



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**CAUSE NUMBER 849 OF 2013**

**JAPHET NYABERI MARANGA.....CLAIMANTS**

**VERSUS**

**KENYA POWER LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant averred that he was employed by the respondent on 9<sup>th</sup> February, 2009 as a driver. On or about 22<sup>nd</sup> September, 2011 he was suspended from duty on the allegations that he was involved in the loss of the respondent's motor vehicle registration number KBJ 528U.

2. The claimant further averred that upon his acquittal from the subsequent criminal charges he was reinstated to work but on 23<sup>rd</sup> July, 2012 the respondent demanded further explanation on the alleged loss of motor vehicle. In response the claimant wrote back and explained his position. The claimant services were subsequently terminated. According to the claimant the sole and singular reason for terminating his services was due to the loss of respondent's vehicle. The claimant therefore averred that he had been charged with the stealing of the said vehicle but was found innocent and subsequently acquitted under section 202 of the criminal procedure code.

3. The respondent on its part pleaded that on 27<sup>th</sup> August, 2011 while on duty in Malindi, the claimant parked the respondent's vehicle KBJ 528U which had been allocated at Kilifi substation with the doors unlocked and also failed to book the vehicle as is the procedure and when asked by the guard to do so he declined saying the vehicle would leave for Mombasa later that evening. The respondent further pleaded that on 28<sup>th</sup> August, 2011 the claimant attempted to book the vehicle but the guard refused to countersign the form because the procedure would have been done the previous day. Following the occurrence the respondent's said vehicle valued at kshs 3.5 million was Lost. The respondent carried investigations and it was established that the claimant had committed a series of deliberate professional omissions and commissions to facilitate the loss of the vehicle.

4. These included approaching the transport superintendent alleging he had locked his vehicle keys in the car and needed spare keys to open which he was given but never returned. Second at Kilifi substation he refused to book the vehicle on the register and impressed upon the guard that the vehicle would be leaving later that evening to Mombasa. The respondent further averred that the claimant was issued with a show cause letter prior to his dismissal as required by law and he responded to the same stating the issues detailed in the show cause letter were the same as those that had been presented in court in the Criminal Case No 913 of 2011 and the court found him with no case to answer.

5. The respondent further averred that the claimant was later invited to a disciplinary hearing on 9<sup>th</sup> July, 2012 accompanied by the Secretary general of his union and a shop steward. According to the respondent, the claimant failed to exonerate himself and a decision was made to summarily dismiss him. In his oral evidence, the claimant repeated most of the averments in the memorandum of claim and added that he registered the vehicle upon entry and exit at Kilifi substation.

6. According to him he booked the vehicle for two days and on the third day it disappeared. It was his evidence that the security guard told him the vehicle was collected by some people from Mombasa at night. He informed the transport manager who told him the vehicle would be tracked and further advised him to report the issue to Kilifi Police Station. He further stated that he was later arrested and charged but the case was dismissed for lack of witnesses.

7. In cross-examination he denied parking the vehicle and leaving the doors open. He admitted that he attended the disciplinary hearing and signed the minutes. At the hearing he said he relied on his previous statements and had nothing to add. The respondent's witness Mr Joseph Kabuto stated that he was the respondent's human resource officer. He stated that the claimant was dismissed from service due to negligence leading to loss of respondent's motor vehicle. According to the witness, the claimant did not book the vehicle when he parked nor left the keys with the guard as required. The claimant further delayed in reporting the loss of the vehicle.

8. The claimant was suspended to allow for investigations. He was later issued with a show cause letter but he never responded to the show cause letter insisting the matter was subject of criminal investigations. The committee therefore concluded the claimant was culpable and recommended his dismissal. In cross-examination he stated that he did not participate in the investigations and further that he was aware that a statement was recorded from the guard on duty.

9. It is not in dispute that the reason for the claimant's dismissal was as a result of the loss of the respondent's motor vehicle which was attributed to the claimant's negligence. The claimant has denied he was negligent and relied on the fact that he was acquitted of criminal charges over the same issue. The claimant does not deny that he was issued with a show cause letter to which he responded to tersely saying all he had to say was that a court of law had found him with no case to answer. He attached a copy of the court's ruling as evidence.

10. A dismissal or termination of employment entails two stages. First an employer must have a valid and or justifiable reason to dismiss and second, in carrying out the process, the employer must ensure it is carried using a fair procedure the most important which is that such an employee must be given a fair opportunity to defend himself.

11. The test for validity or justifiability of reason for dismissal is on a balance of probabilities. The question is usually whether a reasonable employer faced with the evidence or allegations would reach the conclusion that it was more probable than not that the allegations against the employee concerned took place or are true. Further whether dismissal is an appropriate remedy will also be tested on the scale of a reasonable employer. That is to say, would a reasonable employer faced with similar circumstances dismiss. If the answer is in the affirmative the dismissal will be upheld by the court.

12. Negligence leading to loss of employer's property is a valid and justifiable reason for dismissal. The claimant herein denied negligence. He was however, given an opportunity to defend himself before the disciplinary committee and demonstrate why he felt he was not negligent. He refused to co-operate stating that the matter for which he was being asked to account had been subject of a criminal case over which he was acquitted. The criminal charges were dismissed for lack of witnesses. It therefore meant that the merit or otherwise of the accusations was never delved into. However, an acquittal over a criminal charge does not prevent the management of an organization from undertaking a disciplinary process based on the same facts. The standard of proof in a criminal case is beyond reasonable doubt while in civil cases it is on a balance of probabilities.

13. The court having carefully reviewed the pleadings, documents and oral testimony of witnesses for

both sides is of the view that the claimant has failed to discharge the burden cast upon him by section 47(5) of the Employment Act to warrant a finding that his dismissal from the respondent's employment was unfair.

14. The claim is therefore found without merit and is hereby dismissed with costs.

15. It is so ordered.

Dated at Nairobi this 10<sup>th</sup> day of November 2017

**Abuodha J. N.**

**Judge**

Delivered this 10<sup>th</sup> day of November 2017

**In the presence of:-**

..... for Claimant

.....for Respondent

**Abuodha J. N.**

**Judge**