



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1994 OF 2013

PAUL METHU MBUCHI.....1ST CLAIMANT

GEORGE ERNEST MWANGI WANJOHI.....2ND CLAIMANT

VERSUS

CIC GENERAL INSURANCE LIMITED.....RESPONDENT

JUDGEMENT

1. George Ernest Wanjohi (herein referred to as the 1st claimant) pleaded that he was employed by the respondent on 1st August, 2008 as a motor vehicle assessor. His appointment was thereafter changed from fixed term contract to permanent and pensionable basis on 1st January, 2011. At the time of termination his monthly salary was Kshs 118,739/=.

2. On 23rd August, 2013 the respondent suspended the 1st claimant for what he claims was no reason and was required to await the outcome of investigations over allegations of negligence, collusion and attempted fraud. His service were eventually terminated on 8th October, 2013 on the same grounds. According to the 1st claimant the termination was wrongful unfair and unlawful. The 1st claimant averred that he was never afforded a hearing or an appeal on the decision to terminate his employment to enable him ventilate his case against the allegations against him.

3. Mr Paul Methu Mbuchi (hereinafter referred to as the 2nd claimant) pleaded that he was dismissed on 8th October, 2013 on the same grounds and allegations as against the 1st claimant. His salary at the time of termination was Kshs 77,819/=. The 1st claimant in his oral evidence additionally stated that he was terminated on account of an inspection he carried out in the course of his work. According to him he recorded a statement with the investigations and was later called by the HRM for disciplinary hearing.

4. He walked into a room full of people and was asked a pair of technical questions. He further stated that he was not told in advance the agenda of the meeting. He was thereafter told to go and wait for further communication. On 8th October, 2013 he was called to see the HRM and was handed a termination letter. The letter according to him did not give reasons for the termination.

5. In cross-examination he stated that re-inspection was not the same as authorizing repairs it meant checking repairs which had been done. He further stated that he was given an opportunity to respond to the accusations however he was not afforded adequate time to prepare for the hearing.

6. The 2nd claimant further stated that he was termination on the allegations of negligence and fraud. The allegations were in the termination letter. There was however no notice to show cause but he was invited to a meeting before he was dismissed. At the meeting no charges were presented to him, he was however asked to explain a certain assessment report.

7. In cross-examination he stated that he started his business after he filed his claim in court. According to him motor vehicle KBU 365L had been assessed and repairs authorized. However, the customer complained about certain parts that were omitted. He assessed the vehicle the second time and was convinced the from side axle was damaged and authorized the garage to replace the same. According to him, he was not required to seek authority before recommendation and that he had a free hand to make a technical decision on motor vehicle repair.

8. The respondent's witness Mr. Peter Mwenda informed the court that he was an HR professional and was employed by the respondent. According to him, the 2nd claimant was employed by the respondent until October, 2013 when he was dismissed. He stated that there was a vehicle KBU 365L which was involved in an accident in Marsabit around March. In August the operations manager recovered information that the 2nd claimant had authorized additional repairs with the approval of the claims manager. The Human Resource Officer investigated the matter and the 2nd claimant was suspended to allow for further investigation. Once the investigation report was out a disciplinary panel was constituted to hear the matter and the 2nd claimant was called for a disciplinary hearing.

9. At the disciplinary hearing he stated that the 2nd claimant stated he knew why he was there and that the only reason he authorized the repairs was because the client complained. The 2nd claimant did not state why he did not consult his manager before authorizing the repairs. According to the witness, the 2nd claimant stated that he authorized the repairs because he thought they were in the best interest of the client. A decision was finally taken to dismiss the 2nd claimant for gross misconduct. The same procedure applied to 1st claimant. Mr Mwenda further stated that claimants had cleared their loans.

10. In cross-examination he stated that both claimants were respondent's employees and further that he could not remember the actual figure of the claimant's respective salaries and whether it included house allowance. Concerning the disciplinary process it was his evidence that the notice of hearing was verbal and that the charges against the claimants were never reduced in writing and further that they were never informed of their right to be accompanied by an employee of their choice.

11. In re-examination he stated that the claimants were paid consolidated salaries and the system just gives basic pay. He further stated the claimants during their employment never raised the issue of house allowance.

12. The respondent's second witness Mr John Mua Nduya stated that he was a private investigator and that he was the one who compiled the investigation report. According to him they recorded statements from the two general assessors (the claimants) employed by the respondent. They established that the claimants visited the garage without informing the respondent and that they assessed the vehicles and authorized additional repairs without informing the management. He stated that from the claimant's statement the claimants stated that they observed from their own eyes that the axle to the vehicle in question was bent. However, according to him, it was not possible to detect a bent axle unless diagnosed by a machine.

