



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 519 OF 2013**

**SYLVESTER AKARANGA KISIALI.....CLAIMANT**

**VERSUS**

**MOTORWAYS CONSTRUCTION LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent as a night guard and was assigned guarding duties at the respondent's construction site near Kilileshwa Police Station. He was earning daily wage of Kshs.546.
2. On 9<sup>th</sup> January, 2013 he claims he was called to the respondent's offices and issued with a payslip which indicated his services had been terminated and he had been paid one month's salary in lieu of notice.
3. The claimant avers that no reason for dismissal was ever communicated to him.
4. Prior to his dismissal, he avers that on 17<sup>th</sup> December, 2012 at around 10.00 p.m he was taking shelter from the rain inside one of the respondent's vehicles when a policeman and one supervisor asked him to accompany them and when they reached a culvert along a road that was under construction, the policeman and his supervisor removed a 3 litre jerrican which was full of fuel.
5. He was then taken to Kileleshwa Police Station where he was detained and released two days later without any charges being preferred against him. Regarding this incident he averred that he had nothing to do with the said fuel and that the allegations against him were fabricated.
6. In opposition to the claim, the respondent averred that the claimant used to siphon fuel from earth moving machines he was assigned to guard and on the material date he was found hiding some in a culvert.
7. The respondent therefore avers that the allegations against the claimant were not fabricated as the claimant was spotted hiding a container with diesel.
8. The respondent further averred that upon termination, the claimant was paid his dues as per his letter of appointment.

9. At the trial the claimant reiterated the averments in his memo of claim. He further admitted in cross-examination that he was paid his leave allowance and 26 days worked in January. He denied being given any reason for his termination.
10. The respondent on its part called Mr. Yaro Abdi who stated he worked for the respondent as a security guard. He stated that his special assignment was on theft of diesel. On the material day, he stated he was on patrol in Kileleshwa and at around 10.00 p.m. he found the claimant alone at work. According to him, the claimant was found siphoning diesel from one of the tractors. He informed his boss and called police officers who took the diesel and the claimant to the police station. The claimant later resumed work but was relocated elsewhere.
11. The respondent's second witness, Mr. Francis Mutinga stated that he was called by his boss on the material day to go and check on a theft incident. According to him the claimant was the one who was in charge of the tractors at Kileleshwa. The claimant was found hiding the diesel in a trench. The container had about 3 litres. He stated that the respondent chose not to prefer charges against the claimant.
12. The respondent's 3<sup>rd</sup> and final witness stated that he was the one who facilitated the employment of the claimant. On the material date, he stated he received a call from the claimant saying he had been arrested on account of fuel theft. When he returned from up-country where he was by the time the claimant called him, he found he had been released. It was his evidence that the workers at the Kileleshwa site were terminated on account of fuel theft. Upon termination they were paid in lieu of notice.
13. In cross-examination he stated that several meetings were held on the issue of theft of fuel and according to him, the claimant was terminated for being negligent.
14. Counsel for the claimant in his closing submissions stated that there was no doubt that the claimant was not offered any proper chance to defend himself as required by section 41 of the Employment Act. According to Counsel, the claimant testified that he was not heard before the decision to dismiss him was arrived at. Counsel further submitted that no letter of dismissal was produced detailing reasons for the claimant's dismissal. On this point Counsel urged the Court to rely on the case of **Donald Odeke v. Fidelity Security Ltd.**
15. Counsel for the respondent on the other hand submitted that the respondent followed procedure in terminating the claimant's employment. According to Counsel, the claimant who was employed as a security guard was caught red-handed siphoning fuel, was given reason for termination and accorded a hearing before being paid his terminal dues.
16. Counsel further submitted that fuel theft was rampant where the claimant was tasked to guard and this caused the respondent substantial loss. This according to Counsel was reasonable and sufficient ground for summary dismissal of the claimant.
17. Regarding terminal dues, Counsel submitted that claimant was duly paid his terminal benefits in January, 2013 including gratuity.
18. In a claim for unfair dismissal, the onus is on the employer to prove that the reason for termination was valid and that such reason was a fair reason. Further, in carrying out the termination the employer is required to do so in accordance with a fair procedure.
19. I have reviewed and analysed the evidence by both sides in this suit vis-à-vis the relevant provisions of the Employment Act and the requisite standard of proof in civil cases and I am reasonably persuaded that the respondent had reasonable grounds for terminating the claimant's services.
20. Employment relationship is predicated upon trust and confidence which once lost, the

relationship cannot continue. The claimant and his colleagues were suspected of involvement in the rampant fuel theft at Kilileleshwa site where the claimant was in charge of security. He need not have been arrested, prosecuted and convicted in order for the respondent to take action against him. Criminal prosecution and disciplinary process in an employment relationship operate on distinct and different evidentiary parameters. A discharge or an acquittal on a criminal charge is therefore not necessarily a bar to a disciplinary process against an employee.

21. Section 45(2) (c) of the Employment Act however requires that even where the employer has justifiable reason for terminating the services of an employee, such termination should be carried out in accordance with fair procedure. Section 41(2) of the Act provides that before terminating the employee or summarily dismissing such employee, an employer shall hear and consider any representations which the employee may make and the person, if any chosen by the employee. Apart from the evidence of Mr. Livondo, who stated that the dismissal of the claimant was discussed, there was no sufficient evidence on how the claimant's termination was carried out in terms of process. To this extent, whereas the Court has found that there was justifiable reason to terminate the claimant's services, it was done without following a fair procedure as contemplated under section 45(2) (c) of the Act. For this reason only the Court finds that the termination of the claimant's services was unfair and awards him 3 months' salary as compensation for unfair dismissal.

22. Concerning other terminal dues, the Court is reasonably persuaded that these were paid and dismisses this aspect of the claim.

23. The claimant shall have costs of the suit.

24. It is so ordered.

Dated at Nairobi this 27<sup>th</sup> day of February 2015

Abuodha J. N.

Judge

Delivered this 27<sup>th</sup> day of February 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge