



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 160 OF 2015

BETWEEN

1. RICHARD OUMA MUSEWE

2. FREDRICK ONYANGO AMUNGO.....CLAIMANTS

VERSUS

TEA WAREHOUSE LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimants

Muturi Gakuo & Kibara Advocates for the Respondent

JUDGMENT

1. The Claimants filed their joint Statement of Claim on 25th of March 2015. They state they were employed by the Respondent. The 1st Claimant was employed as a Forklift Operator in February 2007. His contract was terminated by the Respondent on 24th October 2013. His last salary was Kshs. 27,984. The 2nd Claimant was employed as a Sorting Machine Clerk. He worked from the year 2009. He was placed on contract in February 2013. His contract was terminated by the Respondent on 14th October 2013. His last salary was Kshs. 17,423.

2. Both Claimants were dismissed on the allegations that they were involved in theft of Respondents 10 bags of blended tea. They were arrested on 12th October 2013 upon complaint against them, made to the Police by the Respondent. They were charged and tried in the Magistrate's Court Mombasa. They were acquitted. Their contracts were terminated on the date they were arraigned in Court, on 14th October 2013. They state they were not heard by the Respondent, as provided for under Section 41 and 45 of the Employment Act 2007. They pray for Judgment against the Respondent for: notice pay of 1 month salary; annual leave pay; pro-rata leave; leave traveling allowance; balance of contract period; and compensation the equivalent of 12 months' salary. In total, they ask the Court for a sum of Kshs. 1,123,479. They also pray for a declaration that termination was unfair; the Respondent issues Certificates of Service to them;

costs; interest; and any other suitable relief.

3. The Respondent filed its Statement of Response on 15th October 2015. It is conceded the Claimants were employed by the Respondent, in the positions given in their Statement of Claim. On 4th October 2013, 10 bags of tea went missing from the Respondent's Warehouse. All Employees on day and night duty on 3rd/4th October 2013 were investigated. The Claimants were arrested and charged upon questioning by the Police. The Respondent lost trust and confidence in the Claimants. Termination was fair. Respondent prays for dismissal of the Claim, with costs to the Respondent.

4. The 1st Claimant gave evidence on 11th July 2016, the 2nd, on 20th February 2017 when Claimants rested their case. A Supervisor in the Maintenance Department, Joseph Macharia Muraguri, and a Clerk Morris Essendi Eboso, gave evidence for the Respondent on 20th February 2017. Managing Director George Patrick Nesbitt gave evidence for the Respondent on 28th March 2017 bringing the hearing to a close. The dispute was last mentioned on 19th June 2017, when Parties confirmed the filing of their Submissions.

5. The 1st Claimant told the Court the Respondent is a Tea Exporter. It has a Warehouse at Shimanzi, Mombasa. The 1st Claimant worked as a Forklift Operator. He was granted the first written contract of employment in 2008, which was renewed in January 2011, and lastly renewed in January 2013. 1st Claimant exhibited the various contracts.

6. The 1st Claimant worked in the night shift of 3rd and 4th October 2013. Other Employees were blending different grades of tealeaves. He was told by the Human Resource Officer Bakari, that bags of tea got lost during 1st Claimant's shift. He was asked to report to Makupa Police Station alongside other Employees who worked the particular shift. They were thrown in police custody upon presenting themselves at the Police Station. He was bailed on 17th October 2013. He went to work on release, and was served with the letter of summary dismissal. It was not possible to steal 10 bags of tea. Each bag weighed 65 kilograms.

7. The Criminal Case is still going on. Termination was unfair. The 1st Claimant was not called to any disciplinary hearing. Leave travelling allowance was provided for under his contract. It was wrong to justify termination on the basis of ongoing Criminal Case.

8. The 1st Claimant used to carry bags of tea using his Forklift. He was on night shift on 3rd and 4th October 2013. 30 Employees were on duty. 3 persons, who included the Claimant, Bernard and Richard, operated the Forklift. Other Employees were cleaning and blending tea. 3 Employees were charged in Court. The Criminal Case is pending. Police did not investigate. They just placed the Claimants in custody upon the complaint lodged by the Respondent. The 1st Claimant recorded a Statement at the workplace. It did not satisfy the requirement of an opportunity to be heard. Redirected, the 1st Claimant told the Court the letter of summary dismissal did not state the 1st Claimant stole; it stated the Respondent had lost confidence in the 1st Claimant.

9. The 2nd Claimant told the Court he was involved in blending of tea, on the night of 3rd October 2013. 17 bags of tea were lost during loading. The Human Resources Officer called Employees involved in the particular shifts, and recorded their Statements. They were then asked to report to Makupa Police Station and locked up. They were taken to Court. On going back to work, they were issued letters of summary dismissal. There was no internal investigation and no disciplinary hearing. 2nd Claimant agreed on cross-examination that bags of tea were stolen during his shift. The Criminal Case ended in the Claimants' acquittal. He did not have a copy of the Judgment of the Criminal Court. His contract provided for instant dismissal. He received the letter of summary dismissal.

10. Joseph Macharia Muraguri confirmed the Claimants were employed by the Respondent. The Claimants handled the lost bags of tea from Go-down 1 to Go-down 2. There were 17 to 20 bags lost.

Cross-examined, Joseph told the Court he did not witness loss of tea. He was not able to say from which Go-down, the bags of tea were lost. He confirmed on redirection that bags of tea were lost while being handled by the Claimants.

11. Eboso served as Clerk with the 2nd Claimant. The 1st Claimant was a Forklift Operator. Eboso reported to work on 4th October 2013. 960 bags of tea were received. He found out 17 bags had gone missing while loading. He reported to the Supervisor. Claimants were in the shift which handled the missing bags. He told the Court on cross-examination that he received 14 bags from the Blending Supervisor, on 5th October 2013. Management did not know who had kept these 14 tea bags, before 5th October 2013. Wambua was the Blending Supervisor. He was not charged. Eboso emphasized on redirection that he did not know where the 14 bags emerged from.

12. Managing Director Nesbitt told the Court it was realized 10 bags were missing on 4th October 2013. The Respondent reported loss to Makupa Police Station. Due process was followed. 4 Employees, including the Claimants, were charged with the offence of stealing. The Respondent issued letters of summary dismissal on 14th October 2013. The Respondent summarily dismissed the Claimants having lost trust in them. Nesbitt did not know the outcome of the Criminal Case.

13. On cross-examination, the Witness told the Court his Company could not continue to work with the Claimants, having lost confidence in them. He was aware the Claimants were presumed innocent until shown to be guilty. He left the process to the criminal justice system. He did not know what became of the lost bags. Eboso stated 14 bags were recovered. 10 bags had been reported missing. Blending Supervisor advised Eboso 14 bags had been found. Nesbitt did not know where these came from. Police Abstract on the incident at page 17 of the Reply to the Claim, states 21 bags were lost. The Claimants were availed due process. They recorded statements. This amounted to a fair hearing. Nesbitt did not have minutes of any disciplinary hearing. He did not recall if the Claimants were charged at the workplace. Bags of tea, regardless of their numbers, went missing. The Claimants were given a chance to explain themselves. They did not give satisfactory explanation. They were fairly dismissed.

The Court Finds:-

14. It is agreed the Respondent is a Tea Exporter, with a Warehouse within Shimanzi, Mombasa. The Claimants were employed by the Respondent at this Warehouse, on dates shown in their Statement of Claim. They worked as Forklift Operator and Clerk respectively, earning the amounts stated in their evidence as their last rate of monthly salary. They left employment on summary dismissal, on 14th October 2013, after they were charged at the Magistrate's Court Mombasa, with theft of Respondent's bags of tea. Theft is said to have taken place on the nights of 3rd and 4th October 2013.

15. There is no clear evidence on the outcome of the Criminal Case. One Claimant testified the trial is ongoing, while the other claimed, but was not able to supply the Court with a copy of the relevant Judgment, that the Claimants were acquitted. The Respondent's Witnesses did not know about the outcome.

16. The Criminal Case however would only be relevant to the administrative process at the workplace, if it was adopted as part of the disciplinary process through the Claimants' contracts of employment; workplace human resources manual; letters of suspension; a relevant law; or applicable workplace labour instrument such as a Collective Bargaining Agreement. The Court has seen nothing on record, to bar the Respondent from proceeding with its internal process, culminating in the summary dismissal of the Claimants. There was nothing shown to the Court requiring the Respondent to abide the outcome of the criminal process.

17. The Respondent was required to show that it followed the minimum standards of fair termination, contained in Section 41, 43 and 45 of the Employment Act. There was an obligation to show valid reason for termination, and show the procedure was fair.

18. The Respondent did not establish the number of bags of tea said to have been stolen on the nights of 3rd and 4th October 2013. The Claimants and Clerk Eboso testified 17 bags were alleged to be missing. Joseph Macharia stated there were 17 to 20 bags. He did not witness the loss. He was not able to say from which Go-down the bags were stolen. Eboso's evidence was that Management stated 10 bags were missing. He was given 14 bags by the Blending Supervisor on 5th October 2013, a day after 17 or 10 bags were reported missing. Nesbitt himself, who is the Managing Director and expected by virtue of his position, to give clear and persuasive evidence, stated 10 bags went missing. He acknowledged on cross-examination that Eboso stated he was given 14 bags by the Blending Supervisor. Nesbitt did not know where these came from. The report to the Police was that 21 bags were stolen.

19. The Respondent did not discharge its burden of persuasion under Sections 44[4] [g] and 47 [5] of the Employment Act 2007. It was not shown that the Claimants committed or on reasonable grounds were suspected of having committed a criminal offence against, or to the substantial detriment of their Employer, or Employer's property. With the number of missing bags inconsistently given; by failing to account for the bags given to Eboso by the Blending Supervisor; the Respondent cannot be said to have had reasonable ground to suspect the Claimants of stealing bags of tea. Even assuming the number was consistently stated, and 14 bags received by Eboso explained, there was no evidence, nothing at all, linking the Claimants to the disappearance of the bags. All the Court was told was that one Claimant was a Forklift Operator, the other a Clerk. Where is the evidence linking them with an employment offence at the workplace? It must be understood by the Parties however, that the Criminal Case is a separate trial from the proceedings herein, and the two processes do not have effect on each other. It would be wrong for the Claimants to leave this Court under the impression that this Court has absolved them of criminal wrong. The decision whether they committed a criminal offence must be left to the Criminal Court, if such decision has not been delivered as yet. From our end, it is concluded there was no substantive justification, in summarily dismissing the Claimants.

20. There was no disciplinary hearing at workplace before the summary dismissal decision was arrived at. The Respondent merely took statements from suspects, then surrendered the suspects to the criminal justice system. They were arrested and taken to Court. On being bailed they went back to work and were handed down summary dismissal letters. There was no hearing. Recording of statements is not a hearing. It is part of the investigatory process. The Respondent was required to place charges before the Claimants, at the end of investigation, and call them to a disciplinary hearing afterwards. It was not sufficient to allege the Respondent had lost trust and confidence in the Claimants. Such loss of trust and confidence needed to be shown through a formal disciplinary hearing. An Employee who by his conduct indicates fundamental breach of his obligations arising under the contract of service may be summarily dismissed under Section 44[3] of the Employment Act. This however is subject to other provisions of the Act such as Section 41, 43, 45 and 47. Termination was unfair for want of valid reason, as well as fairness of procedure.

21. ***It is declared termination was unfair.***

22. ***The Claimants are granted the equivalent of 8 months' salary each, in compensation for unfair termination.***

23. ***They are allowed the prayer for 1 month salary in lieu of notice.***

24. The 1st Claimant was entitled to 24 days of annual leave, and Kshs. 4,600 as leave traveling allowance, under his contract. He prays for annual leave pay and annual leave traveling allowance, based on 7 years of service. In his Witness Statement however, he states he did not go for annual leave, in the year 2013. He does not mention which other years he did not go on leave. His evidence in Court similarly did not give details of his annual leave balance. ***The Court shall allow him annual leave pay of 1 year and leave traveling allowance of 1 year.***

25. The 2nd Claimant prays for pro-rata annual leave and balance of the contract period. He said nothing in his evidence on pro-rata leave, and balance of contract. The Court has granted him compensation for unfair termination. There would be no justification to claim salaries for the balance of his contractual

period. He did not come out clearly on pro-rata leave. These prayers are declined.

IN SUM, IT IS ORDERED:-

a) It is declared termination was unfair.

b) The Respondent shall pay to the 1st Claimant: equivalent of 8 months' salary in compensation for unfair termination at Kshs. 223,872, 1 month salary in lieu of notice at Kshs. 27,984, leave traveling allowance at Kshs. 4,600, and annual leave pay of 24 days at Kshs. 25,554- total Kshs. 282,010, and to the 2nd Claimant: equivalent of 8 months' salary in compensation for unfair termination at Kshs. 139,384, 1 month salary in lieu of notice at Kshs. 17,423- total Kshs. 156,807.

c) In total the Respondent shall pay to the 2 Claimants Kshs. 438,817.

d) Certificates of Service to issue.

e) No order on the costs.

f) Interest allowed to the Claimants at 14% per annum from the date of Judgment.

Dated and delivered at Mombasa this 15th day of September 2017.

James Rika

Judge