



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 754 OF 2015

SAMUEL ODOYO SOTH.....CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim against the Respondent in this case is that his employment was unlawfully terminated. The claim is condensed in a Statement of Claim dated 30th September 2015 and filed in court on 7th October 2015.
2. The Respondent's defence is by way of Memorandum of Reply dated and filed in court on 29th October 2015.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its National Operations Manager, Jacob Isaya.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on 1st January 2012.
5. The Claimant further states that on 13th April 2015, he was arrested and booked at Central Police Station in Mombasa, on accusations that he was responsible for the loss of items belonging to the Respondent's customer.
6. The Claimant was detained at the Police Station for 3 days after which he was released on a cash bail of Kshs. 5,000.
7. On 27th May 2015, the Claimant was issued with a letter of dismissal. At the time of dismissal, the Claimant earned a monthly salary of Kshs. 10,912.
8. No criminal charges were preferred against the Claimant and his cash bail was therefore refunded to him.
9. The Claimant avers that his dismissal was without justifiable cause and in violation of due procedure. He therefore claims the following:
 - a) Salary in lieu of notice.....Kshs. 10,912
 - b) Compensation for unfair termination.....129,944
 - c) Terminal benefits for 5 years.....27,280
 - d) Costs plus interest

The Respondent's Case

10. In its Memorandum of Reply dated and filed in court on 29th October 2015, the Respondent admits having employed the Claimant.

11. The Respondent further admits having reported the loss of its customer's property to the Police who commenced independent investigations, as a result of which the Claimant was taken by the Police to aid in further investigations.
12. The Respondent states that it had no role in any action or inaction on the part of the Police.
13. The Respondent denies issuing the Claimant with a letter of dismissal as alleged by the Claimant.
14. The Respondent states that it complied with all legal requirements before terminating the Claimant's employment.

Findings and Determination

15. There are two (2) issues for determination in this case:
 - a) Whether the Claimant's dismissal was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

16. The Respondent filed a letter dated 15th April 2015, addressed to the Claimant as follows:

“Dear Samuel,

RE: SUMMARY DISMISSAL

We make reference to the disciplinary hearing held at our Mombasa office on 14th April 2015 where it was established that while assigned duties as a Courier you performed your duties negligently by;

- Fraudulently consigning and sending parcels using same waybill number.*

Your above actions constitute gross misconduct.

You are therefore dismissed from company service with effect from the date of this letter for gross negligence in performing your duties as per section 44 Part (c) of the employment act 2007.

Your terminal dues will be paid as follows:-

- a) Salary and allowances for days worked up to and including 14th April 2015*
- b) Leave days earned but not taken as of 14th April 2015*

Your terminal dues net of statutory taxes and monies you maybe owing the company will be processed upon clearance. Kindly hand over all company property in your possession and handover the clearance form to your immediate manager.

Yours sincerely,

*For: **G4S Kenya Limited***

(signed)

David Itubia

HR Business Partner-Coast Region”

17. This letter makes the following charge against the Claimant:

‘Fraudulently consigning and sending parcels using same waybill number.’

18. In his witness statement dated 15th September 2016, the Claimant states that he worked as a Courier Clerk at the Respondent's Nakumatt Likoni Branch.

19. He further states that he was arrested on 13th April 2015, following complaints by the Respondent that a customer's items had been lost. The Claimant claims that he was released from police custody after 3 days, upon which he went to his place of work but was not allowed to

resume duty.

20. In its Memorandum of Reply, the Respondent states that the Claimant's employment was terminated within the law. Moreover, in a Form of Discharge and Receipt (Unionisable) issued by the Respondent on 27th May 2015, the mode of the Claimant's exit is stated as dismissal.

21. The fact that the Claimant's employment came to an end by way of dismissal is therefore not in dispute. What is in contest is whether the dismissal was lawful and fair.

22. The Respondent sought to distance itself from the criminal investigations conducted by the Police.

23. It is now well settled that there is no necessary nexus between internal disciplinary proceedings and a criminal process on the same set of facts (see *Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR*).

24. The Court will not therefore concern itself with the Claimant's arrest and release. What the Court must do is to inquire into the internal disciplinary processes leading to the Claimant's dismissal.

25. In support of its case, the Respondent filed a number of reports allegedly compiled by Martin Mwangera. These reports were however not signed and Mwangera was not called as a witness to verify their contents. Moreover, the reports make reference to a number of attachments which were not availed to the Court. In the circumstances, the Court attached nil probative to these reports.

26. Among the attachments cited in the reports assigned to Mwangera, was the waybill the Claimant is alleged to have manipulated to defraud his employer. I was unable to comprehend why the Respondent would keep such crucial evidence from the Court.

27. Overall, the Respondent did not present any documentary evidence to back the accusations made against the Claimant. It seems to me therefore that although the Claimant was subjected to some form of disciplinary process at the shop floor, the accusations levelled against him were not proved to the standard required by Section 43 of the Employment Act.

28. As a result, I find and hold that the termination of the Claimant's employment was unlawful and unfair and he is entitled to compensation.

Remedies

29. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in executing the dismissal.

30. I further award the Claimant one (1) month's salary in lieu of notice.

31. No evidence was led to support the claim for terminal benefits which therefore fails and is dismissed.

32. Finally, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....Kshs. 65,472

b) 1 month's salary in lieu of notice.....10,912

Total.....76,384

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

34. The Claimant will have the costs of the case.

35. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Oguna h/b for Mr. Ngonze for the Claimant

Mr. Ajigo for the Respondent