13. In cross-examination he stated that, he was asked by the respondent to confirm if the alleged repairs took place. According to him the vehicle was repaired but he could not confirm if the axle was replaced. He asked for the respondent's authorization procedures and were given. According to the procedures the claimants reported to the claims manager and that the claims manager was not aware of the axle repair until the last minute. In conclusion it was his finding that the claimants did not have the authority to procure or authorize parts without approval from their managers.

14. Under Section 43(2) of the Employment Act, the reason for termination of contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. The provision of this section is corollary to the evidentiary burden placed on an employer by section 43(1).

15. It was not in dispute that the claimant's more specifically the 2nd claimant were summarily dismissed for authorizing additional repairs to motor vehicle KBU 365L without the approval of the claims manager to whom they were required to report to. The 2nd claimant on his part contended that his work was to inspect and re-inspect where necessary a vehicle which had been repaired. According to him re-inspection was not the same thing as authorizing repairs.

16. The respondent's witness Mr Mwenda who stated he was the Human Resource Manager conceded that apart from the suspension the claimants were never formally invited for a formal disciplinary hearing and that neither a copy of the investigation report nor advance copy of the charges the claimants were to face was availed to them.

17. Section 41(2) of the Employment Act provides that an employer shall before terminating the employment of an employee or summarily dismissing an employee hear and consider any representations which such employee may make on the grounds of misconduct. Further section 45(2) of the Act provides that a termination of employment shall be deemed unfair if the employer fails to prove the reason for termination is a fair reason and that the employment was terminated in accordance with a fair procedure.

18. Regarding the reason for termination, the test has been always been that a reasonable employer placed in similar circumstances would consider dismissal or termination as the most appropriate action. If the answer is in the affirmative, the dismissal will be upheld.

19. In this particular case the claimants were accused of negligence and possible fraud. It is however important to note that the repairs that were allegedly recommended by the 2nd claimant and confirmed were not paid for by the respondent. According to the 2nd claimant, he became of the view that vehicle axle was bent and in his view once an axle is bent it had to be replaced. The respondent did not produce any report to the contrary that the axle in issue was not bent hence did not require to be replaced.

20. The respondent's complaint was that the claimant's authorized additional repair without consulting their line manager. This payment was in any event not made. The accusations against the claimants were captured in the minutes of the disciplinary hearing held on 26th September, 2013 found at page 45 of the respondent's bundle of documents filed together with the response to the claim. At page 48 concerning conclusion of the matter relating to the claimants it minuted as follows:

a) "After a long discussion on the resolution of the committee it was agreed that Peter Simiyu who represented Mary Wanga of the legal department would do an advisory legal opinion on the implications of the matter in case of termination of the said suspended staff members. This is because of the divergent opinions of the committee members on whether to terminate the subject employees or not"

21. From the foregoing it would seem that at the conclusion of the disciplinary hearing the committee was divided on whether to dismiss the claimants or not. It is the courts view therefore that in the circumstance summary dismissal was too harsh. A summary dismissal should be handed down in plain and obvious cases where the misconduct in question is plain and clear not in a case such as this where there was doubt over whether to dismiss or not. After the disciplinary committee hearing who supplied the casting vote to justify the dismissal?

22. Regarding procedure for dismissal and or termination as set out in the Act, the respondent's witnesses have as observed earlier in this

judgement conceded that this was not complied with.

23. In conclusion the court holds and finds that the summary dismissal of the claimant amounted to unfair termination of service in terms reasons for termination and procedure followed. The claimants claim for house allowance would be disallowed for the reason that their pay was a consolidated salary and further that it was unconceivable that at the senior level they worked, the claimants did not raise earlier the issue of non-payment of house allowance only to do so when their services were terminated.

24. The court therefore enter judgement against the respondent in favour of the claimant as follows:

George Ernest Mwangi Wanjohi	Kshs
a. One month's salary in lieu of notice	118,739
b. Salary for 8 days worked in October	31,663
c. Eight months salary as compensation for unfair termination of service	<u>949,912</u>
	<u>1,100,314</u>

d. Costs of the suit

e. Items (a) (b) and (c) shall be net of taxes and statutory deductions

Paul Methu Mbuchi	Kshs
a. One month's salary in lieu of notice	77,819
b. Salary for 8 days worked in October	20,751
c. Eight month's salary as compensation for unfair termination of service	<u>622,552</u>
	<u>721,122</u>

d. Costs of the suit

e. Items (a) (b) and (c) shall be net of taxes and statutory deductions

25. It is so ordered.

Dated at Nairobi this 17th day of May, 2019

Abuodha Jorum Nelson

Judge

Delivered this 17th day of May, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.