



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 602 OF 2013

ERIC MBALYA NGENZI.....CLAIMANT

VERSUS

ATHI STORES LIMITED.....RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 29th April, 2013, the Claimant seeks an order for compensation for wrongful and unfair termination of his employment.
2. According to him, he was employed by the Respondent between 1999 and 2012 as a driver. On October, 2012 he was suspended from employment on grounds that he had carried unauthorized goods in the company's motor vehicle. Upon completion of the suspension period he was dismissed.
3. The matter was reported to the Ministry of Labour by him for conciliation.
4. The Claimant avers that he prior to his dismissal, he was never given an opportunity to be heard and that no evidence was exhibited to him hence according to him his termination was unlawful. He further complained that upon termination, the Respondent refused to pay his terminal dues.
5. By a memorandum of response filed on 5th July, 2013, the Respondent does not deny dismissing the Claimant. It was its position that the dismissal was justified since the Claimant was found guilty of dishonesty and gross misconduct in that:-
 - (a) *The Claimant interfered with the tracking system of the motor vehicle he was assigned in an attempt to conceal its movement.*
 - (b) *He diverted the vehicle from the designated route and travelling a distance of about 30 km without authority.*
 - (c) *He carried unauthorized goods on the company's vehicle thereby putting the company's property to personal use.*
6. The claimant in a response filed on 23rd July, 2013 denied the accusations of gross misconduct. He particularly denied interfering with the motor vehicle's tracking system and that on the material date he was to transport goods to Garissa and upon reaching City Cabanas along Nairobi-Mombasa highway, there was immense traffic and he intercepted towards the Northern

bypass so as to avoid the traffic.

7. At the trial the Claimant, who was the only witness for his side reiterated the averments in his memorandum of claim. He stated that on the material date, he was assigned to transport goods to Garissa. He stopped for lunch at Mlolongo but when he resumed there was traffic jam he decided to use the Northern by-pass.

8. At Utawala he was stopped by a Mr. Nyaga for the Respondent and asked why he was using that route and he explained. Mr. Nyaga then told him to proceed with the journey and the issue would be looked into when he returned. Upon return, he was suspended without pay and later dismissed.

9. In cross-examination he stated that there are designated routes but drivers were allowed to change whenever there was jam. He denied ever being instructed to call prior to changing designated route. He further denied being found with unauthorized goods.

10. The Respondent through Mr. Nyaga stated that drivers are given designated routes which are mapped and plotted on the GPRS system. The system according to him was live and gave real time information about the vehicle. If the vehicle goes off the designated route for long, the system would be notified.

11. According to Mr. Nyaga, the Claimant left earlier than expected. He was meant to leave around 2.00 p.m. but he left around 12.00 p.m. He saw the vehicle at a quarry some 7 kilometers from Mlolongo so he started to track it and intercepted the same at Utawala. It was his evidence that he found the vehicle carrying ballast yet they were not authorized to do so at that time. He allowed the claimant and his colleague to proceed with the journey and advised that the issue would be looked into upon their return. Mr. Nyaga informed the Court that drivers must inform transport manager before changing routes.

12. Upon return the claimants were suspended and the shop steward and the union accordingly informed. Their activities were investigated during the suspension and the management made a decision to dismiss the Claimant and his colleague and that the management further offered to pay their terminal benefits. The claimant's colleague took his benefits but the Claimant declined.

13. In cross-examination, he stated that the Claimant was represented by the shop steward, union officials and Ministry of Labour.

14. At the conclusion of the hearing, I directed that the parties file their submissions however, only the Respondent filed submissions.

15. Mr. Karanja submitted that the Claimant noticeably gave no explanation or any reason why he never informed the company about his change of route yet he was well versed about company policy on the issue.

16. Counsel urged the Court to find that by changing the designated route without authority, the Claimant could only have been trying to use the alternative route to conduct his personal business on company time and using company resources hence a gross violation of the company rules and breach of the Claimant's employment contract.

17. Counsel further submitted that the Claimant was represented during the disciplinary proceedings, by his union representative and the decision for dismissal was made which went even to the appellate stage. Counsel submitted that the claimant's Union agreed with the decision to dismiss the Claimant but negotiated for an apt package for him and his colleague but the Claimant rejected the package while his colleague accepted it.

18. One of the major pillars of employment relationship is fidelity or trust. The employee while

performing his duty as per the contract is entitled to his remuneration and benefits as per the contract.

19. On the other hand, an employer expects utmost good faith and responsibility on the part of the employee while carrying out his duties. This includes an injunction not to improperly use or abuse the employer's property entrusted with such employee.

20. The Claimant herein was accused of ferrying unauthorized goods using his employer's motor vehicle which was entrusted to him. The Respondent reasonably and on a balance of probabilities, demonstrated to the Court how it arrived at the suspicion that the Claimant was using its motor vehicle contrary to the company's regulations and policy.

21. Mr. Nyaga testified that using the tracking system, the vehicle was located some 7 kilometers off the designated route at a quarry where the Respondent used to collect building stones. Mr. Nyaga further testified that he later intercepted the vehicle at Utawala and on inspection he found it ferrying ballast which was not part of the assignment given to the Claimant.

22. The Claimant was consequently suspended from duty and later dismissed after investigation which according to the Respondent, his union was involved in.

23. Disciplinary proceedings under a contract of employment are not the same as Court proceedings hence the rigours of burden of proof and rules of evidence in Court proceedings need not be strictly observed. What is most important under such process is that a fair procedure is followed in hearing the accusations against the employee and he is accorded a reasonable opportunity to present his defence either personally or through a union representative where such employee is unionisable.

24. Reasonable opportunity to present defence include reasonable and adequate disclosure of the charges levelled against such employee and the evidence allegedly in support of such charges. Anything less may not constitute a reasonable opportunity.

25. Taking the foregoing into account and applying it to the case before me, I am reasonably persuaded that the Respondent had reasonable cause to believe the Claimant was putting to unauthorized use, the Respondent's vehicle entrusted to him and that this constituted a valid reason for his dismissal. The Court is further persuaded that the process followed in his dismissal neither offended the Employment Act nor rules of natural justice generally.

26. In conclusion, the Court disallows the claim as filed but orders that the Claimant be paid by the Respondent the termination package which was negotiated between the Claimant's Union and the Respondent within 30 days of this judgment.

27. The Respondent shall further issue the Claimant with a Certificate of Service. There will be no order as to costs.

28. It is so ordered.

Dated at Nairobi this 15th day of January 2015

Abuodha J. N.

Judge

Delivered this 15th day of January 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge