



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 44 OF 2016

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....CLAIMANT

VERSUS

DELMONTE (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed suit on behalf of the 2 Grievants Eric Wanyama and Samuel Munene both former employees of Delmonte (K) Ltd the Respondent herein. They seek relief for unfair dismissal. The 1st Grievant was employed by the Respondent in 2013 as a store/record clerk at a salary of Kshs. 21,000/- and a house allowance of Kshs. 3,400/-. The 2nd Grievant was also employed in 1988 as a conveyor operator on seasonal basis. He served in various departments including empty cans, liquid section as (machine operator), fleeced plant (plant operator) and finally as a forklift operator. At the time of his dismissal he was earning Kshs. 39,436.80 and Kshs. 2,900/- as house allowance. The genesis of the dispute dates back to 23rd June, 2014 when the 1st and 2nd Grievants were on duty and subsequently informed that the copper wires from the cage (can plant) were missing. On 23rd July, 2014 1st Grievant was arrested and recorded a statement at the police station but was never charged. Notice to show cause were issued to the Grievants and both responded to the same thereto. The Grievants were subjected to a disciplinary hearing on 20th August 2014 and subsequently dismissed on 16th September, 2014. Upon dismissal the 1st and 2nd Grievants appealed against the dismissal, but the respondent declined the appeal and affirmed it is earlier decision of dismissal. The Union by virtue of the Grievants being its members; took up the matter, and its secretary general reported the existence of the dispute to the cabinet secretary on 17th October, 2014. The Cabinet Secretary, through the Industrial Relations Officer appointed a conciliator. Parties drew their respective memorandum to the conciliator, after which parties were invited to several meetings with a view to settling the dispute. On 30th March, 2015 both parties agreed to disagree and a certificate was issued to that effect. It was after conciliation failed that the Grievants through the union resolved to come to court seeking for reinstatement to work without loss of benefits and for payment of damages in case reinstatement is disallowed.

2. The respondent in its response denies that the grievants were unfairly dismissed and avers that they were dismissed for gross misconduct. The respondent further avers that they were given an opportunity to explain themselves and a disciplinary hearing was conducted but they were unable to bring up any tangible evidence to exonerate themselves from the offence. In the reasons for dismissal, the Respondent asserts that Eric Wanyama the 1st Grievant herein did not perform his duties in due diligence by not securing the storage areas under lock as he was the custodian and that Samuel Munene the 2nd Grievant herein was found to have given contradicting information on his whereabouts on that material day. The Respondent averred that the services of the two Grievants were terminated in accordance with Section 44(4)(c) and (g) of the Employment Act 2007 and therefore the Grievants were not entitled to the prayers sought.

3. The 2nd Grievant testified and stated that he knew nothing about the theft of the copper wire and that there were seven gates and all of them were fitted with CCTV and had security guards. He averred that no one could go in without being recorded. He further stated that the forklift he used cannot lift more than 1.5 tons while the alleged stolen copper wire was 2.5 tons. He proceeded to state that Eric Wanyama had a key to the store and not the can plant where the copper wire was kept. He confirmed that Eric Wanyama the 1st Grievant was at the empty cans store and not at the can plant.

4. The Respondent's witness Mr. Simon Wachira Mwangi (DW1) a security officer testified that he knew Eric Wanyama who was operating as a store clerk. He confirmed that the copper wire was at the can plant inside a cage locked with chains and padlocks and that 1st Grievant had the key to the can plant. He further stated that he saw that the padlocks of the cage had been cut on the material day. He further testified that 1st Grievant was on duty and the 2nd Grievant was the forklift operator. He testified that the 2nd Grievant was not able to explain satisfactorily where he had worked on the material day and that investigations indicated that he went to the can plant area with the forklift and he offloaded materials despite stating that he did not work there. In cross examination he confirmed that the theft was not reported after two months; it was reported immediately after they noticed the theft and investigations commenced. In his testimony he stated that the

forklifts are hired from Toyota Kenya and that they are similar in capacity. He further testified that when materials or goods are delivered the clerk calls a security officer to witness and check but in this case no guard was called when drums were delivered. He testified that there were no security guards at the time of the theft neither were there CCTV cameras at the time. That marked the end of oral testimony and parties were to file submissions.

5. In submissions filed, the Claimant contended that there was suspicion as to whether the copper wire and electric cable were really in the cage because there was no evidence showing that this matter was investigated by an independent arm of the Government (read the Police) until after two months when the 1st Grievant was arrested and recorded a statement. The Claimant submitted that the two Grievants were not charged in Court. Further they contended that there was delay in taking action by the Respondent. The Claimant also submitted that the keys of the cage where the copper wires were allegedly stored was under the custody of the manager charged with supervision of the copper wire and the size being cut when need arose. The Claimant submitted that there are two categories of forklifts. One that is battery driven with a capacity of 1.5 tons and another of 2.5 tons which is gas driven. It was submitted that the 1st Grievant was operating the one with a capacity of 1.5 tons while the copper wire was 1.9 tons and the Claimant thus contends that the copper wire could not be lifted by the 1.5 ton forklift and that neither could the copper wire be lifted by one individual. The Claimant further submitted that the Respondent's witness confirmed on oath that the Respondent's gates are guarded by security guards and G4S and that gates 3 and 4 are heavily guarded because they are the ones used by trucks to deliver as well as pick goods, therefore nothing can sneak through the gates without being noticed. The Claimant submitted that every truck entering or exiting the Respondent's premises had to be checked by security guards, hence making it difficult for the Grievants to steal, organize and cause the loss of the copper wires and the electric cable.

6. The Respondent submitted that failure by the police to charge the Grievants in a court of law does not exonerate them from the fact that they were involved in the theft of the Respondent's property on the material day.

7. From the above pleadings, evidence and submissions of the parties, 3 issues fall for determination in this cause:-

- i. Whether the Grievants engaged in gross misconduct justifying their summary dismissal;
- ii. Whether the Grievants' termination was fair or unfair; and
- iii. Whether the Grievants are entitled to the remedies as prayed for in their claim.

8. As to whether the 2 Grievants engaged in gross misconduct thereby justifying summary dismissal. Section 44(3) of the Employment Act makes provision as follows:-

44.(3) an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

The Act further provides for acts that may amount to gross misconduct per Section 44(4). Section 44(4)(c) and (g) make provision as follows:-

44(4)(c) an employer will be justified for dismissal if an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(g) an employer will be justified for dismissal if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

From the facts of the case and the evidence adduced, it was the duty of the 1st Grievant to act diligently and ensure that the property of his employer were secured as he was a store clerk charged with the responsibility of keeping records and a custodian of the keys to the can plant from which the copper wire worth Kshs. 8.6 million and electrical cable worth Kshs. 235,000/- were stolen. Further the 2nd Grievant was the only forklift operator at the site at the time of the alleged theft, and from the evidence adduced the copper wire could only be lifted with a forklift and not by an individual. This therefore is sufficient reason for an employer to believe that the theft was orchestrated and carried out by the two Grievants in a joint scheme.

9. As to whether the Grievant's termination was fair or unfair, the law provides under Section 45(2) of the Employment Act as follows:-

45(2) unfair termination to include; termination by an employer with failure to prove that the reason for termination is valid, that the reason for termination is a fair reason, relating to the employee's conduct, capacity or compatibility and that the employment was terminated in accordance with fair procedure.

Prior to dismissal, an employer has to give an employee the safeguards of Section 41 of the Employment Act. Section 41 *in parre materia* provides as follows:-

41.(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.

10. The 2nd Grievant's evidence was to the effect that they were issued with a notice to show cause, they responded to it, after which they

were taken through a disciplinary hearing where they were allowed to appear with a representative and tendered their defence. It is clear therefore that the Grievants were therefore taken through a fair procedure. The employer has also proved that there was a valid reason to terminate the Grievant's employment. Pursuant to Section 43 of the Employment Act, the reasons are matters that the employer genuinely believed to exist at the time of the termination and the reason has to be valid and fair. The Respondent gave reasons for terminating the employment for the two Grievants and in evidence what came out is that the two Grievants are the only people that were on the site at the time of theft. The 1st Grievant had access to the can plant while the 2nd Grievant was the only forklift operator on site. Both Grievants however did not discount the Respondent's case of dishonest conduct on their part. In the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR**, the learned judges of the Court of Appeal borrowing from **Michael Dowling v Workplace Safety and Insurance Board [2004] CAN LII 43692** observed as follows;

"...It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct."

Further in the same judgment, the learned Judges of Appeal held as follows:-

"Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

11. As to whether the Grievants are entitled to the remedies as prayed for in the memorandum of claim, having held as I have above that the employer was justified in terminating the Grievants' employment, the two Grievants become disentitled to the relief sought. The suit is dismissed with orders that each party bears their own costs of the claim.

It is so ordered.

Dated and delivered at Nyeri this 21st day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar