



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 33 OF 2016

[As consolidated with NO. 34, 35 and 36 of 2016]

(Before Hon. Justice Mathews N. Nduma)

KELAS WANYAMA.....1ST CLAIMANT

BONIFACE MUSYOKA.....2ND CLAIMANT

RONALD KIPRONO SIELE.....3RD CLAIMANT

HARRISON MUKASA SHIKUKU.....4TH CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The claimants Kelas Wanyama; Boniface Musyoka; Ronald Kiprono Siele and Harrison Mukasa Shikuku are claimants in causes Numbers 33; 34; 35 and 36 respectively which were consolidated on 30th July 2018 and heard together.
2. The claimants were employed by the respondent on diverse dates as drivers in the Courier Division of the respondent. The claimants collected and delivered parcels from various collection points to the respondent's Kisumu office.
3. The drivers were responsible for taking care of the motor vehicle as assigned to them and to use most efficient routes in course of their duties. The drivers were also to ensure efficient use of fuel in the vehicles.
4. On or about the 12th August 2015, the employment of the claimants was terminated for failing to account for named litres of fuel that was 'put' in the respective motor vehicles assigned to each one of them.
5. The claimants content that the decision to terminate their employment was:
 - (a) Too harsh and not commensurate with the allegations that were levelled against them.
 - (b) That the process leading to their termination was biased and skewed in favour of the respondent.
 - (c) That the claimants had not been issued with the G4S fuel policy and regulations used against them.
 - (d) That the fuel policy and regulations applied to fuel Marshalls and not drivers.
 - (e) That the claimants have suffered hardship, loss and damage.
 - (f) That the respondent did not issue them certificates of service to help them get alternative employment.
6. The claimants state that they were not given annual leave during the respective periods they served.

7. The claimants pray the court to declare the termination of the employment of the claimants unlawful and unfair and they be awarded compensation and terminal benefits including three months notice pay; payment of overtime worked; grant of certificate of service; interest and costs. CW1 Kelas Wamalwa Wanyama testified that he was assigned motor vehicle Registration No. KAQ707R. That the respondent employed mechanics and fuel Marshals. That the vehicles were fueled at designated petrol station known as Total-new silo at Kamabi.
8. At the fuel station was stationed a fuel Marshall. The pump attendants filled the car. The driver only opened the fuel tank. The fuel Marshall records the transaction by running the fuel card. Each motor vehicle had a different fuel card. The card had a pin number which was kept by the fuel Marshall. The fuelling depended on the journey to be undertaken. The fuel card handling regulations only authorized the fuel Marshall to fuel the card.
9. The claimant testified that himself and other drivers had no control of fueling. CW1 relied on witness statement dated 9th February 2016 as part of his testimony in chief. CW1 produced annexures to the statements of clam as exhibits in the suit. Under cross examination CW1 stated that no rules and regulations were given to him in the beginning. That the drivers were told what to do. That the fuel tanks took about 200 litres of fuel at a time. That two fuel Marshalls swiped the cards upon fueling. CW1 stated that he was required to record fuel drawn. On the material date, he had taken 89.80 litres and signed on the fuel record form. CW1 then went to take tea nearby and then went to the office. The office was a short distance from the restaurant. At the office, CW1 was directed to return to the fuel station and requested to fuel. He drew further 39 litres. CW1 recorded a statement the following day. CW1 was issued letter of suspension on 13th July 2015 and a notice to attend a disciplinary hearing on 4th August 2015. CW1 and other claimants attended the disciplinary hearing. CW1 and others were after the hearing issued with letters of dismissal. CW1 and other claimants were accused of involvement in fuel malpractices which they all deny.
10. CW1 stated that he was not paid terminal benefits. That he had a loan with the SACCO. CW1 stated that he did not go on leave and he had worked for 15 years. CW1 was shown leave application forms for the years 2010, 2011, 2012, 2013 and 2014. However CW1 denied he went on annual leave stating that the claimants were only given off days. CW1 stated that he was not paid overtime. CW1 was however shown pay slip for July 2015 and he admitted that the slip showed payment of overtime to CW1. CW1 stated that he did not Appeal the decision to dismiss him. CW1 stated that they worked from 6.00 am to 6 p.m. That at times they exceeded those hours. CW1 stated that the charges against them were not specific. That they were accused of fuel malpractices. CW1 stated that the leave forms produced by the respondent do not indicate that leave was approved. CW1 prayed that the claimants be awarded as prayed.
11. RW1 Samson Machokha testified that he worked in the Risk Department of the respondent. That his work is to gather intelligence and conduct investigations. That around July 2015, he received intelligence upon which he and others conducted surveillance on G4S drivers. RW1 and others mounted a sting operation from a distance of 50 metres from the office. Upon motor vehicles arriving at the branch office at Kisumu, RW1 and other inspected the vehicles and noticed that the fuel tanks were not full. The drivers had just fueled the vehicles. RW1 stated that the company policy was to fill the tanks before the vehicles commenced work. RW1 asked the drivers to go back to the fuel station and the tanks were then filled up. RW1 made a report of the difference put in the tanks to fill them up. RW1 produced the report marked exhibit 'R1'. RW1 testified that the Marshalls and drivers had colluded to steal company fuel. RW1 stated that disciplinary process was then commenced against the claimants.
12. Under cross examination by Mr. Onsongo for the claimants RW1 stated that he did not have the fueling record of the day from the fuel station before court. That he had the records from the fueling Marshalls. That fuel cards were kept in custody of the fuel Marshalls. That none of the claimants was a fuel Marshall. RW1 said that some of the speedometers were defective. RW1 further testified that fuel Marshalls authorizes fueling of motor vehicles and not the drivers.
13. Under re-examination RW1 stated that they had observed fuel Marshalls gave the cards to the drivers to pay for the fuel drawn
14. RW2 Jackline Onyango testified that she was the Human Resource Officer of the respondent. That she kept records of the claimants. That they were all drivers. RW2 said she did not know the claimants personally. That she received a report from RW1 upon which the claimants were suspended from work and issued with notice of disciplinary hearing. RW2 produced the letters of suspension marked exhibits '2a' and notice to attend the disciplinary hearing marked exhibit '2b'.
15. That the claimants attended disciplinary hearing on 4th August 2015. RW2 produced the minutes of the disciplinary hearing marked exhibit '3'. RW2 stated that she was present at the disciplinary hearing. That the claimants could not explain loss of fuel and were dismissed for misconduct. The claimants were given dismissal letters on 12th August 2015. That the letters set out the reasons for dismissal. That the claimants ere paid terminal benefits. RW1 produced discharge vouchers dated 28th September 2015. The voucher shows all outstanding terminal dues as at the time of dismissal. The vouchers are exhibit '4'. RW2 stated that the respondent followed due process in dismissing the claimants. That the claimants were issued with certificate of service. RW2 produced copies of certificates of service marked exhibit '5'.
16. Under cross examination by Mr. Onsongo for the claimants, RW2 stated that all the claimants were dismissed for fuel malpractices. That the speedometers of their vehicles appeared to be vandalized. It was not clear what fuel consumption was being reckoned per kilometer. That drivers had a duty to report faults experienced in the vehicles allocated to them. That the respondent was responsible for the repairs of the vehicles. RW2 did not have letters of appointment of the claimants. RW2 stated that it was not the responsibility of the drivers to maintain the motor vehicles. That under the fuel management policy, the drivers were under a duty to account for fuel drawn by the vehicle they used. That the fuel Marshalls and the drivers jointly recorded the quantity of fuel drawn. That it was the fuel Marshalls who were responsible for the fueling of the vehicles. RW2 stated that deficits were found on the amount of fuel put by the Marshalls. RW2 stated that no findings were made against the Marshalls in the minutes before court. That the claimants had representatives of choice at the disciplinary hearing. The reasons for the dismissal are per bullet number 2 in the minutes of the disciplinary hearing. RW1 stated that the claimants had no previous record.
17. Under re-examination RW2 reiterated that speedometers of the vehicles driven by the 4 claimants were not functional. That it was the responsibility of the claimants to report defects in their vehicles. That the Marshalls absconded work. Only the drivers faced disciplinary

hearing.

Determination

18. The issues for determination are:

(a) Whether the dismissal of the claimants was for a valid reason and if fair procedure was followed in arriving at the decision to dismiss them.

(b) Whether the claimants are entitled to the reliefs sought.

Issue (a)

19. In terms of Section 43 of the Employment Act, 2007:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 54”

20. In the present case RW1 and RW2 testified that the claimants were found guilty of fueling malpractices in the course of their employment. That RW1 and others mounted a sting operation upon receipt of intelligence that drivers were involved in fueling malpractices. That upon conduct of the operation, it was discovered that the four claimants did not fuel the tank fully as was the policy of the company. That the claimants had their speedometers not working and had not reported the same. That it was therefore not possible to know the amount of fuel used by the claimants per kilometre. They therefore did not fill the tanks as required. That the claimants colluded with the fuel Marshalls in the malpractice because the Marshalls were responsible for the fueling of the vehicles using fuel cards. That the Marshalls kept the fueling records signed by the Marshall and the driver. That the company lost fuel as a result of this malpractice. That though the drivers did not have previous adverse records, the misconduct discovered was serious enough to warrant dismissal of the claimants. That the Marshalls absconded from work and did not undergo the disciplinary process. That the respondent was justified to dismiss the claimants. RW2 testified further that the claimants were paid their full terminal benefits upon dismissal. RW2 produced records to prove the payment. RW2 also produced copies of certificates of service given to the claimants contrary to the testimony by CW1. The pay slip produced by RW2 shows that the claimants were paid overtime as and when they worked for more than the normal hours. RW2 produced leave records to show that the claimants had taken leave from the year 2010 to 2014. These records again contradicted the testimony by CW1 on behalf of the four (4) claimants.

21. The court is satisfied that the respondent had discharged the onus placed on an employer in terms of *Section 41, 43 and 47(5) of the Employment Act 2007*, in that the respondent had demonstrated that it had a valid reason to dismiss the claimants from work. The respondent also demonstrated that it had followed a fair procedure in that regard by giving the claimants notices to attend a disciplinary hearing. That the claimants attended the hearing and were allowed representatives of choice. That the respondent was not satisfied with the explanation given by the four (4) claimants and the respondent was justified to dismiss their employment which it proceeded to do.

22. Accordingly, the claim by the four claimants for declaration that their dismissal from work was unlawful and unfair lacks merit and is dismissed.

23. In answer to issue (b) following the finding above, the claim by the four (4) claimants for compensation for wrongful dismissal is equally dismissed.

24. From the testimony by RW2, the court is satisfied that the claimants had been granted annual leave and off days during the period they worked for the respondent. The court is also satisfied that the claimants were from time to time paid for overtime worked. The claimants were also given certificates of service upon dismissal. The claims by the four (4) claimants for payment of the terminal benefits set out in their respective suits, now consolidated, lacks merit and are equally dismissed.

25. The claimants had long relationship with the respondent and had no adverse record until the fueling malpractices were discovered. We find this appropriate case for each of the parties to meet their costs of the suit.

Judgment Dated, Signed and delivered this 5th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Onsongo for Claimants

M/S Kirimi for Respondent

Chrispo – Court Clerk