



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 189 OF 2016**

**PETER K. NGENO.....CLAIMANT**

**VERSUS**

**UNGA LIMITED.....1<sup>ST</sup> RESPONDENT**

**UNGA FARCARE (E.A) LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the first respondent as a trainee miller in July, 1985 and thereafter rose through the ranks to become Buying Centre supervisor earning kshs. 117,255.24 plus mobile phone allowance of Kshs. 3,964.25 per month. In February 2014, he was transferred from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent in the same position and terms of service. In January, 2015 he attended a Show Cause disciplinary hearing and thereafter he was dismissed summarily. According to him the dismissal was without proper justification and only a cover up because the actual reason for the termination of his contract was redundancy following the closure of the Buying Centre where he was working. He therefore brought this suit seeking the following reliefs: -

- a) Declaration that a redundancy situation existed in relation to his position as a buying centre supervisor Grade 3.
- b) Declaration that his dismissal was unfair.
- c) Declaration that the respondents breached his right to reasonable housing as provided for under the revised and the current Employment Act.
- d) Terminal dues plus compensatory damages from unfair dismissal.
- e) Certificate of service
- f) Costs and interest.

2. The Respondent filed defence on 8<sup>th</sup> July, 2016 admitting that they employed claimant as a Buying Centre Supervisor in the Procurement Department earning kshs. 121,219.53 gross pay per month but denied that they dismissed him wrongfully as alleged. They averred that the dismissal was lawful as it was grounded on a valid and fair reason and the procedure followed was fair. They denied the alleged redundancy situation and maintained that the summary dismissal was on account of the claimant's gross misconduct. They further denied the claim for accrued house allowance and leave and prayed for the suit to be dismissed with costs.

3. The suit went to full hearing and both parties gave evidence and thereafter filed written submissions.

**CLAIMANT'S CASE**

4. The claimant testified as CW1 and told the court that he was employed by the respondents, who are sister companies vide the letter dated 25<sup>th</sup> June, 1995 and worked for 30 years. He was dismissed on 25<sup>th</sup> June 2015 while serving as Buying Centre supervisor based in Nairobi earning Kshs. 121,000/= as his gross pay. The reason for the dismissal was insubordination and according to the claimant he was not taken through disciplinary hearing.

5. He further testified that he was served with a show cause letter via email dated 18<sup>th</sup> December, 2014 from his supervisor Alice Teyie accusing him of retaining company car after the close of the Buying Centre, and going on leave without prior approval. He contended that

the alleged misconduct was not true, but admitted that on 13<sup>th</sup> January, 2015 was as summoned from disciplinary hearing but denied that he was asked to go with a fellow employee. He stated that for the 30 years he served the respondents he never received any warning letter. He maintained that his dismissal was unfair and his 30 years' diligent service was not considered. He admitted, however that he was paid pension after the dismissal.

6. On cross-examination he contested that from 2003 to the time when he left the respondent, he was not paid house allowance. However, he admitted that the letter dated 23<sup>rd</sup> September, 2003 stated that his salary had been consolidated, so that he could benefit more on the issue of pension. Accordingly, the gross pay under the payslips was equal to basic pay.

7. He admitted that as a Buying Centre Supervisor, he was reporting to the Procurement Manager Alice Teyie. He admitted that he was late for work on two occasions due to breakdown of the vehicle. He further admitted that from 19<sup>th</sup> to 23<sup>rd</sup> December, 2014 he was absent from work but contended that he had permission. He explained that he obtained permission verbally but he was told to fill leave forms by 23<sup>rd</sup> December, 2014 and he complied.

8. He contended that the reason for his dismissal was failure to return company vehicle after close of the Buying Centre on 10<sup>th</sup> September, 2014. He further stated that no one told him to return the vehicle before 19<sup>th</sup> December, 2014. He denied ever being given the company vehicle policy guidelines and usage, nor was the same explained to him. He was also not told that the vehicle was a management pool car. He admitted that he was also in the management. He stated that he returned the vehicle on 19<sup>th</sup> December, 2014 after instructions from Ms. Alice Teyie.

9. He admitted that he was summoned for hearing on 13<sup>th</sup> January, 2015 in company of another employee of his choice. He admitted that he signed the minutes of hearing which are in page 8-10 of the respondents bundle of documents. He further admitted that he was dismissed after the hearing. He contended that he was not paid for his accrued leave plus the other claims set out in his suit.

10. On the re-examination he contended that had he been told to return the vehicle earlier, he would have done so immediately. He maintained that he was instructed to return the vehicle on 18<sup>th</sup> December, 2014 and he called Mr. Peter Ndirangu (fleet manager) who said that he was out and told him to return the vehicle on 19<sup>th</sup> December, 2014. He stated that he returned the vehicle in obedience to the instructions given by his supervisor. Finally, he admitted that he offered to compensate his late reporting by working extra hours.

#### **DEFENCE CASE**

11. Ms. Ferrinn Kafunah, 1<sup>st</sup> Respondents' Human Resource Officer testified as RW1. She confirmed that the claimant was employed as Trainee Miller effective 8<sup>th</sup> July, 1985 vide the letter dated 25<sup>th</sup> June, 1985 earning a consolidated salary of 999 pounds per annum. On 23<sup>rd</sup> February, 1990, the claimant became a management staff entitled to pension. As at the time of separation the claimant was Buying Centre Supervisor.

12. RW1 testified that in December, 2014, the 1<sup>st</sup> Respondents' Human Resource Department received a complaint from the procurement manager that the claimant had reported to work late on 15<sup>th</sup> December, 2014 and 22<sup>nd</sup> December, 2014, that the claimant had proceeded on an unofficial leave; she stated also that the claimant had unlawfully retained motor vehicle registration number KAU 952Y after the closure of the Nanok Buying Centre on 11<sup>th</sup> September, 2014 till 17<sup>th</sup> December, 2014. RW1 further contended that the issues raised in the said complaints constituted gross misconduct and under the 1<sup>st</sup> Respondent's Human Resource Manual consequently the claimant was served with two show cause notices inviting him to a disciplinary hearing on 13<sup>th</sup> January, 2015 and giving him the liberty of being accompanied by a representative of his choice.

13. She further testified that the claimant attended the hearing without any representative and participated fully in the hearing. Thereafter the claimant signed the minutes of the hearing, and upon consideration of the minutes the management decided to dismiss the claimant summarily and communicated the decision vide the letter dated 24<sup>th</sup> June, 2015. She denied knowing the allegation that the claimant ought to have been declared redundant contending that the claimant position did not become superfluous.

14. She explained that Buying Centres for maize and wheat have all along been opened seasonally and they have continued even after the dismissal of the claimant. She further contended that the position of Buying Centre supervisor is currently occupied by Mr. Justus Musangi. She explained that the circumstances under which Mr. Joseph Oloo was declared redundant were different from the ones in which the claimant was dismissed.

15. Finally, she denied reliefs sought by the claimant contending that the claimant was not declared redundant; that he was receiving a consolidated salary; that he was paid accrued 9 leave days together with terminal dues after the termination, and that the dismissal was lawful. She therefore prayed for the suit to be dismissed with costs.

16. On cross-examination RW1 stated that she joined the respondent in 2018 and became aware of the facts of this case after perusing the claimant's employment file. She maintained also that Mr. Justus Musangi took over claimant's position but produced the appointment letter as proof.

17. She reiterated that the claimant was accused of retaining company vehicle even after being asked to return it. She contended that the Human Resource manual came into force in January, 2015.

#### **CLAIMANT'S SUBMISSIONS**

18. The claimant submitted that his dismissal was unfair both procedurally and substantively because the reason for the dismissal was not valid and the procedure followed was not fair. He contended that the procedure followed was not fair and it did not accord with section 41 of the Employment Act because he was given only one day notice before the hearing on 13<sup>th</sup> January, 2015 and the show cause letter did not state the charges against him. He further argued that the dismissal was communicated 4 months after the hearing and he was not given any chance to appeal.

19. As regards the reason for the dismissal he contended that the respondent has not sufficiently established that keeping company car was an offence that amounted to gross misconduct warranting summary dismissal. He contended that due to the nature of his employment he was assigned the vehicle which he was later accused of retaining. He further contended that the demand to return the vehicle was unusual but he complied with it. He reiterated that the instruction to return the vehicle was made on 18<sup>th</sup> December, 2014 and he complied with the same on 19<sup>th</sup> December, 2014. He also contended that the demand for the vehicle was in bad faith because the procurement manager was aware that his bid to purchase the car was successful as indicated by the fleet Administrator, Mr. Peter Ndirangu in the email forwarded on 21<sup>st</sup> December, 2015 (page 90 of the claim bundle).

20. On the hand, the claimant submitted that actual reason for his dismissal was redundancy after the Buying Centre was closed down. He contended that his colleague Mr. Oloo was declared redundant after being deemed to be surplus. According to the claimant the respondent decided to summarily dismiss him instead of declaring him redundant in order to avoid high expenses.

21. He prayed for the reliefs sought in the claim contending that in consideration of his long service and age he is entitled to the maximum compensation of 12 months salary for the unfair dismissal.

### **RESPONDENT'S SUBMISSIONS**

22. The Respondents submitted that the dismissal of the claimant was fair and lawful because he admitted the misconduct of failing to obey instructions from his supervisor to return company vehicle after the Narok Buying Centre was closed on 10<sup>th</sup> September, 2014. They contended that the claimant failed to obey verbal instruction given on 22<sup>nd</sup> October, 2014 by his supervisor to return the vehicle and by email on 18<sup>th</sup> December, 2014. That the claimant remained with the car from 11<sup>th</sup> September, 2014 to 19<sup>th</sup> December, 2014 when he returned. They contended that the supervisor had lawful authority to instruct the claimant on what to do but he disobeyed as such the reason for the dismissal was valid.

23. On the other hand, the respondents submitted that the procedure followed before dismissing the claimant was fair because he was served with two show cause notices and thereafter he was accorded a disciplinary hearing by a committee; that although he attended alone, he had been granted the right to be accompanied by another employee of his choice. They further submitted that after the hearing the claimant signed the minutes which were considered by the management and made a decision to dismiss the claimant. Thereafter the decision was communicated through the letter dated 24<sup>th</sup> June, 2015 which set out the reason for the dismissal as insubordination and retaining a company vehicle without permission.

24. They further disputed the claimant's contention that he was not given sufficient time to prepare for the hearing and argued that at no time did the claimant raise that issue before or during the hearing. They therefore, dismissed the said allegation as a mere after thought. They argued that the four months taken to make the decision was to enable them consider the matter keenly because they were not rushing to dismiss the claimant formally. They further argued that the claimant was aware of his right of appeal under the Human Resource Manual but he chose not to appeal.

25. As regards the relief sought, the respondents submitted that the claimant is not entitled to the same for the reason that the dismissal was fair and lawful, and that all the rightful terminal dues were paid to him after the separation. They therefore prayed for the suit to be dismissed with costs.

### **Issues for determination and analysis.**

26. Having considered the pleadings, evidence and submissions, I find no dispute in that the claimant was employed by the respondents from 25<sup>th</sup> June, 1985 to 24<sup>th</sup> June, 2015 when he was summarily dismissed by the respondents. The issues for determination are;

- a) Whether the dismissal was unfair and unlawful.
- b) Whether the claimant is entitled to the relief sought.

### **Whether the dismissal was unfair and unlawful**

27. **Section 45** provides that;

***(1) No employer shall terminate the employment of an employee unfairly.***

***(2) A termination of employment by an employer 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.*

*(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

*(4) A termination of employment shall be unfair for the purposes of this Part where— (a) the termination is for one of the reasons specified in section 46; or (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—*

*(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

*(b) the conduct and capability of the employee up to the date of termination;*

*(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

### **Reason for the dismissal**

28. The dismissal was communicated to the claimant by the letter dated 24<sup>th</sup> June, 2015 which set out the reasons for the dismissal as follows;

*“In light of the foregoing, please note that your action amounted to gross misconduct for not only failing to honour a lawful instruction by a person in authority but also keeping the company[sic] to the detriment of the company. You confirmed you know you ceased being entitled to a company car immediately you left the buying centre duties”.*

29. The reasons for the dismissal according to the foregoing quoted paragraph are that first the claimant unlawfully retained the aforesaid company vehicle from 11<sup>th</sup> September, 2014 to 19<sup>th</sup> December 2014 and secondly, the claimant disobeyed lawful instruction given to him on 22<sup>nd</sup> October, 2014 by his supervisor to return the vehicle to the Company. The claimant admitted during the disciplinary hearing that he stayed with the car from 10<sup>th</sup> September, 2014 till on 19<sup>th</sup> December, 2014 after his supervisor instructed him for the second time to return the vehicle.

