



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 1234 OF 2013

ELIUD WACHIRACLAIMANT

-VERSUS-

GENERAL MOTORS (EA) LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim on 6th August 2013 contending he was unlawfully, unjustifiably and wrongfully dismissed from his employment by the respondent on grounds that he performed his work negligently without following the laid down procedures. He therefore prayed for the following reliefs:

- a) A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and or unfairly.
- b) Payment of the Claimant's terminal benefits
- c) An award of Kshs.183,998.85 being the service pay of one month's salary every year completed for 4 years and 10 months.
- d) An award of Kshs.457,130.00 being damages for wrongful termination maximum of 12 months
- e) The Respondent do issue the Claimant with certificate of service.
- f) In the alternative the Claimant be reinstated back to work by the Respondent with full benefits.
- g) Any other or further relief that this Honourable court may deem fit and just to grant.

2. The Respondent filed its Statement of Defence on 10th October 2013 denying that the Claimant's termination was wrongful and unfair. It averred that the Claimant was summarily dismissed in accordance with the Employment Act for failure to follow the correct procedure in handling vehicle assembling materials referred to as "forward robbing" parts leading to loss. She therefore prayed for the suit to be dismissed with costs.

3. During the hearing, the Claimant testified as Cw1 while the Respondent called three witnesses, Robert Ngaira, Fred Wasike and Kennedy Mutua who testified as Rw1, Rw2 and Rw3 respectively. Thereafter, both parties filed their respective submissions.

Claimant's case

4. The Claimant testified that he was employed as an assembler of motor vehicles from 9.7. 2007 to 8th October 2012 when he was terminated. He further testified that he was suspended on 11th September, 2012 to pave way for investigations, not allowed to go to the office and he was immediately arrested and taken to Industrial Police Station on allegation that he was accused of not keeping records during forward robbing as a result of which some items (spare parts) were allegedly lost. However, he was released on the same day after the Respondent failed to avail evidence. He denied being in-charge of stores or records and stated that he was only an assembler.

5. As regards the procedure followed before the dismissal, Cw1 contended he was never given a chance to defend himself by the employer as confirmed by the clearance form, which indicates that he was not given a chance to explain himself. He therefore contended that the

termination was unfair.

6. In cross-examination he testified that he was suspended for not following the forward robbing procedure. He testified that there was no clear forward robbing procedure and people would get parts from all over. He testified that he was not trained about forward robbing and he was not to fill any paperwork. He further testified that forward robbing is not part of assembling. He testified that it is him who reported that there were lost parts.

7. He further testified that there were no investigations and no internal hearing was conducted. He testified that he only received his pension contribution after the termination. He however admitted that he had a loan of Kshs.600,000 from GM Sacco where he also had Sacco shares amounting to Kshs.200,000, but he clarified that the Sacco is a separate entity from the employer.

Respondent's case

8. **Rw1** Robert Mmasi Ngaira the then Manager in Charge of Security and Transport adopted his statement filed on 12th May 2016. He testified that a report was made to the office about lost spare parts from the respondent's yard and he carried investigations with Kennedy Mutua (the transport & Security Officer) and Joash Ogembo (G4S Contract Manager). That after the investigations it was discovered that the claimant was "forward robbing" parts without using the proper procedure and that the Claimant was unable to account for some parts that were forward robbed. He testified that the Claimant was not using the Material Replacement Requisition Form which was supposed to be used for forward robbing while requisitioning for material.

9. In cross-examination, he testified that on 9th August 2012 Mr. Gideon Gateru, the Supervisor of Material Handling reported missing items. He testified that he did not know what happened thereafter but Mr. Gateru no longer works at the Respondent. He testified that investigations were conducted by 3 people including Mutua, Ogembo and himself. He testified that after the investigations they wrote a report to the management and presented it in October 2012. He however admitted that the suspension took place before the investigations report was presented to the management. He further admitted that during the suspension the Claimant was not allowed to set foot at the Company's premises. He testified that they reviewed the CCTV Cameras at the premises but where the CKD is situated there were no cameras.

10. Fred Wasike, the Respondent's Director of Human Resource Manager testified as **Rw2**. He adopted his Witness Statement filed on 20th June 2016. He stated that on 9th August 2012 Gideon Gateru the then Material Handling Supervisor reported the loss of parts from Completely Knocked Down (CKD) yard. He testified that investigations were conducted by Kennedy Mutua (the transport & Security Officer), Joash Ogembo (G4S Contract Manager) and Robert Ngaira (the then Security Manager) to ascertain how the loss occurred. He testified that during investigations the claimant was given numerous opportunities to explain himself but he was unable to give reliable explanations and consequently, he was terminated on grounds of gross negligence due to the failure to follow proper work procedure resulting to losses.

11. He further testified that at point of exiting employment, the claimant was entitled to salary for the days worked in October 2012, two months' salary in lieu of notice, leave and pension. However, he contended that Kshs.71,509.60 was applied to settle a loan owed by the claimant from GM Kenya Sacco, with his authority.

12. In cross-examination he testified that he was given a report by **RW1** which informed the decision of suspending and terminating the Claimant. He however stated that there were also discussions with the Claimant prior to his termination but he did not produce the investigations report or any other documentary evidence to prove the alleged meetings held to discuss the misconduct with the claimant.

13. He contended that the Claimant remained suspended until when he was required during the investigations. He however admitted that the termination letter never made any reference to any meeting or hearing before dismissing the Claimant. He testified that the Claimant was dismissed for negligence in handling records of material which led to loss. He contended that the claimants job description was changed after the appointment but produced nothing to prove that allegation. He testified that the Claimant never cleared with the Human Resource office but the clearing process was done on his behalf by circulating the clearance form.

14. In re-examination **RW2** testified that the Claimant was entitled to Kshs.116,380 but was paid Kshs.19,752 and the remainder was deducted towards medical, pension, his Sacco loan amounting to Kshs.71,509.60 and excess 6 leave days taken. He further testified that he was paid his outstanding pension of Kshs.196, 791.40.

15. **Rw3**, Kennedy Mutua adopted his statement filed on 17th April 2014 in which he also states that the Claimant was unable to explain discrepancies in spare parts during the forward robbing that were discovered after investigations were conducted. In cross examination, he testified that the company had introduced new security guards. He testified that there was an intruder who cut through the fence and was caught selling batteries. He also admitted that the internal security guards were not being searched like the other staff while exiting the company premises.

Claimant's submissions

16. The Claimant submitted that this case is largely founded on the natural justice principles of the right to fair hearing. The Claimant relied on section 43 of the Employment Act and the Supreme Court decision in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others [2018]eKLR**. The Claimant submitted that it is clear that he was never accorded a fair hearing where he was to explain himself and as he did it was upon his own invitation and the same was never regarded.

17. The Claimant submitted that the Court in **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** summarised the legal requirements for termination of employment on grounds of misconduct, poor performance or physical incapacity under section 41 of the Employment Act as follows:

- (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination.
- (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.
- (iii) Heard and considered any explanations by employee or his representative.
- (iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules.

18. The Claimant further submitted that should the Court give the Respondent the benefit of doubt that the Claimant was summarily dismissed under section 44 of the Employment Act, section 44 (4) of the Employment Act is to the effect that a fair hearing is not a concept that would be disregarded even in instances of summary dismissal. The Claimant therefore submitted that the test pronounced in the **Alphonse Machanga Mwachanya case** (supra) was not complied with.

19. The Claimant further submitted that in **Nicholus Muasya Kyula v Farmchem Ltd [2012] eKLR** the court laid down the typical process of terminations on grounds of gross misconduct. That in applying the said test in the case, he submitted that the Respondent did not table any reports contemplated in the above case scenario that justified summary dismissal. He therefore contended that the Respondent did not discharge its burden of proving that the termination of the Claimant was rightful and fair.

