



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 813 OF 2014**

**GODFREY ODIWUOR OWAKO..... CLAIMANT**

**VERSUS**

**BATA SHOE COMPANY LIMITED..RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 15.5.2014 alleging that he was employed by the respondent from 12.8.2013 till 28.2.2014 when he was unlawfully and unfairly discharged by the respondent. He sought for reinstatement to his employment plus compensation for the said unfair termination of his employment.
2. The respondent has admitted to employing the claimant but denied the alleged unfair termination. On the contrary, she averred that the claimant was terminated for a justifiable cause, and although done during the probation period, he was accorded due process.
3. The main issue for determination is whether the termination of the claimant's contract of service was unfair. The claimant testified as Cw1 and the respondent called three witnesses. After the hearing, the two parties filed written submissions.

**Claimant's Case**

4. Cw1 testified that he was employed by the letter dated 26.7.2013 and worked until he was terminated by the letter dated 28.2.2014. His position in the respondent was security Supervisor. He further testified that he was terminated for allegation of misconduct related to breach of security regulations with respect to loading of motor vehicle registration number KAS 925Q on 28.1.2014. He denied the validity of the alleged misconduct. He however admitted that before the termination he was given a disciplinary hearing by the committee, which he alleged that it was improperly constituted. He prayed for the reliefs sought in the suit.

**Respondent's Case**

5. Edgar Mugodo Goredi testified as Rw1. He was employed by Knight Security company but assigned to the respondent as our outsourced guard. He stated that on 28.1.2014 while on duty he witnessed carton of shoes being put in a car at a time when a lorry Registration number KAS 912Q was being loaded at the distribution Centre. He reported the matter to Richard Mwambi and a spot check was done on the car and the stolen 7 cartons of shoes were recovered.
6. Mr. Richard Mwambi testified as Rw2. He stated that in January 2014 he was working at the respondent as an outsourced Guard. During the said month he was informed by Rw1 that there was collusion by workers to steal at the loading yard and he instructed him to be on the alert. On 28.1.2014, Rw1 suspected motor vehicle KAS 925Q and called him. He stopped the vehicle at the gate and send it back to the yard for spot check. Before he did so, James Kanyi Maina called him and requested for assistance in exchange of Kshs.20,000 because he is the one who had loaded the vehicle and had added 7 more cartons without loading documents. Mr. Mwangi also named claimant as one of the persons involved in the excess loading.
7. Rw1 further stated that he reported the matter to the respondent's Chief Security officer and the vehicle was checked and seven extra cartons of shoes were recovered. Later the claimant was taken through disciplinary hearing by the respondent's management. He however admitted that when he recorded statement with the police, he never mentioned Cw1 as one of the person involved in the theft of 7 cartons of shoes.
8. Mr. Peter Giathi testified as Rw2. He is the respondent's HR Manager.

He confirmed that Cw1 was employed by the respondent as a security officer. He further stated that Cw1 let a truck leave loading yard the without inspecting the cargo as a result of which he was served with a show cause letter. That after his response he was invited to a disciplinary hearing where he was found guilty and terminated. Thereafter his dues were calculated and paid to him and he signed a settlement agreement.

9. Rw3 contended that the termination of the claimant occurred during his probation period. He testified that the claimant's appointment started on 12.8.2013 and worked upto 28.2.2014 when he was terminated before the 6 months had lapsed. He further testified that the claimant appealed against the termination but the same was dismissed for lack of merits.

### **Analysis and Determination**

10. There is no dispute that the claimant was employed by the respondent from 12.8.2013 until 28.2.2014 when he was terminated. There is further no dispute that under the contract of service dated 26.7.2013, the first 6 months of service by the claimant was on probationary terms. The issues for determination are:

- a. Whether the termination of the claimant's service was done during probation period.
- b. Whether the termination was unfair;
- c. Whether the claimant is entitled to the reliefs sought.

### **Probation period**

11. I have carefully perused clause 3 of the claimant's Appointment Letter dated 26.7.2013, and confirmed that it provided for probation period during the claimant's first six months of service. The claimant pleaded in paragraph 3 of his statement of claim that his appointment to effect from 12.8.2013 and as such the 6 months probation period ran upto 12.3.2014. He was however terminated on 28.2.2014 by the letter dated even date. Consequently, I agree with the defence that the claimant's services were terminated during his probation period.

### **Unfair termination**

12. Under section 45 (2) of the Employment Act, termination of employment is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the requirement of proving fair procedure is exempted by dint of section 42 of the Act because the termination occurred during the probation period. Section 42(1) of the Act provides that:

**“The provisions of section 41 shall not apply where termination of employment terminates probationary contract.”**

13. The exemption, however, in my view does not include the burden of proving a valid and fair reason for termination as provided for by section 43 and 45 2(a) and (b) of the Act. It follows rationally therefore that, even during probationary contract, the employer is barred from terminating the services of his employee without any valid and fair reason. A valid and fair reason is one which relation to employee's conduct, capacity or compatibility or based one the employer's operation requirements.

14. In this case, the reason for termination relates to the claimant's conduct. It was alleged by the defence that the claimant failed to inspect the load on a vehicle as a result of which 7 cartons of shoes were driven out of the loading centre only to be stopped at the gate by outsourced guard. The claimant never denied that it was his duty to ensure that the 7 cartons of shoes were not loaded and removed from the loading centre on 28.1.2014. He admitted that he was on duty at the Warehouse on 28.1.2014 when the vehicle was loaded with extra carton of shoes and he only learned about the theft of the shoes when the vehicle was intercepted at the barrier by the outsourced guards.

15. After careful consideration of the evidence by the claimant during cross examination, I am of a considered view that the claimant admitted that he failed to act with diligence to ensure that motor vehicle KAS 925Q did not leave the respondents warehouse with unauthorized 7 cartons of shoes. Had he been diligent, the offence could not have occurred. The only other rational conclusion from the claimant's evidence is that he conspired with the persons loading the vehicle to steal the said carton of shoes. Consequently, it is my finding that the responded has proved on a balance of probability that there existed a valid and fair reason to warrant dismissal of the claimant from service within the meaning of section 43 and 45 (2)a & b of the Act.

### **Reliefs**

16. In view of the foregoing finding, I decline to order the respondent to reinstate the claimant to his employment or to award compensatory damages. Even if the termination had been unfair, the 3 years limitation period for granting the relief of reinstatement has long lapsed.

### **Disposition**

17. The suit is dismissed with no costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**