



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 986 OF 2014

WYCLIFFE MAGOMERE.....CLAIMANT

VERSUS

SANKARA NAIROBI.....RESPONDENT

JUDGMENT

1. In this claim, the Claimant seeks to recover for the termination of the Claimant by the Respondent in June 2013. In the claim filed on 17th June 2014, the Claimant avers that the Respondent employed him in July 2010 as a storekeeper with a monthly salary of Kshs. 57,858.42. It was averred that the termination was unfair, malicious and unprofessional. He averred that he was entitled to 2 months pay in lieu of notice and that by reason of the matters aforesaid, he had lost substantial amounts in salary, allowance and other benefits he would otherwise have earned. He thus sought 1 year compensation Kshs. 694,301.04, 2 months notice Kshs. 115,716.84 and the June salary Kshs. 57,026.57. The Respondent filed a reply to the memorandum of claim on 17th October 2014 and the Respondent averred that the Claimant was employed vide a contract of employment dated 28th June 2010 as a store keeper in the Finance Department commencing 1st July 2010 at a gross salary of Kshs. 16,639/- plus house allowance of Kshs. 5,777/- a month. The Respondent averred that the Claimant was as a store keeper required to be responsible for the safe custody of grocery and engineering consumable items ensuring the recommended storage conditions are adhered to whilst maintaining proper records of all transactions for goods entering and leaving the stores on a real time basis, developing par stocks required and ensuring that no operational interruptions occur from stock outs, maintain an update of inventory for products and items in store reflecting the true position of stock, responsible for all documentation and document flow pertaining to any transactions in store whilst observing the agreed procedure, review all requisitions pertaining to stock replenishment to ensure no over or under ordering of items, inspection and authentication of all materials entering the hotel store to verify the materials arriving at the stores for the correct quantity, quality, pricing, expiry date and other specifications. The Respondent averred that the Claimant was negligent in his duties which caused his dismissal from employment having received three previous warnings for failing to discharge his duties. The Respondent gave particulars of the Claimant's negligence and averred that the letter of termination dated 28th June 2013 detailed reasons for his dismissal. The Respondent averred that the Claimant was invited for a disciplinary hearing and the explanations he gave were found to be unsatisfactory and the lack of proper accounting and/or mismanagement of stock amounted to serious misconduct and breach of clause 11.2.1 of the Claimant's contract of employment. The Respondent averred that there were criminal proceedings on going against the Claimant based on the acts of negligence and mismanagement of stock. The Respondent averred that the Claimant was paid and acknowledged receipt of all his dues upon termination of the contract and was issued with a certificate of service. The Respondent averred that fair and proper process was followed in termination of the Claimant's employment in accordance with the Claimant's contract of service. The Respondent urged the dismissal of the claim as the dispute at hand is wrongly conceived and does not lie in law.

2. The Claimant testified on 16th June 2015. He testified that he had sued the Respondent for the dismissal from employment for an alleged infraction. He stated that he was accused of issuing things that were not in the system and for failing to follow the procedure by receiving items from the supplier and issuing them without authority. He testified that it was for him to raise a purchase order, the purchasing manager was to issue an LPO and the purchasing manager used a shortcut and asked him to collect the items from the supplier with a delivery note and not an invoice as required. He stated that he followed the instructions of his boss, that the invoice was to follow after the issuance of the LPO by the purchasing manager and that there was procedure that was not followed. He testified that the meeting called was after a decision had been made and that the dismissal letter was written before he was called for the meeting. He stated that at the meeting attended by the purchasing manager, the finance controller, union representative and HR, he was accused of receiving goods without entering them into the MC system and causing the Respondent grave risk. He testified that the invoice had not been received by the receiving clerk and there was another invoice for 23rd August 2012. He stated that it was unfair to dismiss him one year after the alleged loss and the dismissal was stated to be for gross misconduct. He testified that he was charged with stealing 20 million worth of wines and spirits between 27th June 2013 and 6th August 2013 a time when he was already dismissed. The case was scheduled to be further heard on 29th September 2015 but it seems the file did not get any traction until 23rd October 2017 when the Claimant continued with his testimony. He testified that the dismissal was because of receiving the products and failing to enter them in the system. He stated that as store keeper, he was to make a requisition note to the purchasing manager to make an LPO for delivery of goods to the hotel. The requisition he made would go to the purchasing manager who checks pricing and if there is no supplier the purchasing manager orders by LPO. Once goods are delivered they are received by the receiving clerk and the order is checked against the LPO and when they are received the Claimant would receive them in the system. He

