

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 262 OF 2016

FRANCIS WAWERU KARIA.....CLAIMANT

VERSUS

MOUNT KENYA BOTTLERS LIMITED.....RESPONDENT

JUDGMENT

1. On 15th December 2015 Claimant was suspended on allegations that he had loaded excess cases of Fanta Orange sodas. His employ was terminated on 16th December 2015, the very next day after the suspension and on the following day, 17th December 2015 he was summarily dismissed. The Claimant averred that the Respondent did not prove the allegations made against him before the termination of his services. Neither was he served with a reasonable notice to show cause. He thus sought compensation for the unlawful dismissal, unpaid leave and salary in lieu of notice. He also sought costs of the suit.

2. The Respondent did not enter appearance or file a defence and an *ex parte* default judgment was entered. Upon commencement of execution the Respondent was successful in setting aside on grounds that the summons were not served upon it. It obtained leave to defend and in the defence filed stated that the Claimant had been instructed to oversee the loading of merchandise per the invoice. It was averred that the vehicle into which the Respondent's merchandise was to be loaded for delivery to its customer on 10th December 2015 was hired from a contractor and was driven by the contractor's driver. The loading was conducted by a forklift driver who loaded the stacked cases and crates – duly stacked by casual labourers employed by the Respondent – in the presence of a security guard. It was the Claimant's job as Operations Assistant – Loading to ensure that the product loaded into any vehicle matched what was in the invoice/LPO. The vehicle was thus loaded under supervision of the Claimant. On departure, it was not inspected at the gate and it was spotted later the same day delivering product to an unscheduled customer. Per the invoice, the vehicle was to make only one stop at the Respondent's customer. The Operations Manager upon receiving a call from the sales manager recalled the truck and the cases initially offloaded returned to the truck. Upon inspection of the truck at the Respondent's premises, it was discovered that there were 63 cases that were excess though only 57 cases were recovered. The Respondent averred that the CCTV footage revealed that the Claimant was absent several times during the loading and particularly was suspiciously absent when the extra pallet of Fanta Orange was loaded. The Respondent issued the Claimant with a show cause letter on 11th December 2015 and invited the Claimant to a disciplinary hearing on 15th December 2015 vide a memo dated 14th December 2015. He was heard and he denied being absent though the CCTV footage revealed he had been absent on a number of occasions during the loading. He was found culpable by the disciplinary committee which placed him on suspension effective 15th December 2015 to allow further investigations into the matter. Termination was on 16th December 2015 and on realising the termination was not summary as intended the Respondent issued a termination letter dated 17th December 2015 summarily dismissing the Claimant from employment. The Respondent asserted that the Claimant was not entitled to the relief he sought as he had been dismissed from employment in accordance with the provisions of Section 44(4)(c) of the Employment Act. The Respondent thus sought the dismissal of the Claimant's case with costs to the Respondent.

3. The Claimant was testified that he was unfairly terminated from his employ. He stated that he supervised the loading and was subsequently accused of permitting the loading of extra merchandise. He was show the CCTV footage and though the sodas allegedly lost were produced the same day, he was told that the management would revert. He received a letter of suspension on 15th December 2015 and the next day on 16th December 2015 received a termination letter. He was called and issued with another letter on 17th December 2017 which was the summary dismissal letter. He was cross examined and stated that he was to supervise the loading and that he had an invoice to confirm the quantities. He testified that the loading was correctly done and that according to him there was no excess.

4. The Respondent called the Operations Supervisor then one Michael Ndururi Nyingi who testified that he presently is the Operations Manager. He stated that the Claimant was suspended then dismissed for the improper loading of crates and cases of Fanta Orange soda which was scheduled for delivery to a client of the Respondent. He testified that the Claimant was absent over prolonged periods during the loading which was contrary to the policy of the Respondent as he was required to be present at all times and witness the loading and confirm that it was in accordance with the invoice.

5. In cross-examination he testified that he did not convene the disciplinary action as this was by HR but he was present at the hearing on 15th December where the Claimant was heard. He denied suggestions that there was no disciplinary hearing and stated that the Respondent was to pay leave dues, outstanding overtime and leave for 2015 and days worked up to 16th December 2015 per the Claimant's letter of termination dated 17th December 2015.

6. In re-examination he stated that it was a prerogative of the employer to decide whether to give a summary dismissal or ordinary termination and that there is no claim on any item that was not paid. That marked the end of oral testimony.

7. Parties were to file submissions and this was done by both parties. The Claimant submitted that he was not given the procedural

safeguards under Section 41 of the Employment Act. It was submitted that the Claimant was taken through the disciplinary meeting before he was suspended on half pay effective 16th December 2015. The Claimant submitted that he was not given an opportunity to defend himself and there was no basis for a summary dismissal.

8. The Respondent submitted that the Claimant admitted that he was not present during the entire loading and confirmed that there was excess product loaded against the invoice he was to supervise. It was submitted that the Claimant was given a fair hearing and his dues paid. He was not entitled to one month salary as notice and therefore had no justifiable cause. The Respondent thus sought the dismissal of the suit noting that costs of the suit had been previously assessed and paid.

9. From the pleadings and evidence adduced, it is clear the Claimant was negligent in the performance of his duties of supervising the loading of the product namely Fanta Orange in 500ml bottles. The Claimant was employed in 1991 and from all accounts had risen through the ranks to the position he held at the time. He was absent during certain times of the loading contrary to the requirements of his job and the fact that the truck was overloaded is testament that he did not perform his duties diligently. He was taken through a disciplinary process and was summarily dismissed. Section 44 of the Employment Act permits the summary dismissal of an employee in fit circumstances. The dismissal of the Claimant though seemingly hurried was on the basis of the findings made through the stock take after the truck was recalled as well as the CCTV footage he was shown. He therefore was entitled to a summary dismissal. His dues were paid and therefore he cannot recover any more. The suit is dismissed and because he received costs prior there will be no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 18th day of September 2018

Nzioki wa Makau

JUDGE