.....CLAIMANT

VERSUS

GILANIS SUPERMARKET.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unfair termination, underpayment of salaries and unpaid leave and holidays.
2. The facts leading to this case is that the Claimant was employed by the Respondent sometimes in November, 1998 or thereabout as a loader earning a monthly salary of Kshs 4,900/- which was later revised to Kshs. 10, 496.90 /- which position he held till his termination.
3. He stated that on 9th December, 2016 he reported to work as usual and was instructed to transport sugar and other assorted goods to Eldama Ravine and Kabarnet towns together with a driver Mr. Gitau which he undertook as instructed and upon return on 10th December, 2016 he was met with a Notice to show cause and a suspension for 3 days for allegedly delivering sugar of varying weights and thus failing to perform his tasks accordingly and appropriately.
4. He stated that the sugar loaded to his truck for transportation was Kakira sugar instead of Butali sugar, which changes were made at the Respondent warehouse. Also that the sugar was only trans loaded into the truck without weighing them and that at all material times the sugar was sealed a fact that is well within the knowledge of the Respondent.
5. That the Claimant filed a response to the Notice to show Cause on 12th December, 2016 and upon reporting to work after the suspension on 14th December, 2016, he was dismissed summarily without any hearing accorded to him.
6. Aggrieved by the Respondents decision the claimant reported the issue to the labour office however there was no redress from them.
7. That the claimant through his advocate sought for an explanation for the dismissal and he was informed that the Claimant had been dismissed for gross misconduct.
8. The Claimant therefore prays for the following reliefs;-

1) Notice pay	Kshs 10,496.90
2) Unpaid annual leave	Kshs. 16,956.50/-
3) Unpaid leave travelling allowance	Kshs. 8,000/-
4) Unpaid rest days	Kshs. 13,726.70/-
5) Unpaid public holidays	Kshs. 807.00/-
6) Underpayment of wages	Kshs. 81,522.00/-
7) Underpayment of House allowance	Kshs. 12,239.50/-
8) Compensation for unlawful termination	Kshs. 125,962.80/-

9. The respondent enter Appearance on 16th August, 2017 and filed a response to the Memorandum of claim on 18th August, 2017 denying all the allegations contained therein and putting the claimant into strict proof thereof.
10. The respondent admitted that it employed the claimant as a loader sometimes in November 1998 earning a salary of Kshs. 4,900 and was later deployed to security department only to be demoted on 4th July, 2012 and transferred to her previous position of offloading department.
11. The Respondent stated that it was a term of employment that the Claimant was under a duty to weigh all goods before dispatch to the different customer.
12. It was stated that on 9th December, 2016 the claimant together with the driver one Mr. Gitau was instructed to transport 150 bags of sugar each weighing 50 Kgs to Mital Supermarket in Eldama Ravine however on arrival at Mital supermarket only 25 bags were accepted and the rest 125 bags were rejected for weighing less than 50 Kgs. Subsequently the Claimant opted to sell the rejected bags of sugar at Kabarnet Town Bei Nafuu Supermarket which noted the Shortage and the deficit was 126Kgs costing Kshs 14,650/-.
13. That the Claimant without any authority paid for the deficit out of his pocket and later on 10th December, 2016 claimed for a refund which caused him to be issued with a show cause letter and suspended for 3 days.
14. He contends that disciplinary hearing was conducted on 14th December, 2016 and the Claimant admitted failing to weigh the sugar before loading into his truck for transportation therefore the Respondent found him culpable for gross misconduct of failing to follow standard procedure and dismissed him accordingly.
15. The Respondent stated that it has computed the terminal dues for the Claimant which monies are awaiting collection by the Claimant.
16. That prior to his dismissal the Claimant had been issued with Seven (7) warning letters with the latest being similar to the case at hand of delivering under weighed goods to the customer which were rejected and occasioned the Respondent losses.
17. The claim hearing proceeded for hearing on 27th November, 2019 with the Claimant, **Thomas Mogiwa Sioge (CW-1)** testifying that he was employed in the year 1998 as an off loader then after 4 years he was transferred to security department and later as a turn boy from the year 2005 till December 2016 when his services were terminated. That on his termination his salary was at Kshs 12,700/-
18. He testified that he reported to work as usual on the 9th December, 2017 and was instructed to transport sugar and other assorted goods to Eldama Ravine and Kabarnet Towns. That the sugar which were to be loaded in his truck were Kakira sugar however the store Manager Mr. Abdul instructed loaders to load Butali sugar which had just arrived directly from the lorry to their lorry without weighing them. That about 150 bags were loaded in the Lorry and he together with the driver were given green light to transport the sugar. That the on arrival at Mital supermarket in Eldama Ravine, the sugar was offloaded and 25bags were retained and 125 bags rejected for weighing below 50 Kgs. He stated that he contacted the transport manager and informed him of the development who in turn directed him to return the rejected sugar. That he proceeded to Kabarnet Town to deliver some goods to Uchuzi Supermarket and while at Kabarnet Town he leant of a customer by the name Bei Nafuu Supermarket who urgently needed sugar and the claimant contacted the Transport manager for advice who directed them to sale the sugar and conceal the shortage in weight. That they sold the sugar and were favour with a cheque of Kshs 725,000/- however when the sugar was weight the shortage was noted and the customer requested for a refund of Kshs 14, 650/ which the transport manager advised him and the driver to pay the customer the shortage promising that he will be refunded upon arrival at the Respondents offices. he testified that upon arrival on 10th December, 2017 he was suspended for 3 days and issued with a show cause letter for failing to weigh the sugar and later was dismissed without any disciplinary hearing.
19. On cross examination, he testified that he together with the driver one Mr. Mwangi paid the customer of Bei Nafuu Kshs, 14,650 and were to be reimbursed by the Respondent. he alleged that the disciplinary hearing did not proceed but were instructed to sign some minutes. He stated that he used to work for 7 days in a week without any compensation and that he has not taken his leave for the last 2 years neither was he compensated for the same.
20. The Respondents called one witness one **Wycliffe Ndunde (RW-1)** the Respondent Human Resource manager who testified that Claimant was instructed to transport 150 bags of sugar each weighing 50 Kgs to Mital supermarket in Eldama Ravine, however the Claimant failed to weigh the sugar and upon arrival at Ravine 125 bags were rejected by Mital Supermarket and the Claimant was instructed to return the same to the Respondent however instead of returning the sugar the claimant together with the driver opted without authority to go and sell the rejected sugar at Bei Nafuu Supermarket in Kabarnet who while weighing noted the shortages and called for a refund of Kshs 14,650 since they had issued a cheque of Kshs.725,000/- for the 125 bags. He contended that the Claimant was at fault by failing to weigh the sugar before transporting an act which according to them was tantamount to gross misconduct and the claimant was dismissed after being subjected to disciplinary hearing.
21. The parties filed submissions with the Claimant filing on the 8th June, 2021 and the Respondent filing on 18th June, 2021.

Claimant's submissions.

22. Counsel for the Claimant submitted that the claimant in case for unfair termination was tasked with proving that his services were terminated in an unfair manner, then the employer on the other hand is burden with the task to prove that the reasons for terminations were fair in accordance with section 43(1) of the Employment Act and cited the case of **Pius Machafu Isundu -V- Lavington security Guards Limited [2017] eklr.**
23. The Claimant submitted that the Respondent dismissed him for allegedly siphoning sugar which sugar was sealed up until delivery to the

customer, that the sugar were not weighed as the store manager one Mr. Abdul had instructed loaded to trans load goods directly from the lorry that was bringing sugar to the Respondent to the claimant truck for transportation and the shortage of sugar was attributable to the person that had brought the sugar to the Respondent and not him.

24. It was submitted that the allegation informing the Claimants dismissal from employment was not substantiated at all when the Respondent was under a duty to prove that the reasons for dismissal was justified and cited the case of **Kenya Revenue Authority –v- Reuwel Waithaka Gitahi & 2 others [2019] eKLR**.

25. The Claimant further submitted that there was no contract or term of employment that required a driver or a turn boy to weigh any goods before transportation but that it was the work of the store manager. Further that the store manager changed the sugar to be transported from Kakira sugar at the warehouse to Butalis sugar in another vehicle was never questioned by the Respondent neither where the transport manager and the store manager asked to write any statements.

26. He argues that the claimant was dismissed from employment on 11th December, 2016 way before alleged disciplinary hearing was conducted therefore the termination was unfair in the circumstances. He further argued that he was called in the human resource personnel office only to be instructed to sign some minutes and that they will be heard however no meeting took place thereafter as the meeting was scuffled and the claimant together with the turn boy were ejected from the office by security personnel at the Respondent.

27. The Claimant submitted therefore that his employment was unfair terminated and urged this Court to allow the claim as prayed.

Respondents Submissions.

28. The Respondent submitted that the Claimant was dismissed from employment in accordance with section 44 (4)(g) of the Employment Act for gross misconduct and was duly notified of the misconduct by the Show cause letter as envisaged under section 41 of the Employment Act. he reinforced its arguments by citing the case of **Anthony Mkala Chivati –v- Malindi Water & Sewage company Limited [2013] eKLR**

29. The Respondent submitted that the claimant has not tendered any evidence to affirm that he communicated the shortage to the transport manager, therefore that the payment of the shortage was not sanctioned by the Respondent and the Claimant ought not be paid a refund.

