



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 1363 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 21st January, 2019)

MORRIS BURI MARUBE.....CLAIMANT

VERSUS

SOCIETE GENERALE

DE SURVEILLANCE (SGS) (KENYA) LTD.....RESPONDENT

JUDGMENT

1. On 23rd August 2013, the Claimant through the firm of J. Okerosi Ochako and Company Advocates, filed his Memorandum of Claim, even dated. The Claimant seeks the following orders:

- a. A declaration that the termination was evil, invalid, null and void, illegal, unjust, inequitable and unfair.*
- b. A declaration that the Claimant's fundamental and basic rights of employment under the provisions of the Employment Act 2007 and the Constitution have been infringed and trampled upon by the Respondent.*
- c. A declaration that the Respondent is in breach of contract and be ordered to pay up to the period the Claimant would have worked, that is, his 7 months' salary.*
- d. General damages for:*
 - i. Breach of contract.*
 - ii. Loss of income.*
 - iii. Illegal, unprocedural and unfair termination of employment.*
 - iv. Mental anguish and psychological torture.*
- e. Exemplary damages.*
- f. The Respondent to pay any other loss consequent upon the illegal and unfair termination.*
- g. Interest on (e) and (f) above at court rates from date of unfair termination until settlement.*
- h. Costs of this suit.*
- i. And further relief this Honourable Court may deem fit grant.*

2. On 8th May 2014, the Respondent through the firm of Obura J. and Company Advocates filed its Response to Claim, dated 7th May 2014. The Respondent prays for the dismissal of the Claimant's claim with costs.

3. It is an undisputed fact that the Claimant was employed by the Respondent between 21st December 2012 and 18th June 2013 as an Assistant Weighbridge Manager earning a monthly gross salary of Kshs. 80,000.00. The parties do not dispute paragraph 5 of the Memorandum of Claim which states that:-

“The circumstances that led to the unfair and illegal termination were false allegations that on 23rd May 2013 the Claimant facilitated a vehicle KBU 832K to transgress. It was alleged that he failed to weigh the vehicle and colluded with his team to allow it to proceed off the weighbridge without capturing the axle weight on the system.”

The Claimant’s Case

4. It is the Claimant’s case that he served the Respondent diligently until 13th June 2013 when the Respondent illegally, un-procedurally and unfairly terminated his employment. He was not given a notice, the chance to be heard, negotiate or appeal the unfair termination. The Claimant avers that he was not issued with a Certificate of Service.

5. It is the Claimant’s testimony that on 23rd May 2013, he was informed that motor vehicle registration number KBU 832K had transgressed the weighbridge. He was requested and he granted authorization to have the car chased and returned. The vehicle was not returned.

6. On 24th May 2013, the Claimant reported the matter to the OCS of the Weighbridge Police Station who then authorized the return of the motor vehicle to the weighbridge for reweighing. Thereafter, it was returned and the Claimant authorized its weighing.

7. It is the Claimant’s case that after the first axle was weighed, the Claimant suspected that the weighing scale was faulty and decided to record the weight manually so as to compare weights after the scales had been repaired. The Claimant requested the person in charge of the machine’s maintenance, to check the default. Mud was found on the machine and removed. The matter was reported to the oncoming duty manager who took possession of the motor vehicle documents. However, the Claimant was informed by the duty manager that the vehicle had been driven away without permission. The Claimant repossessed the documents.

8. The Claimant avers that after two days, the Weighbridge Manager called and enquired about the documents. The Claimant directed him to where they had been kept and he confirmed to the Claimant that they were in his possession.

9. It is the Claimant’s case that he handled the matter professionally and in accordance with the Respondent’s regulations. He denies colluding with anyone to have the motor vehicle transgress the weighbridge.

10. The Claimant in his witness statement dated 23rd August 2013 and filed on even date, avers that he was ordered to write a letter to show cause which he did. He listed his potential witnesses and attached the following documents:

a. Police OB 5 independently filed by police officer.

b. Testimony of his colleague, Mr. Bernard Muema.

c. Weighing ticket showing the 1st axle recorded by the computer and the rest that were recorded manually.

11. He further avers that the Respondent had CCTV on site and the recordings made can be replayed to show what happened on that material day.

12. It is the Claimant’s case that his show cause letter, witness testimony and the annexed documentation was disregarded and his employment terminated.

13. During trial, the Claimant sought to rely on his witness statement and the documents he had filed in Court. He restated the facts as set out in his Witness Statement and Memorandum of Claim.

14. It was the Claimant’s testimony that a month after he was issued with a termination letter, he was called for a disciplinary hearing. However, he did not attend because his employment had already been terminated.

15. During cross-examination, the Claimant testified that it was the Census Clerk who wrote the report of the transgression and which was signed by him on the next day and the Manager. It was his testimony that he was given 16 hours to show cause which he did. It was also his testimony that the said vehicle’s weight was recorded manually and that the Computer Clerk recorded the 2nd weighing.

16. During re-examination, it was the Claimant’s testimony that the Census Clerk wrote a statement in the Claimant’s favour and partly in his favour.

The Respondent’s Case

17. It is the Respondent’s case that the Claimant’s dismissal was warranted, justified and made after following due process.

18. The Respondent avers that it was its duty under its contract with the Kenya National Highways Authority, to weigh trucks using the highway to ensure their axle loads do not exceed the limits set by the law.

19. The Respondent also avers that the Claimant had a duty to ensure that all trucks passing the Gilgil weighbridge while he is on duty, are weighed. However, the Claimant neglected to perform this duty by making false and erroneous entries in relation to truck number KBU 832K.

20. During trial, RW1 Isaac Wanjohi and the duty manager at Gilgil weighbridge, testified that when he reported for duty, the Claimant gave him an Insurance Certificate of truck registration number KBU 832K and informed him that the vehicle was in the holding yard. However, in the morning he was informed that the truck escaped. He informed the Claimant and returned the insurance certificate because the vehicle had not been properly handed over to him. It was his testimony that he was issued with a copy of the insurance certificate and not the original. It was also his testimony that at the time he was given the certificate, the vehicle was not shown to him and neither was he given the ignition keys.

21. He explained to the Honourable Court what usually happened when there was power failure or mechanical breakdown.

22. It was his testimony that the Census Clerk was investigated as well, given a chance to defend himself and was cleared.

23. During cross-examination, RW1 explained to the Court what usually happens when a vehicle transgresses. It was his testimony that the truck disappeared from the yard when he was on duty.

24. RW1 admitted that there was no statement relating to his testimony issued in Court. He asserted that the Claimant went through a disciplinary procedure but admitted that he never attended the disciplinary hearing neither did he handle it.

25. During re-examination, RW1 testified that he had not inquired about the keys when the Claimant was handing over.

Submissions By The Parties

26. The Claimant in his submissions dated 27th July 2018 and filed on 30th July 2018, submits that he worked for the Respondent diligently yet he was unfairly blamed, which fact led to his wrongful dismissal.

27. It is also the Claimant's submissions that the Respondent acted unlawfully and breached its contract with the Claimant. The show cause letter did not originate from the Human Resource Department, the weighbridge manager did not have the capacity to deal and dismiss the Claimant and the Human Resource Manager failed to reinstate him before a disciplinary hearing could be conducted.

28. The Claimant submits that his termination was both unfair and unlawful. He relied on the case of **Principal and BOG Machakos Teachers College vs. Wambua Muange [2016] eKLR** where the Court observed that:-

“An unfair dismissal is one ... where there is no substantive justification provided or procedural fairness observed. The elements of a claim for a claim for unfair dismissal are explained in Tolley's Employment Handbook, 20th Edition at paragraph 53.1 at page 984 as follows:-

‘An employer who dismisses an employee without good reason or without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for dismissal... if the dismissal is found to be unfair the employer can be ordered to re-engage, reinstate or to pay compensation to the ex-employees.’ A dismissal can therefore be both unfair and wrongful at the same time.”

29. The Claimant submits that he is entitled to the prayers sought as he was unfairly and wrongfully dismissed.

30. The Respondent in its written submissions dated 3rd October 2018 and filed on even date, submits that the Claimant's employment was dismissed due to gross misconduct and according to its company policies. No record of the weight of motor vehicle registration no. KBU 832K was ever made, no key was handed over to the incoming duty manager and that the handover report was never prepared by him.

31. It is the Respondent's submissions that the Claimant's termination was lawful because he was informed of the allegations against him, given an opportunity to respond through a show cause letter, his explanation was found wanting leading to his dismissal. The Claimant failed the integrity test, warranting his summary dismissal.

32. I have examined evidence from both parties. The issues for determination are as follows:-

- 1. Whether there were valid reasons to warrant dismissal of the Claimant.***
- 2. Whether due process was followed before Claimant was dismissed.***
- 3. Whether Claimant is entitled to remedies sought.***

33. On the 1st issue, the Claimant was served with a dismissal letter dated 18/6/2013 which read as follows:-

“Dear Sir

We refer to our show cause letter to you of 13th June, 2013 and your response to it dated 13th June 2013.

We regret to advise that your response is unacceptable.

Your response is different from what you told the investigator, yet still raises questions. It does not justify having weights recorded manually, and having the diversion unmanned. It does not explain why you thought the scale was overwhelming, contrary to what you told the investigator.

Yet, after receiving the documents from your colleague, you still delayed reporting the incident to your manager.

Not only does your response fail to justify your actions, but has been inconsistent, raising questions on your integrity at work. As such, the Management finds you liable or colluding with the transporter to transgress.

This is unacceptable, and the company has no option but to terminate your contract with immediate effect.

You will be paid one month's pay in lieu of notice in accordance with the terms of your employment contract.

You are hereby advised to handover all Company property in your possession to your Manager, upon which your terminal dues will be paid.

A Certificate of Service is enclosed.

Yours faithfully,

For: SGS KENYA LIMITED

Signed

Hillary Terer,

Weighbridge Manager

“

34. The reason given in the termination letter for dismissal was “colluding with the transporter to transgress”. The Claimant’s case was that he was on duty when a Census Clerk reported to him that a vehicle had transgressed. He authorised the vehicle to be chased by the police and their driver. The vehicle was brought back and he was given the ignition keys. The vehicle was weighed and detained and he handed it to night shift staff.

35. He avers that the vehicle thereafter disappeared and it had been handed over to be driven by Isaac Wanjohi who informed him that he had handed over the documents to the driver. The contention by the Claimant is that it is not him who colluded with the driver to transgress and release this vehicle unprocedurally.

36. Isaac Wanjohi who testified for Respondents denied the vehicle and insurance were handed over back to him by the Claimant. He contended that he had been given a copy of the insurance.

37. The issue then is who between the Claimant and Respondent were telling the truth. No records of the vehicle documents showing handover were ever produced in Court. It is not clear under whose watch the vehicle was when the driver drove it off.

38. It is not clear whether the facts as narrated by either Claimant or Respondent are true because they were both involved in handling the vehicle in question. The only way this issue would have been resolved would have been through a disciplinary hearing which was never done.

39. Section 45(2) of Employment Act 2007 states as follows:-

(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”.

40. There is no evidence that the Claimant was taken through a disciplinary hearing. It is therefore my finding that the termination was

unfair and unjustified.

41. In terms of remedies, I find for the Claimant and award him:

1. 7 months' salary as compensation for unfair termination = 7 x 80,000 = 560,000/=

2. Plus costs and interest.

3. He will also be issued with a Certificate of Service

Dated and delivered in open Court this 21st day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Echako for Claimant – Present

Respondent – Absent