



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.362 OF 2014

FRANCIS NGIGE KIMANI..... CLAIMANT

VERSUS

GILANIS SUPERMARKET.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent in June, 2012 as a Truck Driver. Between July and August, 2013 the claimant was sent to Trans Mara to collect a consignment of sugar and to deliver to a customer in Kericho using motor vehicle KAX 230L. At the Trans Mara, the claimant collected sugar; the truck was weighed at the Weybridge before and after loading to get the weight of the sugar loaded. The claimant then proceeded to Kericho for sugar delivery as instructed.

2. The claim is that, upon arrival at Kericho the customer started weighing each bag of sugar and found some bags with less than the 50kgs while others had more. The customer rejected the delivery. The claimant called his supervisor Mr Dan and notified him of these developments and was directed to pick the entire load and bring to the respondent's Nakuru warehouse.

3. The respondent weighed the entire sugar bag and found some had less or more than 50kgs of sugar. The claimant requested that the entire load be weighed as had been done at Trans Mara but the respondent declined and instead called the police who arrested the claimant and took him to Nakuru police station where he was held and directed to report daily and not to go back to work until he was cleared.

4. When the claimant reported back to work, he was summarily dismissed by the respondent on the grounds that the respondent did not know where he had been for 9 days. His explanations did not help.

5. On 27th August, 2013 the claimant was issued with a letter of summary dismissal. At the time he was earning Kshs.15, 000.00 per month. There was no notice or valid reasons given for the summary dismissal.

6. The claims are for the payment of;

i) Kshs.180,000 compensation;

ii) Kshs.15,000 salary for August, 2013;

iii) Kshs.15,000 notice pay;

iv) Kshs.15,000 for leave days earned;

v) 21 days for the completed year at kshs.10,500 Total Kshs.235, 500

7. The claimant testified in support of his claim that as a truck driver he was sent to Trans Mara to collect sugar and with him was his Turn Man Mr Evans Anyoka. Upon collecting sugar the weighing was at the Weybridge and when he delivered to the customer at Kericho this was rejected on the grounds that some bags had less weight. He was directed to bring all the sugar at the Nakuru warehouse where he requested for the same to be weighed and his was done, one bag to the next and a record was kept. He was then sent home. The next day when the claimant reported at work he was put under interrogations and the police were called and was arrested. He was then directed to report at the police station until he was cleared. Nothing was found to warrant further instigations. On the 9th day the claimant reported back to work but was issued with a letter of summary dismissal on the grounds that he had absented himself from work for 9 days.

8. The claimant also testified that he is seeking reinstatement or the payment of his terminal dues.

Defence

9. In response the respondent filed the Memorandum of Response on the grounds that the claimant commenced employment with the respondent on 6th July, 2012 until his dismissal on 26th August, 2013.

10. The defence is also that while the claimant was using motor vehicle KAX 230I he was sent to Trans Mara to collect a consignment of sugar which he did and proceeded to Kericho to deliver. The truck had been weighed before and after loading. Each bag of sugar was to weigh 50kgs but when loading it was discovered some bags were less than 50kgs. To customer rejected the delivery and the claimant brought the consignment to the respondent's warehouse at Nakuru.

11. The defence is also that the sugar consignment was weighed at Nakuru where there were 280 bag supposed to be 50kgs each but the total weight taken was 13,926.20kgs instead of 14,000kgs. There was a deficit of 73kgs.

12. The respondent reported the matter to Nakuru police station where the claimant was taken for interrogations and in the statement taken for the claimant and the turn boy, Mr Anthony Ngugi it emerged sugar had been siphoned and later sold along the way and the proceeds split between the claimant and the turn boy.

13. After the claimant was released he did not report to work for 9 days. Absconding duty amounted to gross misconduct under section 44 of the Employment Act, 2007 and warranted summary dismissal. The claimant was given a chance to exonerate himself by way of a show cause letter but he refused to take it. The termination of employment was lawful and justified.

14. The defence is also that he claimant for compensation by the claimant has no basis as he was implicated in stealing the property of the respondent which is a criminal offence and for absenting himself from work for 9 days without due cause. The salary due for August, 2013 is not proved as being due. No notice pay or claim for leave is warranted in this case.

15. In evidence the respondent's sole witness was Zedrick Nduati Waweru the human resource officer of the respondent and who testified that the claimant was the respondent's employee from 6th July, 2012 to 26th August, 2013 when he was summarily dismissed following the siphoning of sugar. The claimant had been sent to Trans Mara to collect a sugar consignment in the company of two turn boys using vehicle registration No.KAX 230L. However the sugar was found less by the client at Kericho and when the claimant brought the same consignment at the warehouse in Nakuru, upon taking weights the same was found to be less by 73kgs. The police were called to conduct investigations and the turn boy admitted to siphoning sugar while on the way and selling the same and shared the proceeds. The vehicle the claimant as driving left the station with 3 employees of the respondent, the claimant, Evans Anyoka and Anthony Ngugi.

16. At the police station, Anthony Ngugi statement was to the effect that he witnessed the siphoning of sugar the sale of the same.

17. The claimant was issued with a notice to show cause but he declined to accept it and demanded to be issued with a letter of summary dismissal. This was witnessed by another employee Rose Ndung'u who countersigned on the notice.

18. His summary dismissal was justified noting the conduct of the claimant. The claimant refused to go and collect his terminal dues for August, 2013 where he is to be paid for 15 days worked. Once the claimant has gone through clearance with the respondent, he will be paid the dues owing. His contract had no provision for 21 days' pay for each year worked.

19. The claimant failed to be cooperative when the matter was reported to the labour office and had he done so this claim should have been resolved.

20. At the close of the hearing both parties filed written submissions.

In determining the matters herein I have put into account the pleading, the evidence of the parties and the written submissions and the cases cited. The issues which emerge are;

Whether the summary dismissal of the claimant amounted to unfair termination of employment;

Whether the remedies sought are justified.

21. By a letter dated 26th August, 2013 the claimant's employment with the respondent was summarily terminated on the grounds that;

... were sent to collect sugar from Trans Mara and deliver at Kericho to a customer driving KAX 230L...he refused the whole consignment due to some bags being underweight...the sugar bags were subjected to weighing and [180] bags were found to be underweight which you witnessed by signing against. The whole trip subjected the company to substantial losses of about Kenya shillings twenty four thousand two hundred and twenty four (Kshs.24, 224/=) being sugar charges and trip charges. One being asked you denied having any knowledge of sugar siphoning which was testified to by an eye witness. You were thereafter referred to the police to record a statement cornering the same and on August, 12, 2013 set free after which you went absent from work for nine days without permission...you were issued with a notice to show cause...but refused to acknowledge the receipt...

22. Following the above record, the claimant was faced with criminal allegations of siphoning sugar while making a delivery from Trans Mara to Kericho and to the respondent's warehouse in Nakuru. Once this happened and the matter was taken over by the police, the claimant failed to report at work for 9 days. A show cause was issued which he is alleged to have refused to acknowledge or respond to and he was dismissed from his employment.

23. The process of summary dismissal is regulated under section 44 of the Employment Act, 2007 and which requires that when an employee commits a criminal offence or is suspected to have committed a criminal offence and is then absent from work for durations of over 14 days or is absent from work without due cause, then on short notice and or without notice for good reason, such an employee is subject to summary dismissal.

24. Section 44(4) of the Employment Act is subject to section 41(2) of the Act. This latter section requires an employer to hear and consider any representations which an employee may have. In **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited [2013] eKLR** the Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under **section 41** of the **Employment Act, 2007**.

25. Where the alleged misconduct is pursuant to the matters set out under section 44 of the Employment Act, 2007 and thus amount to gross misconduct, less notice is allowed. Where notice is not issued and or the employer is unable to hear the employee as under section 41(2) of the Act, the duty rests upon such an employer to set out the exceptional circumstances making it impossible to abide the provisions of the law must be demonstrated by the employer. See the Court of Appeal decision in the case of **CMC Aviation Limited versus Mohammed Noor [2015] eKLR**.

26. In this case, the claimant was alleged to have taken a consignment of sugar from Trans Mara where it was weighed and the necessary records issued. The *delivery note* from Trans Mara Sugar Company Ltd was issued to the claimant. The claimant was driving Motor vehicle KAX 230L in the company of a Turn Man or 2 Turn Men.

27. The respondent has attached a *Delivery Note* dated 10th August, 2013 issued with brown sugar 50ks bags all at 280 bags and received by Mr Mwangi on truck and motor vehicle KBV 930N.

28. The claimant is also alleged to have taken his consignment of sugar to Kericho which was rejected by the customer and taken to the warehouse and where each bag was weighed and record taken and the claimant made to counter-sign. A loss was established amounting to 73kgs valued at Kshs.24, 224.00.

29. The respondent has attached a record allegedly taken when the weighing was done at the warehouse. The records relate to Motor Vehicle No.KBV 930N driven by Nelson Mwangi and the turn Man was Anthony Ngige. The consignment related to sugars loaded on 11th August, 2013.

30. The evidence and records submitted in defence are at variance. Whether this was a mistake, error on the part of the respondent or sheer carelessness, when these matters were put to the respondent's witness in cross-examination, no effort was made to rectify the error. I take it this is a true record of events leading and material to events leading to the summary dismissal of the claimant.

31. Both parties agreed that the claimant was the driver of Vehicle and truck No.KAX 230L and not KBV 930N. where such a vehicle was then weighed at Trans Mara and found to carry the delivered consignment, the records taken at the warehouse should reflect what was delivered and what is alleged to have been siphoned if at all. With the records submitted by the respondent, the picture painted is that the matters leading to any assumptions that he delivered less sugar than collected are not true. Matters leading to his arrest and interrogation by the police lacked any justification.

32. However, even where the claimant may have been unfairly treated upon the false allegations of siphoning sugar, upon the report to the police and his requirement to assist in investigations, there is a charge that he failed to attend at work for 9 days. The explanation is that he was directed by the police at the Nakuru station not to report to work until investigations concluded. The claimant was sundering a contract of service as driver with the respondent. his employment was with the respondent and save for what investigations were taking place with the police, reasonable cause required him to report to his employer with regard to directions issued not to report to work as otherwise he was in breach of his contract of service pursuant to section 44 of the Employment Act. Failure to report to work as required is regulated.

33. Taking into account the above, the on-going investigations with regard to a matter the respondent had caused to be reported with the police and leading to the claimant's directions to take statement, the allegations now established not to have had any basis, the failure by the claimant to report on duty for a period of 9 days, the sanction of summary dismissal was too harsh in the circumstances. A hearing as contemplated under section 41 of the Employment Act, 2007 would have given his case context and a warning would have applied. A deduction of a wage equivalent to the number of days absent would have well remedied his case.

34. For lack of fair procedure, the records taken into account demonstrating lack of a substantive reason to justify a case for summary dismissal, the termination of employment was contrary to section 45 of the Employment Act.

35. In taking the findings above into account, section 45(5) of the Employment Act, 2007 as requires the court to put into perspective matters addressed by the employer during the process of termination of employment. The claimant has been offered to collect his owing terminal dues upon clearance with the respondent and declined. The salary due for August is payable as at the date when termination of employment took effect on 26th August, 2013. Notice pay is also due where termination of employment is found to lack justification. Claim for 21 days for each year worked has not been given context or the legal framework for its basis.

Accordingly, the court finds the claimant was unfairly dismissed from his employment and is hereby awarded notice pay of one month at Kshs.15, 000.00 and compensation of one month Kshs.15, 000.00. All other lawful dues owing shall be accessed upon clearance with the employer each party to bear own costs.

Delivered in open court at Nakuru this 7th June, 2018.

M. MBARU

JUDGE

In the presence of.....

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