



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 667 OF 2012

NICHOLAS OTIENO ALOO.....CLAIMANT

VERSUS

G4S SECURITY SERVICES (K) LIMITED.....RESPONDENT

JUDGMENT

1. The claimant pleaded that he was in the year 2000 up to January, 2012 employed by the respondent first as an Alarms Crew Commander and later as Communications Centre Operator. He stated that throughout his employment he served the respondent with due diligence and to the satisfaction of the respondent.
2. On 27th December, 2011 he was suspended from work without being afforded an opportunity to be heard pending further investigations into allegations of loss of company property.
3. According to the claimant, the respondent knew that he had absolutely nothing to do with the alleged loss. The alleged loss was attributed to other employees who had been charged in Court and that the Police investigations exonerated him from any criminal act or wrongdoing. He pleaded further that he was not the person manning the operations centre at the time of the alleged loss. The claimant therefore contended that his summary dismissal was unfair, illegal and harsh.
4. The respondent on the other hand pleaded that the claimant was well aware that the vault doors were only to be opened in the ATM vaults and that he was not allowed to open vault doors while vehicle was in the parking lot. The respondent further pleaded that the claimant was under duty to ensure that he could see the location of an ATM vehicle immediately he received request for opening a vault door. According to the respondent it was for breaching these duties that a sum of Kshs.2,000,000/= was removed from the vehicle whose vault he had opened in disregard to set out procedures.
5. The respondent further pleaded that the claimant's suspension letter specifically referred to a disciplinary hearing accorded to the claimant prior to his suspension and further stated that the suspension was pending further investigations. Further, the claimant's dismissal was based on the grounds that he had negligently discharged his duties by failing to prevent the loss of company's property.
6. At the hearing the claimant testified that on 1st December 2011, after leaving work, he was recalled by his superior one Grace and instructed to report on duty the following day to hold for his colleague. While on duty, a radio operator in one of the vehicles called him in the morning when the vehicle was in the vault areas to open the vault door. He did so and the vehicle was loaded. He thereafter sent the closing

signal and the vehicle left. At around 9.15 a.m. he handed over to his colleague and left for home. He was called back to work at 5.00 p.m. by Grace and asked to report to the Security Desk to record a statement.

7. According to him the subject of the statement was not disclosed to him at this stage. When he reported his manager reported that some cash had been lost and that it was being alleged that he opened the vehicle at some point leading to the loss. He was subsequently taken to the Police Station and after sometime released and asked to report to the station the following day. He thereafter was issued with a suspension letter and hearing notice for the disciplinary session. According to him the hearing took place without him. He left the meeting prematurely and came back half an hour later. According to the supervisor the meeting had ended prematurely. He received his dismissal letter two weeks later.

8. In cross-examination, he stated that he was in charge of cash collections and handling. His work was to pen and lock vehicle's vault doors on request and that he would confirm the vehicle location before dealing. He did so on this occasion.

9. The respondent's witness Mr. Yegon testified that he conducted investigations and confirmed that motor vehicle KBF 277N was loaded with a consignment of several cassettes destined for ATM sites. After exit from the vault the vehicle parked at the inner parking area awaiting clearance. According to him, the CCTV footage showed the driver left with the work tickets for signature and the crew commander went to look for armed Police escort leaving the radio operator in the vehicle. At about 6.00 p.m. he observed the radio operator exit from the vehicle with a parcel which he handed to a stranger who was waiting outside the main gate. He had reason to believe that was the cassette which was stolen. According to his evidence, the radio operator confessed the theft at the police station and stated that the access was issued within the compound. He established negligence and recommended disciplinary action against the claimant.

10. DW2 Ms. Ann Gitonga testified that in December, 2011 there was an incident which was investigated and the claimant subjected to disciplinary hearing and found to have been negligent in his duties. She stated that she was the one who took the minutes at the hearing and that the claimant was present at the hearing. According to her, the claimant failed to check where the vehicle was prior to opening the vaults. The vehicle was not supposed to be opened in the parking lot hence the claimant should have inquired more prior to opening the vault.

11. It was further her evidence that upon termination the claimant was paid his terminal dues in the sum of Kshs.20,695/=. He never collected his certificate of service. In cross-examination she stated that she was the one who recorded the minutes of the disciplinary hearing. According to her the claimant was informed by his supervisor that he would be required for a meeting the next day 24th, the meeting was an open session and the claimant was free to ask questions. It was her testimony that the claimant was given a chance to interrogate the investigations report and that the minutes were not an after thought. They were prepared after the meeting as per the procedure.

12. In his closing submissions Mr. Namada for the claimant submitted that the respondent miserably failed to produce evidence that the claimant had been negligent in the discharge of his duties. According to Counsel the respondent had an elaborate security system capable of producing print outs of every event happening. He submitted that RW1 Mr. Kiplagat failed to provide before Court any CCTV footages he claimed to have viewed.

13. Further no report covering the purported investigations was produced in Court. Counsel therefore submitted that there was no evidence to show the claimant acted negligently. Counsel sought reliance on the words of my brother Justice Rika in the case of **David Wanjau Muhoro v. Ol Pajeta Ranching Limited** where the learned Judge stated that whenever money of any large magnitude was lost by the respondent, it was easy for the employer or the Court trying the facts to be influenced by the feelings of moral disapproval and quickly blame the official responsible. Counsel urged that the Court must keep feelings of moral disapproval in check and examine facts objectively.

14. Concerning procedure adopted in the dismissal, Counsel submitted that the claimant was not offered any proper chance to defend himself as required by section 41 of the Employment Act. According to Counsel, RW2 testified that there was disciplinary hearing conducted on 23rd December, 2011 but no minutes was produced of such hearing. Mr. Mulaku further submitted that annexure 3 of the respondent's bundle were minutes of a hearing purportedly conducted on 24th December, 2011 but the said minutes were not signed hence their validity could not be vouched for. Counsel further submitted that annexure 1 in the respondent's bundle was a letter dated 23rd December, 2011 suspending the claimant which was received by him on 29th December, 2011. The claimant could therefore not have been accorded a fair hearing if this disciplinary meeting took place on 24th December, 2011.

15. According to Counsel, the claimant was never presented with any investigation report to interrogate. It was the report which could have shown if the claimant was negligent in his duties. Further the respondent did not produce in Court any warning letter, or notice to show cause inviting the claimant to a disciplinary hearing. The claimant was ambushed with the disciplinary hearing date as confirmed by RW2 in her testimony. In the circumstances the respondent failed to discharge the burden of proving the claimant's dismissal was fair and justified as required by section 43 and 45 of the Employment Act.

16. Mr. Makori for the respondent on his part submitted that the respondent had demonstrated that the claimant was summarily dismissed on account of fundamental breach of his contract of employment. According to Counsel, the respondent had demonstrated that there was both valid and fair reason for the dismissal and that all processes were followed. According to Mr. Makori, the claimant was notified of the charges that he was facing, he attended the disciplinary hearing where he was heard before a decision to dismiss him was arrived at.

17. The claimant had a duty to discharge the terms of his assignment and his contract of service. According to Counsel for respondent, the claimant misconducted himself leading to loss of respondent's property. It was not disputed that the claimant opened the vault door at about 6.05-6.12 a.m. as shown by the CCTV footage. The claimant opened the vault door after the vehicle had left the loading bay and before it left the respondent's compound contrary to instructions that he was to open a vault door only when the vehicle was at an ATM lobby. According to the respondent therefore, the summary dismissal was warranted and in accordance with the law. In this regard Counsel sought reliance on the case of **Miriam Siwa v. Postbank Ltd 2014 eKLR.**

18. In dismissing an employee the employer must have a valid or justifiable reason for doing so. Once this condition is met the termination or dismissal must be carried out through a fair procedure.

19. Regarding reasons for dismissal or termination, they ought to be reasons for which a reasonable employer would dismiss or terminate services for. In proving these reasons, the standard of proof should be on a balance of probability. Where an employee is implicated in a charge bordering or amounting to commission of a crime, it is not necessary to establish as a criminal Court would, that the employee concerned is culpable. It is enough to show that it was more probable than not that employee is blameworthy is enough.

20. The claimant herein was issued with a suspension letter on 23rd December, 2011. The letter informed him of an incident at the Head Office on 2nd December, 2011 and a hearing on the same date. He signed for the letter on 27th December, 2011. On 2nd December, 2011 he wrote statement regarding the incident in which he admitted receiving radio communication from one Samson Odoyo to open the vehicle door for loading ATM bags. He stated that he could not remember which vehicle was requested for but he opened the door and later closed the same. In his evidence in chief, the claimant stated that on 1st December he was called back to work around 5 o'clock in the evening and asked to report to the security desk and record a statement. He stated that his manager had reported that some cash had been lost and it was being alleged that he opened the vehicle at some point leading to the loss. In cross-examination he stated that his work was to open vehicle vault doors upon request and that he would confirm the location of the vehicle before opening.

21. Mr. Yego for the respondent took the Court through the procedure required of the control room operator, in this case the claimant. It was his evidence that the work of the control room operator was to:

- (a) Co-ordinate operation of CIT vehicles
- (b) Monitor their movement through tracking
- (c) Open and close CIT vehicle vaults
- (d) Open and close cash centre vaults.

22. A day before scheduled loading, two back office operators process cash and pack them in small calibrated containers called cassettes. The cassettes are verified to be loaded by supervisors and stored overnight in the vault. The following morning the ATM crew visit the vault area and call the control room and request for the opening of the rear vehicle vault door for the loading and the control room locks the door and the vehicle leaves. After exit from the vault, the vehicle is parked in an inner parking area awaiting clearance.

23. From the above and considering the sensitivity of this operation, each person involved must be extremely careful since any lapse could occasion loss as happened in this case.

24. The claimant testified that before he could open any vault he must confirm the location of the vehicle. He further stated that when he received communication to open a vehicle vault door from Samson Odoyo he was not sure which vehicle it was. This casual treatment of such a sensitive operation was indeed negligence on the part of the claimant for which the respondent was justified to summarily dismiss him. To this extent the claim for wrongful dismissal is unmerited.

25. Regarding the procedure followed in dismissing the claimant, it was his evidence that he was called back to office on 1st December, 2011 and asked to record a statement regarding this incident. His statement was acknowledged by him in Court and marked as appendix 2 in the respondent's bundle of documents. He was subsequently thereafter suspended by a letter dated 23rd December, 2011. A disciplinary hearing was subsequently held on 24th December, 2011 at which the claimant was noted as present and gave his version of the events of 2nd December, 2011.

26. The report was attached to the respondent's memorandum of response as appendix 3. The claimant never filed any reply to the memorandum of response refuting the authenticity of the report of the disciplinary hearing compiled by the 2nd respondent's witness Ms. Ann Gitonga. The attempt to dispute the report in Court was therefore belated in any event there is no legal requirement that every report must be signed.

27. In conclusion the court is persuaded that there were sufficient reasons to summarily dismiss the claimant and that the procedure followed in the dismissal was fair. The claim is therefore dismissed with costs.

28. It is so ordered.

29. It is so ordered.

Dated at Nairobi this 18th day of August 2016

Abuodha Jorum Nelson

Judge

Delivered this 18th day of August 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge