



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 261 OF 2018

NICHOLAS KIPLAGAT KIMECHWA.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LTD.....RESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed by the respondent as initially as a Security guards from 31st march,1995 duly stationed at Eldoret. Through hard work and commitment, he was promoted on 10th December, 1999 to the position of Security Guard 1. At the time of termination of his employment his salary was Kshs. 127,366/25 per month.
2. On 24th July, 2015 he was suspended from duty pending investigation of alleged incident that took place on 10th July 2015.
3. On 9th September,2015 the Claimant was called and interviewed on the happenings of 10th July 2015 but denied any kind of involvement in the theft of oil. The Claimant was however not supplied with clear particulars of the allegations of theft.
4. On 29th October, 2015 he was issued with a show cause letter to which he responded denying any involvement in the theft of respondent's oil. He was however not furnished with the investigation report on the issue
5. On 29th February,2016 the Claimant was issued with a termination letter without being accorded an opportunity to be heard and defend himself. He appealed against the termination and the appeal according to him was never heard and was never invited to present his case.
6. The respondent on its part denied most of the Claimant allegations and put him to strict proof thereof.
7. The respondent stated that at all stages of the investigations from when the truck was allowed to pass the main gate with excess oil, the Claimant was made aware of the allegations of the theft.
8. The respondent denied that the Claimant was not fully aware of the charges leveled against him and for the said reasons that he wrote a reply to his show cause letter.
9. At the hearing the Claimant stated that he was relying on his witness statement as his evidence in Chief and documents filed in support of its claim.
10. It was his evidence that he was employed in 1995 as a security guard earning Kshs. 4,000/= per months, where he left his salary was Kshs. 126,000/= per month. He stated that he was dismissed on account of negligence. He was issued with a show cause letter and he responded denying the allegation against him. He was further called for a disciplinary hearing which he attended. He was however not given a copy of the investigation report.
11. It was his evidence that he was in charge of the gate register for export and further in charge of documentation. According to him the documents for the vehicle concerned were not tallying so he told owner to take them back to KRA and the shipper. They did so and KRA wriste 9000 litres while the shipper wrote 10,000 litres. He was therefore satisfied.
12. He stated that upon dismissal he was not paid his terminal dues. He was only paid Kshs. 227,706/= through the Bank. He was told the payments was for CBA arrears.
13. In cross-examination he stated that he had worked for 21 years and that he was in charge of documentation. He was to compare notes of

vehicle recorded in the morning and counter sign. He stated that he never saw the gate pass for Tosha Petroleum. He further stated that he was with Mr. Gamira from the union at this disciplinary hearing and he left.

14. The respondent's witness Ms Emily Wanyuki Thathi stated that she worked for the respondent as Senior HRO and dealt with staff discipline issues and that she kept staff records. She relied on her statement recorded on 4th July, 2019 as her evidence in Chief. It was her evidence that the Claimant was suspended and due procedure followed before the termination of his services.

15. According to Ms Thathi, there was a report of a truck released using a wrong gate pass. Investigations were done and it was established the Eagle Truck had no gate-pass but used an altered gate pass. The Claimant was found culpable and asked to explain. He could not retrieve the gate pass for Eagle he claimed to have used to release the truck. He was therefore taken through the disciplinary process and dismissed thereafter. The Claimant was thereafter informed of his terminal dues payable and these were paid. He was further paid arrears of automatic increment.

16. In cross-examination she stated that she prepares disciplinary meetings and takes minutes. The Claimant was suspended on 24th July, 2015 and a show cause letter issued to him on 29th October, 2015. It was her evidence that the Claimant never requested for a copy of the investigation report.

17. In a claim for unfair termination of service the concern of the Court is usually whether the reason for which an employee was terminated were valid and fair reasons for which any reasonable employer would consider termination as the most proportionate disciplinary measure to mete out. It is not for the Court to overanalyze the reasons for termination and substitute its own view of what constitutes a valid and fair reason with that of the management. The validity and fairness of a reason varies from one organization to another and is heavily influenced by the nature of the organization's business and sensitivity of its operations.

18. The second concern of the Court is usually that of termination is to be considered if must follow a fair process. That is to say an employee must be notified of the allegations for which termination is being considered and given an opportunity to respond to the accusations and where necessary call evidence.

19. The Claimant stated in his evidence that he had worked for the respondent for 21 years by the time he was terminated. It was further his evidence that he was in charge of documentation. That is to say he was to compare notes of vehicles recorded in the morning and counter sign. It was further his evidence that he never saw the gate pass for Tosha Petroleum.

20. By a letter dated 29th July, 2015 the Claimant was suspended from duty on the allegation that on 10th July 2015 while on duty a truck Registration No. KBU 512X belonging to East African Oil (EAGOL) was loaded at the depot and released using gate pass belonging to Tosha Petroleum. The fraudulent activity resulted to a pending claim from the company of 10,000 litres of AGO.

21. The show cause letter repeated the same charges and further informed the Claimant that following the completion of investigations it was alleged that he falsely and fraudulently confirmed to have seen Eagol's gate pass for truck KBU 512X contrary to records in the relevant file that indicate that the truck was released using the gate pass belonging to Tosha Petroleum (K) Ltd.

22. The Claimant was therefore called upon to explain why disciplinary action should not be taken against him.

23. The Claimant responded to the show cause letter on 3rd November, 2015 and stated among others that he was on duty on the material day at the gate house clearing local and export trucks in the two registers and he believed he carried out his duties well by confirming all the details in the register tally with the gate pass before appending his signature. Thereafter the drivers went for final clearance at the gate exit where his colleagues checks physical truck against the two gate passes and released them after confirming truck registration numbers tally with the gate passes. He stated that he knew an illegality was committed pertaining the particulars of truck KBU 512X but believed it was done outside the gate house without his knowledge and therefore regrettable.

24. The Claimant was consequently called to appear before the staff Disciplinary Committee through a letter dated 19th November, 2015. The letter repeated the charges and informed him that he was entitled to be accompanied by either a Union Official or a colleague of his choice during the proceedings.

25. The accusations against the Claimant were that while in the Course of his duties which were his obligation to perform, a truck belonging to EAGOL exited the respondent's gate with a gate pass belonging to the Tosha Petroleum. The Claimant in his response to show cause letter concedes that he knew an illegality had taken place but seems to shift the blame to his colleagues who he did not name, at the exit.

26. From the minutes of the disciplinary committee held on 23rd to 25th November, 2015 the Court has noted that it was not the Claimant alone who was dismissed over the incident but those who were concerned or had as their responsibility in the chain. This therefore demonstrated the seriousness with which the respondent considered the breach. The Claimant himself conceded in his response to show cause that he knew an illegality had occurred. He however did not come clear either in his cause letter or his response before the Disciplinary what steps he took to ensure the illegality should not take place but still took place.

27. That is to say he did not sufficiently exculpate himself of the incident.

28. In conclusion the Court is persuaded that their existed valid reason to terminate the Claimant's service and the procedure followed in doing so was fair and in accordance with the Employment Act. The claim is therefore found without merit and is hereby dismissed with costs.

29. It is so ordered.

Dated at Eldoret this day of 2019

Abuodha Jorum Nelson

Judge

Delivered this 14th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge