



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

AT NAIROBI

CAUSE NO.1636 OF 2013

JOHN NGANGA NGIGI.....CLAIMANT

VERSUS

THE NAIROBI HOSPITAL.....RESPONDENT

CONSOLIDATED

CAUSE NO.636 OF 2014

JACOB ORLANDO OCHANDA.....CLAIMANT

VERSUS

KENYA HOSPITAL ASSOCIATION LTD

T/A THE NAIROBI HOSPITAL.....RESPONDENT

JUDGEMENT

Pursuant to directions of court on 1st December 2015, cause No. 1636 of 2013 and Cause No.636 of 2014 were consolidated. Parties agreed for file List of Agreed Issues and to proceed by way of written submissions.

Claim

1. John Nganga Ngigi (Ngigi) was employed by the Respondent when on 17th July 2013 he was alleged to have been involved in a transaction of fraudulent delivery of fuel. A show cause letter was issued on 19th July 2013. He Responded and noted that while going through fuel records he noted the levels were low and informed his senior Daniel Mkongo and suggested they place an order for fuel procurement. That the Claimant was not involved in the fuel delivery but Mr Ochanda handled the transaction as deliveries are done in the presence of security officers, procurement staff, maintenance staff and the supplier has the acknowledgment of delivery signed alongside the delivery. On 20th July 2013 the Claimant was suspended to allow for investigations and was called to a disciplinary hearing on 23rd July 2013. The suspension was extended to 3rd August 2013 but on 7th August 2013 he was issued with a letter of dismissal on the reason that he had been negligent. That his explanations were never taken into account and persons who were implicated in the incident were arrested and charged for the same. That his rights under sections 41, 43 and 45 of the Employment Act were not adhered to. The Claimant is seeking a

revocation of his letter of dismissal; an order for reinstatement with full benefits; damages for wrongful and unfair dismissal; and costs.

2. Jacob Orlando Ochanda (Ochanda) was employed by the Respondent on 18th January 1989 as a supervisor building. Gross salary was Kshs.72, 300.00 and leave of 30 days per year. On 7th August 2013 the Claimant was terminated from his employment with the respondent. There was no notice, it was without justification or due process. The Respondent reported to Kilimani Police Station fabricated charges in Criminal Case No.2450 of 2013 and the Claimant was acquitted on 15th January 2014. The Claimant was terminated while aged 55 years and had hoped to complete 5 years to retirement. As a result of the malicious action by the respondent, his dues were withheld, he was occasioned untold suffering and claims special damages, exemplary and general damages. The Claimant is seeking his gross pay for 5 years at Kshs.4,338,000.00; notice of 6 months at Kshs.433,800.00; expected pension after 60 years; unpaid gratuity at 30% for the period not served; a declaration that the termination was unfair; and costs.

Defence

3. In defence, the Respondent states that Ngigi has sued the wrong entity and no orders can issue against the entity sued. That Ngigi is an ex-employee of the Respondent from 1st April 1983 as electrician and rose through the ranks of maintenance Supervisor in July 2007. He had salaries reviewed over the years and due to his good work became a trusted employee. In November 2008 Ngigi was awarded a Long Service Award upon clocking 25 years with the respondent. However he was issued with several warnings and cautions for various acts. On 17th July 2013 he was implicated in scam to defraud the Respondent together with Jackson Ochanda, the Maintenance Supervisor and Julius Olendo, the Stores Assistant. The scam involved ordering of diesel fuel by Ngigi on behalf of the Respondent before it was required with the aim of converting this together with the 2 others in collusion with the employees of the supplier a Mr Kimani, the supplier turn boy. Ngigi requested for urgent delivery of 2000 litres of diesel which was irregular and meant to create an artificial crisis and emergency upon indication that fuel levels for generators were below half capacity. This assessment was not correct. The artificial emergency was to facilitate the supply of unrequired fuel to be converted by Ngigi and those he was colluding with. The scam was revealed when the supplier's turn boy made effort to recruit Ben Dacha, Field Security Officer upon promise to benefit from the same. Ben Dacha informed the Surveillance Officer and Security Officer and was advised to play along so that the culprits would be nabbed. He signed delivery receipt and got a bribe of Kshs.5, 000.00 upon delivery of 600 litres of fuel out of the 2000 litres supposed delivery. Security impounded the supplier vehicle No.KBV 578L when the turn boy made effort to bribe security with Kshs.16, 000.00. Upon arrest, the turn boy admitted to have colluded with Ben Dacha, Nixon Shikuku, a security Guard and Jacob Ochanda. The directly implicated persons were arrested at Kilimani Police station – Jacob Ochanda, Julius Olende and Kimani, the turn boy.

4. Ngigi was issued with a show cause letter, a suspension and upon investigations he was called for a hearing on 23rd July 2013 and the panel recommended the dismissal of those directly involved and upon the fuel supplier confirmation of the attempted fraud, Ngigi was summarily dismissed. He asked for his retirement benefits which were paid. He also cleared with the respondent.

That Ngigi betrayed the trusted bestowed upon him, he was taken through a fair hearing following investigations and the claim herein is misconceived as the summary dismissal was justified and the Respondent was within reasonable standards entitled to dismiss him. The claim should be dismissed.

5. In defence to the claim by Ochanda, the Respondent states that Ochanda was employed on 1st January 1989 as a Carpenter and moved through the ranks to Charge Hand, and Maintenance Supervisor. He had a checkered career with letters of warning and caution letters due to misconduct. He was suspended to allow investigations over misconduct. However, together with others, John Ng'ang'a, the maintenance supervisor and Julius Olendo, the Stores Assistant, he got involved in a scam by ordering supply of fuel prematurely. Ochanda colluded with others for the supply of fuel upon creation of an artificial emergency requiring 2000 litres when only 600 litres were supplied. The supplier of fuel, Kimani the turn boy made effort to recruit Ben Dacha and who proceeded to inform the respondent. Upon investigations, the

Respondent established that ochanda, Julius Olende and Kimani were directly implicated, and they were arrested and charged in court and criminal charges were withdrawn under section 87(a) of the Criminal Procedure Code. The Respondent issued Ochanda with a show cause letter and he failed to give satisfactory defence. He was suspended and then called for a hearing on 23rd July 2013 and the panel recommended a dismissal vide letter dated 7th August 2013. Ochanda asked for his retirement benefits but he refused to clear with the respondent. The dismissal was procedural, justified and the claim should be dismissed.

Submissions

6. Counsel for Ngigi submit that he was not involved in any manner in the alleged attempt to defraud the Respondent in the fuel delivery transaction as during his routine maintenance check of generators at Nursing school and doctor's plaza, he made an urgent request for delivery of fuel. That during investigations and hearing, no wrong doing was attributed to Ngigi as he only carried out routine checks and made order for a delivery of fuel. Allegations of negligence is unfounded as Ngigi was not involved in procurement or security. There were no criminal charges levelled against Ngigi for being involved in any scam and the dismissal based on the same is not justified.

7. That there was no evidence of any wrongdoing by Ngigi to justify his dismissal from employment with the respondent. Upon issuance of a show cause letter, he gave his defence and at the hearing there was no evidence to link Ngigi to the alleged fuel scam. In **Nicholas Otinya Muruka versus Equity Bank Ltd [2013] eKLR**, the court held that an employer must demonstrate reasonable and sufficient grounds that link an employee to acts of criminal nature that amount to gross misconduct to justify a summary dismissal. That mere suspicions are not enough as there must be reasonable and sufficient grounds. Section 43 of the Employment Act requires an employer to prove the reasons for termination.

8. That the dismissal was unfair as the Respondent failed to accord Ngigi mandatory provisions of the law as held in **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Saco Limited, Cause No.74 of 2013**. That section 41 of the Employment Act sets the mandatory procedures an employer must take before terminating an employee. Section 43 requires the employer to prove reasons for termination which mandatory provisions were not followed.

9. Ngigi also submit that he is entitled to the claims as set out and seek reinstatement noting his expected retirement age is 65 years, compensation for unfair dismissal and costs.

10. On his part, Ochanda submit that he was unfairly terminated from his employment with the Respondent after fabricated charges were levelled against him in Criminal Case No.2450 of 2013, Kibera law Courts. That he was acquitted of the unlawful charges on 15th January 2014. The Claimant was terminated while aged 55 years and had expected to serve the Respondent until retirement at 60 years and therefore had 5 more years of service.

11. The Claimant also submit that his rights were violated and there was no valid reason for his termination as the case of attempted theft was dismissed in the criminal proceedings. The Respondent failed to take the Claimant through a valid disciplinary process in accordance with the law and this was in clear violation of the law. The termination was unfair as under section 45 of the Employment Act and the Claimant is entitled to compensation; pay for 5 years and notice pay of 6 months. The Claimant is also seeking Kshs.10 million shillings for unlawful confinement.

12. The Respondent submit that the events leading to the dismissal of the Claimant are clear, they were jointly involved in a transaction to defraud the Respondent through requisition for generator fuel knowing that such was not required and only meant as a scam. Ngigi made the requisition appear to be urgent and of immediate attendance and the process went on to involve other employees including ochanda.

13. The Claimants were taken through disciplinary process, Ngigi was found culpable of negligence and deliberate intention to defraud. This was the reason for his dismissal. The Claimant acted deliberately and with negligence to cause the Respondent loss and damage.

14. With regard to ochanda, the Respondent submit that he was dismissed for the reason that he singed for delivery of generator fuel and for confirming that the fuel levels were low and required to be replenished. The confirmation made by Ochanda was while he knew that actual fuel ordered was not required and was never delivered. He was issued with a show cause letter and accorded a hearing where he was found culpable and thus the summary dismissal.

15. That the criminal prosecution of Ochanda and the acquittal has no bearing on the internal disciplinary proceedings carried out by the respondent. There is a different set of principles and standards required for either. The Claimant was found culpable for the attempted theft and negligence that justified hi dismissal. The claim has no merits and should be dismissed.

16. The Respondent has relied on the cases of **Shimeo Ayieda Ontita & others versus Nas Airport Service Ltd, Cause No.199 of 2012** and **George Onyango Akuti versus G4S Security Services Kenya Ltd, Cause No.107 of 2013**.

Determination

17. The defence challenged the entity sued by Ngigi, but this was not gone into in the submissions. Parties have opted to address the substantive issues. I will therefore not overly rely on this technicality and shall address the issues set out by the parties in their claim and defence thereof.

18. Both Claimants were dismissed summarily for the reasons of attempted fraudulent fuel under-delivery which amounted to negligence. Both Claimants admit they were taken through disciplinary hearing but challenge the modalities for the same. Ngigi challenges his disciplinary hearing on the basis that upon issuance of notice to show cause and subsequent hearing, there was no link established between him and the employees who engaged in attempted fraud. Ochanda's case is that despite a report of his case with the police and being charged with criminal case, he was acquitted and thus he was not found culpable.

19. Section 44 of the Employment Act all an employer to summarily dismiss an employee on where there is a fundamental breach of the employment contract or relationship.

44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

20. The law sets instances that warrant summary dismissal and the employer is allowed to add to the list based on its business operations. Section 44(4) (c) provides that an employee who is negligent and fails to do their duties properly is subject to summary dismissal;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

20. Therefore, where the employer has evidence of such fundamental breach of the employment contract, summary dismissal can follow subject to giving the employee notice and reasons for the same and where circumstances for the required notice warrant a lesser notice, such is for the employer to demonstrate. Section 47 of the Employment Act gives the employee the right to challenge the reasons given for dismissal. in the case of **Caliph O Ogega versus the National social Security Fund, Cause No. 280 of 2013** where the Court held;

Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... due process must be followed.

21. It is therefore imperative that the internal disciplinary proceedings be held where the employer is called at the shop floor and given a hearing. Such a place is where the best evidence is to be found. Such proceedings need not be similar to criminal proceedings where the evidence called is beyond reasonable doubt. This position was adopted with affirmation in the case of **Joseph Onyango Asare versus Brookside Dairy Limited, Cause No.1204 of 2014** that The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably give a hearing to be able to give his defence.

22. In **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** the court held that internal disciplinary proceedings are not similar as Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably give a hearing to be able to give his defence.

23. The Claimants were issued with show cause letters and subjected to internal disciplinary hearings, and based on the evidence and defence tendered, they were found culpable and dismissed for neglecting their duties as employees of the respondent. Ngigi does not deny that he requisitioned for fuel and that such requisition was established to lead to a series of fraudulent transactions that were with the intention of making losses for the respondent. The defence that he was never charged with criminal proceedings is lame. His actions resulted in the aiding of other employees in transactions that were fraudulent. A careful and proper enquiry on his part before signing the papers required for requisition of products and or goods for the Respondent required a high standard of security to avoid losses. Equally, Ochanda was involved in signing delivery for goods and or products that were never delivered in the amount and qualities requisitioned. As the accounting person, by signing the documents in acknowledgement of any transaction, he should have taken care and attention as by passing a delivery without confirmation put him as part of the fraudulent transaction.

24. Every employee is required to undertake their duties diligently, properly and with care to avoid the employer making unnecessary losses. Where an employee knowingly or negligently fails to undertake their duties properly and with care, they are subject to summary dismissal.

25. I therefore find the Claimants were dismissed for valid reasons that were justified at the international disciplinary hearings where they participated and had a chance to give their defences. Such defences lack merit and the dismissal are lawful.

Remedies

26. The claim for damages in summary dismissal that is found justified is not due. Ngigi is claiming reinstatement, but such is not available in a case of an employee found culpable for negligence of duty.

27. Ochanda is claiming salaries due for 5 years for the period remaining in his contract to retirement. However, by breaching the provisions of section 44 of the Employment Act, the Claimant went contrary to fundamental principles governing his employment and therefore he is not entitled to such a claim.

28. The notice required in summary dismissal is short or less subject to the circumstances of the allegations made or offences committed. Where summary dismissal is found justified, the notice period due in a contract is not payable.

29. Ochanda is also seeking damages of 10 million Kenya Shillings on the basis that he was falsely detained. The Respondent made a report to Kilimani Police Station and where there was an arrest, this was by an agency other than the respondent. Any proceedings that followed the report by the Respondent were done by an independent agency. I find no submissions that the report made by the Respondent was malicious and without basis. Such therefore removes the Respondent from any blame with regard to the Claimant being placed in custody and not liable in damages.

Conclusion

The claims herein must fail save that the dues set out in the summary dismissal letter owed to the Claimants as at the time of dismissal are payable. The Respondent shall also issue the Claimants with Certificate of Service and P9 forms for Kenya Revenue Authority returns for the last year of service.

Each party shall bear own costs.

Orders accordingly.

Delivered in open court at Nairobi this 6th day of October year 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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