Respondent's submissions

20. The Respondent submitted that the Claimant neglected to follow his core duty which was to oversee the opening of CKD boxes and forward rob parts. The Respondent therefore submitted that in neglecting to perform his duties, he breached the trust bestowed upon him and occasioned the Respondent insurmountable losses. The Respondent relied on the cases of **Francis Nyongesa Kweyu v Eldoret Water and Sanitation Company Limited [2017] eKLR** and **Mutua Musau v Barclays Bank of Kenya Limited [2016] eKLR** where the Court held

“I therefore find the Respondent acted within a just and reasonable process to arrive at the decision to terminate the claimant. I find there existed sufficient grounds and reasons to justify the termination of claimant. The loss of the employer property in the course of an employee's work is tantamount to conduct that warrant summary dismissal.”

21. The Respondent submitted that RW2 explained in court the deductions made in concluding that no terminal benefits were owing to the Claimant as alleged as the Claimant had loan arrears with General Motors Kenya Co-operative Sacco amounting to Kshs.528,491. The Respondent submitted that the Claimant belonged to the GM Kenya Co-operative Sacco which bars the Claimant from demanding service pay. The Respondent relied on the decision in **Michael Obudho Amondi v United Millers Limited [2016] eKLR** where the Court held:

“What section 35 (6) of the Employment Act provides is that where an employee is already benefiting from a registered pension or provident fund; or gratuity or service pay scheme established by the employer or under a collective bargaining agreement or is a member of NSSF, then he would not be entitled to service pay.”

22. The Respondent submitted that the remedy for reinstatement as provided under section 49 (3) of the Employment Act is not to be whimsically granted and the Court must be guided by the provisions of section 49 (4) (a) to (m) of the Act including practicability of reinstatement or re-engagement as may be ordered by the court. To fortify the foregoing submission she relied on the Court of Appeal decision in **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR**. The Respondent further submitted the Court should be guided by the principle that costs follow the event.

Analysis and determination

23. It is undisputed that the Claimant was employed by the Respondent vide the Letter of Appointment dated 9th July 2007 as an Assembler until 8th October 2012 when he was terminated with immediate effect. The issue for determination are therefore:

- a) Whether the Claimant was unfairly terminated.
- b) Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly terminated

24. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

The reason for termination

25. The termination letter dated 8th October 2012 states that the Claimant was terminated with immediate effect for gross negligence due to failure to follow the material handling procedure for CKD forward robbing and record keeping resulting in unexplained loss. The Claimant denied the alleged offence and testified that he was arrested together with this supervisor for the alleged offence but they were never arraigned in Court because the respondent failed avail any evidence. He further contended that as an Assembler, it was not his job to oversee

stores and keep record of spare parts. He however admitted that his supervisor told him that there were spare parts lost.

26. Rw1 testified that he was part of the investigations team and that the investigations report was presented to the management in October 2012 long after the suspension of the claimant in September 2012. However, the foregoing was contradicted by Rw2 who testified that the said investigation report was the basis on which the claimant was suspended and terminated. Rw2 cannot be right in stating that a report presented to him in October 2012 informed the decision to suspend the claimant a month earlier.

27. The foregoing contradiction notwithstanding, it is clear from the evidence adduced by both sides that motor vehicles parts from the CDK were lost during the process of forward robbing by employees in the Materials Section. That some employees discovered loss of motor vehicle parts but failed to follow the procedure of reporting the losses and replacement of the lost parts. The claimant was one of the employees who was working in the said section and he admitted that such losses were true and that he never at any one time filled the necessary form to report the loss and replacement of items during his forward robbing. The reason given for such default is that the said duty was not part of work as an Assembler and contended that he was never trained on that said reporting and record keeping. He however confirmed the testimony of the Rw1 that the employees in the section were robbing parts all over and everywhere in the CDKs without the requirement of filling any forms.

28. The respondent did not rebut the foregoing allegation that the claimant was never trained on the recording and reporting the loss and replacement of parts in the Production Material Replacement Requisition (PMRR) Form for forward robbing. The form was also not shown to the claimant for identification during cross examination nor was any attempt to produce it made by the defence. I therefore find on the preponderance of evidence that the respondent has not proved that the claimant knew that he was supposed to fill the PMRR form during forward robbing but deliberately failed to do and as a result, vehicle parts were lost.

29. As admitted by Rw1, it was not the claimant alone who was forward robbing negligently. So, why was he and the supervisor the only one arrested in their section? What items were lost as a result of the claimant's negligence? In my view, without evidence to answer the foregoing questions means that the claimant was made to pay the price on behalf of all his colleagues in his Section yet he was not their supervisor. Picking on the claimant alone meant that the lost material was due to his personal negligence, which was not prove. Consequently, I return that the respondent has failed to prove and justify the reason for dismissing the claimant.

Procedure followed

30. In the three witness statements filed, Rw1, Rw2 and Rw3 stated that the Claimant was given numerous opportunities to explain the discrepancies that were discovered but he was unable to explain. However, the defence witnesses produced no documentary evidence, like invitation letters or minutes, to prove that any meeting was done to hear the claimants case before dismissing him. Rw1 said that the claimant was away while the investigations were being done and he was not required to step in to the company premises. Rw2 stated that the claimant was called to the office whenever required for hearing. The claimant stated that he never went back to the company whether to take his belongings which were left behind after his arrest, or even to clear after the separation. The burden of proving that the claimant was heard before the separation as required by section 41 of Employment Act lies with the respondent. The said burden was not discharged and the termination became unfair.

31. Section 41 of the Employment Act provides that:

“41 (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.”

32. In view of the fact that the respondent has failed to prove, a valid and fair reason for discharging the claimant, and that a fair procedure was followed, I return that the termination was unfair and wrongful within the meaning of section 45 of the Employment Act. In **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (K) [2017] eKLR** the Court of Appeal held:

“We have considered the record, submissions by the respective parties as well as the law. As correctly observed by the trial court under Section 47(5) of the Employment Act the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing. Consequently, as noted by this Court in Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR, whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

17. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. See this Court's decision in Samsung Electronics East Africa Ltd vs. K. M [2017] eKLR. It is that right that is delineated under Section 41 of the Employment Act which stipulates...”

Whether the Claimant is entitled to the reliefs sought. Declaration

33. In view of the finding herein above that, the respondent has failed to prove a valid and fair reason for terminating the claimant, and that a fair procedure was followed, I make a declaration that the termination was unfair and wrongful.

Damages for wrongful and unfair termination

34. Having found that the Claimant's termination was unfair, I award him compensation equivalent to his 8 months' salary compensation under section 49(1) of the Employment Act being Kshs.303,656. In awarding the said award I have considered that he served for almost 5 years without being served with any warning letter.

Service pay

35. The Claimant seeks service pay amounting to Kshs.183,998.85. He was however, a member of the respondent's pension scheme and indeed admitted during cross- examination that he collected his pension from the insurance. He is therefore disqualified from getting service pay as provided under Section 35 1(6) of the Employment Act.

Certificate of Service

36. The Claimant is entitled to a Certificate of Service under section 51 of the Employment Act.

Conclusion and disposition

37. I have found and declared that the termination of the claimant's services by the respondent was unfair and wrongful and awarded him compensation plus a certificate of service. I therefore enter judgment for him in the sum of **Kshs.303,656 plus costs and interest** at court rates from the date hereof. The claimant will also be issued with a certificate of service under section 51 of the Employment Act. The award herein will be paid subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 29th day of March, 2019

ONESMUS N. MAKAU

JUDGE