



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 294 OF 2014

SWINSTONE OKUMU WASIKE.....1ST CLAIMANT

SAMUEL KIPKIRUI.....2ND CLAIMANT

VERSUS

GENERAL MOTORS EAST AFRICA LIMITED.....RESPONDENT

JUDGEMENT

Background

1. The 1st and 2nd Claimants were employed by the Respondent on 1st August 2002 and June 2010 respectively as technicians in the sales department.
2. On 24th September 2012, the Claimants reported to work as usual but were arrested by police officers from Embakasi Police Station acting on a criminal complaint lodged by one Robert Mmasi Ngaira on behalf of the Respondent.
3. The Claimants recorded statements with the police on 26th September 2012 and were released on cash bail pending further investigations and arraignment in court. The claimants returned to work on 26th September 2012, and were given letters of dismissal citing gross misconduct in that they were involved in fraudulent sale of spare parts.
4. The Claimants were on 2nd October 2012 arraigned in court at Makadara in Criminal Case No 5107 of 2012 with the offence of stealing motor Vehicle spare parts and alternative charge of handling stolen property.
5. On 13th September 2013, the Claimants were acquitted by the Chief Magistrate under section 202 of the Criminal Procedure Code for lack of evidence.

The Suit

6. The Claimants brought this suit vide memorandum of claim dated 28th February 2014 and filed on the same date seeking;
 - i. declaration that the dismissal from work was wrongful and unlawful;

ii. that the claimants be awarded as follows respectively;

- a) 12 months compensation for unlawful dismissal;
- b) one month salary in lieu of notice;
- c) payment in lieu of leave;
- d) refund of personal savings held by the Respondent;
- e) exemplary damages;
- f) interest and costs.

7. The two claimants testified under oath in support of the case. They produced the various documentation in support of the case. The 1st Claimant (CW1) produced a payslip indicating that his last salary was Ksh 83,191.70 and that his last day at work was 26th September 2012.

8. CW1 said that he had a difficult working relationship with the immediate supervisor Mr Patrick Wanjohi who was a manager. CW1 said he did not know the reason for the arrest on the material day since he had no knowledge that a report had been made to the police. CW1 added that he was not charged with any disciplinary offence at work and was not called to a disciplinary hearing before the dismissal. CW1 denied stealing any spare parts CW1 said he had a good record at work for 11 years and seeks compensation and payment of terminal benefits for the wrongful and unlawful dismissal.

9. The personal savings of Kshs 94,500.00 was under a scheme called '*shilingi kwa shilingi*'. The employees contributed equal amount with the employer. CW1 paid Kshs 4,500.00 per month. The amount was not paid when he left. The claimant seeks payment of other claims set out in the statement of claim and retirement benefits as per Clause 6 of the Benefits Scheme.

10. The Claimant said that his name was soiled by the false accusation and it was difficult for him to get another job. That he had a loan with the bank of Kshs 251,000.00 and he had to use his retirement benefits to pay the loan balance. He now survives on *ad hoc* jobs. He was interviewed by D.T. Dobie but the Respondent gave a negative reference report and so could not get the job. CW1 has two children in school and struggled to pay school fees and house rent.

11. Under cross examination CW1 stated he was paid Kshs 792,000.00 by the pension fund. That he was owed 18 days leave. He received computation of terminal benefits but was to receive it on condition he signed a discharge which he declined. The Claimant denied any wrong doing at all. The claimant stated that the computation of terminal benefits in the sum of Kshs 152,082.80 was wrong because it has erroneous deductions for stolen spare parts which he denies stealing. The Claimant denies owing any money for spare parts.

12. 2nd Claimant Samuel Kipkirui (CW2) made similar claims as the 1st Claimant in the memorandum of claim. The 2nd Claimant had worked for about four (4) years from May 2008. He worked as a technician earning Kshs 44,635.00 gross per month. The claimant's employment like that of CW1 was terminated on 24th September 2012. He reported to work and at 2.30p.m. on the material day and was called by his supervisor to go to the security office on allegation of theft of spare parts.

13. CW2 was arrested and arraigned together with CW1 at Embakasi Police Station. He was released on bail and returned to work on 26th September 2012 but was given the letter of termination. CW2 was acquitted of the offence of theft under section 202 of CPC for lack of evidence. CW2 was not paid terminal benefits except the salary for September 2012. CW2 was not given a show cause letter nor was he subjected to a disciplinary hearing before the dismissal.

14. CW2 prays for the reliefs sought for wrongful and unlawful summary dismissal. CW2 was still unemployed and was looking for a job. He says he had no prior warning and had good record at work.

