



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 450 OF 2015**

**BETWEEN**

**CHARLES KIIKU MULI.....CLAIMANT**

**VERSUS**

**FIVE FORTY AVIATION LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Oduor Siminyu & Company Advocates for the Claimant*

*Mungu Kimetto & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 8<sup>th</sup> July 2015. He states he was employed by the Respondent Aviation Company, as a Cleaner-cum-Messenger, on 1<sup>st</sup> March 2012. His last monthly salary was Kshs. 18,000. He was arrested on 30<sup>th</sup> January 2013, and charged in Mombasa Chief Magistrate's Court in Criminal Case Number 365 of 2013, with the offence of attempted stealing from Respondent's locked safe. He was released on cash bail on 6<sup>th</sup> February 2013. He went back to work, but was locked out by the Respondent. His trial ended in acquittal on all counts, on 11<sup>th</sup> December 2014. He again asked to be allowed to continue working. The Respondent refused to continue employing the Claimant. He prays the Court to find that the Respondent terminated his contract unfairly, and pay him the following:-

- a) Salary in lieu of notice at Kshs. 16,480.
- b) Salary for the period of suspension at Kshs. 379,040.
- c) 12 months' salary in compensation for unfair termination at Kshs. 197,760.
- d) Costs and interest.

2. The Respondent filed its Statement of Response on 18<sup>th</sup> September 2015. The Respondent concedes to have employed the Claimant on the date, and in the position stated in the Claim. He did not complete 12

months in employment. He was summarily dismissed on 5<sup>th</sup> February 2013. He received his letter of summary dismissal on 6<sup>th</sup> February 2013, but declined to acknowledge receipt. Summary dismissal was well grounded on Section 44 [3] and 44[4] [g] of the Employment Act 2007, the Claimant having attempted to break in the Respondent's safe. He confessed and admitted the offence to his Superiors, whereof the break in was reported to the Police. The Respondent stresses that its decision was justified under the Employment Act 2007 and Article 7 of ILO Termination of Employment Convention of 1982. The Respondent urges the Court to dismiss the Claim; declare termination was fair and lawful; and order the Claimant to return all Respondent's belongings in Claimant's custody.

3. The Claimant gave evidence on 13<sup>th</sup> March 2017. Respondent's Senior Sales Executive Rama Hassan Gutsi gave evidence on 28<sup>th</sup> June 2017 when proceedings closed. The matter was last mentioned on 28<sup>th</sup> July 2017 when Parties confirmed the filing of their Submissions.

4. The Claimant restated his employment history, terms and conditions of service, as outlined in his Pleadings. He added that on 30<sup>th</sup> January 2013, he was sent to buy milk for use in the Office. Joyce Muiya, the Ticketing Clerk had opened the Office. 4 other Employees, including the Claimant arrived in the Office at the time it was opened. The Claimant was asked to go for milk.

5. On return, his Colleagues alleged there was something inserted in the safe. They alleged the Claimant had inserted something in the keyhole to the safe, and had attempted to steal. Police Officers were called in. He was arrested. He was charged with the offence of attempted theft. He arraigned in Court on 31<sup>st</sup> January 2013. He was acquitted on 11<sup>th</sup> December 2014. He left prison custody on bail, on 6<sup>th</sup> February 2013. He went to work and was told he had been sacked. There was no letter of termination.

6. He did not appear before Acting Office Manager on 31<sup>st</sup> January 2013, as alleged by the Respondent. He was in custody. He never sat with Management and deliberated on the allegation against him, before dismissal, as alleged in the letter of dismissal. Release Order shows he left custody on 6<sup>th</sup> February 2013. He did not admit anywhere that he attempted to steal. He never acknowledged the letter of summary dismissal. He was never told his contract had been terminated. He wrote demand letters to be allowed to return to work. He was never recalled. He denied on cross-examination that he confessed to Mildred and others that he attempted to steal from the safe.

7. Rama told the Court he was with his Colleagues at the Office on 31<sup>st</sup> January 2013. Mildred normally opened the safe. She banked the proceeds. On this occasion she was not able to open the safe. She found a small piece of key, stuck in the safe's keyhole. The Claimant confessed to his Colleagues that he attempted to open the safe, but was unsuccessful. Rama called Respondent's Security Manager from Nairobi. The Security Manager advised Rama to call in the Police. The Claimant was arrested and charged with the offence of attempted theft. The Claimant was summarily dismissed. Dismissal was fair and lawful.

8. Rama told the Court on cross-examination that he was present when all this happened. Attempted stealing happened in the morning of 31<sup>st</sup> January 2013. The Claimant was arrested on the same date. Charge Sheet states date of arrest was 30<sup>th</sup> January 2013. Rama reaffirmed the incident took place on 31<sup>st</sup> January 2013. The Claimant confessed even before the Police. The Claimant and Mildred had wrangles. The Claimant's relationship with Office Manager Judy Kabita was cordial. The Claimant was a Cleaner. He had a bad relationship with Mildred. It was Mildred who found the lock in the safe had been interfered with. Dismissal letter issued from the Head Office on 5<sup>th</sup> February 2013. It was served on the Claimant from Respondent's Office in Mombasa. Rama was not able to say if the Claimant was served with, and received the letter of summary dismissal. The Respondent did not give the Claimant a hearing. Redirected, Rama testified the Claimant may have tried to open the safe on 30<sup>th</sup> January 2013, or 31<sup>st</sup> January 2013.

**The Court Finds:-**

9. The letter of employment dated 1<sup>st</sup> March 2012 shows the Claimant was employed by the Respondent Aviation Company as a Cleaner/ Messenger at Mombasa. He was alleged to have attempted to break into Respondent's safe. According to him the incident happened on 30<sup>th</sup> January 2013. The Respondent's evidence is that the incident took place on 31<sup>st</sup> January 2013 in the morning and the Claimant was arraigned in Court the same date. Redirected however, Respondent's Witness vacillated, testifying the incident may have happened on either date.

10. The Claimant was taken through a criminal trial between 31<sup>st</sup> January 2013 and 11<sup>th</sup> December 2014. He was eventually acquitted. The Respondent declined to return the Claimant to work when the criminal trial was going on, and after the Claimant was acquitted. It was alleged that the Claimant confessed to his Colleagues and to the Police that he had attempted to steal.

11. The Employment Act 2007 requires the Employer to show valid reason in terminating a contract of employment, and show fair procedure has been followed.

12. Starting from the back, it can easily be concluded that the Respondent did not satisfy the fair procedure test. Rama boldly stated on cross-examination that the Respondent did not give the Claimant a hearing. This was contrary to the dictates of the law under Section 41 and 43 of the Employment Act 2007. The letter of summary dismissal is dated 5<sup>th</sup> February 2013. It was issued by a Director from Nairobi. The Claimant was still in custody when the letter issued. The Claimant denies ever receiving this letter. Rama could not confirm whether the Claimant was served with the letter, and whether he received it. There were no charges presented to the Claimant. He was not advised of his procedural rights and guarantees under Section 41 of the Employment Act 2007. Rama confirmed there was no hearing at all, let alone a fair hearing. Termination was unfair under the first test on procedure.

13. The Respondent justified its decision on the ground that the Claimant confessed attempting to steal. It was the evidence of Rama that there was bad blood between the Claimant and Mildred. Mildred was the custodian of the safe. It was she who discovered there was attempted theft. The presence of bad blood between the 2 ought to have informed the Respondent to carry out investigations on the incident with greater circumspection. The bad blood was shown to exist also, in the criminal proceedings. The Respondent rushed to accept the story as told by Mildred, while not listening to the Claimant and evaluating carefully whether Mildred was driven by ulterior motive. The Court has considerable doubt about Respondent's justification. Given the presence of bad blood between 2 Co-Employees who were the principal players in the incident, the Respondent cannot be said without equivocation, to have had reasonable ground to suspect the Claimant of attempted theft. The criminal trial was told that Mildred had wondered how the Claimant got employed by the Respondent, and that she would ensure she brought her brother to work for the Respondent. In such a poisoned atmosphere, the Respondent needed to handle the incident with greater circumspection. It was the wrong approach to merely accept that the Claimant had confessed to Colleagues and the Police. There were no statements shown in Court of confessions made by the Claimant at any forum. He denied accusations against him before the Magistrate's Court. He was acquitted. Although Judgment of the Criminal Court does not bind this Court, the Respondent should have offered some evidence showing why the criminal trial ended in acquittal. Overall the Court does not find that there was any valid reason in terminating Claimant's contract. Termination under the second test was likewise unfair.

14. The Claimant's salary, as shown in the letter of employment, was Kshs. 18,000 per month. He had worked for about 11 months. ***He is granted the equivalent of 5 months' salary in compensation for unfair termination at Kshs. 90,000.***

15. ***Notice pay of 1 month salary is allowed at Kshs. 18,000.***

16. The Claimant did not establish that he was under suspension over the period of the criminal trial. The Respondent severed its relationship with him, the minute he was arrested by the Police and arraigned in Court. A letter of summary dismissal was written by Respondent's Director on 5<sup>th</sup> February 2013. There is no evidence as seen above, that this letter was received and acknowledged by the Claimant. The

Claimant however pleads at paragraph 2.8 of his Statement of Claim that the Respondent confirmed to him, that the Respondent had summarily dismissed him, when the Claimant went to the Head Office to find out about his fate. This was at the commencement of his criminal trial. He ought not to have been any longer in doubt, whether he was still in employment. It was confirmed to him he was not. The failure to serve him with the letter of summary dismissal was a procedural issue, which would not affect the fact that the Claimant was no longer in employment, in light of the verbal communication he received from the Respondent at the Head Office. He was not under suspension over the period of the criminal trial. His prayer for salary arrears over this period is misplaced and is rejected.

17. No order on the costs.

18. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) It is declared termination was unfair.***

***b) The Respondent shall pay to the Claimant the equivalent of 5 months' salary in compensation for unfair termination at Kshs. 90,000; and 1 month salary in lieu of notice at Kshs. 18,000- total Kshs. 108,000.***

***c) No order on the costs.***

***d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

Dated and delivered at Mombasa this 24<sup>th</sup> day of October 2017.

**James Rika**

**Judge**