



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 80 OF 2012

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

KAPA OIL REFINERIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 12th January 2012 and filed in Court on 24th January 2012, the Claimant Union has sued the Respondent on behalf of its member, Joseph Tumuti (the Grievant). The Respondent's defence is contained in a Memorandum of Response dated 12th April 2012 and filed in Court on 23rd May 2012.

2. When the matter came up for hearing the Grievant testified on his own behalf and the Respondent called its Human Resource Assistant, Anthony Nzioka Mule.

The Claimant's Case

3. The Claimant states that the Grievant was employed by the Respondent in March 2000 as a driver at a monthly salary of Kshs. 4,040. He was not issued with a letter of appointment until June 2005. The Grievant's salary was progressively increased to Kshs. 13,320 as at the time he left the Respondent's employment.

4. On 8th January 2011, the Grievant was arrested upon a complaint by Haggai Multi-Cargo Handling Services Limited, a transporter contracted by the Respondent. He was booked at Industrial Area Police Station from where he was transferred to Makongeni Police Station. On 10th January 2011, the Grievant was charged at Makadara Law Courts from where he was released on bail on 11th January 2011. He reported to work on 12th January 2011 but was not assigned any duties. He was told to go home and after three (3) days, he received a dismissal letter through his colleague.

5. The reasons given for the dismissal were implication in theft of company goods and unauthorized absence from work for three (3) days.

6. The Claimant reported a dispute to the Minister for Labour on 28th January 2011 and a Conciliator was appointed on 29th April 2011. The conciliation process did not resolve the matter and the Claimant therefore moved to court.

7. It is the Claimant's case that the Grievant was not involved in diversion of the Respondent's goods as alleged and that during the period he is said to have absented himself from work he was in police custody, a fact that was well within the Respondent's knowledge.

8. The Claimant therefore pleads that the Grievant's dismissal was unlawful and unfair and claims the following on his behalf:

- a. Three months' salary in lieu of notice.....Kshs. 39,960
- b. Gratuity for 11 years @ 1 month's pay per year.....146,520
- c. Pay for 13 days in January 2011.....6,660
- d. One month's pending leave.....13,320
- e. 12 months' pay in compensation.....159,840
- f. Costs

The Respondent's Case

9. In its Memorandum of Response dated 12th April 2012 and filed in Court on 23rd May 2012, the Respondent states that the Grievant was employed as a driver on a yearly renewable contract effective 22nd June 2005. He earned a monthly basic salary of Kshs. 7,234 plus a house allowance of Kshs. 1,700.

10. On 6th January 2011, the Respondent lost goods that were on transit aboard a hired motor vehicle registration number KBC 427G owned by Haggai Multi Cargo Handling Services Limited. The Respondent states that on the said day, the Grievant had asked for permission from his supervisor to see a doctor. The Respondent alleges that the Grievant waited for the driver of the motor vehicle and diverted the motor vehicle to an unnamed destination where the goods were offloaded. The driver was then released to drive the motor vehicle to the Respondent's premises.

11. The turn boy of the motor vehicle recorded a statement on the diversion of the goods. The Grievant was arrested on 8th January 2011 and remained in police custody until 10th January 2011. He was charged in court with the offence of theft and was released on bail on 12th January 2011.

12. When the Grievant reported to work on 12th January 2011, he was asked to explain his absence as well as his involvement in the diversion of the Respondent's goods. His explanation was found unsatisfactory and he was dismissed on 13th January 2011.

13. It is the Respondent's case that the Grievant's dismissal was lawful and fair.

Findings and Determination

14. There are two (2) issues for determination in this case:

- a. Whether the Grievant's dismissal was lawful and fair;
- b. Whether the Grievant is entitled to the remedies sought.

The Dismissal

15. The Grievant was dismissed by letter dated 13th January 2011 stating as follows:

"Dear Sir

RE: SUMMARY DISMISSAL FOR GROSS MISCONDUCT

Please refer to the meeting you attended in this office today. Also present at the meeting were: Time Office Clerk and Ms Dorothy Mwale, Assistant Transport Officer.

To justify your absence from work on 10th, 11th and 12th January 2011, you presented to the company a copy of a cash bail deposit receipt No. 0067189 issue by CMC Makadara Law Court on 11th January 2011 in a Criminal Case No 133/11. In your letter dated 12th January 2011, you stated that you had been in police custody since your arrest on Saturday 8th January 2011, on allegations that you had stolen some goods belonging to the company that were for delivery to customers. You had no authority to give out Company Property to your "Clients".

In view of the above incidents, the Management has decided that you will be summarily dismissed forthwith for gross misconduct in accordance with the provisions of the Employment Act 2007.

Please arrange to collect your Certificate of Service from the Personnel Office once you have cleared with the Company.

Yours faithfully

KAPA OIL REFINERIES LTD

(Signed)

(J.M. OGODE) HUMAN RESOURCE CONSULTANT

16. According to this letter, the Grievant was dismissed on two counts; first, absenting himself from work for three (3) days and second, diversion of the Respondent's goods on transit to a customer. Regarding, the charge of absenting himself from work, the Grievant testified that he was in police custody between 8th January 2011 and 11th January 2011 when he was released on bail. He reported to work on 12th January 2011 but was not assigned any duties and on 13th January 2011 he was dismissed.

17. As part of its supporting documents, the Respondent produced a cash bail deposit receipt dated 11th January 2011 issued by CMS Makadara to Rosemary Wanjiku Nderitu on account of the Grievant. This receipt, whose authenticity was not challenged, was produced by the Respondent and it would therefore appear that at the time the decision to dismiss the Grievant was made, the Respondent was aware that during the period of absence, the Grievant was in police custody. This is confirmed in the Respondent's Memorandum of Response.

18. In any event, even assuming that the Grievant had indeed absconded duty, the Respondent ought to have taken steps to notify him that he was liable to dismissal if he did not report to work. On this account I am persuaded by the decision by **Abuodha J** in **Godfrey Anjere v Unique Suppliers Limited [2015] eKLR** where he held as follows:

"In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse."

19. In the absence of evidence of any steps taken by the Respondent to reach the Grievant during the period he was absent, the charge of absconding duty collapses.

20. Regarding the charge of diversion of the Respondent's goods, the Respondent appears to have relied on investigations conducted by its hired transporter, Haggai Multi Cargo Handling Services Limited. According to a letter dated 8th January 2011 addressed to the Respondent's Management by

Haggai, the conclusion of the investigation was informed by a statement by the turn boy of the hired motor vehicle, one Stephen Otanga. Neither Otanga nor any officer from Haggai Multi Cargo Handling Services Limited was called as a witness.

21. More significantly, there was no evidence that this particular charge was put to the Grievant for his response prior to the dismissal. The meeting said to have taken place on 13th January 2011 cannot pass for a disciplinary hearing since the Grievant had no prior notice of the charges he was facing. It would also appear that his union was not invited to this meeting.

22. Overall the Court finds that the Respondent had no valid reason for dismissing the Grievant as required under Section 43 of the Employment Act, 2007 and that in effecting the dismissal, the mandatory procedural fairness requirements set out under Section 41 of the Act were totally violated.

Remedies

23. Before making the final award in this matter I need to dispense with the issue of the effective date of the Grievant's employment which has a direct bearing on the award. The Grievant claims that he started working for the Respondent in March 2000.

24. The Respondent on the other hand pleaded the effective employment date as 22nd June 2005 and produced an offer of temporary appointment of the same date. In the absence of any contrary evidence, the Court adopts the

date stated in the appointment letter as the effective date of the Grievant's employment with the Respondent.

25. That settled, I proceed to award the Grievant eight (8) months' salary in compensation. In making this award I have taken into account the Grievant's length of service as documented as well as the Respondent's conduct in the dismissal transaction.

26. I further award the Grievant two (2) months' salary in lieu of notice as per Clause 11 of the applicable Collective Bargaining Agreement (CBA). I also award him gratuity at one (1) month's pay for every completed year of service as provided under Clause 18(a) of the CBA. Additionally, the Grievant is entitled to salary for 13 days worked in January 2011. In the absence of leave records to counter the claim for leave pay, this claim succeeds and is allowed.

27. Ultimately I enter judgment in favour of the Grievant in the following terms:

a. 8 months' salary in compensation.....	Kshs. 106,560
b. 2 months' salary in lieu of notice.....	26,640
c. Gratuity for 5 years (13,320x5).....	66,600
d. Salary for 13 days in January 2011 (13,320/30x13).....	5,772
e. Leave pay (13,320/30x24x1).....	10,656
Total.....	216,228

28. This amount will attract interest at court rates from the date of judgment until payment in full.

29. The Respondent will pay the costs of the case.

30. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF
JUNE 2017**

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JUDGE

Appearance:

Mr. Nyumba (Union Representative) for the Claimant Miss Kamau for the Respondent