



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 327 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> December, 2018)**

**VINCENT NYACHIBWEDE.....CLAIMANT**

**-VERSUS-**

**BOB MORGAN SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Nachibwede, filed a Memorandum of Claim dated 11<sup>th</sup> March, 2013 on 13<sup>th</sup> March, 2013 seeking payment of his terminal dues and compensatory damages against the Respondent, Bob Morgan Services Limited.

2. The Claimant avers that he was employed as a Security Guard by the Respondent from September 1998 and continuously worked to the satisfaction of the Respondent, rose through the ranks and was promoted to the position of a Rider earning a gross salary of Kshs. 18,400/= per month.

3. He further avers that on 17<sup>th</sup> February 2012, the Respondent's Human Resource Manager suspended him from duty without pay on grounds of negligent performance of duty and misuse of company resources, which allegations he claims were false and without any basis.

4. He further states that on or about 22<sup>nd</sup> August 2012, he was given a summary dismissal letter dated the same date with reasons that he was involved in siphoning of fuel and that he had performed his duties below the Respondent's expectations.

5. He avers that the Respondent in its decision to dismiss him did not adhere to fair labour practice as envisaged by the Constitution, the Employment Act 2007 and the general principles of natural justice in that there was no hearing before the alleged summary dismissal, the reasons were false and due process was not followed. That the Respondent's actions amounted to unlawful, unfair and inhumane termination of his employment which was further aggravated by the fact that the Respondent declined to pay him his terminal benefits and damages as hereunder:-

i) *One Month's salary in lieu of notice.....Kshs.18,400/=*

ii) *Unpaid salary from February to July*

*being (18,400 x 6 months).....Kshs.110,400/=*

iii) *Salary for 22 days in August being*

iv) *(22/30 x 18,40).....Kshs.13,493/=*

v) *Damages for loss of employment and future at 12 months'*

*salary being (12 x 18,400).....Kshs.220,800/=*

vi) *Damages for abrupt loss of income, trauma and*

*inability to meet continuing obligations.....Kshs.220,800/=*

**TOTAL.....Kshs.583,893/=**

6. The Claimant therefore prays for judgment against the Respondent for:

- a) A declaration that the termination/dismissal of the Claimant's employment was illegal, unlawful, unfair and inhumane and that the Claimant is entitled to his due terminal benefits and damages.***
- b) An order for the Respondent to pay the Claimant his terminal dues and compensatory damages totalling to Kshs.583,893/=.***
- c) An order for the Respondent to issue proper certificate of service to the Claimant.***
- d) An order for the Respondent to pay the Claimant's costs of this claim plus interest thereon.***

#### **Respondent's Case**

7. The Respondent filed a response dated 8/05/2013 confirming that the Claimant was its Security Guard from 02/09/1998 until 15/10/2008 when his duties were varied to a Rider and the terms of employment outlined in the Letter of Confirmation dated 13/02/2009. It avers that the Claimant breached his contract of employment and the Employment Act 2007 on or about February 2012 when he and some of its other Riders were involved in criminal malpractices and were also not carrying out their supervisory duties. That it thus suspended the Claimant and thereafter constituted a disciplinary committee to investigate, hear and probe the aforesaid malpractices and after the Claimant and the other Riders on suspension made their representations before the said disciplinary committee, their report recommended for the Claimant's summary termination. Further, that it was the disciplinary committee's report that the Claimant and other Riders would siphon off an average of 5 litres of fuel from their assigned motorcycles and sell of the same to boda boda operatives at an average of Kshs.100/= per litre. That it consequently summarily dismissed the Claimant in line with **Section 44(4) (g) of the Employment Act**.

8. It avers that upon the Claimant being terminated from employment, it calculated his terminal dues and duly prepared a Clearance Certificate which the Claimant refused to sign to enable it remit the dues to CFC Stanbic Bank as per the Claimant's instructions under the check off system. That the Claimant had obtained a loan through a check off system and the Respondent was bound to submit dues if there was an outstanding loan.

9. It also avers that the Claimant was not entitled to notice pay because he was summarily dismissed; not entitled to salary from the date of suspension to his termination; and to damages for unlawful termination from employment because it is not claimable in law. The Respondent avers that the Claimant's termination from employment was lawful and that he is not entitled to the prayers he seeks and so the claim should be dismissed with costs.

10. The Respondent filed an application dated 12/07/2013 supported by the affidavit of John Ochuku, the Respondent's Human Resource & Administration Officer, seeking leave to amend its Response on the ground that it had traced important documents which were not available at the time of filing the response and which it wished to rely on in its defence. That the said documents include fuel reports for the months of November 2011 and February 2012, a witness statement by one Jared Moruli implicating the Claimant and a copy of the irrevocable authority duly signed by the Claimant authorizing the Respondent to remit his terminal dues to the bank to offset his outstanding loan. The Respondent's Amended Reply to the Memorandum of Claim dated 13/11/2013 was thereafter filed on 18/11/2013.

#### **Evidence**

11. The Claimant testified that he was told to go for a meeting that he did not know anything about and he was not informed that he could go to the meeting with witnesses. In cross-examination, he stated that his motorbike consumed 7 litres per day, which he fuelled daily while others used 9 litres and so the allegation that he used 10 litres is not true because his motorbike could only take up to 9 litres.

12. The Claimant also testified that CFC Bank cleared him of his bank loan which he had finalised and confirmed that no witness was called in the meeting that he attended and that he was alone. RW1 testified in cross-examination that it is the Respondent's company policy not to pay employees on suspension and confirmed that the Respondent did not issue the Claimant with any warning letters.

#### **Claimant's Submissions**

13. The Claimant submits that the disputed facts are:-

- 1. Whether the Claimant was guilty of any misconduct warranting dismissal from employment.***
- 2. Whether fair procedure was applied before disengaging the Claimant from employment.***
- 3. Whether the Claimant is entitled to the prayers sought.***

14. He submits that under **Section 45 of the Employment Act 2007**, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. That he disputes the minutes of the purported disciplinary hearing relied upon by the Respondent and which recommended his dismissal stating that the Respondent had developed a predetermined conclusion that the reason his motorcycle consumed more fuel was because of siphoning even after he had informed the Respondent that his motorcycle had a problem that increased its fuel consumption. That he was not brought before his accuser who had given a statement of his siphoning of fuel and thus not given the opportunity to challenge any evidence against him and that his accusers could

have as well mentioned his name so as to save their jobs. Further, that the Respondent failed to generate a report on the mileage of his motorcycle to back its allegations that he used more fuel and that his colleagues whom the report recommends reinstatement did not even come before this Court to stand on their word.

15. He submits that fair procedure was not applied and therefore his dismissal was unfair and unlawful and he relies in **Cause No. 440 of 2013 Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers –vs- Mombasa Sports Club** where Justice Radido observed at page 5 that *no employer shall terminate the employment of an employee unfairly*. He further stated that *termination of employment is unfair by an employer if the employer fails to prove (a) that the reason for the termination is valid: (b) that the reason for the termination is a fair reason...*

16. It is the Claimant's submission that he has proved his case to the required standards and having concluded that his dismissal was unfair, the claim for Notice becomes payable under **Section 36 of the Employment Act**. That since it was confirmed that he used to report to work during his suspension, he was never paid even half pay during that period and so he is entitled to his full monthly salaries for the months of February to July 2012 and for the 22 days he worked in August 2012.

17. Further, that he was dismissed in the most inhumane way and is yet to find a befitting job and that bearing in mind that the Respondent did not issue him with a letter of service to enable him get alternative employment, he is therefore entitled to an award of 12 months' salary in compensation as per **Section 49 of the Employment Act** and a *Certificate of Service* as per **Section 51 of the Employment Act**.

### **Respondent's Submissions**

18. The Respondent submits that siphoning and pilferage of fuel is theft against the employer and the fact that the Claimant was implicated of the same by the three riders, others who include Augustine Kahemba and Eliud Wafula, it raised reasonable and sufficient grounds for his dismissal. Further, that the Court should apply the test of reasonableness amplified by the Court of Appeal in several cases including **Clement Karuri –v- Kenya Ports Authority[2018] eKLR** where the court cited sentiments of the Canadian Supreme Court in **Mc Kinley vs B.C. Tel. [2001] 2 S.C.R. 161** thus:-

***“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment on the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”***

19. In response to the allegation that no show cause letter or charges was served upon the Claimant for him to answer, the Respondent submits that a disciplinary hearing cannot be expected to act like a trial Court and urges the Court to be persuaded by the decision in the case of **George Musamali –vs- G4S Security Services Kenya Limited [2016] eKLR** where Justice Abuodha stated that:-

***“However, the conduct of the disciplinary hearing does not have to take the rigours of a court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”***

20. Further, that while internal proceedings of an employer are anchored on the contract of employment and the burden of proof is on a balance of probabilities in criminal proceedings proof beyond reasonable doubt is required. That it therefore met the requirements of Section 41 of the Employment Act 2007 and the Court will be satisfied that the Claimant was given an opportunity to make representations prior to his dismissal.

21. It is submitted by the Respondent that since the summary dismissal was lawful and fair, the Claimant's prayers for unlawful and unfair termination of employment and payment of terminal benefits, notice pay and compensation are therefore unmerited. That the Claimant's terminal dues being salary was processed and with irrevocable instructions for the Claimant, remitted to CFC Stanbic Bank where the Claimant was servicing a loan.

22. It is further submitted that while the Claimant reported to work during the period of his suspension but did not work, he is only entitled to half salary amounting to Kshs. 61,946/= because investigations found him culpable and it will be unjustifiable to make full payment. That the claim for damages is also unmerited because the Respondent has established that the Claimant committed an act of gross misconduct and it followed due process in dismissing him while the other claim for damages is a repetition and that damages are not available on contractual claims.

23. I have examined all evidence and submissions of the parties. The issues for determination are as follows:-

- 1. Whether there were valid reasons to warrant dismissal of the Claimant.**
- 2. Whether the Claimant was subjected to due process.**
- 3. Whether the Claimant is entitled to the remedies sought.**

24. On the 1<sup>st</sup> issue, the Respondent aver that the Claimant was dismissed for siphoning fuel from his motorcycle which in essence is theft by servant. The Respondent called one witness their Human Resource Manager but no eye witness was even called to prove the Claimant was involved in siphoning of fuel. It was alleged, 2 people mentioned Claimant as engaging the fuel theft but none of them was called as a witness.

25. What remains is suspicion and mere suspicion however strong cannot amount to proof of theft as the Respondent wants this Court to believe.

26. The Claimant indeed denied any theft or involvement in siphoning of fuel. In absence of any evidence to the contrary, I do find that the Respondent have not discharged the burden of proving the reasons for the dismissal as envisaged under Section 43 of Employment Act 2007 which states as follows:-

**“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

27. Other than proof of reasons, the Claimant was also entitled to a fair disciplinary process as envisaged under Section 41 of Employment Act 2007 which states as follows:-

**“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.**

28. The Respondent indicated that they investigated the incident but the investigation report was not availed. Minutes of the disciplinary process were also not availed. Even the RW1 indicated that the witness who mentioned the Claimant in fuel siphoning did not attend the alleged disciplinary hearing. My conclusion is that no due process was followed before the Claimant was dismissed.

29. Section 45(2) of Employment Act 2007 states as follows:-

**(2) “A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee’s conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure..”.**

30. In view of the fact that the Claimant was dismissed without valid reasons and without following due process, I find that the dismissal of the Claimant was unfair and unjustified.

31. In terms of remedies, I find for the Claimant and I award him as follows:-

**1. 1 month salary in lieu of notice = 18,400/=.**

**2. Salary unpaid during suspension from 17<sup>th</sup> February to 22<sup>nd</sup> August 2012 = 6 months = 6 x 18,400 = 110,400/=.**

**3. 6 months’ salary as compensation for unlawful and unfair termination = 6 x 18,400 110,400/=.**

**Total = 239,200/=**

**4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 18<sup>th</sup> day of December, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Njuguna for Respondent – Present

Claimant – Absent