



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 459(N) OF 2009

SAMUEL MOYAKI.....CLAIMANT

VERSUS

CATERING & TOURISM DEVELOPMENT LEVY TRUSTEES.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 19th August 2009. In his suit he averred that his services were unlawfully terminated on 3rd December 2008. He claimed that the dismissal was unlawful, illegal and/or wrongful. He averred that the dismissal was on the basis of malicious allegations and further that the Respondent refused, failed, and/or ignored to pay the Claimant his terminal dues and gratuity. In the alternative, the Claimant averred that the decision to terminate his services was in contravention and/or violation of the rules of natural justice, equity and conscience. The Claimant averred as a result, he had suffered injury to his credit, name, good image, character, reputation, severe mental anguish and pain for which he sought compensation and damages. He sought one months salary in lieu of notice Kshs. 22,202/-, severance pay of Kshs. 22,200/- and legal fees of Kshs. 100,000/- as well as general damages for maligning of the Claimant's good name, employment terminal dues and benefits together with costs of the cause and interest on the sums at Court rates.

2. The Respondent was opposed to the Claim and filed a Memorandum in Reply and Submissions on 22nd October 2009. In the Reply, the Respondent denied that the termination was illegal, unlawful, wrongful and/or unproven. The Respondent averred that the termination was not in contravention of the employment contract and that it paid the Claimant all his dues owing as at the time of dismissal. The Respondent denied that the Claimant was entitled to gratuity and he was heard in accordance with the rules of natural justice, equity and conscience. The Respondent averred that an investigation was conducted after the Claimant was interdicted for theft of money from colleagues and fuel. The investigation indicated the Claimant was guilty of the accusations and the Claimant admitted paying back the money he allegedly stole though he denied taking it. It was averred that the Claimant was given an opportunity to defend himself and he did so. The decision to terminate his services was made after the Claimant was found in the cash office whilst the cashier was not in. The Respondent thus sought the dismissal of the Claimant's claim with costs.

3. The Claimant testified on 4th May 2011 before Madzayo J. and subsequently on 12th March 2013 and 7th July 2014 before me. He was represented by Mr. Naikuni. The Claimant testified that he was a businessman and was educated up to Form III level. He testified that he was employed on 1st February 2006 as a driver II in the Nairobi branch earning a gross pay of 17,000/- and worked as a driver for one year before he was transferred to the head office as a clerk in 2008. He testified that he was later deployed

as a field driver and his duty was to collect the 2% levy from hotels. At the head office when he served as clerk his duties were to check vouchers from hotels and confirm payment. He received his letter of termination in February 2010. He testified that he was in Court because he was wrongly dismissed. He stated that the grounds were indicated as misuse of fuel, theft from colleagues and being present in cashier's office without permission. He testified that he worked well until one day he found two ladies talking saying he had entered the cash office. He asked them why they were talking about him and they stopped and went and reported to the Manager who went and found the cash office locked. He denied receiving the letter of 18th November 2008 accusing him of entering the cash office. He testified that the matters in his case were deliberated in his absence and that he was not given an opportunity to defend himself. He admitted receiving letter of 3rd December 2008 relating to the fueling of a car with his fuel card. He received a letter of dismissal which indicated he had been found in the cash office and he testified that his dismissal was without a hearing.

4. In cross-examination by Mr. Ojienda for the Respondent the Claimant testified that he was hired as a driver and drove KAV 644E a Toyota Corolla and that he was a field driver at one time and the vehicle he knew was KAV 645E and another one with plates beginning with KAV as well. He stated that he wanted to be paid notice of Kshs. 22,202/- and that he had worked in December and noticed there was no money in his account. He denied receiving the letter of 11th December 2008 as he was on leave in December. He admitted that he did not file a defamation case. He stated that he was not informed of dues held by the insurance. He testified that that he did not know if he was summarily dismissed. He testified that he went to the lawyer as he had not received the salary for March 2008. He stated that he was not aware of the letter of appeal and testified that he never appealed against his dismissal. He admitted receiving pay for December 2008 and January 2009. He denied being suspended from work.

5. He was re-examined by his counsel Mr. Naikuni and testified that he received a net pay of 22,202/-. He maintained that there was no indication that he received the dismissal letter dated 3rd December 2008. He denied appealing and testified that the letter was not his as he did not recall writing the letter.

6. The Respondent called Loise Akinyi Josiah, Virginia Chira, Charles Gumbo, Ruth Wanyangu Sande, Barack Isao Odindo, George Ochanda Machooka. The witnesses all testified that they worked with the Claimant at the Respondent now renamed Tourism Fund. The 1st Defence witness adopted her statement filed on 22nd May 2014 which was to the effect that she was taking vouchers from Kisumu to the registry when she met Virginia in company of Masivo and was given cheques to drop at the cash office and on getting to Mr. Achola's office she found the Claimant in the office. On enquiring the Claimant left and returned shortly after and locked the door and pocketed the key. The Claimant was taken to Machooka's office and denied being in the cashier's office.

7. In cross-examination she testified that she recorded the statement in 2014 and that she had a photographic memory. She testified that she did not have a grudge with the Claimant. She stated that the Claimant left the cash office in a hurry and left the keys hanging on the door and that he came back and retrieved them and pocketed them. She testified that the Claimant was not searched in her presence. She stated the police were not involved in the saga.

8. In re-exam she testified that the cashier on return stated that he had not given the Claimant the key to his office and she confirmed seeing the Claimant pocket the keys.

9. The 2nd Defence witness was Virginia Chira. She testified that the Claimant was found in the cash office. She relied on her written statement filed on 22nd May 2014. She stated in her statement that she was speaking to her boss Julius Masivo when the 1st Defence witness passed by on her way to the cash office and Virginia requested Lois to take some cheques to Achola the cashier. Lois came back running and said she had found the Claimant in the cash office and on going there found keys on the door and the Claimant came back and pushed them aside, locked the office and took the keys and pocketed them.

10. In cross-examination she testified that was an employee of the Respondent though she had not stated that in her written statement. She testified that she was a personal secretary at the time to Mr. Masivo. She

testified she saw the Claimant put the key in his pocket and that the Claimant was searched by Mr. Omulo and the key was not found. She testified that nothing was found missing at the Cashier's office.

11. In re-exam she testified that the Claimant was found in cashier's office and that it was at lunch time.

12. The 3rd Defence witness was Charles Gumbo an auditor with the Respondent. He testified that he knew the Claimant who was his colleague before dismissal in 2008. He relied on his statement which was to the effect that he confirmed there was misuse of fuel and on enquiry the Officer in charge of petrol order books indicated the fuel order in question was issued to the Claimant. He testified that he attended a meeting convened in the Boardroom where the agenda was discussions in relation to the misuse of fuel. He stated that the Claimant confirmed that one of the signatures on the petrol orders was similar to his and after the deliberations management decided to recommend the termination of the Claimant's services.

13. In cross-exam he testified that the statement he recorded was 6 years after the incident but the facts remained the same. He testified he went for one of the meetings and that there were investigations and the Claimant was one of the culprits.

14. In re-exam he testified that he was doing his routine checks when he noted the anomaly and inquired on the same. He interrogated all those who issued the orders and the Claimant.

15. The 4th Defence witness was Ruth Wanyungu Sande. She testified she knew the Claimant and relied on her written statement. In her statement she stated that the Claimant appeared before the Disciplinary Committee of the Respondent in November 2008 in relation to the unauthorized entry into the cash office using a spare key. She stated that the evidence adduced from members of staff who witnessed the incident was overwhelmingly convincing that the Claimant had been caught in the cashier's office and was attempting to open drawers when he was caught red handed.

16. In cross-examination she stated that it was upon request that she wrote the statement. She testified that her designation was Standards Development Manager. She stated that she had an opportunity to sit in the disciplinary committee and the Claimant did not attend as a member of the disciplinary committee. She confirmed that the incident was not reported to the police. She stated the Claimant could not sign as an attendee. She stated that she is from Kenya, Vihiga County.

17. In re-exam she testified that there was a disciplinary meeting and the Claimant attended and was then dismissed. She noted there was a letter inviting him to attend and that he was present as the person accused and not as a member of the committee. The conclusion of the meeting was that he be dismissed.

18. The 5th witness for the Defence was Barrack Isao Odindo. He testified that he was an employee of the Respondent and that the Claimant was his former colleague. He adopted his written statement filed on 22nd July 2014. He stated in it that the Claimant came to the office and sought a petrol order for a vehicle KAB 645 E and that he issued the order to the Claimant genuinely believing the vehicle belonged to the Respondent as he had not crammed the numbers of the Respondent's vehicles. He received a call a few days later from the 3rd Defence witness who told him that if the vehicle had been misspelt to be KAV 645E then the vehicle in question was in Nanyuki and not Nairobi.

19. In cross exam he testified that he was presently a levy clerk while at the material time he was a store clerk. He testified that the matter of the fuel misuse was investigated by internal audit and he did not know the outcome. He testified that the report by internal audit was on the abuse of the fuel system.

20. In re-exam he testified that he was in the same job category as the Claimant at the material time.

21. The 6th and final witness was George Ochanda Machooka who was an employee of the Respondent. He relied on his written statement filed on 22nd May 2014. His statement was to the effect that he wrote letters seeking explanation on anomalies in the fuel orders. He stated that the officers all wrote back and the Claimant denied having obtained the fuel order in respect of a vehicle that was not owned by the

Respondent. He stated that he was informed by Lois Josiah and Viginia Chira (1st and 2nd Defence witnesses) came to his office to report that the Claimant had been found in the cashiers office. He stated that he called the Claimant to his office and interviewed him and asked that he surrenders the key to the office. The Claimant denied having a key and did not surrender the key he was alleged to have taken and pocketed.

22. In cross exam he testified that his statement was made in 2014 while the incident was in 2007. He stated he was the Human Resource Officer (HRO) though he had not indicated on his statement. He testified that he was on interdiction for a matter involving procurement. He testified that the matter involving the Claimant and the fuel was taken to disciplinary which recommended the dismissal of the Claimant but the Claimant was allowed to continue working by the CEO without demotion. He testified that the Claimant was seen pocketing a key by 1st and 2nd Defence witness.

23. In cross exam he testified that the letter on interdiction issued prior was in respect of misuse of fuel order. He was interdicted and recommendation was dismissal but he was retained and later was dismissed due to unethical practices.

24. Parties filed written submissions with the Claimant filing on 12th November 2014 while the Respondent theirs on 27th November 2014. In his submissions the Claimant submits that the evidence he adduced proved unfair and unlawful dismissal and that he had proved the Claim. He thus sought the entry of judgment as per his claim as well as costs of the dispute and interest. He relied on the case of **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** and **Mark T. Mwangi v. Gateway Insurance Company Limited [2013] eKLR**.

25. The Respondent in its submissions submitted that the Claimant had not proved his case and thus it should be dismissed with costs. The Respondent relied on the case of **Mark T. Mwangi v. Gateway Insurance Company Limited [2013] eKLR**.

26. The Claimant in this case came across as a dishonest and untrustworthy person. He denied making an appeal yet he attached a copy of an unsigned letter to his Memorandum of Claim. He denied the same letter which was annexed by the Respondent. He was found in the cash office and was interviewed by the officials of the Respondent who found grounds to refer the matter to the disciplinary meeting. He was invited to the disciplinary meeting and the minutes show he was heard. He appealed and cannot be heard to say his termination was unfair.

27. The Respondent had good grounds to dismiss the Claimant and as required by the law has demonstrated that the dismissal was in compliance with the law. The Claimant was accorded a hearing and the outcome was the dismissal. Under Section 43 of the Employment Act the Respondent is required to prove the reasons for the termination were proper. Section 43 provides as follows:-

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

28. The Claimant was found in a compromising situation and he was suspected of dishonesty. The termination he suffered was thus fair and in conformity with the law and no remedies would lie. The Claim is thus dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of January 2015

Nzioki wa Makau

Judge