

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 97 OF 2017

SIMON GITHINJI WAHOME.....CLAIMANT

VERSUS

G.M KARIUKI HARDWARE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed as a loader by the Respondent from 20th February 2006 till February 2007 thereafter as a supervisor till November 2012. He then worked as a branch manager earning an initial salary of Kshs. 5,000/- from February 2007 to November 2012 when it was increased to 17,000/- and later 30,000/-. He last earned Kshs. 40,000/- a month before the dismissal on 19th November 2016. He averred that he was summarily dismissed from his position on allegations of conflict of interest alleging that he was running a business in competition with his employer which allegations were unfounded and untrue. He was not given an opportunity to be heard, he was not notified or warned of the allegations prior to the dismissal and he was not subjected to any internal disciplinary hearing over these false and unfounded allegations. He averred that at the time of dismissal, the Respondent had acknowledged owing the Claimant Kshs. 104,037.60 being salary for days worked, leave arrears, unremitted NSSF deductions and unremitted insurance premiums. The Claimant averred that the Respondent deducted but failed to remit the agreed insurance premiums as a consequence of which the Claimant's insurance policy lapsed with the resultant forfeiture of the already paid premiums totalling Kshs. 55,000/-. He claimed underpayment of salary for the years 2007, 2008, 2009, 2010, 2011, 2012 totalling Kshs. 486,844/-. He sought a declaration that the dismissal was unlawful/unfair and one month's salary in lieu of notice, damages for unlawful dismissal, costs of the suit and interest.

2. The Respondent filed its defence in which it averred that the misconduct upon which the dismissal was based amounts to a criminal offence which ought to have been reported to Police for investigations and necessary action. The Respondent contended that the allegations against the Claimant were put to him in a show cause letter to which the Claimant responded with a mere denial. The Respondent averred that the Claimant having been caught red handed in the act complained of did not request for a hearing and satisfied himself with his reply to the detailed allegations made in writing. The Respondent contended that the Claimant was offered fair and adequate opportunity to show cause why appropriate disciplinary action should not be taken against him and the Claimant failed to take the opportunity to do so. The Respondent averred that the Claimant was paid all his terminal dues and therefore the suit should be dismissed with costs.

3. The parties resolved to have the suit determined under Rule 21 and the submissions were to be accordingly filed. Only the Claimant filed final submissions in the matter on 27th July 2018. In the submissions filed, the Claimant asserted that it was common ground that he was employed on the dates and manner he described in his claim and was summarily dismissed on 19th November 2016. He contended that the dismissal was as per the allegations of the Respondent in the statement of the HR manager Joseph Muriuki Mwaniki that the Claimant failed as branch manager to prevent other employees from selling their own hardware products to the Respondent's customers. It was done mainly by Margaret Njoki who was the mastermind. In his letter to show cause he was accused of sourcing products from other hardware's within town and using his own cash booklet while using the company trucks to deliver the same products whose sales margin goes direct to him without authorisation. The letter of dismissal gave the reason for the dismissal as the being the Claimant's participation in the process of procuring hardware goods locally and reselling the same to the Respondent's customers using unauthorised cash sale receipts and sharing the sales margins with the branch sales team. He was accused of failing to take appropriate action to curtail the branch employees carry out an activity that contravened company policy and procedures. The Claimant submitted that admittedly after being accused of these acts denied the same in his reply to the show cause letter. He was dismissed the next day and was asked to clear which he did and was authorised to take goods worth the amount of his final dues. The Respondent did not controvert that it failed to remit the insurance premiums causing his insurance policy to lapse. He submitted that he was not given an opportunity to be heard contrary to Section 41 of the Employment Act contrary to the rules of natural justice and he was thus condemned unheard. He submitted that the statements on record indicate that the charged acts were committed by another employee Margaret Njoki. The Claimant relied on the case of **John v Rees (1969) 2 All ER 274** and **General Medical Council v Sparkmen (1943) 2 All ER 337** on the issues of hearing and submitted that the Respondent did not subject the allegations to any further investigation and merely believed the same without any evidence. He submitted that the dismissal failed the Burchell test which requires the employer to make inquiry as to whether the employer has proved that the principal reason was its belief in misconduct, whether there was reasonable investigation. The Claimant submitted that the burden of proving the reasons for the termination upon the employer in terms of Section 43 of the Employment Act. It was submitted that the employer had woefully failed to discharge this burden and he was charged with acts of omission and not commission which would require clearer information on the alleged acts he had failed to prevent from being committed. He sought compensation for unfair termination in terms of Section 49(1)(c) of the Employment Act to the full extent possible being the 12 months salary, the one month salary in lieu of notice and that the claim should be allowed as prayed.

4. The Claimant's claim for underpayment was for the years 2006-2012. The cause of action on these claims of underpayment arose at the time the underpayment was meted out to him and therefore the Claimant had a 3 year limitation to surmount in regard to the years 2008-2012 and a 6 year limitation for the year 2006-2007. A suit for recovery should have been filed within the period of limitation and none was filed. In addition, the Claimant was required to prove the underpayment. No evidence was adduced for this. The claims for underpayment must therefore fail and are accordingly disallowed. The Claimant had an insurance policy with Britam and it was evident that the Respondent deducted money from him and did not remit the sums to the insurer as a consequence whereof his insurance policy lapsed. That was squarely blame that can lie at the feet of the Respondent. The Claimant would be entitled to the recovery of the sum paid that was lost. The Claimant did not tabulate the sums the Respondent deducted and failed to remit. He would also have been entitled to this had he particularised his claim accordingly. As no figures were given he will not get the refund due to him. The Claimant was dismissed after a letter dated 19th

November 2016 was issued to him asking him to show cause. It was alleged therein that he had been sourcing products from other hardware's within town even for products that had been stocked and was reselling them to the Respondent's customers using his own generated cash sale booklet. He was accused of using the company trucks to deliver the merchandise whose sales margin went directly to the Claimant without authorisation. He was asked to show cause immediately why disciplinary action should not be taken against him. The statement by the driver of the truck Edward Muriithi Gatheca stated that the sales person is the one who gave him the unmarked cash sales receipts and told him to go and only come with the money and give to the cashier all the payments received. The evidence by the other witnesses for the Respondent is clear. There was a scheme to defraud the Respondent and the cashier together with a sales person were linked to it. As to the Claimant's involvement, the evidence was tenuous at best. Only the manager who intercepted the truck and inspected it and the one who dismissed the Claimant seemed to link the Claimant to the heist. This in my view was not sufficient basis to prove the Claimant was in cahoots with the duo who were part of the scheme. Further investigations should have been undertaken to link him to the acts he was accused of. As a manager, he ought to have been more diligent and this of itself would have been cause for disciplinary action but in my view, insufficient to summarily dismiss the Claimant. The Claimant is therefore entitled to his terminal benefits calculated as Kshs. 104,037.60. As his dismissal was unfair in the circumstances for failing to accord him the procedural safeguards under Section 41. These are well enunciated in the decision by Ndolo J. in **Simiyu Kibengo Godfrey v Private Safaris (EA) Limited [2013] eKLR** where the learned Judge held that the employer must not only have a manifestly valid reason for termination but must also exercise due process in effecting the termination. The dismissal was without these safeguards in the law and was thus unlawful and unfair in the circumstances. The Claimant is successful in his claim to this extent and is entitled to Kshs. 45,000/- being salary in lieu of notice and Kshs. 270,000/- being 6 months salary as compensation in terms of Section 49(1)(c) of the Employment Act.

5. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. Refund of insurance premiums Kshs. 55,000/-
- b. One month salary in lieu of notice Kshs. 45,000/-
- c. Final dues as computed by the Respondent Kshs. 104,037.60
- d. 6 months salary as compensation Kshs. 270,000/-
- e. Costs of the suit
- f. Interest on items (a), (b), (c) and (d) at court rates from date of judgment till payment in full.

The sums awarded in (b) and (d) as notice pay and compensation shall be subjected to statutory deductions per Section 49 of the Employment Act.

It is so ordered.

Dated and delivered at Nyeri this 31st day of October 2018

Nzioki wa Makau

JUDGE