



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 159 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

LEVY MUZUNI CHADIKI CLAIMANT

-Versus-

WELLS FARGO LIMITED RESPONDENT

JUDGEMENT

By his Memorandum of Claim filed on 8th July, 2014 the Claimant Levy Muzuni Chadiki alleges that he was unlawfully and unjustifiably dismissed by the Respondent Wells Fargo Limited. He seeks the following remedies:

- a) The honourable court be pleased to find that the termination of the claimants employment and the continued withholding of his dues by the respondent to be unjustified, unlawful, unfair, wrongful and/or illegal.
- b) This honourable court be pleased to order the respondent to pay the claimants statutory entitlements and/or terminal dues totalling to Kshs.174,510.00.
- c) This honourable court be pleased to order reinstatement of the claimant or in the alternative award him his damages for wrongful dismissal.
- d) Cost of this suit to be borne by the Respondent.

The Respondent filed a memorandum of Reply on 1st October 2014. The Respondent avers that the Claimant was summarily dismissed for gross misconduct, that the dismissal was not unfair as alleged as it followed due process of the law, having found the Claimant guilty after a disciplinary process. It denied owing the Claimant the terminal benefits Claimed.

The case was heard on 23rd September, 2015 when the Claimant testified in the absence of the Respondent after confirming that the Respondent had been properly served with the hearing notice. The Respondent later applied and was allowed to reopen the case of the Claimant who was cross examined and re-examined on 27th October 2016 when the Respondents witness also gave evidence. The parties thereafter filed and exchanged written submissions.

The Claimant's Case

The Claimant testified that he was employed by the Respondent, a security firm, as a guard in 1993. His services were terminated on 30th August 2013. The reasons for termination of his employment was that

he was found in possession of stolen property. He testified that he was charged in Criminal Case no. 1826 of 2013 and was acquitted. The Claimant testified that apart from the Criminal Case there was no other ground of termination.

He testified that he was called to the Head Office on 20th September 2013 and accused of handling stolen goods. He was told to go back to the branch and wait for a report. He was later called after about one month and was issued with a letter of summary dismissal. He returned all company property but was not paid any terminal benefits. He was not given notice. He stated he was owed annual leave for that year which was not paid for. He was also not paid salary for August 2013.

The Claimant testified that the court convicted the person who was responsible for the theft, who was not him.

The Claimant prayed for payment of his terminal benefits. He did not wish to go back to employment but asked for the summary dismissal letter to be withdrawn. His last salary was Shs.10,116 with house allowance of Shs.1,518.

Under cross examination the Claimant stated that he was called to head office Nairobi and was charged with handling stolen property. He stated that when he arrived at the Head Office he met Mr. Kangethe, Mr. Stanley Mbai and Mr. Humphrey Were, a shop steward whom he had never met. He stated that he was interrogated by Mr. Kangethe and Mbai. He was informed that there was a report that things were stolen from Crown Bus Bungoma and he explained that the things were found in his house but not with him, that they were taken to his house by a son of his landlord called Fred, a casual labourer. He explained that he found the things in his house when he arrived from work. Fred who lived with a woman, told him that his house was locked and he did not have the key. The Claimant denied that he told Kapchanga, his colleague and co-accused in both the Bungoma Criminal case and the disciplinary hearing, that he was selling a laptop and further denied that he was the one selling the laptop. He stated that he was acquitted in the criminal case.

In the written submissions, Mr. Siganga counsel for the Claimant submitted that although section 44 of the Employment Act provided for summary dismissal, an employee was entitled to a hearing under section 41 of the Act.

It was further submitted that the Respondent having admitted that the Claimant was acquitted of the criminal charges against him in Bungoma Criminal case No. 1826 of 2013, the provisions of section 44(f) and (g) are not applicable as the Respondent did not complain that the Claimant absented himself from work as a result of his arrest and neither was the stolen items the property of the Respondent or to the substantial detriment of the Respondent. It was submitted that the alleged offence was not committed at the place of work or during working hours, nor in the Claimant's official capacity. It was submitted that the incident occurred while the Claimant was away at work and he only learned about it upon returning home from work, that it was in order for the Claimant to assist a neighbour who was also his landlord's son. Mr. Siganga further submitted that the Claimant was not present and did not question Gilbert Kapchanga on the evidence against him during the disciplinary hearing.

In support of this contention the Claimant relied on the cases of **Nicholas Otingu Muruka v Equity Bank Limited [2013]eKLR**, **Banking Insurance Finance Union (Kenya) v Consolidated Bank of Kenya Limited [2014]eKLR**, **Onesmus Omwenga Maroko v Co-operative Bank of Kenya [2013] eKLR** and **Ismail Hassan Abdullahi v Kenya Ports Authority [2013] eKLR**.

Respondents Case

The Respondent called one witness Mr. Stephen Kangethe, the Human Resource Manager who testified that he chaired the Claimants disciplinary hearing of 20th September 2013. He testified that there was a report from their Bungoma Branch Office where the Claimant was stationed, that the Claimant was arrested and some items stolen from an office across the road from the office were found in his house. The report stated that the Claimant was arrested and taken into custody for several days before he was

released on cash bail.

Mr. Kangethe testified that the Claimant was called for a disciplinary hearing on 20th September 2013 and was also asked to record a statement. He testified that the disciplinary hearing was attended by the Claimant, Mr. S.M. Mbai the Human Resource Manager in guarding section, Mr. Humphrey Were the Chief Shop steward, the Claimant and his co-accused. He testified that the Claimant was interrogated alone and then released after being informed that he will be informed of the verdict.

Mr. Kangethe testified that the Claimant informed them that the stolen goods were brought to his house by his friend. That he informed them that at around 7 am he called Gilbert Kapchanga and offered to sell him a laptop, that they agreed on a price of Kshs.15,000 with a deposit of Kshs. 4500.

He testified that Gilbert Kapchanga informed the meeting that he was going home when the Claimant called him and offered to sell him a laptop, that they met and agreed on the price. He further testified that at the hearing none of the shop stewards defended the Claimant and that the Claimant was issued with a letter of dismissal on 24th September, 2013. The reason for dismissal was that stolen items were found in his house and he was handling stolen property. He stated that the Claimant's admission was corroborated by his colleague. He testified that in the criminal case the Claimant was acquitted.

Under cross examination RW1 stated that he did not know where Bungoma office was or if the bus company from where the theft occurred was the Respondent's client. He further stated that he did not know how many employees the Respondent had in its Bungoma Office. He did not know if anybody from Wells Fargo was called as a witness in the criminal case against the Claimant. He testified that the Claimant was not housed by the respondent and the stolen property was not the Respondent's. He stated that when the Claimant is not at work he can do what he wants. He stated that he could not remember harassing the Claimant or raising his voice during the disciplinary meeting. He said there was an intervention by Mr. Were but it was not considered because of the gravity of the issue. On re-examination he stated that the Respondent being a security company integrity issues are very serious.

In the submissions filed on behalf of the Respondent it is urged that the dismissal of the Claimant was fair as he was taken through a disciplinary hearing at which he was represented by two shop stewards, and that there was valid reason for the dismissal. It is submitted that the Claimant admitted that the stolen goods were found in his house, and that the facts do not point at him being an innocent bystander whose wife was tricked into storing stolen property while he was away at work, but one who was actively involved in dealing in the stolen property. It was submitted that the actions of the Claimant amounted to an act to the detriment of the employer and undermined the integrity of the Respondent as a security organisation.

It was further submitted that the grounds enumerated in section 44(4) do not constitute comprehensive grounds for dismissal as was stated in the case of **Metah Mzee v SDV Transami t/s Bollore Logistics Kenya Ltd[2013]eKLR** where the court stated:

Strictly speaking, a plain interpretation of section 44 of the Act leaves no illusion that the conduct of the Claimant is not covered under any of the seven categories outlined in the section. But section 44(4) is not conclusive or exhaustive of what conduct would amount to gross misconduct justifying summary dismissal.

The Respondent further relied on the decision in the case of **Sophia Wanjiku Ngugi v Saida Ali & 2 Others [2013]eKLR** and **the case of Fulgence Sunza Masai v Kenya Revenue Authority[2014]eKLR** where the court defined what constitutes gross misconduct. It is submitted that the facts disclosed at the Claimant's disciplinary hearing were sufficient for the Respondent to believe that the Claimant was involved in theft.

Determination

I have considered the pleadings and the testimony of the witnesses called by the parties. I have also

considered the authorities cited.

For termination of employment to be fair the employer must prove both procedural and substantive fairness. Procedural fairness is provided for in section 41 of the Act while substantive fairness is provided for at section 43 as follows:

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. Proof of reason for termination

(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.

The only ground for the Claimant's summary dismissal is that he handled stolen property. The Respondent stated in the Memorandum of Reply that the Claimant was dismissed summarily after a disciplinary process. A copy of minutes of the meeting is annexed as one of the documents attached to the Memorandum of Defence. The minutes of the disciplinary hearing state;

"After intense deliberations, the meeting resolved that the guard and controller without any reasonable doubt were involved in handle (sic) stolen property which is criminal offence under penal code 268 sub sections 1. The company no longer has trust in them and according to Employment Act 2007 f & g. The Committee will deliberate and verdict will be given to them on Monday 23rd September, 2013."

The Claimant's show cause letter dated 13th September 2013 required him to show cause why he should not be dismissed on grounds that:

While on duty you were arrested by the police for handling stolen property, which had been stolen from Crown Bus Company at their Bungoma office, for which it is alleged that you were given by the suspect to source for a buyer.

In his written explanation which is one of the documents in the Respondent's bundle of documents the Claimant explained that the stolen items were brought to his house in his absence and he called Kapchanga at the request of Fred, his neighbour who had left the items in his house. This is also the explanation given by the Claimant at the hearing of the criminal case based on which he was acquitted.

The issues for determination are whether there was valid reason for summary dismissal of the Claimant and if the disciplinary procedure was fair.

Under section 44(4) of the Employment Act the only grounds for summary dismissal relating to criminal

charges are the following:

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; 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.

As submitted by Counsel for the Claimant there was no complaint that the Claimant was in custody for more than 14 days, the charges against the Claimant did not relate to the property of the Respondent and there is no allegation that the Respondent was prejudiced in any way by the charges. As the Claimant stated both in his response to the show cause letter and in his testimony in court, these were issues that occurred at home which had nothing to do with his work. This is the position at law as reflected by section 44(4) (f) and (g). There was therefore no valid reason for termination of the Claimant's employment merely because he had been charged with a criminal offence. This underlies the provision in the constitution that a person is presumed innocent until proved guilty. Criminal charges that have not been proved therefore do not form the basis for termination of employment. The charges and subsequent dismissal of the Claimant were therefore an affront to his constitutional right to be presumed innocent until proved guilty, a matter that was subsequently resolved by the acquittal of the Claimant.

I also find that the disciplinary hearing did not conform to fair procedure as provided in section 41 of the Act. According to the testimony of RW1 the Claimant was called alone and Kapchanga his co accused was also called alone, meaning that the Respondent took evidence from both of them in the absence of the other, thus they were not allowed to hear and controvert the evidence against them by their co-accused, which evidence was used to find them guilty. Second, RW1 stated that they ***interrogated*** the Claimant and Kapchanga. An interrogation and a hearing are not the same. It means the Claimant was asked questions by the Respondent's representatives and his responses were used to condemn him. He was not allowed to state his cases.

Further, the Claimant stated that he did not know Humphrey Were, the shop steward. This means he did not have an opportunity to prepare for the disciplinary hearing with the shop steward and the shop steward was not able to make representations on his behalf as also confirmed by RW1 who stated that the shop stewards did not defend the Claimant.

The dismissal was thus unfair both procedurally and substantively.

Remedies

The Claimant prayed for gratuity, annual leave, pay in lieu of notice, salary for September, 2013 and compensation. The Respondent's submissions that the Claimant is not entitled to gratuity because he was a member of NSSF is misplaced as the Regulation of Wages (Protective Security Services) Order provides for gratuity at 18 days per year worked with a qualifying period of 5 years service. The Respondent did not adduce any evidence to prove that the Claimant took leave in 2013.

The Claimant is entitled to one month salary in lieu of notice at Shs.11,634/-. He is also entitled to salary up to the date of dismissal that is 30th September, 2013 when he received the letter of dismissal dated 24th September, 2013 less Shs.2,752 paid in the Claimant's payslip for August 2013. This amounts to Shs.20,941.20/-. He is entitled to leave for 2013 up to August being 14 days at Shs.5,429. The Claimant is also entitled to gratuity at 18 days pay per year worked for the period of 20 years that he worked for the Respondent as provided in the Regulation of Wages (Protective Security Services) order at Shs.139,608/-.

Having been unfairly terminated, and taking into account his length of service, his clean record and all relevant circumstances, I award the Claimant maximum compensation being 12 months' salary at Shs.139,608/-.

Conclusion

In conclusion I find and declare that the summary dismissal of the Claimant was unfair both procedurally and substantively and award him Kshs.317,220.20. The Respondent shall also pay Claimant's costs.

Dated, delivered, Signed in open Court in Kisumu this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE