



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO. 1400 OF 2011

FRANCIS KILYUNGI NDULI.....CLAIMANT

VERSUS

NAS AIRPORT AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed plaint in the High Court on 15.9.2006 alleging that he was wrongfully and unlawfully dismissed from employment by the respondent on 6.9.2006. He therefore prayed for the following reliefs:-

- (a) Recovery of Kshs.18,004,666
- (b) General damages
- (c) Costs.

2. The respondent filed her reference on 19.10.2006 contending that she dismissed the Claimant lawfully for gross misconduct of being found in possession of property believed to be stolen from her. She further denied the reliefs sought by the suit but admitted the following dues were payable to the Claimant.

- (a) Salary for 16 days marked upto 16.10.2006 453,333.55
- (b) Accrued leave of 40 days 113,333.35
- (c) Gratuity for 11 months basic pay plus House..... 671,000

Total: 829,666.20

Less PAYE 219,643.00

Kshs.610,023.70

3. On 23.4.2007, the respondent obtained Court Order to deposit in Court the said admitted sum of Kshs.610,023.70 pending trial. On 12.7.2011 the High Court transferred the suit to the Industrial Court and directed that the Cash deposit of Kshs.610,023 be transferred to the same Court. Thereafter the Industrial Court was replaced by this Court in July, 2012. The suit was heard on 16.10.2018 when the Claimant testified as C.W.1 and called one witness while respondent called Mr. Michael Ngare Kiiga as R.W.1. Before the hearing commenced the counsel agreed that the only outstanding issue for trial is salary in lieu of notice. After the hearing, both parties filed written submissions.

Claimant's Case

4. C.W.1 testified that he was employed by the respondent in 1995 as Assistant Catering Manager earning Kshs.85,000. He worked for 20 years.

5. On 16.8.2006, he was called to the Human Resource Manager's office where he found the Human Resource Manager Mrs Githaiga and

R.W.1. They told him about a complaint received that he was removing items from the respondent's premises but he denied. They then searched his car (Pick up) and removed his 2 bottles of whisky (John Walker Black Label) and 4 bottles of Nedernburg Wine and took them to his office. They also searched his office locker and removed the bottle of Scotch Whisky and one bottle of Nedernburg wine and took them to the office.

6. He contended that the said drinks were his personal property which he bought but he had left the receipts in his jacket at home. He was then told to go away and return for hearing on 25.8.2006.

7. On the said 25.8.2006, he attended the hearing carrying the receipts to prove that he purchased the drinks but the Group Human Resource Manager never showed up. He further stated that he showed the receipts to R.W.1 who checked them and returned the same to him.

Thereafter he received dismissal letter dated 28.8.2006 citing theft as the reason for the dismissal. He contended that the dismissal was wrongful and prayed for 3 months' salary in lieu of notice.

8. On cross-examination C.W. 1. contended that after the drinks were taken away by R.W.1, they were not marked for identification. He denied that the Scotch Whisky bottle, John Walker Red Label and 2. Nedernburg wine bottles brought to Court were the ones taken away from him. He also denied that the 2 packets of Cussons soap, 2 clean films and a new padlock were recovered from his locker.

He maintained that all what R.W.1 removed from his car were 2 John Walker Black Label Whiskey and 2 Nedernburg Wine while from his locker he removed one Nedernburg Wine and one Scotch Whisky.

9. C.W.1 further denied ever recording any statement at the Human Resource Manager's office on 17.8.2006 and maintained that he was only asked questions and he answered. He denied the allegation that no drinks were indeed found in his car but in his trouser pockets and maintained that the drinks were found inside his car when it was searched in his presence. He demonstrated physically using the bottles in Court that none can enter his trousers pockets. He further contended that all the bottles were wrapped at the shop where he bought them.

10. C.W.1 further contended that after the searches on 17.8.2006, he was told to go home. Thereafter he was served with a letter dated 22.8.2006 inviting him to see the Group Human Resource, Mrs Faith Githaiga on 25.8.2006 for hearing. He however never found her on 25.8.2006 but he met R.W.1 for less than 2 minutes and presented the 2 receipts for the purchase of the 8 bottles of drinks. He maintained that the bottles produced in Court by the respondent were not the ones taken from him and they did not correspond with the receipts for purchase which he showed R.W.1 on 25.8.2006.

11. C.W.1 further contended that the respondent's premises was a restricted area and one cannot enter or exit without being searched at the gate because the respondent keeps foodstuffs for her clients. He admitted that Clause 12 (iii) of the Respondent's service Handbook barred employers from removing goods belonging to either the respondent or her clients. He further admitted that there was restriction from bringing items from outside into the respondent's premises.

12. He denied that he was in the photo generated from CCTV showing the back side of a man walking through a door. He denied further any wrong doing and maintained that he is entitled to the dues deposited in Court plus 3 months' salary in lieu of notice.

13. C.W.2 is a long time friend of the Claimant. He stated that on 10.8.2006 he witnessed the Claimant buy 2 bottles of Wine and was issued with a receipt. He further contended that the Claimant was preparing for visitors who were bringing dowry on 27.8.2006. He contended that the bottles they bought were not the ones showed to him in Court. He stated that when they bought the bottles, they were not wrapped with clean film.

Defence Case

14. R.W.1 joined the respondent on 1.11.1995 as a Personnel Officer and returned on 31.12.2016 as an Assistant Human Resource Manager.

He confirmed that the Claimant was employed by the respondent. He further testified that on 16.8.2006 at 5 am he received anonymous call from a Land line reporting that the Claimant was ferrying items from the respondent's premises. He then went to the office at 7 am and he reviewed the CCTV video and noticed that the Claimant left the main gate at 11.07 pm and he appeared to have a hump. That while he was still reviewing the CCTV, Mrs Githaiga walked and showed her the footage and explained to her about the anonymous call.

15. They then called M/s Denise Jessup, Claimant's immediate Manager to see the CCTV. They thereafter called the Claimant to the Office and then went to search his car and his locker. That they recovered nothing from the car but one John Walker Red Label and one Nedernburg bottle was recovered from his pockets. That from his locker they also recovered one Scotch Whisky, one Nedernburg, 2 Clean films, 2 packets of Cussons Soap and one new padlock. That they also found a list of names of staff which indicated that claimant was shylocking.

16. R.W.1 further testified that after repossessing the said items, Mrs Faith Githaiga told the Claimant verbally to go away and return on 18.8.2006 but he never showed up on that day as instructed. As a result a letter dated 22.8.2006 was served on him to attend hearing on 25.8.2006 at 2 pm. R.W.1 denied ever being shown any receipts by the Claimant on 25.8.2006 and contended that the Claimant merely recorded a statement in his presence after which he issued him with a dismissal letter.

He clarified that the Claimant was dismissed because the respondent lost trust in the Claimant due to the said misconduct.

17. On cross-examination R.W.1 contended that he kept custody of items recovered from the Claimant until the day he retired and then he handed over to Mrs Githaiga. He contended that the said items were stolen from the Bonded Store and no report of theft had been made from that section. He confirmed that an email from Ngarariga, Bond Stores dated 17.8.2006 stated that there was no stock lost from that store. He

further admitted that the theft by the Claimant was never reported to the police. He denied that the Claimant presented any receipts to him on 25.8.2006 and contended that the batch numbers cited in the email dated 17.8.2006 by Ngarariga, corresponded with the 4 bottles brought to Court and meant that the items were from the respondent's stores.

That the removal of the items from the respondent's stores meant that they were stolen.

Analysis and Determination

18. There is no dispute that the Claimant was employed by the respondent until 25.8.2006 when he was dismissed for gross misconduct. The issues for determination is whether he is entitled to 3 month's salary in lieu of notice for wrongful dismissal. In answering the said question, the Claimant had in mind that the law applicable to this case is Employment Act which was in force then and which was repealed by the 2007 Act.

19. The relevant provision herein is section 17(g) of the repealed Act which entitled the employer to summarily dismiss his employees for committing or being suspected of committing a criminal offence against or to the detriment of the employer or his property. The question that begs answers is whether the Claimant committed a criminal offence (theft) or on reasonable grounds he was suspected of having committed that offence of theft against the employer.

20. The Claimant was found in possession of bottles of drinks resembling those stored by his employer. The drinks were in the Claimant's car at the staff parking area and others were in his office locker. Although he contended that he availed receipts for purchase to R.W.1, before dismissal, R.W.1 denies being shown such receipts. C.W.2 stated that he was with C.W.1 when he purchased 2 bottles, but that allegation never justified the other items found in claimant's possession.

20. On the other hand the Claimant denied that the drinks produced by the respondent in Court were the same ones repossessed from him on 16.8.2006. C.W.2 also denied that they are the 2 bottles they bought on 10.8.2006. But why was the Claimant bringing the drinks resembling the ones stocked by the respondent to the work place while fully aware that there was restriction from bringing such items into the respondent's premises.?

21. In my view the failure by the Claimant to answer the foregoing question is enough for the Court to find that the respondent had reasonable grounds to suspect that the Claimant had committed the offence of Stealing by Servant on the night of 16.8.2006. That the said suspicion was a valid reason for dismissing the Claimant summarily under section 17(g) of the repealed Employment Act. Consequently, I return that the Claimant was not entitled to any salary in lieu of notice.

Conclusion and Disposition

22. In view of the foregoing finding that there were reasonable grounds for suspecting that the Claimant had committed the Criminal offence of Stealing by Servant, the employer was right in summarily dismissing the Claimant on 28.8.2006. I therefore dismiss the Claim for 3 months' salary in lieu of notice. I however enter final judgment in his favour for the sum of **Kshs.610,023.70** which was deposited in Court vide the Order dated 23.4.2007. There shall be no Order for costs and Interest because the said sum was never disputed. The said money should therefore be released to the Claimant forthwith.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU JUDGE