



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 26 OF 2017

MORRIS MBAYA NYAGALA.....CLAIMANT

VERSUS

AUTO EXPRESS RESPONDENT

J U D G E M E N T

1. This cause and cause number 27 of 2017 were consolidated and heard together.
2. The Claimant's pleaded that they were employed by the respondent as workshop assistants on 1st March 2011 and February, 2011 as workshop assistants. They were both earning a monthly salary of Kshs. 15,554/= at the time of termination. According to them, they worked devotedly without any incident of warning until 27th April, 2016 when they were served with termination letters.
3. According to them they were never issued with any notice to Show Cause nor taken through any disciplinary or any hearing before termination. The Claimants therefore contended that the termination was without any reason and was unprocedural and contrary to law.
4. The respondent on its part pleaded that the Claimants were employed as workshop assistants from February, 2012 and 1st March, 2012 until 27th April, 2016 when they were summarily dismissed on grounds of committing criminal offence of theft to the substantial detriment of the respondent.
5. The respondent further stated that the Claimants were not industrious, diligent or honest as alleged and they were part of a group that conspired to steal tyres (old casing) of a customer vehicle which had been replaced with the intention of selling and sharing the proceeds.
6. The respondent further pleaded that the Claimants were given an opportunity to submit a formal explanation in writing for their attempted theft which was set out in the Show Cause letter dated 19th April, 2016. They responded through an apology letter dated 19th April, 2016 in which they admitted their gross-misconduct.
7. At the hearing the 1st Claimant Mr. Morris Mangala stated that he used to work for the respondent. He joined in 2010 but was confirmed in 2011. He was working as a workshop assistant.
8. It was his evidence that on 21st March, 2016 they were at work. He was dealing with one and others with another. His colleagues were changing tyres and that Walter used to sell used tyres from vehicles and remit the money to the office. He further stated that tyres from GK vehicles were also sold and money remitted to the office. He was called to explain about sale of GK tyres and said he was not concerned because he was dealing with another car. He said it was Walter who used to deal with tyres and should know. It was his evidence that they worked for a while and thereafter on 27th April, 2016 his service was terminated.
9. There was no disciplinary hearing before he was dismissed and that they were never issued with a termination letter.
10. In cross-examination he stated that the tyre incident was on 21st March, 2016. He was working on Rupis car while Walter and his colleague sold the tyres. It was his evidence that he saw them remove the tyres but never saw them sell them. He wrote an apology letter because he was forced to. He denied ever selling any tyres and that he never saw any tyres beams removed from the respondent's premises.
11. He further stated that he received a notice to Show Cause to explain the incident. He went to the Manager and explained that he never understood what was going on. He was further called to Nairobi by the Human Capital Manager to go and explain what happened. He asked him why he wrote an apology letter yet he was not involved.

12. The second Claimant Francis Roy stated that he was employed in 2010 and got confirmed in 2011. His salary was Kshs. 12,000/= per month upon confirmation.

13. It was his evidence that he used to work on tyre replacement and that one of them used to sell used tyres and they share the money. Walter was the one. In this particular incident they were accused of stealing used tyres. It was his evidence that he was asked to apologize to save his job. In cross-examination he said he was working on the Kenya Police Landover and that Walter sold the tyres.

14. The Respondent's witness Mr. Dickson Nyambori stated that he worked for the respondent as in-charge Human capital for EA- Region. He was informed by the Regional Manager that there was a case of tyres getting sold in Eldoret. He asked the people involved to write a statement which was scanned and sent to him. The regional manager forwarded the apology letters and he sought reconfirmation of the same.

15. It was his evidence that the respondent encourages customers to leave tyres for destruction and that they collect all used tyres for police cars once Toyota approves. It was his evidence that the Claimants were replacing new tyres for the police were returned and put in the police car and Walter drove the Car to the next petrol station and left them there. When asked, the Claimant and Walter could not account for the tyres. He asked the regional office to look into the issue and submit a report to him in Nairobi. The Claimants were subsequently terminated and asked to appeal to his office. He called Walter to Nairobi and he admitted selling tyres. He also called the Claimants to Nairobi and asked them why they wrote the apology letters yet they claim they were harassed into writing them.

16. It was his evidence that police tyres are branded by hot iron hence selling them elsewhere poses reputational risk for the respondent.

17. In cross-examination he stated that the mark is on all police vehicles tyres and that the respondent's staff are not allowed to sell tyres. If a customer leaves tyres for destruction they must be destroyed. The tyres in issue were sold the same day. It was further his evidence that Morris and Francis reported to Walter and that Walter was the only person allowed to drive the vehicles into and out of the bay. On the material day Walter drove the police vehicle out of the respondent's premises.

18. The reason for which the Claimant's services were terminated was that they sold used Police tyres which they were not supposed to. The two Claimants in their defence stated that the respondent permitted the selling of used tyres left by customers and the money submitted to the office to be shared among staff. The selling according to them was done by Walter who was their supervisor. On the material day the Claimants changed tyres from the Police car and Walter drove the vehicle out of the respondent's premises. This was confirmed by the respondent's witness Mr. Nyambori.

19. Further Mr. Nyambori stated that Walter admitted selling the tyres in issue. There was however no allegation that he shared the money with the Claimant's. Further the Claimants alleged that it was a practice in Eldoret to sell used tyres left by customers by the respondent's staff especially Walter, and share the money. No one from the respondent was called to rebut this allegation.

20. However, from the evidence before the Court it was clear that it was Walter who handled the tyres in question and drove out of the respondent's premises with them after they were changed.

21. In the circumstances there was no justifiable reason to terminate the Claimants service since they were able to make a good account of their involvement with tyres. The court therefore finds the termination of their service unfair. The Court therefore awards the Claimant as follows: -

Francis Roy

(a) One month's salary in lieu of notice 15,554

(b) Six months' salary as compensation for

Unfair termination 93,324

108,878

Morris Mangala

(a) One month's salary in lieu of notice 15,554

(b) Six months' salary as compensation for unfair

Termination of service. 93,324

108,878

22. The Claimant's shall further have costs of the suit.

23. It is so ordered.

Dated at Eldoret this day of 2019

Abuodha Jorum Nelson

Judge

Delivered this 28th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge