



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2036 OF 2012

PHILIP MUUO KITIVI.....CLAIMANT

VERSUS

H. YOUNG & CO EA LTD.....RESPONDENT

M/s Wachira for Claimant

M/s Muriu for Respondent

JUDGEMENT

1. The suit was filed on 3rd October 2012 seeking maximum compensation for unlawful summary dismissal and payment of terminal benefits set out in the statement of claim. The claim is opposed vide a memorandum of reply filed on 8th November 2012.

Claimant's case

2. The claimant was employed by the respondent on 12th February 2011 as a shovel operator at a gross salary of Kshs 30,380 and worked continuously until 22nd June 2012 when he was summarily dismissed from employment on allegation of theft of ballast belonging to the employer.

3. The claimant testified in support of the particulars of claim. In terms thereof, the claimant had no letter of employment but received a letter of summary dismissal dated 29th June 2012 given to him by the Human Resource Officer named Samuel Gathogo. The claimant denies having sold ballast unlawfully. He testified that he was not given opportunity to explain why he should not be dismissed and was not given notice nor paid in lieu thereof. The claimant seeks payment in lieu of leave days not taken. He said he was duly registered with NHIF and NSSF and the deductions were duly remitted by the employer.

4. The claimant seeks compensation for unlawful dismissal from employment. That he wrote a demand letter but the same was not heeded by the respondent.

5. The claimant called CW2 John Gitonga to testify in support of his case. CW2 was a co-worker of the claimant and they were dismissed together for the same offence. CW2 had a pending case before court. He told the court that he was a driver of security and police officers. The claimant denies that the claimant and himself were involved in theft of ballast at Kedong Quarry. He confirmed that the claimant was a loader and he came to testify on behalf of the claimant since he was his former colleague. CW2 said that the allegations of theft were false and no case was reported to the police. The claimant prays that he be awarded as prayed.

Respondent's case

6. The respondent avers in the statement of reply that the claimant was dismissed for a lawful cause and in terms of a proper procedure. The respondent called two witness in support of its case. RW1 Edward Patrick Muriuki, told the court that he was a security officer of the respondent. That the respondent is involved in road construction and has sites all over the country. That on 20th June 2012 at 5:30 p.m. he received information from security personnel that some employees were selling material at Kedong site. The police had been tipped off on the matter. RW1 proceeded to Kedong Quarry and found one lorry filled with six tonnes of ballast at the site. Two police officers had stopped the truck before it went out of the outer gate of the quarry at 5:15 p.m.

7. The claimant was at the site. He had parked the shovel he had used to load the ballast. The security officer on duty ran away. Ordinarily the site was closed at 4:15 p.m. The claimant loaded the ballast after the quarry had closed and there was no overtime on the day. The quarry employees and manager had already left the site at the time. RW1 interviewed the driver of the lorry and the claimant and the driver disclosed that he had paid the claimant and the security officer Kshs 6,000 for the six (6) tonnes of ballast.

8. The officer had already ran away. RW1 recovered Kshs 4,000 from the claimant. The claimant confessed that the Kshs 2,000 was paid to the security officer. The claimant verbally asked for forgiveness but RW1 told him his hands were tied. The claimant bribed the police officer with Kshs 10,000 on the way to the police station and he was released. The claimant did not therefore record a statement. The claimant however recorded an admission freely and voluntarily at the workplace and the same was produced in court. The claimant however denounced the statement in court.

9. RW2 was Charity Nyakio the Human Resource Officer who testified that she issued the claimant with a letter of summary dismissal in which she provided reasons for the action. She produced the letter before court. The dismissal was in terms of section 44 (4) (g) of the Employment Act, 2007 the claimant having admitted a serious offence at the work place. The respondent prays that the suit be dismissed with costs.

Submissions

10. The claimant and the respondent filed written submissions on 20th May 2016 and 30th May 2016 respectively in which they put forth the summary of their respective cases on both facts and law.

Determination

11. The issues for determination are as follows;

- i. Whether the claimant was summarily dismissed for a valid reason.
- ii. Whether summary dismissal was in terms of a fair procedure.

Issue i

12. From a proper evaluation of evidence before court, the claimant was caught red handed stealing ballast from his employer. The claimant was arrested in the presence of RW1. The claimant admitted the offence and sought forgiveness. The claimant compounded the matter by bribing his way out of trouble hence he was not prosecuted by the police.

13. The evidence by RW1 and RW2 is credible and consistent with the summary dismissal handed to the claimant. The evidence by the claimant and CW2 his witness, does not add up on the face of his own admission to the offence. This being the case, the claimant did not discharge the onus placed on him in terms of section 47 (5) of the Employment Act 2007 to show on a balance of probability that the summary dismissal was wrongful.

14. On the converse, the respondent has demonstrated that the summary dismissal was justified and was for a valid reason as is required under section 43 as read with section 45 of the Employment Act, 2007.

15. As stated by Justice Abuodha in **John Gitonga Vs H. Young & Co EA Limited**, in the circumstances such as present, the requirement of a hearing under section 41 of Employment Act 2007, was satisfied by the confrontation between RW1 and the claimant. The claimant was caught red handed and he made an admission in writing seeking for forgiveness. It was not necessary in the circumstance to give the claimant a formal notice to show cause followed by a formal hearing.

16. The court is satisfied that the confrontation coupled with an admission satisfied the requirement under section 41 of the Act. The situation warranted summary dismissal and therefore no notice nor payment in lieu of notice was warranted in the circumstances of the case. This explanation answers the second issue and the court finds that the summary dismissal of the claimant satisfied procedural requirements as provided under section 41 of the Act.

Remedies

17. The claimant is only entitled to payment of Kshs 22,890 in lieu of leave days not taken. The claim for compensation and payment in lieu of notice are dismissed.

The final orders of the court are as follows:

18. The respondent has already settled terminal benefits due to the claimant including Kshs 22,890 in lieu of leave days not taken. This being the case there are no further orders in favour of the claimant. Each party to bear their cost of the suit.

Dated and delivered at Nairobi this 7th day of October, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE