



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 511 OF 2017

SAMUEL KYULU NDUNDA.....CLAIMANT

VERSUS

DELMONTE (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued his erstwhile employer seeking to recover for the wrongful and unfair termination of service. The Claimant was employed in 1993 as a casual labourer and confirmed into permanent employment in July 1994 in the position of irrigation leadman and he worked as such till 3rd September 2015 when his services were terminated. He avers that his summary dismissal was unfair and unlawful as he was accused of siphoning fuel from the Respondent's motorbike and that the incident was reported to the Police causing him to be charged in Thika Cr. Case no. 4293 of 2015. He was acquitted on 30th November 2016 and notwithstanding the acquittal the Respondent upheld its dismissal of the Claimant meted out on 3rd September 2015. At the time of termination of his services he was earning Kshs. 37,319.95 and that this salary was revised upwards in the CBA signed on 10th March 2016. He therefore sought a declaration that his dismissal was unfair and he sought compensation as follows:-

- a. Balance of August 2015 payment for 7 days Kshs. 10,449.54
- b. Pay for September 2015 payment less advance of Kshs. 3,000/-for 5 days Kshs. 4,463.99
- c. Pay in lieu of notice for 80 days Kshs. 119,423.36
- d. 12 months salary as compensation Kshs. 490,384.08
- e. Salary arrears for July and August 2015 per the new CBA Kshs. 7,090.78
- f. Salary arrears for September 2015 per the new CBA Kshs. 708.81
- g. Service gratuity for 21 years at rate of 31 days Kshs. 1,064,098.56
- h. Unpaid annual leave for 2015 Kshs, 40,685.34
- i. Costs of the suit
- j. Interest
- k. Any other relief the court may grant

2. The Respondent in its defence averred that the Claimant admitted that he siphoned fuel vide a letter dated 13th August 2015 from the Respondent's motorbike KMCC 858J assigned to him and that he was arrested and charged at Thika Law Courts with the offence of stealing contrary to Section 275 of the Penal Code. It averred that the acquittal does not absolve the Claimant from the fact that he siphoned fuel belonging to the Respondent. The Respondent denied that the Claimant was unlawfully dismissed from employment or that he was entitled to any remedy for the dismissal. The Respondent averred that the Claimant's terminal dues were fully paid including his salary up to and including 3rd September 2015. The Respondent sought the dismissal of the suit with costs.

3. The Claimant testified and so did the Respondent's witness Stephen Nyamoti Thomas a security officer with the Respondent. The Claimant stated that he was not allowed to give his side of the story and that the statements recorded were recorded for him and he was forced to sign them. He stated that he was requested by a colleague to get him fuel for his personal motorbike and that he obliged, went and bought a jerrican and purchased fuel for his colleague which was the fuel he was found with. He testified that the security guards roughed him up and threatened him with dire consequences if he did not admit the alleged theft. The Respondent's witness stated that the Claimant was not coerced and though the statement was recorded by a security officer the same was a rendition of what the Claimant had stated. He testified that the Claimant when spotted ran away and he was waylaid, arrested and recorded the statement admitting the theft of fuel. He was issued with a show cause, was taken through disciplinary hearing where he was represented by a shopsteward before the summary dismissal. He was also charged by the Police with stealing. He stated that he did not see the Claimant siphon the fuel but the fuel in the motorbike assigned to him less the fuel siphoned tallied.

4. The parties filed submissions and the Claimant submitted that the dismissal was not justified, was unlawful and unfair. He cited Section 45 of the Employment Act which requires that there must be procedural and substantive reasons for the termination pursuant to the provisions of Section 43 of the Employment Act before an employer effects a termination of employment. The Claimant submits that the Respondent never proved the allegations leveled against him by the Respondent. He cited the case of **Bernard Dodo Mbaja v Air Traffic Limited [2014] eKLR**. The Claimant submitted that the Respondent failed to prove the allegations before the disciplinary committee and also before the court. He cited the case of **Daniel Kiplagat Kipkebut v SMEP Deposit Taking Microfinance Limited [2016] eKLR** where the judge cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the provisions of Section 45 of the Employment Act. The Claimant submitted that there was no substantive justification for the termination and that the dismissal fell short of the threshold in Section 45(4)(b) of the Employment Act and the tenets of justice and equity required. The Claimant submitted that he was not afforded the safeguards under Section 41 of the Employment Act and that the dismissal for gross misconduct was thus unfair and unlawful. He cited the case of **Martin Bundi Gitonga v Del Monte Kenya Limited [2016] eKLR** where the court held that the rights of an employee under Section 41 must be secured and that the process should not just be undertaken to satisfy the going through the motions. He submitted that the disciplinary hearing was a sham and that the court should find that he was unfairly and unlawfully dismissed and award him the relief sought.

5. The Respondent submitted that the Claimant's dismissal was lawful and that the disciplinary process properly carried out. The Respondent asserts that the reasons for the dismissal were provided in the dismissal letter of 3rd September 2015. The Respondent submitted that the Claimant was acquitted under Section 206 of the Criminal Procedure Code due to lack of witnesses and not lack of evidence. The Respondent cited sections 41 and 44(4)(g) of the Employment Act for the proposition that the law was followed in the dismissal. The Respondent submitted that the cases cited by the Claimant were not relevant as the facts and circumstances were different to those herein. The Respondent cited the case of **Banking Insurance and Finance Union (K) v Standard Chartered Bank of Kenya Ltd [2013] eKLR** which quoted with approval the decision in **Alphonse Machanga Mwachanya v Operation 680 Ltd [2103] eKLR** that the Claimant was given the reasons for the termination and that he was heard before the dismissal. The Respondent also cited the case of **Amos Ogamba Bosire v Wakenya Pamoja Savings Credit Society Ltd [2017] eKLR** and urged the court to find that the Claimant was not entitled to any of the reliefs sought. The Respondent submitted that if however the court were to find in favour of the Claimant the compensation should be capped at 3 months and relied on the case of **William Kariarithi Gacheru v East African Packaging Industries Ltd [2016] eKLR**. The Respondent urged the dismissal of the Claimant's case with costs.

6. The Claimant's position is that his dismissal did not accord with the law and that the allegations against him were not proved both at the disciplinary hearing and in court. He urged the court to find his dismissal unlawful and unfair. The Respondent on its part asserts that the dismissal did accord with the law and that the Claimant was heard before the dismissal and that he was given the reasons for the dismissal. The Respondent urged the court to dismiss the Claimant's suit with costs. The Claimant was accused of siphoning fuel from the motorbike assigned to him. His side of the story is that his colleague Mburu sought his assistance to get some fuel for his personal motorbike and that he agreed. He says he went to Kilimambogo where he got the fuel and was on the way to deliver the same to his colleague when he was accused of theft. The Claimant left his workplace to purchase fuel for a fellow employee while using his employer's motorbike. He was signaled to stop and instead took a different route and was waylaid then after the arrest was arraigned in court on charges of stealing. At the time of the disciplinary hearing, the Claimant had been accused of theft. Section 43 of the Employment Act provides as follows:

43.(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. (underline mine)

7. Section 43(2) is quite clear. The reason for termination is the matters at the time of the termination that the employer genuinely believed to exist. The employer in this case was of the view that the Claimant had siphoned fuel. After hearing testimony from the Claimant and the Respondent's witnesses, the apprehension of the Respondent was not misplaced. The Claimant's story did not add up as he seriously could not expect the Respondent or this court to believe that he was so generous as to use his own money to bail out a colleague who used to ride a motorbike to work. If indeed the colleague was in need of obtaining fuel for his motorbike, he would have made arrangements that would not have entailed the Claimant leaving his work place, driving to a petrol station along Garissa Road and then return with the fuel. The Claimant's also asserts that he was coerced to write the statements he allegedly wrote. The arrest of the private motorbike with the siphoned fuel was sufficient cause for the dismissal under Section 44 of the Employment Act and given the process undertaken the Claimant was given the safeguards under the law. His dismissal was therefore lawful and fair. The suit is thus unmerited and is dismissed. I make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 11th day of December 2018

Nzioki wa Makau

JUDGE