



REPUBLIC OF KENYA



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**Wainaina v Del Monte Company Ltd (Cause 744 of 2015)  
[2019] KEELRC 2615 (KLR) (20 December 2019) (Judgment)**

*Peter Karuhiu Wainaina v Del Monte Company Ltd [2019] eKLR*

Neutral citation: [2019] KEELRC 2615 (KLR)

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

**CAUSE 744 OF 2015**

**ON MAKAU, J**

**DECEMBER 20, 2019**

**BETWEEN**

**PETER KARUHIU WAINAINA ..... CLAIMANT**

**AND**

**DEL MONTE COMPANY LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on 5.4.2015 seeking the following reliefs:
  - (a) A declaration that the Respondent cannot terminate the services of the Claimant without granting claimant an opportunity to be heard following the due process, fairness and adherence to the rules of natural justice.
  - (b) A declaration that the termination of the claimant employment by the respondent was unlawful, unfair and unprocedural.
  - (c) That upon granting prayer (a) and (b) the Respondent be ordered to pay compensation to the clamant as follows:-
  - (d) Salary claimant would have earned until his retirement at age 60 years hence balance of period not in employment i.e.
  - (e) Gratuity for 12 years i.e. 7/6/2000 to 7/5/2012 at the rate of 1 month basics salary per year i.e. 28,533.81 X 12.
  - (f) Salary for the month of April, 2012
  - (g) 1 month pay in lieu of notice Kshs. 28,533.81



- (h) Pay for leave not taken
  - (i) Legal fees for criminal case Kshs. 116,000/-
  - (j) Any statutory deductions not remitted to the relevant authorities
  - (k) Damages for illegal termination of Employment
    - (i) Interests of above.
  - (m) Any other appropriate relieve this Honourable court may deem fit to grant
  - (n) The respondent to bear the costs of this suit.
2. The facts of the case according to claimant are that he was employed by the respondent on 7.6.2000 as a tractor driver and later he was deployed to drive canters. For 12 years he worked diligently without any disciplinary issues. On 17.4.2012 he was arrested and charged with criminal case no. 1957 of 2012 at Thika Law Courts with the offence of stealing the respondents motor vehicle. The trial went on for 2 years but he was eventually acquitted.
  3. While the trial was pending, the claimant was served with a show cause letter and thereafter summoned to a disciplinary hearing in respect of the same offence of stealing the employers motor vehicle and eventually he was summarily dismissed. In his view the dismissal was unfair and wrongful because it was for an invalid reason and fair hearing was not accorded to him and his witnesses.
  4. The respondent filed defence on 22.5.2015. She admitted that claimant was her employee but denied the alleged unfair dismissal. She averred that the claimant is the one to blame for breaching the employment contract and responsibility. She further averred that the claimant committed or was a suspect of the criminal offence and as such he was charged in court in accordance with law of his country. She therefore contended that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.
  5. The main issue for determination is whether the claimant was unfairly or unlawfully dismissed from his 12 years employment. To answer the said question both parties tendered evidence and filed written submissions.

### **Claimants Case**

6. The claimant testified as CWI and basically echoed what he had stated in his pleadings and his written statement dated 16.4.2015. In brief he testified that he worked for the respondent from 11.6.2000 to 17.4.2012 when he was arrested and charged with criminal offence of stealing the employers motor vehicle on 14.4.2012. That while the criminal case was pending in court, he was called for disciplinary hearing by the employer and gave evidence but his witnesses were not allowed to speak. Thereafter he was served with a dismissal letter dated 8.5.2012.
7. He contended that the dismissal was unlawful because it was without a valid reason and fair hearing was not accorded to him before the dismissal. He therefore prayed for the reliefs set out in his claim contending that he was not paid any terminal dues after the dismissal.
8. In cross-examination he admitted that after the arrest and arraignment in court he was served with show cause letter and thereafter summoned to hearing. He further admitted that after the hearing he was served with a dismissal letter. He also admitted that on 4.2.2011 he was suspended for another offence but later he was reinstated by the letter dated 21.2.2011. He further admitted that the receipts in support of the claim for legal fees were without Revenue Stamps.



## Defence Case

9. Mr. Simon Wachira Mwangi, a security officer for the respondent, testified as RWI. He adopted his written statement dated 10.6.2016 and filed in court on 20.2.2017. In brief he stated on 16.4.2012 at 7 a.m. he was on duty when one Gilbert Kiambi called him and informed him that motor vehicle KBP 676V was missing together with the ignition key.
10. RWI further stated that he informed all the guards on patrol, those at the gate and also the G4S officers. He thereafter checked the key register and noted that the key was returned by one T. Kamau on 14.4.2012 at 18.15 hours but the vehicle left the gate the same day. He further stated that a guard by the name Boniface Gathoga told him that he could identify the person who left with the vehicle, who he later mentioned his name to be Peter Karuhiu Wainaina, the claimant herein.
11. In cross-examination, RWI stated that he was present during the claimant's disciplinary hearing. He admitted that. In page 2 of the proceedings, Boniface stated that he came to know the correct name of claimant after the investigations. He further admitted that in paragraph 3 of the proceedings, Boniface stated that he knew the claimant since 2009.
12. RWI further stated that the claimant attended the disciplinary hearing with the shopsteward and Mr. Mwaura Njoroge and Mr. Elija Njeru. He however denied knowledge whether the two persons attended as claimants witnesses at the hearing. He contended that the claimant defended himself but the dismissal letter indicated that he did not exonerate himself from the offence of theft of the motor vehicle.

## Issues For Determination

13. After careful consideration of the pleadings, evidence and the submission before the court, I find no dispute in the fact that the claimant was employed by the respondent as a driver from 7.6.2000 till 8.5.2012 when his services were summarily terminated by the employer. The issues for determination are :-
  - (a) Whether the summary dismissal was unfair and unlawful.
  - (b) Whether the claimant is entitled to the relief sought.

## Analysis And Determination

14. Under Section 45 (2) of the *Employment Act*, termination of an employee's services is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements, and that a fair procedure was followed.
15. In this case the reason cited for dismissal was that the claimant stole motor vehicle KBP 676V from the employers premises on 14.4.2012 at 20.05 hours. The only evidence used to connect the claimant to the alleged theft was the evidence of one Boniface Kathoka. During the disciplinary hearing on 2.5.2012, Boniface identified the claimant as the person who he booked as Maina before he drove away the stolen vehicle. He contended that he knew the claimant as one of the drivers of the respondent who drove the vehicle earlier the same day during the first shift. He further contended that he came to know that the claimant's name was Wainaina after the investigations were done.



16. However, in the same proceedings Boniface contradicted himself thus:

“Kathoka said that he has known Wainaina since 2009 when he was at Ndula upto 2011 when he resigned after being deployed to Ruiru. While at Ndula he used to know the employee as Wainaina whenever he was at the gate.”

