



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 432 OF 2013

PATRICK KILEMBI MUSEMBI.....CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on 28th March, 2013 the claimant averred that he was employed by the respondent as a warehouse porter in 1999 and that on 23rd February, 2009 without any lawful justification and at the instigation of the respondent he was arrested and charged before the Chief Magistrate Court at Makadara with the offence of stealing and neglecting to prevent a felony. He was consequently suspended from duty and later had his services terminated on 15th April, 2009. At the time of termination he was earning a monthly salary of Kshs.28,627/=.
2. According to the claimant, on 16th February, 2009 he was on night duty at the respondents premises where he worked normally however, the following morning he was called to the warehouse by his supervisor and informed that cargo which was on transit from Dubai to Lusaka was missing and he was a suspect.
3. The claimant further averred that the charges against him were subsequently dismissed for lack of evidence hence according to him his dismissal was malicious, unlawful, irregular and unfair. The claimant therefore sought from the Court judgment against the respondent for general damages and a declaration that the termination of his services was irregular and unlawful. He further sought an order that he be paid his dues and compensation in the sum of Kshs.6,462,428/=.
4. The respondent on the other hand refuted the claimant's claim and averred that it was entitled to summarily dismiss the claimant. The respondent further averred that the claimant was not discharged from the criminal case due to lack of evidence but rather the case was withdrawn under the provisions of section 87(1) of the Criminal Procedure Code.
5. The claimant's evidence at the trial repeated the averments and added that during suspension he was not paid and that criminal case was withdrawn after one year. He attempted to get back to his job through his union without success. It was further his evidence that he was called to a disciplinary hearing panel and was represented by a Mr. Noah from his Union.
6. In cross-examination he stated that n reporting to duty they used to be allocated flights to

attend to and that on the material day he was working together with Thomas Njeru and Kennedy. There was also Geoffrey Ogeche as well. Geoffrey was charged together with him and later terminated. It was further his evidence that he was called by the operator Mr. Nathan and shown CCTV footage on the day he was at work and he saw how people were moving at his place of work. At the disciplinary hearing, there was no representative of his choice from the respondent or the union though he asked them to come. He was dismissed after the disciplinary hearing.

7. The respondent's witness Mr. Evans Maisiba testified that he worked for the respondent as a Cargo controller and that he knew the claimant. In 2009 he was the Cargo Co-coordinator exports and that he was to ensure export cargo was ready for airlifting. He was also in charge of preparing transit cargo.

8. It was his evidence that they received a report of a missing piece of cargo destined for Lusaka which had been placed at Lusaka bay without documents. The documents were dispatched from Dubai but when they arrived the cargo piece was missing yet it was there the previous day. It was his evidence that they immediately informed security and asked to see the CCTV footage for 16th February, night. According to him, the claimant was allocated the Lusaka flight on the material day and that at around 23.04 hours there was activity around the piece of cargo and that the footage showed it was the claimant who was working around there at that time. The matter was referred to security for further investigations. In cross-examination he stated that he did not know the weight of the missing cargo and that cargo would not be moved unless booked for a flight.

9. The respondent's second witness Mr. Thomas Njeru Nyaga informed the Court that he used to work for the respondent as equipment operator and that he knew the claimant since they used to work together. Him and the claimant were in the same shift on the material night. The claimant asked him to put some cargo on a trolley around midnight which he did and left the claimant alone.

10. In cross examination he stated that the cargo he placed on the trolley was destined for Bujumbura and that he could not tell the weight of the cargo.

11. The claimant's last witness was Mr. George Guro who stated he worked for the respondent as Manager – Quality Assurance. He knew the claimant as he used to work for the respondent as a loading agent. He was the one who was assigned to investigate the incident. When he received the report of the loss of the cargo he visited the scene and called those who were on duty that night. The claimant was among them. It was his evidence that he recorded statements from those who were on duty that night and reviewed the CCTV footage together with claimant and his colleagues. According to him, around 23.00-00.00 hours the claimant removed the two assignments from the Lusaka rack. He was questioned about it and he agreed it was him on the CCTV. He compiled his report thereafter in which he concluded that the claimant in collusion with G4S and equipment operator stole the missing cargo.

12. He further stated that he attended the disciplinary hearing and submitted his report and findings. In cross-examination he stated that the CCTV footage did not indicate the time it was recorded however at the time of reviewing it they were there. He further stated that from the footage it was not possible to see cargo reference numbers. According to him, the booking for the night were only for Bujumbura and Kigali hence the claimant had no reason going to the Lusaka rack. The claimant never removed anything outside the shade.

13. In his closing submissions, Counsel for the claimant Mr. Mutemi submitted that the cargo on the trolley could not be identified from the CCTV footage presented to Court. According to counsel no documents were presented to show what exactly was said to have been stolen by the claimant and that nothing in the footage showed that the image of the person caught in camera was that of the claimant. Further that the footage neither had the date nor the time to vouch for the allegations against the claimant.

14. In conclusion counsel submitted that it was a case of elaborate frame up meant to deprive the claimant of his lawful terminal benefits. According to counsel, the claimant had proved his case on a balance of probabilities and judgment ought to be entered as prayed.
15. Mrs. Omondi for the respondent on the other hand submitted that there were valid reasons to justify the claimant's summary dismissal for gross misconduct. According to counsel on the night of 16th February, 2009 when the cargo went missing the claimant, equipment operator Geoffrey Ogechi and Team Leader Kenneth Ndungu were on duty in the specific Warehouse. According to Mrs. Omondi, the claimant removed the consignment from the Lusaka rack at the exports warehouse when the same had not been booked to fly and requested an equipment operator Thomas Njeru to forklift the cargo and load them onto a trolley. Counsel submitted these actions by the claimant amounted to theft and serious breach of confidence thus justifying summary dismissal.
16. Regarding procedure for termination the respondent submitted that a fair and proper procedure was followed pursuant to the claimant's contract of employment, the staff rules and regulations and the Collective Bargaining Agreement between the respondent and the recognized Trade Union. According to counsel, the claimant was provided with a letter of suspension vindicating reasons for suspension and on-going investigations on the matter. By a letter dated 24th March, 2009 the claimant was invited to a panel hearing and given particulars of the charges he was to face. The claimant was given a fair and just panel hearing in the presence of representatives of the claimant's Trade Union.
17. Regarding the criminal prosecution counsel submitted that a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standards of proof requirement.
18. Termination from employment must be for valid and justifiable reasons. These reasons must be reasons that the employer genuinely believed to exist at the time of termination. The Employment Act places the burden of proof of reasons for termination on the employer and where the employer fails to discharge this burden, the termination will be considered unfair.
19. The claimant herein was terminated on suspicion of involvement in loss of some cargo destined for Lusaka. According to the summary dismissal letter, the claimant on the night of 16th/17th February 2009 moved the lost cargo from Lusaka rack when the same had not been booked to fly and that he asked the equipment operator to folk lift the same.
20. In proof of these accusations, the respondent relied mainly on the CCTV footage which allegedly showed the claimant around the lost cargo shortly before they went missing.
21. During the disciplinary hearing, Mr. Njeru, the equipment operator stated that on the material day at around midnight, the claimant called and asked him to load for him some luggage in the warehouse. He complied and loaded the 2 cargo for Astral and then was asked to load Bujumbura cargo. He recalled loading 2 shipments that were shrink wrapped in black paper. He did not know where they were destined for but the claimant told him they were for Bujumbura.
22. On being questioned by the claimant, Mr. Njeru stated that the 2 cargo for Bujumbura that the claimant asked him to load were loaded on a 5th trolley and attached to four others and that the other 4 trolleys too had black cargo.
23. The Court got the chance to view the CCTV footage however the images were not very clear to tell the identities of the persons captured. However, the Court makes observation that the claimant has not denied he was on duty on the material day and time. The Court further observed that the warehouse was one with bays for cargo destined to different destinations. The Court also learnt from the respondent's witness that cargo in the bays cannot be loaded on a trolley for dispatch unless booked on a particular flight. The foregoing observations having been made, the

Court is of the view that there was a possibility of negligence on the part of the claimant in loading the two pieces of cargo together with those destined for Bujumbura. Human error is a matter that cannot be denied and has on occasions resulted in disastrous consequences such as the industry in which the respondent operates, human error has been responsible for considerable number of aviation disasters.

24. Whereas the respondent may have proceeded on the criminal intent theory, the Court looking at all the circumstances of this case sees a possible case of unintentional negligence which the respondent had a choice either to dismiss for or not. It chose to dismiss.

25. As has been stated before, reason for terminating an employee is usually measured against a standard of a reasonable employer. If taking the act or omission in issue into consideration, a reasonable employer would dismiss, the Court will uphold the dismissal but if no reasonable employer would dismiss, then the Court will find in favour of the employee.

26. Loss of cargo is a very serious incident for which the respondent would be exposed to claims for compensation. However these are as required by law covered by insurances taken out both by the consignee and the airline. To dismiss an employee on account of negligence it must be shown that the act or omission was due to laxity on the part of the employee concerned and that no reasonable employee could let such an act or omission occur. Previous record of work performance and warning letters may need to be examined to see if indeed the employee should not be excused for such an act or omission.

27. As stated earlier, the Court is not persuaded that this incident had criminal intent on the part of the claimant. The Court taking all the circumstances into account has become of the view that this was unintentional negligence for which the respondent ought not to have dismissed the claimant. It is the Court's view and finding that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the claimant's services. However, considering the sensitivity of the area the claimant was operating an award for unfair termination of service would be moderated to three month's salary as compensation for unfair termination of services. The claimant's complaint over procedure followed in terminating him will be rejected since the Court has reviewed the entire process and found that proper procedure was followed prior to terminating the claimant's services.

28. In conclusion the Court awards the claimant as follows:-

- a. One month's salary in lieu of notice.....28,627.00
 - b. Three month's salary as compensation
for unfair termination of services.....85,881.00
- 114,508.00

29. It is so ordered.

Dated at Nairobi this 11th day of March 2016

Abuodha J. N.

Judge

Delivered this 18th day of March 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge