



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 46 OF 2017

(Before Hon. Justice Mathews N. Nduma)

PHILIP OWINO MUSULA.....CLAIMANT

VERSUS

ALICIA BAKERS AND CONFECTIONERS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant worked for the respondent as a driver from 18th October 2011 up to the 19th November 2014. The claimant earned Kshs. 10,974.70 a month.
2. The claimant was summarily dismissed by a letter dated 19th November 2014 for being found guilty of fuel cheating on repairs and threatening of fellow staff with a knife contrary to the employee's code of regulation. That the claimant had several previous warnings on the same misconduct.
3. The claimant denies the allegations made against him. States that the dismissal was unlawful and unfair and that he should be compensated accordingly. Furthermore the claimant prays for grant of terminal benefits including one month salary in lieu of notice and payment in lieu of leave days not taken as set out under paragraph 7 of the statement of claim.
4. The claimant stated that the dismissal was without warning, notice and was not preceded by a disciplinary hearing. The claimant prays to be awarded accordingly.

Defence

5. The respondent filed a statement of defence on 23rd June 2017 in which the employment of the claimant as a driver at a salary of Kshs. 10,974 is admitted. RW1 Fredrick Otieno the Human Resource Officer of the respondent testified under oath and relied on a witness statement dated 12th October 2018. RW1 testified that the claimant was employed on 23rd December 2012 on a two years contract which was due to end on 22nd December 2014. That he was summarily dismissed on 19th November 2014, a month before the expiry of the contract. That the claimant had failed to fuel a motor vehicle and produced a fake receipt. That this was discovered on a routine check-up. The contract of employment and the fuel receipt were produced as exhibit '1 and 2' respectively. RW1 testified further that when the mechanic raised a query on the fuel put in the motor vehicle, the claimant went away and came back with a knife and threatened to kill Morris Aswan, the mechanic. The mechanic reported the matter on the same date which was 4th November 2014. The mechanic recorded a witness statement on 26th December 2014 and same was produced as exhibit '3'.
6. RW1 testified that the conduct by the claimant amounted to gross misconduct and the claimant was summarily dismissed. That the claimant was given a hearing before the dismissal. That due process was followed on 5th November 2014, a day after the incident. RW1 relied on the Human Resource records of the respondent. RW1 stated that the matter was not reported to the police but the dismissal was effected upon following due process.
7. RW2, Morris Omondi Aswan testified that he was the mechanic that was threatened with a knife by the claimant. RW2 relied on a witness statement dated 10th October 2017. RW2 stated that the claimant was his colleague. That RW2 inspected motor vehicles for repair and fueling. That on 4th November 2014, at 7.30 p.m, the claimant brought motor vehicle KBQ405U for inspection. Upon inspection, RW2 found that the fuel gauge showed the car had half tank of fuel but the receipt produced by the claimant showed that the car had been filled with 98 litres of fuel. RW2 produced receipt for Kshs. 10,113. RW2 testified that the tank took 100 litres of fuel. RW2 queried the claimant on the matter. The claimant went away briefly and came back with a knife and threatened to stab RW2. RW2 testified that he reported the matter immediately to the transport in charge Mr. Barnabas. RW2 was asked to record a statement on 20th December 2014. RW2 produced his statement as exhibit '4'.

Determination

8. The issues for determination are:

- (i) Whether the summary dismissal of the claimant was for a lawful reason and if fair procedure was followed.
- (ii) If the claimant was entitled to the reliefs sought.

9. Section 44(1) provides:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term”.

10. Section 44(4) provides the reasons for which summary dismissal maybe meted on an employee to include:

“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 employers property”

11. The totality of evidence before court has shown that the claimant was reasonably suspected of theft of fuel. The claimant became violent and threatened RW2 with a knife, when he was asked about the matter. The claimant made a bare denial. The respondent has through the evidence by RW1 and RW2 demonstrated that the respondent had a valid reason to summarily dismiss the claimant from employment for theft of fuel and for threatening a fellow employee with a knife. The respondent discharged the onus placed on it in terms of *Sections 41, 43, 45 and 47(5) of the Employment Act*. Conversely, the claimant has failed to prove on a balance of probabilities that the summary dismissal was wrongful and/or unfair.

12. The suit for wrongful dismissal is dismissed accordingly. The claimant having been summarily dismissed is not entitled to any payment in lieu of notice. The claim is equally dismissed. The claimant is only entitled to payment in lieu of leave days not taken in the sum of Kshs. 21,949.40. The claimant is awarded accordingly.

13. In the final analysis the suit is dismissed in its entirety except with respect to payment in lieu of leave days not taken in the sum of Kshs. 21,949.40. This is payable with interest from date of filing suit till payment in full. Each party to bear their own cost of the suit.

Judgment Dated, Signed and delivered this 13th day of February, 2020

Mathews N. Nduma

Judge

Appearances

Mr. Ouma for Claimant.

Mr. Odongo for Respondent

Chrispo – Court Clerk