15. Claimant was unable to get a job with Toyota Kenya for lack of certificate of good conduct following the charges against him. Both were given certificate of service.

Response

16. The Respondent filed a statement of defense on 17th September 2014 in which it denies the claims by the claimants and states that on or about 21st September 2012 at around 9 p.m. Kenneth Mutai an employee of the Respondent in-charge of security and transport got a report from a security officer manning gate 'B' that he found one Collins, a Nation Media group employee who was stationed at the Respondents compound leaving with motor vehicle spare parts consisting of bearings and bulbs in his car.

17. Upon interrogation, Collins revealed that he got the parts from the 1st and 2nd Claimants and would deliver the parts to the two later in Donholm Estate. On 24th September 2012 Mr Robert Ngaira a manager at the Respondent and Kennedy Mutua interrogated Collins further in the presence of Mr Wasonge his boss at Nation Media group and the matter was reported to the police. The police carried out their investigation and decided to charge the two claimants together with Collins in case No 1507 of 2012 with the offence of stealing motor vehicle spare parts.

18. On this basis the Respondent decided to terminate the employment of the claimants. Mr Kennedy Mbai K. Mutua testified in support of the Respondent's case and adopted a written statement dated 16.9.2014 as his evidence before court. He said that the two claimants were guilty of theft but were acquitted for non- attendance of a witness under section 202 of the CPC.

19. RW2 was Robert Ngaira who also adopted his witness statement dated 23rd September 2015. The Respondent further relies on bundles of documents submitted in court as exhibits. RW2 told court that the claimants were dismissed while the criminal case was pending before court. That the matter was dealt with by Human Resource department.

Determination

20. The issues for determination are as follows;

- i. was the employment of the Claimants terminated for a valid reason?
- ii. was the termination in terms of a fair procedure?
- iii. are the Claimants entitled to the relief sought?

Issue I and II

21. The Claimants deny that they were involved in theft of spare parts. The Respondent state on the other hand that the two were found to be involved in theft of spare parts following internal investigations. The claimants were charged with theft of spare parts but were acquitted under section 202 of CPC for non-attendance of a witness.

22. The Respondent terminated their employment on 26th September 2012 for misconduct. The Respondent did not give a letter to show cause to the Claimants and did not subject them to a disciplinary hearing for the alleged offence. This being the case, the Respondent missed the opportunity to establish the guilt or otherwise of the Claimants on a balance of probabilities. Indeed no charges were formally levelled against the two Claimants at the workplace for them to answer.

23. The conduct by the Respondent was in violation of section 41(2)of the Employment Act which

provides;

“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 work performance, and the person, if any, chosen by the employee within subsection (1) make”

Accordingly, the termination of the Claimants was based on mere suspicion which does not constitute a valid reason for terminating the employment of the claimants in terms of section 43 as read with section 45 of the Employment Act, 2007. The termination was also not carried out in terms of a fair procedure. The court answers both questions in the negative.

Issue III

24. The Respondent paid the Claimant Kshs 65,894.00 and Kshs 32,753.20 in lieu of notice and also paid them Kshs 34,974.00 and 9,775.20 for leave days not taken. Equally, the Claimants were refunded their personal savings in the sum of Kshs 700,592.10 and 51,578.35 respectively.

25. Both Claimants are therefore not entitled to payment in lieu of notice, in respect of leave not taken and in respect of personal savings.

26. The only outstanding claim is for compensation for the wrongful and unlawful termination of employment. The two are entitled to compensation in terms of section 49(1) (c) as read with Section 49(4) of the Employment Act 2007. The two Claimants lost their means of livelihood wrongfully and unlawfully on mere suspicion of theft. The two had good record at work and had served the Respondent well for considerable long periods being ten (10) years for the 1st claimant and two (2) years for the 2nd Claimant. They both lost prospects of future income and the criminal charge preferred against them though were acquitted diminished their chance for future employment.

27. Indeed the 1st Claimant failed to get a job on account of bad reference by the Respondent while 2nd Claimant failed to secure a job due to lack of certificate of good conduct on account of this criminal charge preferred against him though he was acquitted. They both had family to take care of and they have suffered loss and damage.

28. The Court grants 1st Claimant 10 months' salary and the 2nd Claimant six (6) months' salary as compensation for the wrongful and unlawful termination of employment in the sum of Kshs 831,920.00 and 267,816.00 respectively.

29. The awards are payable with interest at court rates from date of filing suit till payment in full.

30. The Respondent is also to pay cost of the suit.

Dated and Delivered at Nairobi this 5th day of February 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE