



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 428 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

JULIUS MUIA PHILIP.....CLAIMANT

VERSUS

ANDY FORWARDERS SERVICES LIMITED.....RESPONDENT

JUDGMENT

On 5th July 2008, the claimant was arrested with a paper bag containing 33 Nokia 1112 mobile phones by security guards from Signon Freight Limited while counting the phones inside the respondent's van which was parked in the compound of Signon Freight.

The claimant was charged, with the offence of conveying suspected stolen property. The case was heard and the claimant and his co accused acquitted on 28th April 2009.

The claimant testified that he reported to work two days after his arrest and was issued with the letter of summary dismissal.

The respondent filed response to the claim denying the averments of the claimant in the claim. The respondent states that the claimant was well aware of the reasons for termination of his employment and denies the particulars of malice as set out in the claim.

That the claimant's employment was lawfully terminated as per clause 10(b) of his employment contract and in strict compliance of all the labour laws. That the claimant's employment was terminated as per the Employment Act.

It is the respondent's further averment that the claimant was paid and acknowledged his terminal dues. It states that the claim is misconceived, bad in law, incompetent and does not disclose any reasonable cause of action against it. It prays that the claim be dismissed with costs.

Under cross examination RW1 stated that the respondent operates at Jomo Kenyatta International Airport (JKIA), that the claimant had removed the phones from the respondent's warehouse. He stated under re-examination that the claimant's explanation for having the mobile phones was that he collected them along the road while going to Signon Freight. He stated that his own explanation was that the claimant collected the phones from the respondent's warehouse.

Analysis and Determination

Fair Procedure

The Section provides for reasons of termination. None of the reasons in paragraph 10(b) refer to the grounds upon which the claimant was dismissed, which was being found in possession of 33 Nokia mobile phones while counting the same. The respondent did not establish whether or not the phones were stolen, or, as the claimant had stated, he had picked the paper bag containing the phones on his way to Signon Freight.

For this reason, the respondents failed to establish that there was any misconduct on the part of the claimant and his colleague before they were arrested and arraigned in court and also before they were dismissed. They thus did not comply with Section 43 of the Employment Act, which provides for establishing valid reason for termination.

As submitted for the claimant, the respondent or Signon Freight did not claim ownership of the phones, and his actions were consistent with

his duties as set out in his employment contract at paragraph 2 being –

“2. DUTIES AND BEHAVIOUR

- a) To ensure that all entries and exits are secured at all times, ensure that arming of t j alarm system is done and safe keeping of keys.
- b) To ensure that cargo is secured during rotation and racking.
- c) To ensure that all cargo for import are checked against payment of terminal handling charges before delivery to consignee/agents.
- d) To maintain general security of the warehouse and the entire premises at surroundings in accordance with the company’s security procedures.
- e) To ensure that cargo is escorted from the warehouse to the Ramp and handed over after signing to the ramp handler
- f) To establish and maintain a good relationship with your office colleagues and workmates.
- g) During the whole of your service, you will conform to such company regulations as are in force from time to time and you will diligently and faithfully perform the duties of your post as designated to you and such other duties within the scope of your abilities which the company may call upon you from time to time to perform and devote the whole of your time, attention and abilities to the service of the company.
- h) You shall perform services not only for the company but also for any other company which is or may become a subsidiary of the Company or otherwise associated with the company (“Group Companies”) and without further remuneration (except as otherwise agreed) and shall accept such offices in any of the Group Companies as the Company may from time to time reasonably require.
- i) You will use your best endeavours to promote the interest of the company and at all times obey the orders and directions given to you by the board of directors, line managers or any one specifically delegated to supervise your work.”

For the foregoing reasons, I find that there was no valid reason for the dismissal of the claimant.

As observed in the case of **Kenya Union of Commercial Food and Allied Workers -V- Meru North Farmers Sacco Limited [2014] eKLR**, where the court held that;

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever the outcome of the process is bound to be unfair as the affected, employee has not been accorded a hearing in the presence of union representative... ”

In **CMC Aviation Limited -V- Mohammed Noor (2015) eKLR** the Court of Appeal cited with approval case of **Kenya Union of Commercial Food and Allied Workers -V- Meru North Farmers Sacco Limited (2014) eKLR** wherein the industrial court held that;

“Whatever the reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that warrants summary dismissal”

Remedies

He further prayed for leave which was not denied by the respondent nor proof tendered that the claimant took leave. I award him annual leave for the 17 months worked at 1.75 days per month being 29.75 days. This comes to Kshs.38,894.30 which I award him.

The foregoing is in addition to the sum of Kshs.11,235.00 paid to the

Orders

unfair and award him **Kshs.333,086.60/=** made up as follows –

- 1. Pay in lieu of notice..... Kshs.27,000.00
- 2. Pay for 5 days worked and not paid in July 2009..... Kshs.5,192.30
- 3. Pay in lieu of leave..... Kshs.30,894.30

4. Compensation..... Kshs.270,000.00

Total Kshs.333,086.60

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE