



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 2333 OF 2012

ANDREW WAFULA AMUTALLA CLAIMANT

VERSUS

KENYATTA UNIVERSITYRESPONDENT

JUDGMENT

1. The Claimant averred that he was employed by the respondent on 11th August, 2003 as a driver. Sometime in 2010 the respondent knowingly and maliciously caused his arrest alleging the claimant had stolen some 200 litres of diesel valued at Kshs. 14,000/- which came to his possession by virtue of his employment. The claimant was subsequently charged with a criminal offence at Makadara Law Courts with the offence of stealing by servant.

2. Further the respondent suspended the claimant from service and was summoned to the Junior Board of Discipline and was required to handover all the matters related to his duties to the transport manager.

3. Within the period of the suspension the claimant received a dismissal letter from the respondent. According to the claimant, the respondent acted wrongfully and unfairly in dismissing him. The claimant complained that the respondent terminated his contract without awaiting the outcome in the criminal case and without conducting sufficient investigations and without substantiating the particulars of the dismissal.

4. The criminal charges were subsequently withdrawn since the prosecution could not establish a prima facie case. The claimant further averred that the respondent neither gave him an opportunity to be heard nor served him with a warning letter contrary to Section 40 of the Employment Act.

5. The respondent on its part pleaded that the morning the claimant was arrested in possession of about 200 litres of diesel, he was supposed to travel to Kenya University Parklands Campus on an assignment which did not in any way require him to be in possession of the 200 litres of diesel.

6. The respondent denied the arrest was wrongful and without reasonable cause as it had a right on reasonable suspicion to arrest the claimant and present him to a police station before being charged in a court of law. The respondent further pleaded that the reasons for the claimant's suspension was to pave way for investigations to be conducted pending his appearance before the Junior Board of Discipline. According to the respondent, the letter inviting the claimant to appear before the Junior Board of Discipline offered the claimant an opportunity to submit a written defence to the Deputy Vice Chancellor (Administration) before the date of the meeting. The respondent further stated that the decision to dismiss the claimant was arrived at by the Junior Board of Discipline after hearing the claimant and as such the dismissal was not wrongful or unfair. Further by dint of clause 5.3 of the claimant's terms of service it had the right to terminate the claimant's appointment without notice for the listed reason among them being conduct by the claimant of a scandalous or disgraceful nature which would entitle him to be rendered unfit to hold office.

7. The respondent further pleaded that there was no order stopping the proceedings of the Junior Board pending the outcome of the criminal case against the claimant. The respondent further stated that before the Junior Board of Discipline arrived at its decision, extensive investigations were conducted and sufficient evidence collected. At the hearing the claimant's charge was read to him as had been communicated to him vide the letters suspending him and inviting him to the Junior Board of Discipline.

8. In his oral evidence, the claimant additionally stated that on 2nd March 2010 he was taking fuel to another department but was stopped at Church Road which was about 600 meters from the main gate. According to him the fuel was for generators and that Reuben Mutua of transport section used to collect fuel for generators and their work as drivers was to facilitate his movement. It was his evidence that on the material day Mutau asked him to drive him around to fuel the generators.

9. The claimant further confirmed that he was called before the disciplinary committee and that he was charged with disgraceful conduct contrary to Clause 5.3 of the respondent's terms of service. He asked the board to await the outcome of the criminal case but was eventually dismissed. The claimant further stated that upon dismissal, he was never paid his terminal due.

10. In cross-examination he stated that on the material day he had been assigned to drive a Nissan Van to Parklands Campus and that he was within the University premises when he got arrested. He confirmed that he was invited to a disciplinary hearing and that he was given a chance to explain himself but he did not do so because prosecution was still going on.

11. The respondent's witness Mr. Nderitu Gikaria informed the court that he was the respondent's Human Resource Manager. It was his evidence that on 2nd March, 2010 the claimant was authorized to drive to the respondent's Parklands Campus and that the work ticket was signed by Mr. Mburu. The claimant was expected to exit through Gate A. He was however intercepted at the shopping centre and found with ten jerri cans of 20 liters each of fuel.

12. In cross-examination he stated that the claimant had no previous warning and that the claimant's case was one of theft hence warning was not necessary.

13. Under Section 43(2) of the Employment Act, the reason or reasons for termination of a contract are matters that an employer at this time of termination of contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

14. The test for reason which can cause a dismissal is usually premised on a reasonable employer. If a reasonable employer confronted with the same reason for which an employee was dismissed would uphold the dismissal then the court would not interfere.

15. The claimant herein does not deny that he was found in possession of diesel. His defence was that the diesel was for the generators and that they were for Mr. Reuben Mutua who had asked him to drive him around to fuel the generators. The claimant did not call the said Mr. Reuben Mutua as witness neither did he hint of any difficulty in calling him. He simply said he could not call him because he (Reuben) had a case against the respondent.

16. The respondent on the other hand stated that the claimant was on the material day and time supposed to drive to the respondent's Parklands Campus and that his work ticket showed this. In the circumstances the court is of the view that the claimant's possession of the diesel was suspect and could have been intended for unauthorized use or disposal to his benefit.

17. The claimant was charged with a criminal offence but the charges were later withdrawn under Section 210 of the Criminal Procedure Code. The fact of acquittal or withdrawal of criminal charges against an employee is no bar to the employer to subject such employee to a disciplinary process on the same facts. The standard of proof in a criminal charge is usually much higher than in a civil case let alone a disciplinary hearing. It was therefore erroneous for the claimant to refuse to tender his defence before the disciplinary committee insisting that the committee awaits the outcome of the criminal case.

18. There is no complaint about the notification of the charges against the claimant and the disciplinary hearing procedure. The claimant's contestation is only over the reasons for termination of his service which the court has found to have been valid.

19. In conclusion the claim is found without merit and is hereby dismissed with costs.

20. It is so ordered.

Dated at Nairobi this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge