



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 141 OF 2013
BRUTUS NANDWA WA AMBUNYA CLAIMANT
VERSUS
KENYA WINE AGENCIES LIMITEDRESPONDENT

Mr. Mbugua Mureithi for the Claimant

Mr Nyaanga for the Respondent

JUDGMENT

1. The claimant worked for the respondent from 2nd February 1979 to 1/4/2011, a period of 32 years in various capacities. At the time of separation he held the position of Assistant Warehousing Manager earning a monthly salary of Kshs.100,000/=.
2. The claimant filed a memorandum of claim dated 31/1/2013, and was amended and replaced by another dated 2/5/2013.
3. The claimant seeks compensation for unlawful and unfair termination after a long, dedicated and clean service to the respondent.
4. The claim is opposed vide a statement of response dated 28/2/2013.
5. The claimant and the respondent adduced oral evidence in support of their respective positions. The claimant was represented by Mbugua Mureithi Advocate whereas the respondent was represented by Mr. Nyaanga advocate.

Claimant's Case

6. The claimant was on annual leave between 5th May 2010 to 5th June 2010. Prior to commencing leave the claimant had conducted a stock take and handed over to his supervisor Mr. Philip Bartay.

7. Upon resuming duty, the claimant, together with his superior Mr.

Bartay, storekeeper and clerk discovered that 37 cases of Amarula liquor were missing together with 85 cases of Johnnie Walker Black.

8. That the respondent had elaborate security to guard the bonded warehouse and the locks to the warehousing were jointly held between respondent's staff and Kenya Revenue Authority staff. That none could open the warehouse in the absence of the other because two keys were required to open the warehouse locks.

9. There was a clear variance between the stocks on record and physical stock in the warehouse. That this was not the case prior to his going on leave. That his superior was in charge while he was away and that no stock could be removed from the warehouse without vetting by the security.

10. That the claimant was wrongly blamed for the loss. That he offered proper explanation to a disciplinary committee that dwelt with his case although hitherto he had been suspended with half pay from 22nd July 2010, was at behest of the respondent arrested and charged for theft of stock and was acquitted after close of the prosecution case since he opted to offer no testimony in his defence as there was clearly no cogent evidence against him.

11. The claimant was acquitted of the charges after he had been disciplined and his employment terminated. The acquittal was on 10th May 2012, whereas the dismissal was on 1st April 2011.

12. The claimant prays for orders that;

(i) Termination of the employment of the claimant was unfair, unlawful and illegal *ab initio* null and void.

(ii) That the termination of employment of the claimant on the same grounds as those constituting particulars of pending criminal case was unlawful.

(iii) That the claimant be deemed to have been employee of the respondent from the period between 1st April 2011 when he was dismissed and 10th may 2012 when he was acquitted of criminal charges.

(iv) A declaration that the claimant is entitled to his full salary from 1st April 2011 to the date of unlawful termination.

(v) An order for reinstatement of the claimant to the employment of the respondent without loss of pay.

(vi) An order that the respondent pay the claimant the sum of Kshs.5,400,000/= being salary for the remainder of years of service from May 2011 to November 2015.

(vii) An order that the respondent do pay the claimant a sum of Kshs.1,200,000 being equivalent of twelve (12) months' salary compensation for unlawful and unfair termination of employment.

Respondent's case

13. The respondent however states that the employment of the claimant was fairly and lawfully terminated. The respondent further states that the suspension of the clamant pending investigations and disciplinary process was lawful.

14. That the respondent's board staff and administrative matters committee (BSMC) heard the case by the claimant, gave him opportunity to explain himself but the explanation was not satisfactory hence the termination of employment.

15. Furthermore, the respondent states that the acquittal of the claimant in criminal case No. 2161 of 2010 could not preclude termination of employment on the grounds relied upon by the respondent.

