



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS

#### COURT OF KENYA AT NYERI

SUIT NO. 389 OF 2017

JOSEPH M. LAZARUS.....CLAIMANT

VERSUS

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

#### JUDGMENT

1. The Claimant herein sued the Respondent his former employer seeking to recover for the unfair termination. He averred that he was employed as an excavator operator on 30<sup>th</sup> June 2016 to work on the Meru bypass roads project and that his employment was terminated on 22<sup>nd</sup> August 2017 without any prior warning or justifiable cause in complete disregard for the procedure set out under the Employment Act. He averred that prior to his termination he was not invited to a disciplinary meeting or accorded an opportunity to defend himself against any allegations that formed the basis of termination of his employment by the Respondent. He earned Kshs. 42,775/- a month at the time of termination. He averred that through his advocates he made efforts to settle the matter amicably but his advocate's letter elicited no response from the Respondent. He averred that the Respondent unilaterally made a deduction of Kshs. 30,209/- from his salary without any legal basis. He thus sought one month's salary *in lieu* of notice, damages for the unlawful termination, reimbursement of the unlawful salary deduction of Kshs. 32,209/-, certificate of service, gratuity at the rate of 15% of the annual salary, costs and interest.

2. The Respondent filed a defence in which it denied that the Claimant's dismissal was unjustified and averred that it aligned with the provisions of Section 44(g) of the Employment Act. It admitted that it summarily dismissed the Claimant who was earning Kshs. 42,775/- a month. The Respondent denied that the deductions in the Claimant's salary were unjustified and states that the balance was settled in the payslip of 9<sup>th</sup> September 2017. The Respondent denied that there were efforts by the Claimant to settle the matter amicably and it denied the jurisdiction of this court.

3. The Claimant testified that he was a machine operator and that he worked for the Respondent in Meru. He stated that no reason was given for the dismissal from employment. In cross-examination he testified that he did not know the reason for the dismissal after working for the Respondent for 1 year 2 months. He stated that he knew Keneke a security officer and that on 22<sup>nd</sup> August 2017 he was called by the site administrator who informed him that the Respondent had decided to dismiss him and that he was to clear with the Respondent which he did. He did not get his dues. He stated that the equipment was fueled by Sri Ranga and they knew the consumption of the machine which had an hourly rate of consumption. In the re-examination he was categorical that he did not see the report and was not told anything about fuel. He stated that he would have been arrested if he was a thief. He worked at the quarry and he would park the machine at the gate and there were watchmen and that the tank had a seal which was only opened by those fueling the machine.

4. The Respondent called Nahum Cash Robert who testified that she was the administrator at the HR office of the Respondent. She testified that from the records, the machine in question was used for 4 hours and stopped. On 22<sup>nd</sup> August he was required to go to the office of the administrator and explain why the machine had stopped as it had been fueled with 200 litres. 90 litres had been siphoned out as established in investigations on 22<sup>nd</sup> August by the material controller. She testified that the Claimant was the person his colleagues saw going to the machine and the terminal dues were not paid as he was summarily dismissed. She stated that the Claimant did not have any pending leave days and his dues were deducted to pay for the loss and he earned nil in August. In cross-examination she testified that the Claimant went to the quarry on 24<sup>th</sup> and the machine only worked for 4 hours and the conclusion of the investigations was that the Claimant had siphoned fuel. She stated that the jerricans mentioned are the equivalent of the quantity of fuel lost which was 5 jerricans. She stated that no one saw him carry the fuel and that the Claimant was asked to give an explanation and left. In re-examination she testified that the Claimant was the one using the machine and the stalling shocked the material controller who had fuelled the vehicle on 21<sup>st</sup> August with 200 litres and it operated only for 4 hours and it was only the Claimant who operated it. That marked the end of oral testimony.

5. The parties filed written submissions and in the submissions he filed, the Claimant submitted that the dismissal was summary and that on 22<sup>nd</sup> August he was handed a dismissal letter dated 22<sup>nd</sup> August 2017 which required him to hand over all company items and tools to the store keeper. He was not notified of the reason for the termination. He submitted that he was not given an opportunity to defend himself

against the allegations leveled against him and instead was summarily dismissed. He submitted that Sections 45 and 35 of the Employment Act were not complied with. The Claimant relied on the case of **Daniel Kiplagat Kipkeibut v Smeep Deposit Taking Micro Finance Limited [2016] eKLR** which cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the substantive justification and procedural fairness test. The Claimant submitted that Section 41 of the Employment Act was not complied with as he was not notified of the allegation and was not given an opportunity to defend himself. The Claimant submitted that on the strength of the case of **George Onyango Akuti v G4S Security Services Ltd [2013] eKLR** the statutory burden of proving an unfair termination has taken place is on the Claimant and the burden of justifying the grounds for the termination of employment shall rest on the employer. He thus urged the court to find in his favour.

6. The Respondent submitted that the issues for determination were whether it had a justifiable reason to terminate the Claimant's employment, whether the Claimant was unfairly terminated from employment and whether the Claimant is entitled to the reliefs sought. It was submitted that the provisions of Section 47(5) of the Employment Act set out the burden each party is to bear in proving the termination was unfair or not. The Respondent submitted that the Claimant was suspected of the loss of fuel on the equipment he was assigned and that the investigation into the fuel siphoning directly linked the Claimant to the loss. The Respondent submitted that under Section 44(3)(g), it was entitled to summarily dismiss the Claimant on suspicion of involvement in the fuel siphoning. The Respondent submitted that it had justified the reason for terminating the Claimant's employment. The Respondent submitted that the Claimant was called by the site administrator and asked to defend himself and when he was unable to do so he was dismissed from employment. The Respondent submitted that the Claimant was therefore not entitled to the reliefs sought.

7. Section 45(2) of the Employment Act provides that termination by an employer is unfair if the employer fails to prove

- i) That the reason for termination is valid
- ii) That the reason for termination is a fair reason –
  - a. Related to the employee's conduct, capacity, compatibility or
  - b. Based on the operational requirements of the employer and
  - c. That the employment was terminated in accordance with fair procedure.

8. The dismissal of the Claimant follows what is stated to have been an investigation of the fuel siphoning from the equipment the Claimant operated. The equipment was parked in the quarry near the gate during the night. The Claimant was dismissed on 22<sup>nd</sup> August 2017 the same day he was accosted with the charges. He asserts he was not given an opportunity to defend himself. The Respondent despite indicating that it had investigated the matter did not avail a report of the investigation. The Claimant was not afforded a chance to defend himself. In the dismissal letter, he was informed that his services had been dismissed summarily effective 22<sup>nd</sup> August 2017 for suspicion of fuel siphoning. Section 45(2) provides that a dismissal is unfair if the employer fails to prove that the reason for termination is valid or that the reason for termination is a fair reason. In this case, had the report been availed, it could be discerned whether the Claimant was indeed reasonably suspected of siphoning the fuel. The vehicle was not in his custody at all times as he left the vehicle at the close of the day in the Respondent's yard where other personnel of the Respondent or the security firm guarding the premises could access. The reason advanced in the letter of dismissal was therefore not a valid reason in terms of Section 45(2) of the Employment Act. The Claimant in any event was entitled to the safeguards under Section 41 and as stated in the case of **Walter Ogal Anuro v Teachers Service Commission (supra)** where Ndolo J. eloquently broke down the elements of fairness in Section 41 as procedural and substantive fairness. The Respondent did not accord the Claimant these safeguards and the dismissal was therefore unfair in terms of Section 45 of the Employment Act. Under the Employment Act, the Claimant was entitled to prove that an unlawful termination had taken place while the Respondent was to prove the dismissal was justified. The Claimant succeeded in proving the dismissal was unlawful and the Respondent failed to hold up its end of the equation. The court therefore finds that the dismissal was unfair entitling the Claimant to obtain relief as follows:-

- a. One month salary in lieu of notice Kshs. 42,775/-
- b. Kshs. 32,209/- unlawfully deducted from his salary
- c. 6 months salary as compensation Kshs. 256,650/-
- d. Costs of the suit
- e. Interest at court rates on the sum in a), b) and c) above from the date of judgment till payment in full
- f. Certificate of service.

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**