stated that the structure was that it starts from the stores and then from him the request goes to the procurement person then to finance and once order is delivered it is entered in the system then given to him. He would request for material through the purchasing manager and his boss prepared the LPO and he was sent to the supplier who was to deliver and LPO prepared. He testified that when the user department made a request there was nil stock and he was instructed to go and collect the items by the purchasing manager and take them straight to the user department on 23rd August 2012 and the issue arose on 28th June 2013 almost one year later. He stated that he was not the one to key in the product and that it was the receiving clerk who was to key in the products. He testified that 3 people did the stocktaking each month and spot checks are done at any time night time or even very early morning. He stated that the purchasing manager is involved in stock taking and that he had been sent to collect the item by the purchasing manager and this was not picked in the stocktaking. He testified that he raised all this at the meeting but there was no one to listen to him. He testified that the dismissal was written on 27th June 2013, the meeting was held on 28th June 2013 and that the shop steward was not given a chance to defend him at the meeting. He stated he was not in employment when he was charged with fraud.

3. In cross-examination, he testified that he was not given a contract of employment. He was referred to the Respondent's bundle and stated that the document produced at pages 1-9 was signed by him and that he was employed as a store keeper union grade 7. He admitted that as part of his contract he could be terminated summarily per the terms of the contract. He testified that he worked with diligence, devotion and dedication. He stated that he misplaced some keys, stated that he would be careful in keeping keys and was given verbal warning for the loss. He was never charged for the loss. He testified that he received a warning letter and appealed. Regarding the products, he testified that he used the material control system (MCS) and that he was not the one who was to enter the goods into the records but the receiving clerk. He stated that he received delivery note and gave it to the purchasing officer to proceed with issuance of LPO. He testified that he took Mohiba complimentary slips, manila envelopes C4 and DL conqueror envelopes. He testified that he handed over the items and delivery to the purchasing manager. He stated that he attended the meeting and his representative was not allowed to ask questions. He did not indicate on his letter to the Respondent that there was refusal to allow shop steward to ask questions. He stated that the union complained to the labour office. He testified that he was summarily dismissed after the hearing and he understood the reasons for the termination. He stated that the terminal dues were indicated and that he received part of them and the missing part is service charge for May and June. He testified that he was charged alongside Mary Nafula Zadok though he had already left the Respondent and that the case was on going.

4. In re-exam, he testified that there were 2 orders made. The first was on 23rd August 2012 and the other was on 4th August 2012 and that the reason for the dismissal was the invoice for 23rd August 2012. He stated that the order of 4th August 2012 was picked the same was and that he was the one who picked both with a delivery note with no LPO to produce an invoice. He testified that the procedure was skipped by the purchasing manager. He stated that the way he worked, the procedure was to take end month stock take and he wondered why the Food and Beverages manager, the purchasing manager and the accounts officer not raise the issue until he was dismissed. He stated that he was never asked to explain.

5. The Respondent called the purchasing manager Josiah Njue Njagi who testified that he knew the Claimant who was a store keeper. He stated that he was the Claimant's superior and that the Claimant as store keeper was supposed to keep the correct stocks, ensure there are no variances, follow procedure in issuing the items in the store. He testified that the Claimant being the custodian of the stocks had to make sure the requests are met on time and procedure followed. He stated that the Claimant had to make sure what leaves the store is recorded real time and input the information in the materials control system. He testified that there were incidences where the Claimant would take good from a supplier and issue them without recording them and that was misconduct because of not managing stores as per the set standards and rules of the organisation. He referred to instances where the Claimant had shortages due to failure to replenish the stores he was managing. He testified that the Claimant went to a supplier and picked the items as a result of not keeping stocks. The items were not input into the system and the Claimant issued them to the user department without accounting. He stated that one of the items were bills used to make sales and that it was important to know where the bills are used and if bills are unaccounted for they could be used to benefit people. He testified that before the termination the Claimant was called for a meeting and at the hearing the Claimant was unable to show why procedure was not followed. He stated that he did not give the Claimant any instructions to collect the items without accounting and that he was present when the Claimant was asked to give an explanation and the Claimant did not accuse him of giving instructions to collect the items without following procedures. He testified that the Claimant said he was sorry for his actions and then stormed out of the meeting attended by Gilbert the union official. He stated that the Respondent would not have realised that goods had been delivered had the supplier not requested to be paid as first and foremost, good received have to be recorded and the invoices taken to finance to pay. He stated that the reasons for the termination were on the letter and that in the criminal case, the Claimant had already left the Respondent and the Police investigations on loss of beverages due to theft led to charging of the Claimant and another person.

6. In cross-examination, he testified that the invoice was in the name of Sankara and that the procedure was for a specific request to be made. He stated that he did not know how the request was made and that the Claimant should give the answer. He testified that some items were missing and that is how the Respondent discovered that the stock was not there. He stated that the Claimant is the one who could tell when he had dispatched the items to the user department. He testified that the procedure was that the respective store keeper would get into the system and make a requisition and after he approves and issues an LPO the LPO is signed by him, the financial controller and general manager and then issued to the supplier. He stated that the specific consignment did not go through the system and they only knew of them when the supplier sought payment. He testified that it was not true that he sent the Claimant to collect stationery as suppliers are supposed to deliver. He stated that the Claimant went and picked the items himself and most probably the Claimant was not questioned as they knew the Claimant. He stated that the Claimant may be the one who ordered the items because if he had ordered them, he would have issued LPO. He testified that there are incidences when he can send someone to pick items and that the big mistake was that the items were accountable documents and the due process was keying them into the system.

7. In re-examination, he testified that it was the duty of the Claimant to keep stock of the items in the store and there was no invoice for the items received. He stated that bills are like cheques, it is what is used to charge clients and that the bills are numbered, accounted for and sales are traced through them. If not in the system, they could be used to charge customers and the person keeps the cash and that was why there were procedures for this.

8. The Respondent then called Esther Wanza Kiplangat who testified that she was an HR assistant. She stated that the Claimant was employed as a store keeper and was issued with a letter of appointment as well as a job description which he signed in acceptance. She stated that the Claimant was issued several warnings and corrective action indicated. On the disciplinary hearing, she testified that the Claimant was

given a show cause letter for a hearing on 23rd June 2013 and the hearing was on 28th June 2013. She stated that the Claimant had 2 representatives who were the shop steward and the union chairman. She testified that the Claimant was issued with a summary dismissal which he signed for on 8th July 2013 and reasons were indicated. She stated that she computed the final dues for the Claimant and the financial controller at the time authorised and a witness confirmed accuracy.

9. In cross-examination, she testified that per the computation, the Claimant was to receive 23,732.83 and that the finance department was to prepare a cheque and call the beneficiary and that she was not aware whether the Claimant had collected. She stated that not entering the items could have led to fraud as things could have disappeared from the stores. She testified that from her position she could not tell if there were items missing.

10. In re-exam, she testified that the Claimant was dismissed for not following procedures. That marked the end of oral testimony.

11. The parties filed submissions with Claimant filing his submissions on 6th December 2017 whilst the Respondent filed submissions on 18th December 2017. The Claimant submitted that he was issued with a termination letter before the hearing scheduled for 28th June 2013 as the Respondent had already made a decision before hearing the Claimant's side of the story. He submitted that he was only dismissed on grounds of receiving goods and failing to enter the in the system. He submitted that at the hearing they did not give the shop steward a chance to defend him and thus he was not heard before the dismissal. He submitted that the purchasing manager skipped procedure and the issue of the invoice was only raised on the day he was dismissed. The Claimant submitted that the issues for determination were

1. whether the Claimant was unlawfully terminated
2. whether the Claimant is entitled to the orders sought

The Claimant submitted that before an employer can exercise the right to terminate an employee or employees, the employer must provide valid reasons to justify the termination either on grounds of misconduct, poor performance or physical incapacity per Section 45(2) of the Employment Act. The case of **Fulgence Sunza Masai v Kenya Revenue Authority [2014] eKLR** was cited on the issue of misconduct. It was submitted that on the basis of the definition given in the Sunza case, there was no misconduct on the part of the Claimant and that the actions of the Claimant were as a result of the instructions from his boss the purchasing manager. The Claimant placed reliance on the case of **Bornventure Munavi Kabbis v Bob Morgan Services (also referred to as BM Security) [2014] eKLR** that the question of summary dismissal though covered under Section 44 of the Employment Act should be critically addressed before an employer can cause its application in any case. This is so because to arrive at the point that an employee has grossly misconducted himself to warrant dismissal, there must be clear and unequivocal breach of the employment contract that the situation cannot be salvaged in any other lawful manner other than resort to summary dismissal. The Claimant submitted that he could not have wilfully neglected or performed his duties improperly because on the said date he was sent by the purchasing manager to go and collect the goods he was acting under the instructions of the purchasing manager who skipped the required procedure. As a result of the skipped procedure the Claimant was not in a position to update the delivered goods into the system. He submitted that the accusations against him were not grievous to amount to gross misconduct to warrant summary dismissal. The Claimant submitted that his dismissal therefore amounted to unfair termination for which he was entitled to remedies under Section 49 of the Employment Act being one year compensation, two months notice pay and the June salary. The Claimant submitted that the Respondent did not follow the procedure provided for under Section 41 of the Employment Act before the termination.

12. The Respondent submitted that the Claimant is not entitled to compensation as he was negligent in the performance of his duties which negligence informed his dismissal from employment. The Respondent submitted that the due process for termination was followed and thus the termination was not unfair and the Claimant was paid and acknowledged payment of all his terminal dues. The Respondent submitted that during the course of his employment, the Claimant was negligent in the performance of his duties and as a result thereof received 3 warnings for failing to discharge his duties diligently and with dedication as agreed under the contract of employment. The Respondent submitted that on 23rd August 2012, the Claimant received printing and stationery items from Ellams Products and did not record the same in the materials control system before dispatching them to the various cost centers as per the set standards and procedures thus exposing the hotel to high risk as some of the printing and stationery items included food and beverage bills. The Respondent submitted that it only found out about the printing and stationery items when Ellams Products inquired about payment of the goods in mid 2013. The Respondent submitted that the Claimant responded to the issue by way of his letter dated 24th June 2013 stating that he had not received an invoice from Ellams Products thus did not post the items into the materials control system. The Respondent submitted that the Claimant was invited to a disciplinary hearing on 28th June 2013 and at the hearing, the complaints against the Claimant were raised and the Claimant given an opportunity to defend himself. The explanations provided by the Claimant were found to be unsatisfactory and the lack of proper accounting and/or mismanagement of stock amounted to serious misconduct and breach of the Claimant's contract of employment leading to the termination of the Claimant's employment. The Respondent submitted that the issues arising from the facts and pleadings were

- a. Whether the Respondent had a fair and valid reason for summary dismissal
- b. Whether proper procedure was followed

The Respondent submitted that under the provisions of Section 44(3) and (4) of the Employment Act, there was basis for the dismissal of the Claimant from employment. The Respondent cited **Halisbury's Laws of England Fourth Edition vol. 16 at 640 paragraph 642** which defines misconduct and paragraph 643 which states that *there is good ground for the dismissal of an employee if he is habitually neglectful in respect of the duties for which he was engaged*. The Respondent submitted that it had a fair and valid reason for the summary dismissal of the Claimant. The Respondent submitted that at no point during his disciplinary process and the dismissal did the Claimant state that he was instructed to collect the items by the purchasing manager. The Respondent submitted that the Claimant had only painted that picture during the hearing of this matter. The Respondent submitted that in his letter dated 24th June 2013 the Claimant acknowledged receipt of the goods and dispatch to the user departments directly without inputting them in the system but did not mention having received any instructions to do so. The Respondent relied on the Canadian case of **Kinley v B.C. Tel [2001] S.C.R 161** as cited with approval in the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** for the position that just cause for dismissal exists where the

dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer. The Respondent also cited the case of **Fulgence Sunza Masai v Kenya Revenue Authority [2014] eKLR** cited by the Claimant in his submissions. The Respondent submitted that the definition of misconduct in the case is a beautiful summary of the conduct of the Claimant as the Claimant by his conduct damaged the trust and confidence of the Respondent and the Respondent was thus not obliged to keep him as an employee with the mistrust existing between the Claimant and Respondent. The Respondent submitted that the Claimant was accorded a hearing as required under Section 41 of the Employment Act. The Respondent placed reliance on the case of **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR** where Radido J. summarised the requirements of Section 41 and stated that the Respondent's procedure applied in the case met the test in the case and thus is proper procedure. The Respondent thus urged the dismissal of the claim with costs as the Respondent had valid and fair reasons for the dismissal and due process was followed.

13. The Claimant was dismissed on account of failure to input stores into the materials control system of the Respondent. The Claimant was summarily dismissed. Dues were processed and from all accounts a sum of Kshs. 23,732.83 was paid to the Claimant. The issue that the court has to determine is whether the dismissal was proper and if not what remedies the Claimant is entitled to. The Claimant was requested to attend a disciplinary meeting on 28th June 2013 vide a letter dated 27th June 2013. In the letter from Dorcas Waweru Human Resources Manager, the Claimant was notified that due to several incidences where he had received several stock items and issued the same to user department without following the set standards, he was invited to a hearing meeting on 28th June at 9.30am in the Training Room. The letter was copied to Victoria Mwaniki, Josiah Njue and the Shopsteward. The Claimant was required to acknowledge receipt of the letter which he did. There are no minutes of the meeting produced but the summary dismissal letter indicates that the meeting was held on 27th June 2013 in the presence of Dorcas Waweru, Victoria Mwaniki, Josiah Njue, Phabian Ong'uen, Gilbert Okatch, Betty Kaindo and the Claimant. It was indicated that the Claimant admitted that he picked the items from the supplier because they were needed urgently and later issued them to the user department without following any documentation. It is stated that the Claimant claimed that he did not post the items in the system because he had received them with only the delivery note and not the invoice. He did not explain why he did not follow up on the invoice nor escalate the matter. The Respondent viewed the actions of the Claimant as gross misconduct and it could not rule out fraud given the Claimant was on the 3rd and final warning letter on related issues. The Respondent thus summarily dismissed the Claimant. In the lead to the dismissal, the Claimant is accused of having taken stores directly from suppliers and distributed them without following procedures. The Claimant had responsibilities as a store keeper which were condensed in writing. He was given several written warnings, three to be precise, prior to the dismissal. Was the dismissal in accord with the Employment Act? In the case of a dismissal for misconduct, the provisions of Section 41 are key. The fair procedure is provided for as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

14. The Respondent it would seem accorded the Claimant the procedural safeguards. There is no mention of the direction to skip procedure in the hand-written explanation given by the Claimant. The Claimant authored his dismissal by failing to key in the items he had collected from a supplier into the system. The fact that he had previously been warned on the same issues prior to dismissal did not aid the Claimant one bit. The suit therefore falls for dismissal save that on perusing the payment processed for the Claimant, it is evident the June salary charge was not paid as only the service charge was computed in the final dues. The sum of 27,123.50 was not paid and I order the Respondent to pay the same to the Claimant within 14 days of the judgement. Each party will bear their own costs for the suit.

It is so ordered.

Dated at Nairobi this 9th day of January 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 19th day of January 2018

Radido Stephen

JUDGE