30. He justified the failure to return the car by stating that he went on leave immediately after closing the Buying Centre and also because he hoped to buy the vehicle through bidding process. However, the employer was not satisfied with the said explanation and formed the opinion that the action by the claimant amounted to gross misconduct warranting dismissal.

31. I have considered the evidence and the submission by both sides on the matter and I am satisfied that the respondents have proved by evidence that the reason for dismissing the claimant was valid and fair within the meaning of **Section 44(4) and 45(2) of the Employment Act. Section 44(3) of the Act** provides that the employer is entitled to dismiss an employee summarily when he has fundamentally breached his obligations arising under the contract of service.

32. **Section 44(4)** on the other hand provides that employer is entitled to summarily dismiss his employee who knowingly fails or refuses, to obey a lawful command which it was within the scope of his duty obey, issued by his employer or a person placed in authority over him by the employer. In this case the claimant breached his obligation under the contract by failing to return the vehicle after closure of the Narok Buying Centre, and further disobeyed a lawful command to return the car from his supervisor from 22<sup>nd</sup> October, 2014 till 19<sup>th</sup> December, 2014 after a second command from the same supervisor was made to him. In my considered view, a reasonable employer in the circumstances where there is misuse of Company property and deliberate disobedience of lawful instructions, would dismiss the claimant.

### **Procedure followed**

33. **Section 41 of the Act** provides that;

*“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.*

34. In this case the claimant admitted that he was notified of his misconduct for which disciplinary action was being considered and he was

also invited to attend disciplinary hearing on 13<sup>th</sup> January, 2015 in the Company of a representative of his choice. He further admitted that he attended the hearing and aired his defence and thereafter he was served with the draft minutes which he made corrections before signing. The minutes were eventually corrected and he signed the same and waited for 4 months before he received the dismissal letter dated 24<sup>th</sup> June, 2015.

35. Having considered the evidence and submissions on the matter of procedure, I am satisfied that the respondent has proved that she dismissed the claimant in accordance with a fair procedure as envisaged under **Section 41 of the Act**. Consequently, I must hold that the claimant has not discharged his duty of proving unfair dismissal as required under **Section 47(5) of the Employment Act**.

#### **Reliefs**

36. In view of the finding herein above that the dismissal of the claimant was fairly done for a valid reason and in accordance with a fair procedure, I decline to make the declarations sought.

37. Flowing from the foregoing I find that the Claimant is not entitled to compensation for wrongful dismissal, and salary in lieu of notice. He is also not entitled to severance pay because he did not lose employment on account of redundancy, but through but summary dismissal for misconduct.

38. The Claimant is further not entitled to accrued house allowance because he admitted that his monthly pay was a consolidated salary as per the salary review letter dated 23.9.2003 which consolidated his pay in order to benefit him more in terms of pension. The claim for 12 months' pension contribution lacks particulars and evidence to substantiate and for that reason it is dismissed.

39. The Claimant for 8 days accrued leave is dismissed because RW1 produced leave records for the claimant and averred that the outstanding 9 leave days were paid for together with the terminal dues. The claimant has not disputed that he was paid terminal benefits, including 9 days leave, after the dismissal.

40. Finally, the claim for certificate of service is not opposed and it is granted as prayed.

#### **Conclusion and disposition**

41. I have found that the claimant has not proved on a balance of probability that his dismissal was unfair, but the respondent has proved by evidence that the dismissal was grounded on a valid and fair reasons and that it was done in accordance with a fair procedure as required by **Section 45 of the Employment Act**. I have further found that the claimant is not entitled to the reliefs sought save for a certificate of service. Consequently, the suit is dismissed save that the respondents are directed to issue the claimant with a certificate of service under **Section 51 of the Employment Act**. Each party to bear own costs.

**Dated, and delivered at Nairobi this 17<sup>th</sup> day of December, 2020.**

**ONESMUS MAKAU**

**JUDGE**

#### **ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**