



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1449 OF 2014

MICHAEL HOMAS OPONDO WERE.....CLAIMANT

VERSUS

MATHS TRADING COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful, unlawful and unfair termination and withholding of wages and benefits, breach of trust and confidentiality.
2. The claim is that the Claimant was employed by the Respondent on 15th April 2013 as a Warehouse Supervisor at a salary of kshs.30, 000.00 per month with no provision for housing. On 6th May 2014 a saleslady, Julia Mburu briefed the Claimant and his supervisor Sudhakar about a customer who was coming to collect 200 pieces of marine ply. At 4.30pm Ms Mburu called the Claimant with information that the customer was running late but gave the vehicle registration number to help the Claimant locate the same. The Claimant took the customer through clearance with security and management where the 200 maritime ply pieces were sold.
3. On 9th May 2014 Ms Mburu briefed the Claimant and Sudhakar that the same customer was coming to purchase 200 more pieces of maritime ply pieces but the Claimant did not see the customer. On 5th June 2014 officers from CID Embakasi Police Station came to the Respondent offices who questioned the Claimant with respect to the 200 maritime ply pieces. On 9th June 2014 the Finance manager of the Respondent informed the Claimant that the General Manager wanted to have a meeting with him but the officer came to the warehouse with CID officers who questioned him on the sales made on 6th May 2014 ad upon which the Claimant was arrested and charged with obtaining goods by false pretences contrary to section 313 of the Penal Code.
4. On 13th June 2014 the Claimant returned to work but was told to proceed on leave for 7 days to enable the Respondent assess and evaluate circumstances leading to the charges that faced him. On 20th June 2014 the Claimant reported to work but was summarily dismissed on the grounds that he was suspected of having been involved or aided the commission of an offence leading to substantial detriment of the respondent's interests. There was no hearing or prior notice.
5. The Claimant is seeking is salary for June 2014; notice pay; unpaid house allowances; salary for the unexpired term contract; damages for wrongful termination; and accrued annual leave. That such should be paid with costs and interest.
6. In evidence the Claimant testified that upon employment by the Respondent he was issued with a

2 years contract with a salary of Kshs.30, 000.00 per month but no house allowance was paid. That as a Warehouse Supervisor he had to release goods to customers upon their clearance by the Respondent and verification by the finance office. Ms Mburu a saleslady with the Respondent directed the Claimant to a client who was to collect goods from the warehouse and upon the customer clearance, the Claimant got authority to load the goods on a truck the customer had. the next day Ms Mburu said the same customer would come for more goods but did not turn up as the Claimant was informed that the customer had not paid. There was no further communication. CID officer came and upon the questioning the claimant, he was arrested and charged with obtaining goods by false pretences. Upon reporting to work the Claimant was sent on leave and then summarily dismissed. That there was no period notice of the offences the Claimant had committed so as to be able to defend himself; the Claimant relied on information from Ms Mburu who as the salesperson had negotiated with the customer and the general manager had to approve before the goods could be released. There was documentation in every department to follow through every transaction.

7. The Claimant also testified that he was unfairly dismissed without good cause. At the time of dismissal he was not paid his dues, he had not taken annual leave and the salary paid was less house allowance. The Respondent paid Kshs.104, 000.00 but this was not adequate.

8. That the criminal case at Makadara law Court is still ongoing.

Defence

9. In defence, the Respondent admitted that they had employed the Claimant with a consolidated salary inclusive of housing. His duties included planning and coordinating goods storage; supervision of warehouse staff; stock management; working with purchasing department to ensure adequate stock levels; working with sales department for close supervision and stock movement in and out of the warehouse; and periodic stock takes. On 6th and 9th May 2014 the Claimant had no authority to transact business for the Respondent with Ms Mburu and Sudhakar as alleged and the CID officers commenced investigation which included the questioning the Claimant together with others so as to assist investigations on theft of Respondent property. The Claimant was sent on leave and later dismissed following internal investigations which indicated that there was a reasonable and sufficient grounds to suspect that the Claimant was involved in the offence of obtaining goods by false pretences thereby occasioning the Respondent substantial loss and damage.

10. The defence is also that on 10th June 2014 the Claimant was charged in Court with the offence of obtaining goods by false pretence contrary to section 313 of the Penal Code. The Respondent then exercised its right under section 44(3) (c) of the Employment Act and summarily dismissed the Claimant for breaching his obligations under his contract of employment. All dues owing to the Claimant were paid and nothing remains outstanding as a cheque of Kshs.104, 684.00 was issued to him and a Certificate of service was issued but the Claimant declined to receive. The cheque has since been deposited in court.

11. That the Claimant having been paid his dues noting is outstanding. The claim should be dismissed with costs.

12. In evidence, the respondents called Abraham Vellakkottu the general manager and who was the warehouse supervisor. He testified that the Claimant was paid an all-inclusive salary and his duties were set out in his contract. That on 6th May 2014 the Salesperson Ms Mburu came with an order on cash allegedly paid via the bank but the client/customer delayed and came before 5pm and had an NIC bank voucher and goods were issued on these documents. Since it was after 5pm the bank had closed and the Respondent could not confirm the transaction.

13. On the third day the Respondent Finance manager was in India but he alerted the witness that cash had not gone through with regard to the transactions made on 6th may 2014. A complaint was made at Embakassi Police Station who conducted investigations and said that this was an inside job. On 5th June 2014 the police investigations revealed that the CCTV footage traced the vehicle and the people behind

the transaction who said that they had been hired by George a former employee of the respondent. Subsequent investigations traced telephone calls and the Claimant and the finance staff were all suspects. On 9th June 2014 the police established a connection between the Claimant and George and both were arrested and charged with criminal offences in court.

14. The witness also testified that on 21st June 2014 the Claimant reported back to work after a 7 days leave and he confessed to the offence and promised to pay five (5) million but the Respondent could not take him back. The Respondent took the option to pay him in lieu of notice; leave and salary due until 20th June 2014 and a cheque was issued but the Claimant declined to accept it together with his certificate of service. The cheque was sent to the labour Officer on 23rd June 2014 and a receipt was issued. Total dues are Kshs.104, 684.00.

15. That the claim should be dismissed as it has been settled.

16. In cross-examination the witness testified that the Claimant was sent on 7 days leave to allow the Respondent undertake and complete internal investigations. Upon return there was a meeting held with him where he admitted to the theft. This meeting was between the Claimant and the witness and no minutes were taken.

Submissions

17. Both parties filed their written submissions. The Claimant submitted that the Claimant was unprocedurally terminated as due process was not followed. The Respondent witness confirmed in evidence that before goods could be released to a customer there was a long process to be followed and where there was theft, senior officers should have detected. The dismissal was effected before the Claimant was called for a disciplinary hearing and despite the criminal charges there were no internal investigations as no report has been produced.

18. The Claimant also submitted that the termination was not justified as the Claimant was instructed by Ms Mburu to issue goods to a customer who had paid, this was done upon confirmation and approval by his supervisor and senior staff. To therefore fail to apply the checks and balances set up and then dismiss the Claimant was unfair.

19. That the Claimant is entitled to his salary for June 2014. The cheque issued was not accepted as such acceptance would mean that it was a payment for his full dues which was not the case. The Claimant is entitled to 2 months' notice pay which should be inclusive of his house allowance; the leave accruing is due together with salaries due for the unexpired term of his contract at 10 months. The damages due to the Claimant for unfair dismissal should be at 12 months' salary as well as all his unpaid house allowances that are owing.

20. The Claimant has relied on the cases of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR; Jackson Oyoo versus Sinohydro Corporation Limited [2012] eKLR; Mary Mutanu Mwendwa versus Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR.**

21. The Respondent submitted that the Claimant was at all material times the warehouse supervisor with the responsibility to ensure the procedures for the purchasing, approvals, sales and dispatch of goods from the warehouse was well done. On 6th May 2014 a customer came at 5.30pm and the Claimant directed this customer to the general manager and since this was way past business hours the Respondent was unable to confirm with the bank deposits. Upon the general manager's approval the Claimant proceeded to load 200 pieces of maritime ply to the customer vehicle. This was later discovered to be theft and CID investigations revealed that the Claimant and other employees were involved and he was arrested and charged in court.

22. That the Respondent conducted internal investigations. The Claimant admitted to the crime and offered to pay back but the Respondent could not keep him in employment. The Claimant was dismissed

and paid 2 months' notice pay at kshs.60, 106; salary for June for days worked at kshs.24, 543.00; and leave due for 14 months at kshs.20, 035.00. The termination was therefore lawful and justified pursuant to section 44(4) (c) of the Employment Act and all terminal dues legally due to the Claimant were paid. There is no house allowance due as the salary paid was all inclusive.

23. The Respondent has relied on the following cases of **Alphonse Mwaghanga versus Operation 680 Ltd [2013] eklr; Abraham Gumba versus KEMSA [2014] eklr; David Mwangi Gioko & Others versus Nairobi Water & Sewerage Co. Ltd [2013] eklr.**

Determination

Whether there was wrongful, unlawful and unfair termination;

Whether there was breach of contract and confidentiality; and

Whether there are any remedies due.

24. The letter of dismissal issued to the Claimant set out that;

Summary dismissal from employment we regret to inform you that the company has resolved to summarily dismiss you from employment for reasons inter alia that following your arrest and arraignment in Court pursuant to investigations by the Kenya Police into the loss of company property on 6th May 2014... the company has reasonable grounds to suspect your involvement in committing or otherwise aiding in the commission of an offence leading to substantial detriment of the company's property.

25. Therefore the summary dismissal of the Claimant was that clear. There were reasons to reasonably believe his involvement in committing criminal offences or in his aiding the commission of criminal offences as he had been arrested and charged in Court with criminal offences. At the time of dismissal, the Claimant was an accused person in Makadara Court under Criminal case No.2731 of 2014.

26. There are few instances where the law allow the employer to summarily dismiss an employee. Such instances are set out under section 44 of the Employment Act and relevant herein is subsection 44(3);

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

27. Any breach of contract of employment may result in summary dismissal. Gross misconduct in one such breach. The law further set out instances that relate to fundamental breaches and resulting in gross misconduct under subsection 44(4) thus;

(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.

28. Where an employee is arrested and remains in custody for over 14 days and thus unable to be at the workplace, such may result in summary dismissal. Further where an employee commits or is suspected to have committed criminal offences against or to the substantial loss of the employer's property, such is breach of contract of employment and is in gross misconduct. The expectation here is that once an employee is employed he is to offer his labour for the overall good of the employer business and where any conduct, directly or indirectly results in the commission of a criminal offence or such

conduct leads to the loss and detriment of the employer, such is gross misconduct that result in summary dismissal.

29. However, the law has set out legal safeguards to protect employee against abuse and violation of their rights at work. Section 41(2) set the procedural requirements and or such safeguards to be adhered to before such summary dismissal thus;

(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.

30. Whatever the offence, gross misconduct or breach has been committed, an employee must be given a hearing to defend himself and such hearing must be before another employee. Such is to ensure a partial process and where an employee is able to give a plausible defence, such should be put into account before summary action. Where circumstances of the offence, gross misconduct or breach do not allow the employer to hear the employee in their defence, or be able to call another employee to be present, the duty is upon the employer to set out such exceptional circumstances. This is to ensure the employee is given fair hearing before being denied the right to offer their labour and earn a just living.

31. In this case the Claimant as the warehouse supervisor at the Respondent had a variety of duties. He was supervised by senior officers of the respondent. Before he could release any goods, there were checks and balances within the structures of the Respondent within which, salespersons got customer and placed orders upon verification that payments had been deposited at the bank. Before goods could be released, the finance office and other senior managers over the claimant's function gave approval. In this regard, Mr Vellakkottu testified that;

... on 6th may 2014 the salesperson Julia came with an order on cash paid via the bank. The client delayed and came before 5pma and had NIC bank voucher and we issued goods. By this time it was after 5pm and the bank could not confirm the payment. On the 3rd day my Finance manager was in India but could not confirm that the payment had gone through. He alerted us that the cash had not been paid. On 9th we complained at the Police Station. ...

32. The Claimant was therefore under the supervision of the Respondent at all material times. Where he had duties that required his outmost care and attention, such duties were based on the approval of other senior officers of the respondent. From the evidence of Vellakkottu, it is clear that before goods could be released from the warehouse, there is a paper train from the sales team/person such as Ms Mburu [Julia] and the Finance manager had to see the bank deposit. On the sales made on 9th May 2014, where the Respondent approval for the loading of the goods required a call at the bank to confirm payment before the release of goods, such was not a duty vested upon the claimant. This was at a higher level beyond him. As such, the work responsibility was the due diligence upon the Respondent senior officers and mangers to confirm payment before approval of release of goods by the claimant.

33. These requirements of confirmation and approvals before release of goods is separate and different from any criminal liability that the Claimant may have. The workplace policies, procedures and safeguards and the due performance of required tasks is the duty of the employer. Where upon proper directions the Claimant ignored and went ahead to release goods contrary to given instructions, then there would be misconduct.

34. Save for the work duties, as set out above, the Claimant should have been called for a hearing and his defence before summary dismissal. At paragraph 9 of the statement of defence, the Respondent states;

... [the] decision to send the Claimant on a seven (7) day leave and subsequent dismissal was premised on the findings of the internal investigations which indicated that there was reasonable and sufficient grounds that the Claimant was involved in the offence of obtaining goods by false pretences thereby occasioning the Respondent substantial loss.

35. Where there are investigations involving the conduct of an employee, such should be presented to the subject employee to enable him give his defence. The essence of section 41(2) is to give the employee a chance to give their defence upon knowledge of such an investigations. Where indeed there existed such an investigation, a report resulting in the findings that led the Respondent in their having *reasonable and sufficient grounds that the Claimant was involved* in criminal offences leading to the loss of goods, the Court is denied of these records/report/assessment/investigations as nothing was submitted. Despite the sworn evidence of Vellakkottu, the nature of his case was that there Respondent conducted internal investigations. Such were left to the Claimant to surmise. No record was kept.

36. Other than the failure to document the investigations conducted on the events leading to the claimant's summary dismissal, the hearing that was said to have taken place on 20th June 2014 and before the Claimant was dismissed was between Vellakkottu and the claimant. It was stated that the Claimant admitted to committing the criminal offences but this was not reduced into writing. The meeting held also failed to adhere to the tenets and pursuant to section 41(1) of the Employment Act. The Claimant was not given a chance to call another employee to be present. What the Court was presented with was the word of the Claimant against that of Vellakkottu with regard to what transpired at their meeting. Without an independent process and or record to confirm that a hearing took place. The word of the Claimant is therefore believed as the employer failed to undertake its duty to keep a record.

37. To therefore dismiss the Claimant even where there was a justifiable reason but fail to give him a chance to state his defence even where the circumstances were available to hear him is to apply a fair procedure and is wrong. The further failure to set out the investigations carried out and leading to the findings that the Claimant was culpable and failed to adhere to work procedures was to set him up for summary dismissal. Despite the criminal charges facing the Claimant which shall be determined beyond reasonable doubts, on a balance of probabilities herein, the summary dismissal was flawed and pursuant to section 45 of the Employment Act unfair.

Remedies

38. The Claimant is seeking various remedies. The testimony was that he was paid kshs.30, 000.00 based on his contract of employment. the claim thus for salary due in June 2014 is for the days the Claimant remained at work for 20 days all being kshs.20,000.00. This is awarded.

39. The Claimant is seeking notice pay of 2 months. Upon the finding that the summary dismissal was flawed notice pay due is pursuant to section 35 of the Employment Act at one (1) month. The basis and claim for two (2) months was not set out. The Claimant is awarded Kshs.30, 000.00.

40. The claim for unpaid house allowance is on the grounds that such was due under the contract but was not paid. Where there is a contract of service and a salary is paid, save where the same is stated to be below the minimum wage, the contract amount is to be respected. As such, no house allowance will be allocated herein.

41. Payment for 10 months to for the unexpired term contract is claimed. Save for the flawed summary dismissal, there was a reasonable and ground set out for the same. Such was in breach of the employment contract. There existed therefore substantive grounds for the dismissal and as such, with the notice pay now awarded herein, with the contract breach, nothing arises under the contract. Such is declined.

42. Annual leave accrued for the 14 months of employment is allocated by the Respondent at 20,035.00 while the Claimant is claiming kshs.24, 500.00. Annual leave is due for every year worked at 21 days where not set out specifically in the contract. Such should be paid and where taken, the working days allocated result in a one (1) months' pay and the Claimant is herein entitled to kshs.30, 000.00 equivalent to such. Such is awarded.

43. It was admitted by both parties that the amount of kshs.104, 684.00 was issued to the claimant. The Claimant declined to accept on the grounds that this was less his dues. The Respondent has since deposited these amounts with the labour officer. The total awards above all amounting to Kshs.80,

000.00. I find the Respondent had offered to pay over and above the legal entitlements due to the claimant. Compensation for the procedural lapse in the dismissal is assessed at one month salary at kshs.30, 000.00.

Judgement is hereby entered for the Claimant for the sum of kshs.30,000.00 compensation; 30,000.00 notice pay; Kshs.30,000 leave accrued; Kshs.20,000.00 for 20 days worked in june 2014; and these payments shall be drawn from the Kshs.104,684.00 deposited with the Labour Officer by the respondent. Each party shall meet its own costs.

Orders accordingly.

Delivered in open court at Nairobi and dated this 27th day of January 2016.

M. Mbaru

JUDGE