



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 13 OF 2018

(Formerly Nyeri ELRC No. 133 of 2017)

JOSHUA MURIUNGI.....CLAIMANT

VERSUS

MERU CENTRAL DAIRY CO-OP. UNION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit seeking recompense for his wrongful and unlawful dismissal from the employ of the Respondent. He averred in his memorandum of claim filed on 31st July 2017 that he was employed as a heavy commercial driver in February 2011. He averred that he was assigned duties of selling milk at Marsabit with KBY 600R and while he was preparing to depart, he was instructed by the transport manager to drive lorry KBZ 577E from the dairy plant to the petrol station at Meru town about 1 kilometre away so as to be refuelled. He was to leave the vehicle there and he averred that he drove it as instructed and on his return to Meru 4 days later he was served with a letter in which he was required to explain the circumstances which made him drive the lorry KBZ 577E from the dairy plant to the petrol station. He stated that he was not aware if there was any milk that had not been invoiced in the said lorry. He averred that the procedure of the milk leaving the plant is that the milk is counted by the dispatch clerk, the gate keeper and the salesman before the vehicle is allowed to leave the gate. He averred that the consignment was duly processed per the procedures of the Respondent and the documents for the same in custody of the Respondent. He thus sought the termination be declared wrongful and unlawful, he be reinstated to his employment unconditionally and costs be provided for. He attached his letter to show cause dated 24th December 2014, the notice of suspension from duty dated 29th December 2014 and the termination from employment letter dated 19th January 2015.

2. The Respondent was served and entered appearance on 25th September 2015 and a statement of defence on 9th October 2015. In their defence, the Respondent averred that the Claimant was dismissed due to the loss of 100 milk cartons. It was averred that the Claimant on 22nd December 2014 drove a motor vehicle KBZ 577E which was not assigned to him out of the Respondent's dairy plant with 100 cartons of excess milk. The Respondent averred that the same was in collusion with the dispatch clerk, the security personnel, the authorized driver of the said vehicle KBZ 577E, the assigned salesman of the motor vehicle a Mr. Erickson Koome all of whom were similarly dismissed from service. The Respondent denied that the Claimant was instructed to drive the vehicle by the transport manager of the Respondent. The Respondent averred that it followed due process in the termination of the Claimant and gave him a hearing at every stage of the disciplinary process and the Respondent averred that the dismissal was lawful, fair and based upon valid reasons. The Respondent thus sought the suit to be dismissed with costs. The Respondent later filed a list of documents including the delivery note for KBZ 577E dated 21st December 2014 with 1,200 cartons of milk, a delivery note for KBZ 577E dated 22nd December 2014 for 1,300 cartons of milk as reassigned to a new driver. Parties filed witness statements as well.

3. The Claimant testified on 6th March 2018 at Meru and stated that he worked for the respondent. He stated that he went to dispatch and was shown the vehicle he was to drive and deliver milk. He had a work ticket that was duly signed for the vehicle he was to drive and was called by the transport manager who told him there was a vehicle with the salesman at the gate and the driver had not arrived. He testified that he was asked to get the vehicle and take it for fuelling as the salesman did not know how to drive. He took the vehicle for fuelling and then called the driver to come and collect the vehicle at the petrol station. He left for Marsabit where he was to sell milk for 4 days and on return reported to work. He was summoned by the transport manager who asked whether he had driven KBZ 577E. He told the transport manager that it was the transport manager himself who had asked the Claimant to drive the vehicle to the petrol station. He was informed that the vehicle had an extra 100 cartons and he indicated that it was the salesman who knew the quantity of milk and that he had no knowledge of the cargo. He stated that he could not know of the extra cartons and that the loading area had CCTV cameras. He said that if he had 100 cartons they would have been in the vehicle he drove to Marsabit. He was taken to the marketing manager's office and repeated what he had been told. He was given a suspension letter indicating he had driven KBZ 577E and KBY 577E. He replied that one cannot drive two vehicles at once. He was told to hand over, was called later to attend the board at Meru central and his services terminated after a while. He testified that the dismissal was not proper and thus sought reinstatement since his family had suffered as a result of the dismissal. He did not expect the dismissal.

4. In cross-examination he testified that it was on 22nd December 2014 when it was said that he had driven two vehicles. He had a vehicle KBY 600Q that he was to drive to Marsabit to deliver milk and that the one at the petrol station was KBZ 577E. He said in lorry KBY 600Q, the milk was inspected at dispatch and at the gate and that he was instructed to drive KBY 577E. He testified that the vehicle was with the salesman and that the goods were inspected under care of salesman. He had only the work ticket inspected and that the work ticket was the only item he was asked for. He said that the salesman is the person in charge of the goods and he did not know if the vehicle was inspected or not. The gates were opened and they left. As a driver, according to process the vehicle may have been inspected. All he knew is that the vehicle he had was inspected. He was not the salesman in the other vehicle and when he was called to receive instructions, it was possible that it was inspected. He stated that he did not see it being inspected and that he was instructed to drive to the petrol station. He said that what was done was that the delivery was signed and for the driver it is the work ticket that is checked. He testified that no vehicle leaves the factory without signatures and that he found the vehicle at the gate. He stated that he was given a suspension letter on return and that he had been given a show cause letter. He testified that his response was oral though the letter had sought a written explanation. He went to the marketing manager's office and gave an explanation. He denied signing the hand written letter produced by the Respondent. He stated that he did not file any response to the defence. He testified that he was the only one whose services were terminated.

5. The Respondent called Fridah K. Mbaya who stated that she was the HR manager at the Respondent. She testified that the Claimant was an employee of the Respondent and was dismissed when he drove a vehicle he was not assigned to as it had an excess of 100 cartons. She stated that the Claimant was asked to show cause by letter and that he responded by an undated letter. She said he gave an explanation that he was called by Koome the salesman and asked to take the vehicle outside the premises. She stated that the Respondent's officers were not satisfied with the explanation and the Claimant was suspended through letter of 6th January 2015. She said the Claimant attend before the board and was dismissed thereafter.

6. The Claimant did not have any questions in cross-examination of the witness. That marked the end of oral testimony and parties were to file submissions. The Claimant filed his final submissions on 20th March 2018 while none were filed for the Respondent.

7. In his final submissions the Claimant submitted that he was employed as a driver and that he was subjected to unfair labour practice as he was asked to check and count the goods in the lorry he was supposed to drive. He submitted that in his case, he counted the milk in lorry registration KBY 600Q which he was assigned as a salesman to sell milk at Marsabit. He asserted that it was the duty of the salesman in KBZ 577E to count and verify the milk which was in the said lorry. He stated that he was invited to the management committee on 8th January 2015 whereat he was not given a chance to defend himself. He submitted that the allegations that the other employees were dismissed was not proved as no documents were produced for the same. He said the allegation that KBZ 577E was found with 100 excess cartons of undocumented milk could not be proved as there were no documents produced in court to prove the same. He stated that if at all the undocumented milk was found, the culprit could have been charged in court on account of theft. He urged the court to disregard the Respondent's witness testimony as he was not served with the witness statement before the matter was heard before court. He submitted that at the gate, he went and verified the milk in lorry KBY 600Q which he was assigned to go and sell milk and the other salesman in lorry KBZ 577E was the one to count and verify the milk in that lorry. He submitted that the Respondent did not call the general manager to testify as a witness to prove that he was the one who wrote a letter dated 22nd December 2014 annexed to the Respondent's list of documents filed in court on 8th May 2015.

8. The accusation facing the Claimant was in regard to the movement of a vehicle out of the Respondent's premises carrying excess packets of milk. He was asked to give an explanation and was suspended from work. He was subsequently dismissed from employment by the Respondent's board after the hearing. The Respondent's position was that the Claimant was asked to give an explanation for his actions and the same was found wanting leading to his dismissal. The 2 delivery notes for KBZ 577E show that the vehicle had milk in the said vehicle being 1,200 cartons of 500ml 90 days milk. The delivery note is serial No. 27945 issued on 21st December 2014. The other delivery note is serial No. 40619 purportedly issued on 22nd December 2014, the very next day. The Respondent did also avail letters it allegedly issued to Operations Manager Benga Security Services and the driver of KBZ 577E Silas Kinyua through the owner Jackson Kangwetu and the salesman Lawi Kimathi Marete. The dates these letters were issued are the same as that of the Claimant's letter of dismissal. The font and layout are markedly different as are the format of the dates. In my view, the letters and the delivery note for 22nd December 2014 are not genuine. They are so discordant as to lead to the inference the Respondent manufactured them for purposes of the case.

9. Whereas the Respondent was entitled to undertake disciplinary process, the said process was in contradistinction from the provisions of Section 41 of the Employment Act, 2007. The dismissal was for what may have amounted to just cause and were the Respondent to have conducted the exercise in compliance with the law, the outcome would be different. As the Respondent did not avail the Claimant an opportunity for procedural fairness as contemplated in Section 41, the court finds that the dismissal was unlawful in the circumstances. The Claimant sought reinstatement but the period that has elapsed is too long to permit reinstatement. Compensation per Section 49 of the Employment Act, 2007 would suffice. The Claimant therefore is entitled to

- i. One month salary in lieu of notice Kshs. 17,604.15
- ii. Compensation being 2 month's salary 35,208.30
- iii. Costs of 10,000/- for the suit
- iv. Certificate of service

It is so ordered.

Dated and delivered at Meru this 8th day of May 2018

NZIOKI wa MAKAU

JUDGE