30. The Respondent maintained that a disciplinary hearing was conducted where the Respondent admitted having failed to weigh the sugar before transportation therefore acting in defiance of the Respondent instruction which resulting to shortage which could have been discovered if the sugar was weighed before they were transported to the customer.

31. The Respondent argued that the failure to perform their duties appropriately is an act of gross misconduct which warrant summary dismissal in accordance with the act but still gave the claimant a chance to defence himself by a disciplinary meeting held on 14th December, 2016.

32. The Respondent therefore submitted that the Claimant has not proved his case on a balance of probability and prayed that the claim be dismissed with costs to them.

33. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;-

a) Whether the respondent had a valid reason to terminate the services of the claimant

b) Whether the respondent accorded the claimant due process before terminating him

c) Whether the claimant is entitled to the remedies sought.

ISSUE NO.1

34. On the first issue the claimant was summarily dismissed vide a letter dated 14th December, 2016 which letter indicated the reason for dismissal as being failure to follow the respondent's standard operation procedures as per company policy. The respondents thus dismissed the claimant under Section 44(4)(g) of the Employment Act.

35. Section 44(4)(g) deals with suspected committal of a criminal offence by the employee.

36. Section 44(4)(e) deals with failure to follow lawful command by the employee. The respondent's contention was that the claimant was driver of KBQ 402J Lorry and was to deliver sugar 150 bags. But it transpired that the sugar delivered was 126kg underweight which led to loss of 14,650/= which the claimant and his turn boy agreed to pay the customer.

37. Before this dismissal, the claimant had been issued with a show cause letter on 10/12/2016 where he was expected to show cause why disciplinary action should not be taken against him for the weight loss in sugar delivered on 9/12/2016.

38. In the meantime, the claimant was suspended from duty. The claimant responded to the show cause letter. He admitted that they didn't weigh the sugar when loading it which was a mistake.

39. They didn't admit causing the weight shortage but asked the respondents to investigate the matter. The claimant was dismissed thereafter. The reason for dismissal of claimant was failure to adhere to company procedures. The respondent has indicated that after the show cause, they were invited to a disciplinary hearing with his turn boy. When they went to the meeting, the meeting didn't proceed. They were thereafter dismissed.

40. The respondents have insisted that they had valid reason to dismiss the claimant for not following standard procedures as per company policy.

41. They referred court to APP 16. APP 16 is a warning letter issued to the claimant in September, 2016 and has nothing to do with any standard procedures. The respondent has not exhibited the standard procedures they have put in place for which they expected the employees to follow and which the claimant failed to adhere to.

42. Section 43 of the Employment Act 2007 states as follows;

Proof of reason for termination

“43. Proof of reason for termination

(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”.

43. Under this law, respondent is obliged to proof they had valid reason to warrant the dismissal. In demonstrating failure to follow standard procedures as per their policy, the respondents are expected to demonstrate they had standard procedures in place, these procedures were notified to the claimant and the claimant failed to follow them.

44. The respondent in this respect, failed to show any standard procedure in place which the claimant failed to follow. It is therefore my finding that there were no valid reasons to warrant dismissal of the claimant.

ISSUE NO.2

45. On issue of a fair disciplinary process the claimant has averred that they were invited to a disciplinary hearing but were never heard. They were instead asked to sign certain documents and were thereafter dismissed.

46. The respondents on their part averred that the claimant was given a fair hearing. The respondents produced minutes of the disciplinary hearing held on 14/12/2016 at 11.30am (APP 14) as proof of the hearing.

47. It is true that the respondent's minutes show a subsistence of a disciplinary hearing but they are written in a prose like manner and it is therefore not easy to depict what the claimant said in answer to the accusations as the minutes are in reported speech.

48. That notwithstanding, the claimants were accorded some opportunity to be heard.

ISSUE NO. 3

49. From the analysis of my evidence above, there were no valid reasons to warrant the claimant being dismissed though he was accorded some hearing. Section 45 (2) of the Employment Act 2007 states as follows;

“45. (1).....

(2) A termination of employment 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”.

50. Given the lack of valid reasons to warrant claimant's dismissal, I find the claimant's dismissal was unfair and unjustified.

51. I therefore find for the claimant and I award him as follows;-

1. 1 month salary in lieu of notice 10,496.90

2. 10 months salary as compensation for the unfair dismissal

= 10 x 1049.90

= 104,990/=

TOTAL = 115,487/=

Less statutory deductions

3. The respondent will pay cost of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nganga holding brief Murimi for Respondent – present

Claimants - absent