



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1730 OF 2014

CHARLES MUMO NYUMU CLAIMANT

VERSUS

BOLLORE AFRICA TRANSPORT &

LOGISTICS KENYA LIMITED RESPONDENT

JUDGEMENT

1. The claimant was 13th March, 2011 employed by the respondent's predecessor, SDV Transami Limited as a Security Officer, Sea Exports department.

On 21st January, 2013 the claimant was promoted to Security Manager- Nairobi. The gross salary was Kshs.100,941.00 per month. Upon promotion, the terms of employment were changed and termination notice was increased to be 3 months or payment in lieu thereof.

2. On 18th July, 2014 the claimant was issued with letter to show cause for alleged substandard work. On 12th August, 2014 the claimant was dismissed from his employment. This was unlawful and contrary to the law and based on fabricated information by his boss Didmus Barasa.

3. The claim is for Kshs.302,823.00 notice pay; Kshs.1,112,292.00 compensation and costs of the suit.

4. The claimant testified in support of his claim and avers that upon employment by the respondent he worked diligently and earned a promotion. Mr Barasa was employed In April, 2013 and he became his boss at work. In June, 2013 he started experiencing problems with his boss and was issued with a warning letter for allegedly failing to submit a report. He filed his report as investigations were onion. On 18th July, 2014 the claimant was with a show cause on 4 grounds. When he replied, Barasa said this was not satisfactory. The matters related to theft at a go down at the airport. The security firm in charge of the area was responsible but the respondent insisted that the claimant was the officer responsible on behalf of the respondent when the theft took place. There were also anonymous letters sent to Barasa with damaging and disparaging reports about Barasa and the claimant was accused of being the author yet there was no such evidence.

5. The claimant was invited for a hearing over the matters against him, he was allowed to bring with him a witness. The claimant was then accused of having left his place of work without authority but the managing director's wife had sent him to run errands and thus he had to help. The claimant was then dismissed from his employment.

6. In the letter of dismissal, the claimant was alleged of allowing a stranger to get into the premises of the

respondent yard without following proper procedures. Mr John Cark and former manager of the respondent accessed the car yard. There were also allegations that alleged some property got lost at the yard; that a Mugoya go down some hot drinks went missing but there were security guards manning the pace and the incident had been reported to the police who were investigating. That all these allegations were a fabrication against the claimant. Barasa had a personal vendetta against the claimant for exposing him as not being a former army officer and thus the accusations leading to termination of employment.

Defence

7. In defence, the respondent avers that upon the employment of the claimant, he failed to undertake his duties diligently and on 18th July, 2014 was issued with a show cause notice as to why he should not be dismissed for allowing a stranger to conduct personal business within the respondent premises; absenteeism; failing to avoid investigations reports; and failing to prevent a felony as a result of which 294 cases of Jameson were lost. The claimant failed to give satisfactory answers to the issues made against him and the summary dismissal was thus justified.

8. The claimant was also implicated in the issuance of defamatory and malicious letters and a show cause dated 6th August, 2014 was issued. There was a hearing on the matter and the claimant was found liable for the same and thus his dismissal.

The basis of dismissal was over various matters the claimant committed and failed to give satisfactory responses and thus he cannot be allowed to shift blame to his boss and supervisor Mr Barasa. The claims for unfair termination are not with merit and should be dismissed with costs.

9. I evidence the respondent called Elizabeth Kariuki the human resource officer who testified that the claimant was dismissed from his employment with the respondent as a culmination of several disciplinary hearings that had been taken against him. On 8th April, 2014 there was a report that the claimant had abused and slapped a security guard manning the gates and on 9th April, 2014 the claimant was directed to give an explanation. Several staff members filed statements to confirm the incident and the conduct of the claimant. The claimant then admitted that the conduct of the security guard had annoyed him and he had contact with him. When invited for hearing on the matter on 28th May, 2014 the claimant failed to attend.

10. The claimant then failed to submit investigation report in the course of his work; he failed to explain why he was absent from work in divers dates; he failed to prevent loss of goods within the respondent work place; he allowed strangers to access and conduct business within the respondent premises. All these amounted to gross misconduct and when the claimant was required to show cause, he did not have a satisfactory answer. On 30th July, 2014 the claimant attended at the hearing. He failed to give satisfactory responses.

11. As the claimant was being heard over various matters of his gross misconduct, on 30th July, 2014 the respondent received 4 anonymous and malicious letters in the mail room and upon investigations it was established that the claimant was involved or had failed to follow and establish where such letter came from. A show cause was issued to the claimant and he failed to satisfactory answers.

12. The claimant was invited to a disciplinary hearing on 12th August, 2014 and there were two witnesses called. All the evidence was put into account and it was established the claimant had not been candid in his responses and a decision to terminate his employment was arrived at. There were good reasons to justify the same. The termination was lawful and the claim should be dismissed with costs.

13. At the close of the hearing, both parties agreed to file written submissions. Only the respondent filed submissions on 7th June, 2017.

Determination

Putting into account the pleadings, evidence on record and the written submissions filed by the respondent, the issues which emerge for determination are the follows;

Whether the termination of the claimant's employment was fair or unfair

Whether the remedies sought are available.

14. On 12th August, 2014 the claimant was issued with letter of summary dismissal. The same was on the grounds that he had been issued with 2 warning letters with regard to his performance and then he was implicated in the issuance of malicious letters contrary to section 44(4)(c) and (g) of the Employment Act, 2007.

15. The respondent thus invoked the provisions of section 44 of the Employment Act, 2007 to effect summary dismissal of the claimant from his employment. The claimant has challenged his summary dismissal.

16. There are several instances where an employer is allowed in law to terminate the employment of an employee. Such are matters addressed under section 35, 43 and 44 of the Employment Act, 2007. Where there is notice, where there are valid, just and reasonable grounds and where there is gross misconduct an employer is justified to terminate employment.

17. Section 44(4)(c) and (g) cited by the respondent in the letter of dismissal provides as follows;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) ...;

(b) ...;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) ...;

(e) ...;

(f) ...; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property

18. In evidence, the claimant testified that he was absent from work on various occasions having been sent to the CID offices by the wife to the managing director. He had no prior authorisation from the respondent as he took it, the nature of instructions were in the course of his boss knowledge.

19. The claimant also admitted that he allowed Mr John into the respondent premises as he was a former employee and thus he was well known by the respondent. he thus did not follow the lad down procedures in ensuring his presence in the yard was recorded.

20. The claimant also testified that various properties of the nature of Jameson drinks were lost and or stolen from the place of storage. His defence was that there were security guards who should be questioned and in any event the matter was not reported to the police who should have investigated.

21. In the first instance, the claimant by admitting that he was absent from work to attend to matters with regard to a third party and wife to the managing director of the respondent is sufficient ground for his summary dismissal under the provisions of section 44(4)(a) of the Employment Act, 2007. In the second instance, by the claimant admitting that he allowed a stranger and Mr John into the respondent premises without following due process and recording the same or having approvals required in tantamount to a fundamental breach of his employment contract and by the nature of his office was required to attend to. In the other instance, the claimant's position as the security manager held the duty and responsibility to ensure all security matters within the respondent business were well attended to and addressed. He can therefore not abdicate from such responsibility where the property of the respondent is stolen and that letters are submitted by anonymous persons at the respondent premises and to particular officers without his knowledge of connivance. Such is a serious admission of dereliction of duty by the claimant.

22. Section 41(2) of the Employment Act, 2007 requires that gross misconduct be addressed within the context that the subject employee is given a hearing with short notice. The claimant was given several warnings to various acts of misconduct, he was issued with a show cause notice and to which he responded and was invited to a physical hearing and upon consideration, the respondent found him culpable and thus the termination of employment.

23. In **Joseph Onyango Asere v Brookside Dairy Limited [2016] eKLR** the court held as follows;

*The Claimant confirmed that he was given a hearing as required under section 41(2) of the Employment Act. Though not documented, this is confirmed by the Claimant in his sworn evidence. As submitted in the case of **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** indeed internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably given a hearing to be able to give his defence.*

Noting the above, the fact that the Claimant had a dented employment record where he got a warning, the provisions of section 45(5) of the Employment Act put into account, the case of failing to abide by his supervisor's directions and challenging him to fire him, the Claimants case lack merit and cannot stand for an award of the remedies sought.

24. Similarly in this case as cited above, where the respondent as the employer issued warnings, a show cause notice and there was a hearing that is not challenged, I find internal disciplinary mechanisms were employed and the claimant given his rights at work. He had no good defence. The shop floor being the best place to source primary evidence and noting the work record of the claimant, I find the termination of employment was justified.

25. The remedies sought of notice pay and compensation are not available to the claimant. He was paid for days worked, leave days due and his pension.

Claim is hereby dismissed. Each party to bear own costs.

Delivered in open court at Nairobi this 26th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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