



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

CAUSE NUMBER 2030 OF 2013

JEREMIAH GAMBA.....1ST CLAIMANT

ESTER CHEGE NJERI.....2ND CLAIMANT

FRANCIS MAINGI.....3RD CLAIMANT

VERSUS

QUALITY QUARRIES (K) LTD.....RESPONDENT

JUDGMENT

1. The claimants that they were employed by the respondent around 1999 as storekeeper, cashier cum chef, and loader. The services were terminated on 26th July, 2013 when the respondent claimed that they were involved in theft of items of the respondent's place of work.
2. The claimant's averred that prior to third dismissal, the respondent never gave them an opportunity to be heard nor served them with a warning letter contrary to the provisions of the employment Act.
3. The respondent on the other hand refuted the claim averring that the dismissal was justified following customer loading anomaly that took place on or about 30th July, 2013 when the respondent's customer truck registration number KBN 362N whose actual gross weight was 23,080 kilograms and net weight is 16,560 kilograms was adjusted to read 16,620 kilograms gross weight and 10,100 kilograms net weight. When the respondent's manager questioned the 1st and the 2nd claimants about the discrepancy the two were unable to explain the same only asking the customer to return to the loading site that was being manned by the 3rd claimant to offload the excess load.
4. According to the respondent, the claimants were issued with one months' notice period from 1st August, 2013 to show cause why disciplinary action should not be taken against him after investigations found them culpable for the missing stock. The claimants failed to show cause and their services were terminated. Upon termination the claimants were paid their dues including service pay.
5. In their testimony in Court the claimant reiterated most of the averments in the memorandum of claim. The first claimant stated that he was earning Kshs.19,000/= per month at the time he was terminated. He denied adjusting the weighbridge and stated that it was impossible to adjust a weighbridge. He testified that there were keys F1 and F2. F1 allowed one to input data including name of the driver, registration number of the vehicle and the company's name. F2 automatically takes

the weight then generates a printout. The printout is sent to cash department for payment.

6. In cross-examination he stated he only claims service pay for November 2008 to October, 2012 and that the earlier services pay was paid. He denied collusion with the other claimants and further that he directed the driver to offload the excess load.

7. The second claimant stated that she was hired in 1999 as a cook and by the time she was terminated, she was working as a cashier earning Kshs.17,000/= per month. It was her evidence that it was impossible to enter more tonnage than allowed. In cross examination she stated that her work was to scrutinize slips from the weighbridge. Upon dismissal she was paid Kshs.100,000/=.

8. The third claimant testified that he used to load vehicles. On the material days the vehicle concerned was to be loaded with 10 tonnes of ballast. He loaded the 10 tonnes but was asked to add more by the owner of the vehicle. It was his evidence that his work was to load vehicles and could not tell what happens prior to the loading.

9. He denied any fault and denied any involvement in theft. According to him, if the weigh was more he would reduce and if less, he would add.

10. In cross examination he stated that he was initially hired in 2002 as a casual but later became a loading operator. He further stated that in loading, the tonnage is guesswork. He simply estimated that the weighbridge confirms the weight. The vehicle in issue was found to have excess tonnage and it was offloaded. According to him it was normal for vehicles to return for off-loading or more loading.

11. The respondents witness Mr. Keitany informed the Court that the truck in question was driven to the loading zone and came back for weighing to confirm the weight authorized. The operations manager suspected there was something wrong over the weight of the truck and asked for it to be weighed. It was found to be 16 tonnes. The loader was questioned about it as well as the cashier but they did not want to explain.

12. The driver tried to offload the excess load but did not succeed in offloading all. It was his evidence that if it was not detected the respondent could have lost the extra tonnage. The extra tonnage was paid for and the truck released. It was further his evidence that investigations revealed loss of tonnage meaning the theft had been going on for a while.

13. The claimants were sent on paid leave for 30 days and they did not offer any explanation during this period. Their services were eventually terminated. He denied that the claimant's services were unfairly terminated since they were offered a chance to explain the incident but failed to do so.

14. The witness further stated that there was an outstanding payment of Kshs.90,755/= due to the claimant on account of service pay, leave and salary for September.

15. In cross-examination he stated that the weight bridge was automatic and that the loading packet was three tonnes and weighing done using manual standards. The weighbridge confirms the weight. He further stated that the claimants were not issued with termination letters but were given notice to show cause. It was further his evidence that there was a management meeting before the claimants were dismissed. The claimants were however not called to the meeting.

16. The respondent's second witness P.C. Ezekiel Juma informed the Court they questioned the claimants and that the OCS ordered the reweighing of the lorry to confirm the allegations. The reweighing found an excess of 3 tonnes. It was his evidence that the investigations established that there was attempted theft and that they suspected collusion among the claimants and truck drivers.

17. Mr. Amutalah for the claimants submitted that document titled one month's notice was not a termination notice as envisaged under the employment Act. The document did not indicate whether there was contemplation that the services of the claimant would be terminated. The notice according to counsel

indicated that the claimants would not be denied access to their duties and was to be reviewed after police investigations.

18. According to counsel section 41 of the employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as affected employee has not been accorded a fair hearing.

19. For the notice to be sufficient, it should specify the complaint or charge, the time and location of the incident charged or matter complained about, the time day and place of the tribunal contemplated by the respondent to hear the claimant, the action proposed to be taken and the ground on which the charge is based.

20. Counsel further submitted that there was no proof that the ballet was stolen from the respondent.

21. On payment of Kshs.90,755 to the claimant's union, counsel submitted that if it was done was without the claimants consent and in any event there was no evidence tendered in Court that it was over paid.

22. Mr. Wachira for the respondent on his part submitted that the claimants salary for July was paid as couched for by the claimants own documents annexed to the claim. According to counsel, the respondent terminated the claimant's services at the end of August, 2013 after they were afforded an opportunity to show cause why there was loading anomaly involving a customer's truck KBN 362N and failed to do so. The respondent further maintained that it paid the claimants September salaries in lieu of notice to terminate their services.

23. According to Counsel, when the respondent suspected that its property was being stolen by the claimants, it issued all of them with one month notice period to show cause why disciplinary action should not be taken against them after investigations found them culpable for the missing ballet.

24. Concerning claim for monies, allowances and benefits from interdiction to date, Counsel submitted section 49 of the employment Act does not provide for unpaid monies, allowances and benefits from interdiction. The prayer according to counsel is therefore vague and unstructured. Counsel further submitted that the respondent has shown that it not only paid the claimants all their dues including service pay but also paid THEM September salary in lieu of notice. Counsel further submitted that section 36 (6) of the employment Act rules out service pay where an employee is a member of NSSF yet the respondent still paid the claimants service pay. Upon termination of their services.

25. Termination of employment contract is segmented into two phases. First there must be a valid and or justifiable reason for termination of services and second, once this condition is met, the termination must be done in accordance with a fair procedure.

26. The claimants herein were accused of collusion to load ballast onto a customer's vehicle more than the quantity authorized. The 3rd claimant, who was the machine operator informed the Court that the loading packet was three tonnes and that the weight is estimated at the point of loading and later confirmed by the weighbridge. If the weight is found to be less, the truck can be returned for more loading or if more for off-loading. The 1st and 2nd claimant on their part stated that it was impossible to manipulate the tonnage on the weighbridge. The respondent's witness Mr. Keitany also told the Court that the truck in issue offloaded the extra tonnage though not all and the driver paid for the balance and was left to go.

27. Mr. Keitany further informed the Court that the driver did not record any statement with the police regarding the incident. It would therefore seem that a truck having less or more tonnage was a normal occurrence and this could be rectified after confirmation at the weighbridge. Apart from suspicion of collusion, the respondent did not provide evidence which suggested or implicated the claimants in any wrong doing.

28. In dismissal cases, the test is usually whether a reasonable employer confronted with the facts as

they are, dismiss an employee. If the answer be in the affirmative, the dismissal would be upheld. The Court in this particular case taking into account the testimony of the claimants as well as that of the respondent's witnesses, is not persuaded that there were reasonable grounds to dismiss the claimants.

29. Regarding procedure, the respondent's witness Mr. Keitany testified that a management meeting was convened at which the decision to dismiss the claimants was made. They were however not called to defend themselves before the decision was made. This contravenes the clear provisions of section 41(2) of the Employment Act which requires that an employee be heard before a decision to dismiss is made.

30. The Court therefore finds that the termination was unfair in terms of reason for dismissal and the procedure followed. The Court therefore awards each claimant eight months salary as compensation for unfair termination of services.

31. The claimants shall further have costs of the suit. Regarding the sum of Khs.90,755/= paid to the claimants union, the claimants shall have the liberty to collect the same from the union if not done already. Other heads of claim are found without merit and are hereby disallowed.

32. It is so ordered.

Dated at Nairobi this 23rd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge