



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 383 OF 2017 CONSOLIDATED WITH CAUSE NO 826 OF 2017

MUSA NDIMA SAID.....1STCLAIMANT

SAID MOHDHAR ABDALLA.....2NDCLAIMANT

VS

MILLY GLASSWORKS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By consent of the parties Cause No 383 of 2017 was consolidated with Cause No 826 of 2017. This judgment therefore applies to both causes.
2. At the trial, the 1st Claimant, Musa Ndima Said testified on his own behalf and on behalf of his co-claimant. The Respondent chose not to call any witnesses. The parties filed written submissions.

The Claimants' Case

3. The 1st Claimant, Musa Ndima Said states that he was employed by the Respondent on 10th September 2007, as an Assistant Operator in the Glass Department.
4. He worked until 17th February 2017 when he was summarily dismissed. He earned a monthly salary of Kshs. 20,838.55 at the time of dismissal.
5. Ndima Said lays a claim for wrongful dismissal stating that there was no justifiable reason for the dismissal and he was not afforded an opportunity to be heard.
6. The 2nd Claimant, Said Mohdhar Abdalla states that he was employed by the Respondent on 1st January 2003, in the position of Transport Manager.
7. He worked as such until 20th February 2017 when he was summarily dismissed. At the time of dismissal, he earned a monthly salary of Kshs. 53,454.
8. Abdalla avers that his dismissal was wrongful and unfair because there was no justification for it and he was not given an opportunity to be heard.
9. The Claimants' claims against the Respondent are as follows:

1st Claimant: Musa Ndima Said

- a. Pay in lieu of notice.....Kshs. 20,838.55
- b. Severance pay @ 15 days for each year of service.....100,000.00

c. Damages for unlawful dismissal

d. Certificate of service

2nd Claimant: Said Mohdhar Abdalla

a. Pay in lieu of notice.....Kshs. 53,454

b. Gratuity @ 15 days for each year of service.....400,680

c. Damages for unlawful dismissal.....641,448

10. The Claimants also ask for costs of the case.

The Respondent's Case

11. The Respondent responded to the 1st and 2nd Claimants' claims by way of Responses dated 22nd June 2017 and 14th November 2017 respectively.

12. The Respondent denies the Claimants' claims and puts them to strict proof.

13. With regard to the 1st Claimant, Musa Ndima Said the Respondent states that he was dismissed legally and fairly. The Respondent maintains that Ndima Said was given a fair hearing prior to dismissal.

14. With regard to the 2nd Claimant, Said Mohdhar Abdalla, the Respondent states that if at all he was summarily dismissed, the dismissal was executed legally, fairly and procedurally.

Findings and Determination

15. There are two issues for determination in this case:

- a. Whether the Claimants' dismissal was lawful and fair;
- b. Whether the Claimants are entitled to the remedies sought.

The Dismissals

16. The Claimants' dismissals were communicated by separate letters dated 17th February 2017. The letter to the 2nd Claimant, Musa Ndima Said states:

““Re: Summary Dismissal

The show cause dated 7th February 2017, your subsequent response and the disciplinary hearing held on 17th February 2017 refers (sic).

On Sunday the 5th of February 2017 you were informed by the Crest Security team on the circumstances related to gate pass no 7934 (copy attached for ease of reference) for 2 pcs oil filter, 2 pcs fuel filter, 2 pcs air filter for servicing truck reg. no KBW 074H. Whilst you proceeded to investigate the matter further, you returned the filters to the Transport Office in breach of security procedure for any ongoing investigation. In addition as the Security guard on duty the incident was not recorded in the OB entries for that shift/day and you only reported the same following prompting by the undersigned.

It is on the above premises that management has decided to terminate your services for failure/refusal to report to Management in the prescribed manner the incident on the 5th of February 2017, refusing to co-operate with the Security team to investigate the incident conclusively and attempting to cover up the incident by returning the items to the Transport Office. This demonstrates carelessness, negligence and dishonesty in the performance of your duties; which constitutes gross misconduct in accordance with the Employment Act Section 44-4-c & g.

Kindly arrange to return all company property before payment of your final dues as follows:

- Salary upto and including 20th February 2017
- Leave earned and not taken 7.5 days as at 20th February 2017
- OT NIL @2.0 & 16hrs @ 1.5 as at 20th February 2017

Less:

- *Any other monies owed to the company*

Please be guided accordingly.

Yours faithfully,

For: Milly Glass Works Ltd.

(signed)

Ms. Georgina Kilonzo

Human Resources Manager

17. The letter to the 2nd Claimant, Said Mohdhar Abdalla states:

“Re: Summary Dismissal

The show cause dated 7th February 2017, your subsequent response and the disciplinary hearing held on 17th February 2017 refers (sic).

On Sunday the 5th of February 2017 you wrote a gate pass no 7934 (copy attached for ease of reference) for 2 pcs oil filter and 2 pcs air filter for servicing truck reg. no KBW 074H. You indicated that the gate pass had been prepared by Pauline-who had resigned as at that date-and authorized the same. In addition, there was no job card filled as per procedure for the work that was to be done on KBW 074 on that day. The service components were returned back to your office on the same day following the intervention of the security team which was prompted by the fact that Ms. Pauline was not on duty on that day and therefore could not have prepared the gate pass. You reported on duty on the 5th February on your off day without notifying your HOD whilst you had informed him on 4th February that you were not feeling well. The truck KBW 074 had been serviced on 16/01/17 and was not due for service on the 5th of February 2017 as per records.

Management notes that you have accepted you erred in processing the gate pass but did not follow up on what the mechanic was to do on that day on KBW 074H. The truck eventually left for Africa Spirits Ltd on Monday the 6th of February 2017 instead of the 5th of February 2017 as planned to ensure that the product is offloaded on the following working day (6/02/2017).

It is on the above premises that management has decided to terminate your services for failure/refusal to verify that the parts requested were actually required, due process on the record of service and repair of trucks is carried as elucidated in your job description carelessness and negligence in the performance of your duties; which constitutes gross misconduct in accordance with the Employment Act Section 44-4 c&e.

Kindly arrange to return all company property before payment of your final dues as follows:

- Salary upto and including 20th February 2017
- Leave earned and not taken 7.5 days as at 20th February 2017

Less:

- *Any other monies owed to the company*

Please be guided accordingly.

Yours faithfully,

For: Milly Glass Works Ltd.

(signed)

Ms. Georgina Kilonzo

Human Resources Manager

18. By his dismissal letter, the 1st Claimant is accused of failure to report the incident of 5th of February 2017, where motor vehicle service components removed from the Respondent's stores were handled in a suspicious manner. The 2nd Claimant was accused of irregular processing of gate pass No. 7934 that facilitated removal of the service components.

19. Although the Claimants lost their employment as a result of the same incident, a close examination of the surrounding circumstances reveal that their cases were not the same on all fours.

20. With regard to the 1st Claimant, Musa Ndima Said, there was no evidence that the charge of failure to report the incident was placed before him for response. Ndima Said told the Court that ordinarily, gate passes originated from the Transport Office. He added that he saw gate pass No. 7934 by which a mechanic known as Ouma removed the service components in issue.

21. According to Ndima Said, there was nothing untoward with the gate pass which appeared properly originated by Pauline and authorised by the 2nd Claimant, Said Mohdhar Abdalla.

22. From the record, it would appear that the Respondent's external security intercepted the service components at the gate. After that Ndima Said who was in charge of internal security took the service components first to the security office and later to Abdalla. Ndima Said saw no need to make an entry in the Occurrence Book because there was no theft.

23. Apart from recording a statement on the incident, the 1st Claimant appears not to have been involved in the investigations conducted by the Respondent. More crucially, he was not subjected to the disciplinary process set out under Section 41 of the Employment Act. This omission, coupled with the fact that the Respondent did not call any live testimony meant that the accusations made against the 1st Claimant were not proved as required under Section 43 of the Employment Act.

24. In the result, I find and hold that the 1st Claimant's dismissal was wrongful and unfair and he is entitled to compensation. He is also entitled to notice pay.

25. For the 2nd Claimant, Said Mohdhar Abdalla the situation was somewhat different. In response to a show cause memorandum issued to him on 7th February 2017, the 2nd Claimant wrote to the Respondent's Human Resource Manager admitting having irregularly raised gate pass No 7934. In this regard, Abdalla had passed off the gate pass as having been raised by one Pauline. Abdalla apologised for the mistake.

26. In the final submissions filed on behalf of the Respondent on 3rd March 2020 reference was made to the decision in **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (k) [2017] eKLR** where the Court of Appeal cited with approval the following holding by Ngcobo JA in **Nampak Corrugated Wadeville v Khoza (JA 14/98) [1998] ZALAC 24**:

“The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”

27. This is what is commonly known as the '*reasonable responses test*' by which the court asks if a reasonable employer would have taken the action complained of and if the answer to that question is in the affirmative, then the court does not interfere with the employer's decision.

28. The 2nd Claimant, Said Mohdah Abdalla admitted having made a mistake in processing the gate pass the way he did. Abdalla did not testify before the Court and from the documents on record, dishonesty on his part could not be ruled out. For this reason and in application of the '*reasonable responses test*' I find and hold that the Respondent had a valid reason for dismissing the 2nd Claimant. Further, prior to dismissal, Abdalla was called upon to explain himself.

29. The 2nd Claimant's claim for wrongful and unlawful dismissal is therefore without basis and is dismissed. He is consequently not entitled to compensation nor notice pay.

Remedies

20. Flowing from the foregoing, I award the 1st Claimant, Musa Ndima Said twelve (12) months' salary in compensation for wrongful and unfair dismissal. I also award him one (1) month's salary in lieu of notice.

31. No basis was laid for the claims for severance pay and gratuity which therefore fail and are dismissed.

32. In the final analysis, I enter judgment in favour of the 1st Claimant, Musa Ndima Said in the following terms:

a. 12 months' salary in compensation.....Kshs. 176,064

b. 1 month's salary in lieu of notice.....14,672

Total.....190,736

33. This amount will attract interest at court rates from the date of judgment until payment in full.

34. The Claimants are also entitled to certificates of service.

35. The Respondent will pay the costs of the case.

36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY MARCH 2020

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JUDGE

Appearance:

Mr. Chamwada for the Claimants

Mr. Ngaine for the Respondent