17. It is worth noting that the boldness with which Boniface spoke during the disciplinary hearing was missing when the theft of the vehicle was reported and he was arrested. One wonders why Boniface never named the claimant early enough as the person who stole the vehicle. One also wonders why he booked the driver as Maina if at all he knew him so well since 2009 as Wainaina. He claimed that the claimant is the one who went to pick him and others from the CID when they were arrested on 16.4.2012 but he never told the police or any one that he was the person who stole the vehicle. In my view the said evidence by Boniface was not sufficient to prove on balance of probability that the person who drove out the stolen vehicle was the claimant.
19. It was also not sufficient to raise suspicion that the claimant did steal the vehicle. The offence occurred during the night and the guard acted negligently by failing to identify the driver. If indeed he saw and identified the claimant as the thief, nothing was more easier then recording Wainaina as the driver who drove out the vehicle and also mentioning his name to the respondent and the CID when he was asked about the person who drove the vehicle out on 14.4.2012 at 20.05 hours.
20. Given the circumstances of this case, I return that no reasonable employer would have dismissed the claimant from employment on the basis of the evidence by Boniface Kathoka. In fact the correct person to be subjected to disciplinary process in the circumstances was Boniface himself for negligent performance of work which led to the theft of the vehicle. Accordingly I hold that the respondent has failed to prove existence of a valid and fair reason for dismissing the claimant.
21. As regards the procedure, the claimant admitted that he was served with a show cause letter to which he responded and thereafter summoned to an oral hearing. He however contended that he brought two witnesses but they were denied the chance to tender their evidence to support his alibi defence that he was away from the scene of the crime when the alleged theft occurred on 14.4.2012 at 20.05 hrs.
22. In his evidence RWI admitted that he saw the said two persons at the hearing but denied knowledge that they attended as witnesses for the claimant. On a balance of probability, the court finds that the claimant’s witnesses were denied audience by the disciplinary committee and as such the hearing as conducted was not fair. Had the two witnesses been heard on the defence of alibi a different decision would have been arrived at as it happened in the criminal case against the claimant. I therefore hold that the respondent has failed to prove that a fair procedure was followed before dismissing the claimant.
23. It is now trite rule of natural justice that justice should not just be done but it must be seen to have been done. In this case the employer did not act in accordance to the said adage when he denied the claimant’s witnesses audience and then condemned the claimant with a dismissal for failure to exonerate himself from the theft.
24. Having considered all the material before the court and the finding that the respondent has failed to prove a valid reason for dismissing the claimant and that a fair procedure was followed, I proceed to hold that the summary dismissal of the claimant vide the letter dated 8.5.2012 was unfair and unlawful within the meaning of Section 45 of the [Employment Act](#).



## Relief's

25. In view of the foregoing holding I make a declaration that the termination of the claimant's services by the respondent was unlawful, unfair. Flowing from the foregoing I decline to award the claimant for salary for the period he would have worked before retirement age of 60 years but instead, I award him ten months salary compensation for the unfair termination of his employment plus one month salary in lieu of notice as provided by Section 49 (1) and 50 of the *Employment Act*. In awarding the said compensation, I have considered that the claimant never contributed to the termination through misconduct and also that for 12 years he served the respondent without being served with any warning letter. The award is based on his gross salary of Kshs. 28,533.81 per month.
26. The claim for gratuity at the rate of 1 month basic pay per year of service from 7.6.2000 to 7.5.2012 is granted as prayed. Hence Kshs. 28,533.81 x 12 = Kshs. 342,405.72. In awarding the said gratuities I have considered the letter of offer dated 15.5.2000 which stated that the terms and conditions of employment would be governed by the prevailing union contract.
27. Under Section 10(7) of the *Employment Act*, the burden of producing the contract of employment in court lies with the employer. The said provision states that:-
- “if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of disapproving an alleged term of the employment stipulated in the contract shall be on the employer.”
28. In this case, RWI never disputed the claim for gratuity or produced the collective agreement between the respondent and the union to disprove the claim for gratuity.
29. The claim for leave is however dismissed for want of particulars and evidence. Likewise the claim for Kshs. 116000 for legal fees in the criminal case is dismissed because it is not well founded. Such claim should be sought in a tortuous claim for malicious prosecution filed against the respondent and the person who preferred charges against him. To claim the same from the respondent alone is to assume, wrongfully, that the prosecution was at the instance of the respondent alone.

## Conclusion And Disposition

30. I have found that the dismissal of the claimant from employment was unfair. I have further found that he is entitled to compensation for the unfair termination and service gratuity. Consequently, I enter judgment for him against the respondent as follows:-

Compensation Kshs. 285,338.10

Gratuity Kshs. 342,405.72

Kshs. 627,793.82

The said sum is subject to statutory deductions but in addition to costs and interests as at court rates, from the date hereof.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

**ONESMUS MAKAU**

**JUDGE**

