



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NUMBER 1199 OF 2014

PATRICK OKOKO NYAKWARA.....CLAIMANT

VERSUS

MALVA COACH BUILDERS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was employed by the respondent as a machine operator/panel beater and worked as such continuously until 25th April, 2013 when his services were terminated. According to him on the material day he was found in possession of a knife which he had carried from his residence because of insecurity around his place of residence. He was however dismissed on allegation of stealing a knife from the respondent's premises. The claimant averred that the dismissal was unfair since he was never issued with a notice to show cause and no hearing took place before he was dismissed.

2. The respondent on its part denied the claimant carried a personal knife and averred that he was found with stolen metal strip from the respondent's garage. The respondent further averred that it was the respondent's policy that while entering or leaving work premises one had to disclose to security any personal items in their custody. The claimant on this day did not disclose to the security personnel the alleged knife in his possession while entering the claimant's premises that morning. Upon being found with the stolen company's metal strip under circumstances sufficient enough to conclude the same was stolen, the respondent summarily dismissed the claimant. Upon dismissal the respondent paid the claimant terminal dues through Kituo Cha Sheria. There was no complaint from Kituo Cha sharia disputing the payment and the same has not been discredited by Kituo Cha Sheria.

3. In his oral evidence the claimant stated that he joined the respondent as a general worker and later became a machine operator at a salary of Kshs 20,060/= per month. He reiterated the knife was his since the respondent deals in motor vehicles not knives. According to him, he claimed he was forced to sign that he stole the knife but he refused and insisted the police be called. The claimant further alleged that he never went on leave during the period he worked until 2008 when he started going on leave and that he was never paid in lieu of leave. Prior to 2008, the respondent never remitted NSSF contributions.

4. In cross-examination he stated that he started to work for the respondent as a casual and was paid weekly. It was further his evidence that the respondent used to close for Christmas and that during holidays there was a break. The claimant further stated that as they report to work they usually go through body search and that the guard who claimed he stole was new.

5. It was further his evidence that they used to have a shop steward and that he came to the office the day he was found with the knife. The shop steward tried to defend him. The claimant further stated the dismissal letter was witnessed by his colleagues. Concerning leave he said he had nothing to show he applied for leave and was refused and that he never raised any complaint with the shop steward. He stated that he reported the complaint to Kituo Cha Sheria and that there were meetings with the respondent. An agreement was reached that he be paid in lieu of notice and that he was paid Kshs 20,000/= in full and final settlement. He further stated that when he was employed on permanent terms he was paid leave allowance.

6. The respondent's first witness/Mr Geoffrey Njuguna Njoroge stated that he worked for the respondent as a fitter and that the claimant was a machine operator. On the material day he heard a commotion between the claimant and the security guard. The claimant was found with a metal strip. According to him he never saw any knife but saw the metal strip. He was the workers representative and was called to the office to witness the issue.

7. In cross-examination he stated that he found when the claimant had signed for the dismissal letter. The dismissal letter did not state the claimant was found with a metal strip. The letter refers to stolen item.

The respondent's second witness Mr Denis Owuor stated that he worked for the respondent as an Assistant Human Resource Manager. It was his evidence that the claimant became a permanent employee in 2008 and before that he was a casual worker. It was further his evidence

that the claimant was found with a stolen metal strip by security while conducting a body search. The management wanted to call the police but the claimant pleaded not to be taken to police and said he would rather be dismissed.

8. Mr Owuor further stated that the claimant was paid his dues before he was confirmed permanent and further that the claimant's NSSF contributions during the time he was a casual were treated as special contribution. The schedule was attached with payment and receipt issued. The claimant was not entitled to leave between 1991 -2007 because he was a casual worker. The witness denied seeing the knife but a metal strip.

9. In cross-examination he said the claimant was not issued with a show cause letter and that he never signed or witnessed the dismissal letter. He further stated that Kituo Cha Sheria did not tabulate the amount due. It was a negotiated amount.

10. The claimant concedes that he was found in possession of what in his version is a knife and the respondent's version a piece of steel which belonged to the respondent. The claimant also conceded that all employees were subjected to personal body search when entering or leaving the respondent's premises. Although the claimant claimed he came with what he called a knife from home and that he carried the same to protect himself due to insecurity around where he lived, he did not say he declared being in possession of the so called knife when he reported to work. This makes it credible that the claimant attempted to steal the metal piece from the respondent's premises. The respondent therefore had a valid and justifiable reason to summarily dismiss the claimant.

11. Regarding the procedure followed in carrying out the dismissal, the claimant in his evidence stated that he was called to the Human Resource Office after the incident and that he was in the company of the shop steward Mr Njuguna Njoroge who tried to defend him.

12. The court in the circumstances is satisfied that the claimant was aware of the reason for which his dismissal was being considered and that he was given an opportunity to explain himself before the dismissal and further that he was in the company of a fellow employee who tried to defend him.

13. This court has stated that a disciplinary hearing must not in all cases take the formality of a notice to showcause, a committee being called and minutes taken. What is important is that the employee to be dismissed in awareness of the reason for which the dismissal is being considered and that he or she has been given an opportunity to defend self.

14. In this particular case the claimant was found with the metal strip in circumstances which gave rise to reasonable suspicion that he intended to steal it. The respondent therefore was not obliged to draft a notice to show cause letter and constitute a disciplinary committee to hear the matter. Theft is a ground for summary dismissal hence no notice was necessary.

15. On the issue of leave and service pay for the period between March 1991 and June, 2008 the claimant cannot claim the same since he was a casual worker and the deeming provisions contained in section 37 of the current Employment Act for casual workers were not in the repealed Act. The present Act came into operations in June, 2008 hence does not apply to him. In conclusion the court finds the claim without merit and the same is hereby dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 31st day of May, 2019

Abuodha J. N.

Judge

Delivered this 31st day of May, 2019

Maureen Onyango

Principal Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.