16. The respondent prays that the entire suit of the claimant be dismissed with costs to the respondent.
17. Respondent relies on annexures 1 to 17 attached to the statement of response including the terms and conditions of employment letter in a document dated 20th August 2003; job description dated 7th September 2007 and standard warehousing department operating procedures which spell out the responsibilities placed on the claimant and which he flouted resulting in the suspension and termination of employment.
18. In the letter of termination dated 11th April 2011, the respondent provides the following reasons for the termination;
- (i) Failure to account for stock variance of products namely thirty seven (37) cases of Amarula and eighty five (85) cases of Johnnie Walker Black label valued at Kshs.3.95 million.
 - (ii) Neglected to perform his work as required and / or carelessly and improperly performed his work leading to the loss being the Assistant Manager in Warehousing Department.
19. The conduct above was categorized as gross misconduct in breach of company staff Rules and Regulations and the Employment Act, 2007.
20. In addition, the letter added that the claimant had been charged in a court of law with the offence of theft of the products mentioned, raising additional reasonable grounds for his termination for gross misconduct.
21. Therefore, the company had lost trust in the claimant hence the termination.
22. The claimant was paid final dues including pending leave days, travelling allowance, three months' salary in lieu of notice and pension benefits as per Trust Deed Regulations. The payments were subject to clearance of any existing liabilities.
23. RW1 Prudence Mwololo testified on behalf of the respondent and the following salient features came out of her testimony;
- (i) Proper investigations were conducted, the claimant was suspended while this took place on half pay and he subsequently appeared before a disciplinary committee, which upon hearing his side of the story terminated the service of the claimant.
 - (ii) Confirmed that the bonded warehouse has two keys; one held by the respondent and the other by KRA officer.
 - (iii) That Assistant Manager or his assistant keeps the respondent's key. Claimant was Assistant Manager.
24. Respondent warehouse procedure guided the handling of the bonded products.
25. Under cross examination RW1 conceded the following;
- a. The claimant worked under Mr. Phillip Bartay the Manager warehousing.
 - b. The record clearly showed the stock was in place but was moving.
 - c. RW1 did not know how and when the product left the warehouse.
 - d. Respondent had elaborate security personnel and procedure to secure KWAL assets and products.

- e. That the inward and outward movement of stock was well documented and physical checks were done.
- f. That one could not blame the claimant for any loss of product without blaming KRA because no goods could leave the warehouse without knowledge or involvement of KRA.
- g. No complaints were made to the police against any KRA officer.
- h. RW1 referred to the Magistrate's Court proceedings and informed the court that the warehouse keys were kept by Mr. Phillip Bartay and not the claimant. (See page 82 of the record).
- i. RW1 did not produce the investigation report, nor the minutes of the disciplinary hearing in spite of request by counsel for the claimant. She confirmed that the investigation report and the minutes were not shared with the claimant.
- j. RW1 was unable to say if the report implicated the claimant with theft or failure to follow procedure.
- k. Retired Colonel Njonge, in charge of overall security referred to the Magistrate's Court proceedings at page 74 – 75 and repeatedly blamed Mr. Philip Bartay and not the claimant for the loss. He told the court thrice that he did not know how the claimant was implicated with that loss. He recommended that Mr. Bartay and Mr. Githinji be recalled to facilitate further investigations. The two were under suspension at the time.
- l. RW1 confirmed that the claimant was away on leave immediately before the loss was discovered after he returned from leave.
- m. RW1 did not know if Mr. Bartay had handed over the warehouse stock to the claimant upon his return from leave.

Determination

- 26. A close assessment of the testimony by the claimant vis-à-vis that by RW1 leads to exoneration of the claimant from any wrong doing in that the claimant had handed over the warehouse to Mr. Philip Bartay before he went on leave.
- 27. The claimant discovered the loss upon coming back. RW1 did not know when the loss occurred and did not know if Mr. Bartay had handed over to the claimant upon his return.
- 28. The claimant had over 32 years' service without adverse record and was charged, tried and acquitted of any wrong doing by a competent court of law.
- 29. From the evidence by RW1, the claimant was subjected to a disciplinary process based on mere suspicion and unfounded speculation.
- 30. The circumstances of this case point to the innocence of the claimant and therefore the respondent had no valid reason to terminate the employment of the claimant.
- 31. The termination violated Section 45 of the Employment Act and was therefore unlawful and unfair. The court so finds.
- 32. It is important to note that the claimant was kept in suspension for a long time on half pay on what the court has found to have been spurious allegations. This needed not to happen at all.
- 33. The respondent cannot take credit for having given opportunity to the claimant to explain his case when it is apparent that the claimant's explanation was disregarded and a decision to terminate not based

on any tangible evidence reached.

Remedy

34. It is common cause that the claimant was paid all terminal

benefits due to him in the sum of Kshs.983,554/= less PAYE Kshs.693,394/=. These benefits included payment in lieu of leave, leave travelling allowance, 3 months' pay in lieu of notice and salary withheld during suspension.

35. In terms of Section 49 of the Employment Act, the court may award compensation equivalent to 12 months' salary where it finds the termination was unlawful and unfair.

36. The claimant in addition to such compensation seeks damages equivalent to the salary due to the claimant. For the remainder of unserved years from May 2011 to November 2015. This remedy is available in cases of fixed term contracts which is not the case in *casu*.

37. The order for reinstatement is similarly not available because the claimant was due to retire in May 2015 which date has since passed.

38. The claimant was paid the salary withheld while he was under suspension but he now seeks payment of salary between the date of termination and the date when the criminal case was terminated by the court and the acquittal of the claimant.

39. This court has severally held that unless the internal policy document of the employer provides that a disciplinary hearing shall await conclusion of a criminal prosecution emanating from the conduct of an employee, the two processes may run simultaneously.

40. An acquittal by a criminal court does not necessary absolve an employee from a disciplinary sanction because the standard of proof in a criminal case is beyond reasonable doubt, whereas that in a disciplinary hearing on a balance of probability.

41. The allegation that the respondent erred in not awaiting the criminal case to conclude has no basis in fact or law in the present case.

42. Each case must be considered on its own facts bearing in mind the internal disciplinary process, and the policy documents of the particular employer.

43. The only available remedy to the claimant in the circumstances is compensation in terms of Section 49 of the Employment Act, 2007. The case of **Samuel Chege Gitau and 283 others versus Attorney General (2016) eKLR** is not applicable in that the claims were based on gross violation of constitutional rights. Court did not award the claimants in terms of the Employment Act, 2007.

44. The court in this regard takes into account the provision of Section 49 (4) of the Act as follows;

(i) That the claimant wished to be reinstated to his job but that has been overtaken by his retirement date.

(ii) That the claimant had a very long unblemished service to the respondent in a position that had heavy responsibility.

(iii) That the claimant was wrongly framed with regard to incidents that occurred when he was not at the workplace and his supervisor bore maximum responsibility on the occurrence together with KRA officials who were not even investigated regarding the matter.

(iv) The claimant had reasonable expectations to earn a salary until retirement which was due by

May 2015. He therefore lost about four years' salary due to the wrongful and unfair termination of his employment.

(v) The claimant was unlikely to get any other employment due to his advanced age.

(vi) The claimant did not contribute to the termination in the court's considered view.

45. This is a case where maximum compensation of the equivalent of 12 months' gross salary is merited and the court awards the claimant accordingly in the sum of Kshs. $(100,000 \times 12) = \text{Kshs.}1,200,000/=$.

46. Judgment is entered in favour of the claimant as against the respondent as follows;

(i) Kshs.1,200,000/= compensation.

(ii) Interest at court rates on the award from date of judgment till payment in full.

(iii) Costs of the suit.

Dated and delivered at Nairobi this 7th day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE