



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2292 OF 2015

FRANCIS KAMENDI..... CLAIMANT

VERSUS

KENYA BREWERIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Francis Kamendi, the Claimant in this case, was an employee of Kenya Breweries Limited. He brought this claim following the termination of his employment on 22nd July 2014. The claim is contained in a Memorandum of Claim dated 21st December 2015 and filed in court on 23rd December 2015.

2. The Respondent filed a Memorandum of Defence on 1st April 2016. By consent of the parties, the matter proceeded by way of written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 5th September 2005. He worked in various capacities and at the time of his termination, he held the position of Beer Planner in which he earned a monthly salary of Kshs. 218,735.24.

4. Sometimes in March 2015, the Respondent's Managing Director informed all employees, including the Claimant that the Company would embark on an organization review process, which would result in the creation of new roles, and some existing roles being declared redundant. The Managing Director notified all employees that they were at liberty to apply for the new positions. The unsuccessful employees would be offered a severance package in line with the Respondent's policies and labour laws.

5. The Claimant states that after the restructuring, he was confirmed to the position of Beer Planner, effective 14th April 2014. However, on 22nd July 2015, the Claimant was notified by his line manager that he would be retrenched. He was served with a termination notice on 23rd July 2014.

6. It is the Claimant's case that the Respondent acted contrary to and in breach of the Employment Act. The Claimant further claims that he was not paid his terminal dues. He now claims the following

- a. A declaration that the termination of his employment was unlawful and unfair
- b. Severance pay as per company policy @ 2 & ½ months' pay per year...Kshs. 4,921,542.10

- c. 12 months' salary in compensation.....2,624,822.88
- d. 1 month's salary in lieu of notice.....218,735.24
- e. Certificate of service

The Respondent's Case

7. In its Memorandum of Defence dated 1st April 2016 and filed in court on even dated, the Respondent admits having employed the Claimant from 5th September 2005 until 23rd July 2014. The Respondent states that the termination of the Claimant's employment was due to the Claimant's failure to ensure safe custody of the Respondent's motor vehicle registration number KBJ 979Q. The Claimant's failure led to an unauthorized person taking possession of the said motor vehicle, from 10th to 15th March 2014 and making an unauthorized trip from Nairobi to Kisii and back.

8. The Respondent avers that from investigations and the Claimant's own admission, the Respondent's motor vehicle registration number KBJ 979Q was in the possession of an unauthorized person, one Jasper Nduko who used the motor vehicle to travel from Nairobi to Kisii and back. This happened between 10th and 15th March 2014, when the Claimant was engaged as the Fleet Manager within the Respondent's Sales function.

9. The Respondent states that the Claimant failed to ensure that motor vehicle registration number KBJ 979Q was not used contrary to the Respondent's operating procedures. The Respondent adds that the Claimant admitted having allowed unauthorized persons to drive the Respondent's motor vehicles on many occasions, without any reference to his line manager. The Respondent denies that the Claimant was declared redundant as alleged. Rather, his employment was terminated on account of misconduct.

10. Regarding the procedure adopted before the termination, the Respondent states that investigations conducted with respect to the movement of motor vehicle registration number KBJ 979Q, revealed unauthorized movement from Nairobi to Kisii and back, between 10th and 15th March 2014. The Claimant was subsequently issued with a show cause letter dated 26th May 2014, detailing acts of gross misconduct and requiring him to respond within 4 days.

11. The Claimant responded to the show cause letter admitting that the Respondent's motor vehicle registration number KBJ 979Q was in possession of an unauthorized person by the name Jasper Nduko who drove it from Nairobi to Kisii and back between 10th and 15th March 2014.

12. The Claimant attended a disciplinary hearing on 5th June 2014, after which he was informed that further investigations would be conducted, on issues raised by him as to the exact location of the motor vehicle between 1st and 16th March 2014.

13. The Respondent avers that after further investigations, the Claimant was invited to a further disciplinary hearing on 10th June 2014. After this hearing, the Claimant asked for time to carry out his own investigations. However, on the same day, he sent an email to the Respondent, indicating that the disciplinary panel could go ahead and make a decision based on his submissions already on record.

14. The Respondent states that by the conclusion of the two disciplinary hearing sessions, the Claimant had not exonerated himself of the charges made against him. The Claimant was therefore issued with a termination letter on 22nd July 2014. He was issued with a certificate of service dated 23rd July 2014. He was also paid one month's salary in lieu of notice.

15. It is the Respondent's case that the Claimant is not entitled to any of the reliefs sought as he was lawfully and fairly terminated from employment for valid and justifiable reasons and in accordance with due process.

Findings and Determination

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

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

17. The Claimant's employment was terminated by letter dated 22nd July 2014, stating as follows:

"Dear Francis,

RE: TERMINATION OF EMPLOYMENT CONTRACT

Further to discussions between yourself and your line manager, this is to confirm that your employment with the company terminates on 23rd July 2014.

Your terminal dues will be calculated as follows:

- 1. 1 month's salary in lieu of Notice.*
- 2. Pay in lieu of 36 Leave Days.*
- 3. Refund of all monies due to you under the rules of the EABL Retirement Benefits Scheme (2003).*
- 4. Refund of your personal contribution monies due to you under the rules of the Share Save Scheme.*

Please arrange to surrender to your line manager any Company property currently in your possession and commence formal clearance from the Company,

Yours faithfully,

For: EAST AFRICAN BREWERIES LIMITED

(Signed)

NJERI NJENGA

HR BUSINESS PARTNER

18. Prior to this letter, the Claimant had been issued with a Memorandum dated 26th May 2014, stating as follows:

"SUBJECT: IRREGULAR MANAGEMENT OF COMPANY VEHICLE *Following investigations after an incident where a G4S Guard was involved in an accident while driving a company vehicle, it has been noted that in March 2014, while you were assigned the role of Fleet*

Manager, within the Sales function, a G4S guard by the name of Jasper Nduko had access a (sic) company vehicle registration number KBJ 979Q, which is a vehicle assigned to the Sales Function.

It has been established from the EABL Company Vehicle Release/Return/exchange records that

this vehicle was initially assigned to a Trade Developer, Fridah Makandi who returned it on 12th February 2014 and it was thereafter assigned to Eunice Murigi on 17th March 2014.

It has also been established that during the period between 12th February to 17th March 2014 (sic), the vehicle had not been allocated to anyone and therefore should have been parked at the staff car park or at the Tusker Village.

Investigations have revealed that Jasper Nduko used this vehicle between 11th March 2014 and 15th March 2014 to go to his home area in Kisii. A review of the motor vehicle report for KBJ 979Q confirms that the vehicle was in use on these dates and was driven from Nairobi to Kisii.

As the Fleet Manager during the period in question, you failed to ensure safe custody and management of the company vehicles and thereby inappropriately allowed an unauthorized person to use the company vehicle.

Please let us have your explanation on this lapse in your failure to ensure accurate reporting of the incident as per the laid down procedures.

Your explanation should be received by the undersigned not later than 30th April 2014

(Signed)_

EMMANUEL KARIUKI

19. In his response to the Memorandum dated 26th May 2014, the Claimant states that Jasper had admitted using the subject motor vehicle to travel to Kisii, without permission. The Claimant denies sanctioning the unauthorized use of the motor vehicle.

20. What is clear from this correspondence is that the termination of the Claimant's employment was triggered by an unauthorized use of the Respondent's motor vehicle registration number KBJ 979Q. The Court did not find any evidence that the termination was on account of redundancy. The Claimant chose not to testify and the Court was therefore unable to establish the basis of his averment that he was declared redundant.

21. Further, from the documentary evidence placed before the Court, it is evident that the unauthorized motor vehicle use complained of took place when the Claimant was the Fleet Manager for the sales function. In my view, this would constitute a valid reason for the termination as contemplated under Section 43 of the Employment Act, 2007. Additionally, the Court found that prior to the termination, the Claimant was subjected to the mandatory disciplinary procedure set out under Section 41 of the Act.

22. In light of the foregoing findings, the Court has reached the conclusion that the Claimant's claim is without basis. The result is that the entire claim fails and is dismissed with costs to the Respondent.

23. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF NOVEMBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Nzaku for the Claimant

Miss Oyombe for the Respondent