



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 299 OF 2017

PETER NG'ANG'A MUGUNIEL CLAIMANT

(as consolidated with)

CASE NO. 300 OF 2017

ROBERT NDUNG'U KAMANDE CLAIMANT

VERSUS

H. YOUNG & CO. (E.A.) LIMITED RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent for their dismissal. The Claimants averred that on or about 24th September 2016 they were dismissed from the Respondent's employ without any reasonable cause and/or justification. The Claimants averred that the sacking was unjustified, unlawful, illegal, in breach of contract of employment between the Claimant and the Respondent contrary to the employment laws of this country and in breach of the rules of natural justice. They averred that they were not given any charges or an opportunity to defend themselves before the dismissal, were not heard and the dismissals were contrary to the Employment Act and CBA as to notice and terminal benefits. They sought certificate of service, 1 month's salary in lieu of notice, leave days earned for years worked, severance pay, general damages for wrongful dismissal, costs of the suit and interest.
2. The Respondent filed responses in which it averred that the dismissal was done after investigations were done proving that the Claimants stole from the Respondent on the diverse dates of 20th and 21st September 2016. The Respondent averred the dismissals were justified and the Respondent sought the dismissal of the claims with costs.
3. The Claimants testified that they worked in the Respondent's project and were building a roof over a vehicle shed. Peter stated that the shed they were roofing was for 3 cars and that they worked on the project with one assistant. He denied stealing any nails. He testified that the store keeper would give them the nails in 4 litre cans and they did not sign for them. He stated that they completed the task and the kilos of nails he received per day was 3kgs or 4kgs and after work the balance would be returned to the store. He said the nails were a bulky item that could be seen and it had to be carried in a sack or a bag. The site had a guard and they would not be searched as they entered and if they carried the nails they would have been asked what it was they were carrying. He stated he had worked as a carpenter for a while and that 50kgs of nails could not be used to build a 10m by 3m shed. He denied being responsible for the theft of the nails. He stated that he was summarily dismissed on 24th September 2016 and they were not given an opportunity to defend themselves and no one was arrested for the theft.
4. In cross-examination, the Claimant testified that he was employed on 17th April and had worked for 4 months only. He was suspected of theft and stated the store keeper would give them nails in a 4 litre paint can. He said it was guess work or an estimate and on the first day they had about 4kgs. A kilogram has 47-50 nails. He did not count and the balance was returned to the store. He stated they used about 100 nails. He testified that he went to the administrator to ask about the theft allegations as he had heard it being mentioned. He stated that the administrator said there was nothing to worry about and he was not called or record a statement or heard. He testified that he was paid his salary for days worked.
5. In re-exam he stated that he was paid for days worked and that the 8kgs of nails used were over a number of days and the 4kgs were what they got per day.
6. The next witness was Robert who testified that he was working at a construction site and was constructing a shed for cars and on 23rd they were roofing the shed. It was 6m by 3m or 10m by 3m. He stated it was a lie to state they had stolen nails. He testified that it was the

assistant who would collect the nails for them and that roughly 8kgs were used for the shed. He stated that the helper would get the iron sheets, timber and nails and that it was the helper's job to do so. The nails were dispensed in a paint can and the collection of nails was only in the morning and the balance was returned. He stated that it was not possible to use 9kgs daily and that they used 3kgs for roofing. He testified that there was no way one would leave with 9kgs of nails as this would be obvious. He stated that there was no discussion before the dismissal and that he was called by the administrator and informed there were nails lost and the administrator wanted an explanation.

7. In cross-examination he stated that it was their assistant who took the nails from the store and the can could contain 3-4kgs of nails. He did not know the quantity of nails they returned to the store. He testified that he and his colleague were called by the administrator who notified them there were nails missing and that the 2 of them were suspected. The assistant was not called and the administrator did not tell them that they were the guilty ones. He stated the administrator indicated that that investigations would be undertaken to establish facts about the theft. He testified that he was paid after 6 months for the days worked and did not get a certificate of service. He was shown a certificate of service dated 24th September 2016 and he noted the certificate referred to a carpenter grade II and he was a carpenter grade III. He stated he did not get the certificate. In re-exam he said that he was not given an opportunity to defend himself before dismissal.

8. The defence called Francis Gitonga Katenya who was a security officer at the Langata site in 2016. He testified that the site administrator called him and he undertook the investigations on the theft of nails. He stated that the nails given to the carpenters for the shed was about 10kgs daily and that he had counted and a kilogram of nails was about 107 nails. He stated that the record kept by storekeeper indicated they used 381 nails and returned 100 nails and 577 nails were missing. He called the Claimants to the office of the administrator and questioned them. They stated that they had used all the nails and did not give an explanation of where the missing nails had gone. They were to be charged with theft and he recommended termination.

9. In cross-examination he testified that the store keeper is the one who kept the record and that he did not have the record in court. He stated that according to the record there were nails issued and it was only the two Claimants who were working on the shed. He was not aware of a labourer who assisted them in their work. He testified that the shed did not warrant 10kgs of nails a day and that they would be given more nails and return balance and for the structure 10kgs was too much.

10. In re-exam he stated that he saw the record by the store keeper and that if the Claimants say it was the labourer it was for them to show that. He testified that they were the only two persons working on that structure and that there was no rule that only the exact quantity of nails was to be availed. That marked the end of submissions and the parties were to file written submissions. Both the Claimant and the Respondent filed written submissions.

11. In their submissions the Claimants submitted that the bone of contention was whether due procedure and substantive justice was adhered to prior to the dismissal and whether the Claimant is entitled to relief sought. The Claimants submitted that Section 41 of the Employment Act required that before terminating the services of an employee on the ground of misconduct, physical incapacity or poor performance the employer must first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice the reason upon which the termination of his services is contemplated and thereafter invite the employee and his chosen companion to air their defence before the termination is decided. The case of **Victor Ouma Otieno v Cool Extreme Limited [2017] eKLR** was cited for the proposition. The case of **Milkah Khakavi Kulati v Sandstorm Africa Limited [2014] eKLR** where the court held that there was no evidence of the Claimant having been taken through a disciplinary process akin to what is prescribed in Section 41 of the Employment Act and in terminating the claimant's employment the respondent failed to follow due process. It was submitted that procedure in this case was not followed and that the Respondent witness admitted that he did not make a finding as to who actually stole the roofing and ordinary nails. The Claimants submitted that fault was therefore made in whole against the Claimant and all the personnel working in the site without any substantive justification. It was submitted that the Respondent's evidence was based on hearsay and was unsubstantiated. Reliance was placed on the case of **Nicholas Otinyu Muruku v Equity Bank Limited [2013] eKLR** for the proposition that unfair labour practices had been committed and the court could award damages. The Claimants thus sought compensation in terms of Section 49(4) of the Employment Act for 12 months compensation. It was submitted that the Respondent should have informed the Claimants of the outcome of their internal investigations or issued notice for termination or payment in lieu of the summary dismissal as this is what amounts to due process even in cases that fall under Section 44 of the Employment Act. It was submitted that the termination of the Claimants was not justifiable and as a result they suffered loss and damage and the conduct of the Respondent was an aggravating circumstance. The Claimants, it was submitted, did not contribute to the termination and there was no payment of terminal benefits upon termination. The Claimants submitted that they were entitled to all the reliefs they sought in their claim.

12. The Respondent submitted that the issues for determination were whether the Claimants were unfairly terminated, whether the Respondent's reason for termination of the Claimants contracts of service was valid and justifiable and whether the Claimants are entitled to the prayers sought. The Respondent cited Sections 45(2) and 41(2) of the Employment Act and submitted that the Respondent had followed due procedure by according the Claimants a chance to defend themselves. It was submitted that the Claimant conceded he was heard in during the hearing. The cases of **Erick Karanja Gakenyo & Another v Samson Githimba [2011] eKLR** and **Nicholas Otinyu Muruku v Equity Bank Limited [2013] eKLR** were cited for the proposition that in the case where the relationship of the employer and employee are eroded by suspicion it leads to loss of confidence and trust by the employee in the case of suspicion of theft of the property of the employer can lead to summary dismissal without notice and the employer must demonstrate reasonable and sufficient grounds that link an employee to acts of a criminal nature that amount to gross misconduct to justify a summary dismissal. The Respondent submitted based on the investigation report there were justifiable reasons for the dismissal of the Claimants employment per Section 47(5) of the Employment Act. The Respondent submitted that the Claimants were not entitled to the reliefs claimed. It was asserted that a certificate of service was issued and that the Claimants were not entitled to severance pay which is paid in cases of redundancy. The Respondent sought the dismissal of the Claimants' cases.

13. Claimants had been tasked to build a shed and on 20th and 21st September 2016, they were given some nails to do so and they only returned a handful of nails which caused suspicion that the Claimants were stealing or diverting the nails. In the investigation report filed on 5th February 2018, it was stated that the Claimants could not account for the missing nails. The report was detailed as to the number of nails used on the shed both for roofing and construction of the shed. The investigator indicated the kilograms identified and the number of nails unaccounted for. It was alleged by the Claimants that the Respondent unilaterally sacked them without any colour of right abridging the law and ignoring the rules of natural justice. It came out in evidence that the Claimants were called and asked to give an explanation. Under

Section 44 of the Employment Act, theft is one of the reasons for summary dismissal. The Claimants had a burden of proving their claim under Section 47(5) of the Employment Act which provides as follows:-

47. (5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination shall rest on the employer.

14. The test as to whether the termination was unfair or justified is twofold – the employer has to prove that there was a valid reason to terminate the Claimant's employment and secondly, the procedure followed was fair. Pursuant to Section 43 of the Employment Act, the reasons are matters that the employer genuinely believed to exist at the time of the termination and the reason has to be valid and fair. In this case, the employees were accused of pilfering nails. The two were the carpenters who could reasonably be expected to access the nails for use. They did not prove their case and their testimony did not rebut the defence raised to the claim. They were guilty of misdeeds and were accorded an opportunity to defend themselves. Suit is dismissed and each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE