



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1421 OF 2013**

**PATRICK MUTUNE KIMEU.....CLAIMANT**

**VERSUS**

**ATHI STORES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was commenced by the Claimant on 11<sup>th</sup> September 2013. He sued the Respondent who he averred was his former employer. He averred that he was employed as a mechanic in April 2006 until 22<sup>nd</sup> February 2013 when he was summarily dismissed from employment without any justifiable reason. It was averred that the dismissal was unprocedural without following laid down procedure in the Employment Act and was based on unfounded allegations. The Claimant sought salary for the month of January 2013, salary for the month of February 2013, three month's salary in lieu of notice, gratuity payment for 7 years, unpaid leave for 3 years and maximum compensation for wrongful dismissal. He also sought costs of the suit and interest. To his claim he attached the summary dismissal letter, payslip for December 2012, letter of recommendation, demand letter and letter from the Respondent.

2. The Respondent replied on 6<sup>th</sup> February 2014 and stated that the Claimant was its employee who was dismissed on 22<sup>nd</sup> February 2013 for gross misconduct, in particular the theft of a Mercedes Benz camshaft valued at Kshs. 200,000/-. The Respondent averred that the Claimant was therefore not entitled to the dues claimed in his claim. The Respondent filed a list of witnesses on 25<sup>th</sup> February 2014 and filed the three statements of the 3 witnesses dated 22<sup>nd</sup> February 2013.

3. The Claimant testified on 8<sup>th</sup> December 2015. He sought through his lawyer Miss Muendo just before testifying, for an amendment to his claim to insert a prayer for salary for the month of January 2013. Mr. Karanja for the Respondent stated that ordinarily an application to amend should be formal but that he would cross-examine the Claimant on the facts. In a brief ruling, the Court allowed the amendment sought, to wit, insertion of a prayer for the salary for the month of January 2013.

4. The Claimant testified that he was employed from April 2006 till 22<sup>nd</sup> January 2013. He stated that he was employed as a mechanic and that he rose in rank to become the workshop supervisor. He testified that his duties were to supervise the repair of motor vehicles of the Respondent and stated that he was not in charge of stores as there was a store keeper. He testified that the store keeper at the time was James Nyoro and that ordinarily the key was in the custody of Mr. Nyoro. He stated that the store would be opened when the mechanics needed to access the store. The mechanics would have to explain why they needed the key and one had to be specific. He testified that his salary was 31,716.10 and that on 22<sup>nd</sup>

January 2013 he reported to work as usual and supervised staff. He stated that there was an engine assembly for a vehicle KAZ 643 a FAW not Mercedes and a spanner was required for the valve lifter. He testified that he went to ask James Nyoro to open the store for him to get the valve lifter and that Mr. Nyoro opened the store. The Claimant testified that he was accompanied by Fred and that Mr. Nyoro said that there was a camshaft for a Mercedes which was now missing. He stated that he told Mr. Nyoro that since morning the person who had the key was Mr. Samson Musee and that Mr. Musee should be called to explain. He testified that he took the spanner and did not keep the key. He went on working until about 11.45 am when he was summoned to the gate to attend to a vehicle that had a problem. He testified that he went for lunch and returned at 2.00 pm continued working on the engine and at 4.00 pm, he was summoned by the workshop manager Mr. Raju who asked where the camshaft was. He stated that he told Mr. Raju that he did not know where the camshaft was. He testified that he was chased like a dog and told never to return. He stated that he knew Mr. Simon Munyao a colleague who worked with Mr. Musee. He testified that he was not given the key and that is why he had gone to Mr. Nyoro to collect the key. He stated that the salary for January 2013 was not paid and that he had taken an advance of Kshs. 6,000/-. He testified that there was a book where one would sign and that each month a payslip would be given and money sent to the account. He stated that he was given a letter of summary dismissal on 22<sup>nd</sup> February 2013 by the shopsteward. He stated that he was not called to defend himself and that he was not paid salary in February 2013. He sought a letter of recommendation in April 2013 from the Respondent which stated that he was hardworking and responsible. He testified that the camshaft loss was not reported to police and that there was no time during which he discussed the loss of the item or given to defend himself. He sought the payment of the sums claimed in the memorandum of claim and stated that he had never had any problem or been given any warning. He testified that he was not treated well and thus sought payment as per his amended claim.

5. In cross-examination by Mr. Karanja, counsel for the Respondent, he testified that he was working with colleagues and that Mr. Nyoro was negligent because when sent would state he was busy. He testified that he had not come with Mr. Fred. He testified that he had gone for leave for 3 months and demanded for 5 months because each year had a month's leave and that he had sought leave not for 3 years but 5. He testified that he did not have the documents showing that he did not proceed on leave. He stated that he sought 3 months for notice as he was dismissed summarily. He testified that witnesses would be lying if they stated that he took the key. He stated that the salary was not credited to his account and the payslip was not given. He testified that he did not steal.

6. The Respondent called 2 witnesses, Mr. Simon Nzau Munyao and Mr. George Odhiambo Gari. Mr. Munyao testified that he worked for the Respondent as a helper and helped the mechanic or supervisor. He stated that he knew the Claimant and that he joined the Respondent in 2009 and that at the time there was an engine they were repairing at the engine room. He testified that some spare got lost and that he later got to know of the dismissal of the Claimant because of the lost spare. He stated that on 22<sup>nd</sup> January, the supervisor Mr. Samson took the key to the store and opened it then gave him the key to keep. He kept the key till around 1.00 pm when the Claimant took the key from him and that they locked the engine room and proceeded to the gate to work on a car outside the gate. He testified that the Claimant took the key as the Claimant had been sent by Mr. Samson to collect the key. He stated that the Claimant did not return the key and did not explain why he took the key. He testified that at about 2.00 pm they returned from lunch and discovered that something was missing and that the Claimant had the key when the time was lost.

7. In cross-exam by Miss Muendo, he testified that he worked with Mr. Samson who was another supervisor and that the key was kept at the store with the store keeper Mr. James. He stated that the supervisor was to collect the key and give it to those working there and that there was no anomaly in him having the key. He testified that the engine room was open and they were at work there. He stated that the supervisor had other work and that he was working on the engine. He testified that the key was on the padlock and not in his pocket and it was only when he locked the room that the key was in his pocket. He stated that when he was called by Mr. Samson is when he locked the room and that the Claimant came and took the key from him. He stated that the spare had been lost and that the key was with the Claimant. He testified that he was not there when the spare was lost and that he did not see the Claimant take the spare and did not know if Mr. James is the one who took the spare. He stated that the Claimant was his

boss and that the Claimant did not give reasons for obtaining the key and that it was Mr. James who discovered the loss. He testified that Mr. James left employment and that it was from the date of the loss that he stopped seeing the Claimant at work and that he was not called to testify in any other case. He denied that he had come to Court to testify so as to palliate the employer and stated that he had not come to lie. He testified that in his statement he explained what happened and did not go on to explain the theft but gave a statement on what happened. He testified that he never saw the Claimant take the item.

8. In re-examination, he testified that when the key is kept in the store the room is locked, the supervisors take the key and the supervisor may return the key to the store. He stated that it was not an offence for him to keep the key as they were still working. He testified that he did not know if the Claimant stole the part and that he just knew what he had stated which was that the Claimant had the key at the material time as he had taken the key from him.

9. The second defence witness was Mr. George Odhiambo Gari who testified that he worked as the security and logistics manager of the Respondent. He testified that he knew the Claimant who was a motor vehicle workshop supervisor. He stated that he was aware of the facts surrounding the dismissal of the Claimant. He recalled that on 22<sup>nd</sup> January 2013, an incident of theft took place at the engine room which required investigations to be undertaken. He testified that he was the security and logistics manager even then and that they were able to identify who was involved and that he isolated 3 people who were to record statements excluding the Claimant. He needed to understand what had happened and stated that the key had been given and it ended up with the Claimant. He testified that it was not unusual for the Claimant to have the key. He stated that he wanted to understand the events and asked the Claimant to come and record a statement the next day but the Claimant never appeared to record a statement and simply stopped coming to work. He testified that after waiting for some days he had to submit the statement to management and that he had reasonable basis to take steps. He stated that the Claimant did not come to his defence and that what they had was incriminating and the Claimant was dismissed thereafter.

10. In cross-exam by Miss Muendo, he testified that he had conducted investigations and recorded statement only from those who handled the engine room key. He stated that the Claimant handled the key and that the Claimant refused to record a statement. He testified that it occurred at 2.00 pm and part of it overlapped to next day. He stated the correct name for the manager was Mr. Sanju not Mr. Raju. He denied that the Claimant was told not to return and that Mr. Sanju had no competence to make such a directive. He stated that he had a sitting with Claimant in his office and that when such an incident takes place, one needs to establish leads which will guide one. He testified that they did not deal with the police as they did not want to give it a criminal angle and that there was incriminating basis for the Claimant to come and defend himself. He stated that he invited the Claimant verbally on the day of the incident and that from 22<sup>nd</sup> January the Claimant stopped coming to work. He stated that they had not reached the point where they would suspend the Claimant and that the suspension would only arise after the Claimant recorded a statement. He stated that the Respondent has a strong labour representation. He testified that the Claimant was given a summary dismissal as by refusing to return, the Claimant had misconducted himself. He stated that there was no statement from the Claimant and if the Claimant had recorded one perhaps the decision to dismiss would not have been made. He stated that 3 people who had handled the key were isolated to exclude the Claimant who was the fourth. He testified that the workshop has over 100 people and that the Claimant was the key accused and main suspect. He stated that they wanted to know what happened from other people and the Claimant was to respond to the allegation and that there was Mr. Munyao, Mr. James and Mr. Simon. He testified that he was not telling the Court that the Claimant was not to be questioned and that the Claimant was the last person who had the key. He stated that the Claimant took the key from Mr. Munyao at lunch time and that the key was large. He testified that Mr. Samson had the key earlier and that had the Claimant gone and recorded a statement it would have helped a lot. He stated that he had nothing to show the Court that the Claimant refused to record a statement.

11. In re-examination by Mr. Karanja, he testified that the workshop manager has no authority to dismiss and that the suspension letter would have been drawn by him. He stated that he would prepare a report, make recommendations and forward it to HR who would make a decision to dismiss. He stated that Mr.

Samson and Mr. Munyao were isolated because they took the key from the store manager and that they were suspects. He stated that isolating means that he identified the 3 and that he called the Claimant to record the statement. He testified that he called the people who took the key from the store and they confirmed that the camshaft was there in the morning and that at 1.00 pm the Claimant took the key and did not return the key to the people who had given him the key. He stated that it was discovered that the camshaft was missing hence the suspicion of the Claimant.

12. The Claimant filed submissions on 28<sup>th</sup> January 2016 and the Respondent filed its submissions on 24<sup>th</sup> February 2016. The Claimant submitted that the Court was being invited to determine the following questions:-

- i. Whether the termination of the Claimant's employment by the Respondent was unfair
- ii. Whether the Claimant is entitled to the reliefs set out in the statement of claim
- iii. Whether the termination was done procedurally

The Claimant submitted that Section 45 of the Employment Act was quite clear on what constitutes unfair termination. The Claimant submitted that his termination was unfair, wrongful, unfair, unlawful and in contravention of the law. The Claimant submitted that the procedure adopted in reaching the decision to terminate was wrong and unfair. It was submitted that there was no disciplinary procedure contrary to what is envisaged by Section 45 as read with Section 41 of the Employment Act. The Claimant submitted that the Respondent did not adhere to the principles of equity, justice and fairness and that he was not given a fair hearing. He submitted that he was an honest and hardworking employee who had never received any warning letter prior to the termination. He submitted that he was entitled to the sums claimed and that the Respondent's witness confirmed that there was theft but did not tender any evidence before the court to connect the Claimant to the said theft.

13. The Respondent submitted that the dismissal of the Claimant was on grounds of gross misconduct particularly theft. It was submitted that the Claimant was given a chance to exonerate himself but chose instead to abscond from work and that it was therefore reasonable to conclude that the Claimant was responsible for the theft. The Respondent cited Section 44 of the Employment Act and submitted that on the basis of Section 44(4)(g) the Respondent could terminate with immediate effect based on the grounds set out. It was submitted that the Claimant had the burden to prove his claim and that no proof was availed that the Claimant did not go on leave. The Respondent submitted that on the basis of Section 35(1) the notice period was one month and that in the event the Claimant was eligible for notice it would be for one month only. The Respondent submitted that no evidence was adduced to prove the non-payment of salary for January and February 2013. The Respondent submitted that the Claimant had failed to prove his case and sought its dismissal with costs.

14. In any suit where termination of employment is asserted, it is the duty of the Claimant to prove that the termination was unlawful and on the converse it is the duty for the employer to show that the dismissal was justified. Section 43 of the Employment Act makes provision on this. The Claimant was dismissed on account of what the Respondent called gross misconduct. Under Section 44(4)(g) of the Employment Act, there are grounds for dismissal for what the Claimant was alleged to have done. It would have been perfectly in order to dismiss for cause. Unfortunately, the provisions of Section 41 of the Employment Act were ignored by the Respondent thus rendering the dismissal unlawful. The Court would therefore find that the Claimant was entitled to recover for the manner of dismissal. The Claimant did not prove that he was not paid the salary for January and February 2013 as he who alleges must prove. He stated that the salary was paid into his account and the simplest proof of non-payment would have been the bank statements for the said months. Equally, he did not prove the leave dues were unpaid. From the payslip exhibited the Claimant was a contributory to NSSF and therefore cannot claim service.

15. In the final analysis, the only claim the Claimant succeeded in proving was that his termination was unfair. In the circumstances of this case, it is clear there was some abrupt and not so pleasant end with the Claimant asserting that he was called a dog and told to never set foot in the premises. Mr. Sanju should

have been called to clarify if indeed he called the Claimant a dog. No witness rebutted the assertion by the Claimant and as such a compensation of 6 months would suffice. I therefore enter judgment for the Claimant as follows

- (a) Compensation for 6 months Kshs. 190,296.60
- (b) Cost of the suit
- (c) Interest on a) and b) above from date of judgment till payment in full
- (d) The sums in a) above subject to statutory deductions

Orders accordingly.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of June 2016**

**Nzioki wa Makau**

**JUDGE**