



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1086 OF 2016

TITUS SILA MULI.....CLAIMANT

-VERSUS-

WILHAM (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 07.06.2016 through Kilonzo and Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that his termination was unlawful.
- b. Reinstatement.
- c. Damages for unlawful termination.
- d. Costs.
- e. Interest on c and d above from the date of judgment until payment in full.
- f. Any other relief the Honourable Court may deem fit.

The claimant's case as pleaded in the memorandum of claim is as follows:

- a. He was employed by the respondent from 01.05.2010 to 25.02.2015 as an IT Assistant. His summary dismissal was on 15.02.2015.
- b. As at dismissal he was on a two years' contract running from 01.01.2014 to 31.12.2015.
- c. In January 2015 4 irrigation cards went missing from the respondent's server room. The respondent's employee one Sheryl Shadrack made the report of the missing cards.
- d. On 22.01.2015 the claimant was suspended for 7 days pending investigation about the missing cards. The claimant was also given a show –cause notice about the missing cards alleging he had failed or ignored to properly take care of the respondent's assets leading to the loss of the irrigation cards.
- e. By the letter dated 27.01.2015 the claimant replied denying the allegations of failing to properly take care of the irrigation cards. He denied responsibility for the missing cards.
- f. By the memorandum dated 20.01.2015 he was suspended for a further period of 7 days from 02.02.2015 to 09.02.2015. He was invited for a hearing on 09.02.2015 but instead his suspension was extended to 10.02.2015 and the hearing rescheduled to 11.02.2015.

g. The suspension was orally extended to 16.02.2015 and the hearing rescheduled for 17.02.2015. The respondent refused to give the claimant the minutes of the disciplinary hearing.

h. The claimant was terminated on 25.02.2015. The claimant's case is that the termination was unlawful because he was not responsible for the missing irrigation cards. His case is that he was dismissed on account of extraneous reasons.

The response to the memorandum of claim was filed on 28.10.2016 through Wachira Wanjiru & Company Advocates. The respondent prayed that the suit be dismissed with costs because the claim is an afterthought brought to Court in bad faith. The respondent's case is as follows:

a. The respondent admits that it employed the claimant and the services were terminated on 25.01.2015.

b. The claimant was employed as the respondent's IT Technician and was charged with the duty to take care of the respondent's property including the 4 irrigation cards. By the letter dated 21.01.2015 the claimant admitted that the cards were in his possession and later he could not account for them.

c. The suspension letter dated 30.01.2015 indicated that the suspension was for 7 days effective 21.01.2015.

d. The respondent admitted the claimant's allegations that the claimant replied the show-cause notice and he denied the allegations.

The Court has considered the evidence, pleadings and the submissions on record. The Court makes findings on the pertinent matters in issue as follows:

a. There is no dispute that parties were in a contract of service as per the parties' pleadings and evidence. The respondent employed the claimant as an IT Assistant.

b. There is no dispute that the claimant's employment was terminated by the letter dated 25.02.2015 and the last day at work was on 25.02.2015. The termination was on account of failure or ignoring to properly take care of the company property in the claimant's possession and failure to perform his duty as required leading to the loss of the irrigation cards.

c. The evidence was that the claimant was accorded a show cause letter, he replied and was allowed to attend the disciplinary hearing with a colleague of his choice. The Court returns that he was accorded due process of a notice and a hearing under section 41 of the Employment Act, 2007.

d. The main dispute is whether the reason for termination was valid. In his reply to the show cause letter the claimant confirmed that he received the cards and he was advised to wrap the cards with papers to avoid direct conduct and which he did and he kept the cards at the server room because technician by the name Rodgers was to come and check if the cards were okay. Rodgers came and after he checked, the claimant stated in the reply that he returned the cards at the server room because there were buyers who were coming to buy the unused computers and printers. The reply does not mention any further about custody of the cards except that they were not available for selling when the respondent sold computer scrap items on 09.01.2015. The allegation as levelled was that the claimant failed to take charge and due care leading to the loss of the irrigation cards. The Court has carefully considered the reply to the show cause notice and clearly the claimant has not explained the due steps he took to secure the cards including ensuring that they were not part of the computer scrap items the respondent sold on 09.01.2015. In the reply it was not the claimant's case that it was not his duty to take such charge and secure the irrigation cards. Further it was not his case that the duty was joined between him and his manager who also accessed the server room and as was purported to be the case in the claimant's testimony at the hearing of the suit. The Court finds that it was his duty to secure the cards and as at the time of termination there was no evidence of steps taken by the claimant to ensure the cards were secure and not part of the computer scrap items that were sold on 09.01.2015. While alleging extraneous reasons for termination, the particulars of such extraneous reasons were not pleaded or proved. Thus the Court returns that the reasons for termination were valid and genuine in terms of sections 43 and 45 of the Employment Act, 2007.

e. Thus the Court returns that the termination was not unfair both in procedure and merits. The claims and prayers will therefore collapse as they were premised on a finding that the termination was unfair and unlawful.

f. The Court has considered all the circumstances of the case including that the respondent failed to provide the claimant with the record of the disciplinary hearing and returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday, 9th April, 2020.

BYRAM ONGAYA

JUDGE