



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

CAUSE NUMBER 1668 OF 2013

BENARD MBAU NGARUIYA.....1ST CLAIMANT

SIMON NJOROGE.....2ND CLAIMANT

SAMUEL KIBIRU.....3RD CLAIMANT

PAUL NYOIKE MUCHIRI.....4TH CLAIMANT

JOSEPH MUNYAO NDETO.....5TH CLAIMANT

SIMON NJUGUNA.....6TH CLAIMANT

BONIFACE KIMOLIA MWILU.....7TH CLAIMANT

VERSUS

CHINA ROAD & BRIDGE CORPORATION.....RESPONDENT

JUDGEMENT

1. The claimants pleaded that they were drivers employed on diverse dates by the respondent at the Southern By Pass project. According to them, the respondent dismissed them on 27th August, 2013 without any reasons or notice.

2. The respondent on its part pleaded that on or about 25th August, 2013 the respondent came to learn from an investigative feature on KTN titled "Crooks siphon fuel from trucks in Nairobi" that some of its employees were linked to a scandal involving siphoning of several litres of fuel from its construction trucks thereby causing the respondent huge losses.

3. The respondent further stated that on 26th August, 2013 the respondent came to learn from yet another related feature that Kenya Police were searching for employees who were shown on television siphoning fuel. According to the respondent the claimants reported to work on 27th August, 2013 but immediately fled from their respective work places upon noticing Kenya Police vehicle with police officers who had come to investigate the matter. The respondent thereafter contacted the claimants on several occasions requesting them to resume work but they failed, refused and or neglected to do so for fear of arrest by the police.

4. According to the respondent, the claimants had therefore rescinded their contracts of employment as they had deserted their respective places of work. Further in view of the fact that the claimants deserted employment, the respondent was also not able to receive an explanation from the claimants with regard to the siphoning of fuel by the claimants. The respondent further pleaded that the claimant's salaries for the month of August 2013 were available to them for collection and that the respondent contacted the claimants severally to collect their salaries but they failed to do so.

5. The first claimant gave evidence on behalf of the rest and stated among others that they were all employed as truck drivers and each one of them was assigned a vehicle except the 7th claimant who was on standby. It was his evidence that they used to work on the Southern By Pass and that they used to sign in the morning and pick motor vehicle keys. At the end of the day a job card would be signed by the supervisor certifying the work done. The vehicles would then be refueled and returned to the site workshop.

6. According to him on 27th August, 2013 he went to work as usual and found an AP at the gate and were told not to enter. He was told some seven people had their salaries withheld, he never read the names as they were removed from the notice board after a short time. He

further stated that they never went to ask why they were dismissed. They sought legal advice instead. He stated that none of them was found with the alleged stolen fuel. He denied that they absconded duty.

7. He further stated that they were never issued with any warning letters nor given dismissal letters. The 1st claimant further stated that none of them was ever called and asked about the video clip. He further stated that the video clip did not show the vehicle registration numbers or anyone siphoning fuel. In cross-examination he stated that his NSSF remittances were never made. He also stated that he watched the video on 25th August, on TV and went to work the next day and worked as usual but on 27th August, 2013 they were locked out.

8. The respondent's 1st witness Mr Joseph Wahiu stated that he worked for the respondent as a security officer and that on 27th August, 2013 in the morning around 6.00 a.m. he was informed the police had entered the site at Langata. He went and found a police vehicle near the workshop. He denied anyone was refused entry to work and that the police did not prevent anyone from working. He denied there was any notice board where the claimant's names were posted as dismissed. According to him police officers came because some of the workers were siphoning fuel. He further stated that 7 vehicles remained at the parking and had no drivers. The claimants were the drivers of these trucks and were not at work.

9. The respondents second witness Delila Aminilwa informed the court that she worked for the respondent as Assistant Personnel Manager and that on 25th August, 2013 she heard rumours that the respondent's vehicles were featured on TV showing the drivers siphoning fuel. According to her, the clip did not show the fuel being siphoned but the place where it was done.

10. On 27th August, 2013 she was again alerted that the respondent's vehicles were being featured on KTN at 9.00 p.m. The next day when she reported to work she saw a police vehicle at the workshop area but did not realize the claimants were not at work. According to her the claimants were not dismissed. It was her evidence that she contacted them and that on 27th August, 2013 they called her to find out if they were going to receive their salaries.

11. In cross-examination she stated that she was not directly in charge of the claimants. They had supervisors who reported to the workshop manager. On 26th August, 2013 after seeing the video the respondent was supposed to summon the claimant on 27th August, 2013 but when the police came the claimants ran away. It was further her evidence that they could not write letters because normally an employee who was absent without authority was given 7 days and thereafter they can be called.

12. According to her, she called the claimants to the office but they refused to come saying they would be arrested. She admitted that none of the claimants was captured in the video clip. According to her the vehicles were captured at an area where siphoned fuel was being sold. It was not a working area. It was further her evidence that the claimants worked up to 26th August, 2013 but were not paid for August. They further worked for four days in September.

13. Delila further stated that some of the claimants still worked for the respondent on different projects. The respondent herein alleged that the claimants ran away from duties for fear of attest after an expose purportedly implicating them in a fuel siphoning crime. It is not clear from the evidence who instigated the expose and whether the respondent was the one who reported the matter to the police.

14. An accusation of theft is a serious offence and one for which an employer would be entitled to dismiss summarily. The respondents seems to have presented the issue to the court in a manner that tended to show that it was not the one behind the expose and that the police were pursuing the matter independently without its instigation. This is curious because if it was indeed true that the siphoning took place this obviously caused the respondent a loss for which a formal complaint would have been made to the police and possible arrest and prosecution of the culprits considered.

15. The respondent however simply claims that the claimants ran away when they found police at the respondent's premises and never returned to work. If this indeed happened the respondent could have taken this conduct of the claimants as a sign of guilt and pursued them further using the police. The video clip in which the claimants were allegedly spotted siphoning fuel never showed any of them by face siphoning fuel. The video simply showed respondent's vehicle parked at a place the respondent claimed siphoned fuel was being sold.

16. A termination on account of desertion of duties must be backed by clear evidence that efforts were made to contact the worker claimed to have deserted without success. No such evidence was presented to the court. Further, it should be strange that despite being implicated in theft, the respondent's second witness Ms Delila informed the court that some of the claimants were still working for the respondent as drivers in a different project.

17. Proof and justification of reasons for termination of employment rests with the employer. Failure to discharge this burden leads to a finding that the termination was unfair and the court will order appropriate compensation. In this particular case, the respondent did not discharge this burden to the desired standard of proof hence the court finds and holds that the termination of service was unfair.

18. The court therefore awards each of the claimant as follows:

- a. One month salary in lieu of notice
- b. Salary for August, 2013 and 4 days in September, 2013
- c. Seven months salary as compensation for unfair termination of services.
- d. Costs of the suit

19. Items (a), (b), and (c) shall be subject to taxes and statutory deductions. Other prayers pleaded by the claimants are hereby dismissed as no evidence was led to establish them.

20. It is so ordered.

Dated at Nairobi on this 29th day of June, 2018

ABUODHA J. N.

Judge

Delivered at Nairobi on this 29th day of June, 2018

ABUODHA J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent