



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 601 OF 2013

AYUB OKOTH NYAWARA..... CLAIMANT

VERSUS

ASHUT ENGINEERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant in this suit seeks compensation to the tune of Kshs.405,000/= on account of what he considers was an unlawful termination of his services. According to the Memorandum of Claim filed on 30th April, 2013 he states that he was employed by the Respondent on 1st November, 2011 as an I.T Support Technician at a monthly salary of kshs.30,000/= and worked until 11th December, 2012 when the Respondents terminated his services and refused to pay his terminal dues.
2. It is the Claimant's contention that he was never accorded an opportunity to be heard prior to the termination of his services.
3. The Respondent in its Memo of Response filed on 24th June, 2013 admitted that the Claimant was not given an opportunity to be heard. According to the Respondent, the claimant was accorded an opportunity to defend himself but failed to clear the charges against him.
4. The Respondent further averred that the Claimant was assigned duties at the I.T Department but contrary to his duties he involved himself in procurement duties wherein he made orders for fuel and acknowledged receipt for more quantities than was actually delivered and generally involved himself in transactions which amounted to gross misconduct and the Respondent had no other option than to dismiss the Claimant.
5. At the trial the Claimant testified that on 27th November, 2012 he was called by the Director, Mr. Mehul to check how much fuel was there. He checked and found 19 drums were empty. He was then asked by the said Director to order 3,800 liters from Pac Oil which he did and the fuel was delivered around 4.30p.m and he received it. According to him he signed a delivery note for 2970 litres and informed the Director that Pac Oil came with a different delivery note from what had been ordered. It was further his evidence that when Pac Oil billed for 3,800 litres they said it was their fault.
6. He stated that later on he was asked by the HR Manager Mr. Kiarie to stay away pending investigation of the issue. He stayed away for about one week and was called back and issued with a show cause letter and later issued with a termination letter.

7. In cross-examination by counsel for the respondent he admitted that initially he used to handle fuel in addition to his tracking duties but in June, 2012 he was asked in writing not to deal with fuel and only restrict his work to tracking. It was however his evidence that these instructions were later verbally altered by Mr. Mehul who asked him to continue handling fuel.
8. The Respondent on the other hand called in its defence Mr. Paul Wainaina Kiare, the HR Manager who stated that on 26th November 2012 the Respondent's Director Mr. Mehul Shah called and informed him that the claimant had presented an invoice with discrepancy on the amount of fuel. A meeting was consequently called in which the claimant was present and he was asked to explain the discrepancy. It was further his evidence that on 26th June, 2012 a vehicle came to refuel and only needed 36 litres to refuel to 60 litres but the Claimant refueled the full 60 litres while the vehicle only needed the difference which was 24 litres. It is the consequence of this which made him issue instruction that the claimant should no longer handle fuel.
9. In cross-examination he stated that the Claimant could carry out any other duty as allocated from time to time. He further stated that he could have been asked to issue fuel.
10. In his closing submissions, counsel for the claimant Ms Ndogo urged that the Claimant in handling fuel after he had been asked not to do so, did so on instructions of the Director and not in violation of HRM's instructions as claimed. According to counsel, the action of 26th November, 2012 were not gross misconduct as they were sanctioned by the Respondents' Director.
11. Regarding procedure for termination, Counsel submitted that the procedure set in section 41 of the Employment Act was not followed by the Respondent as the Claimants was not advised of his right to bring with him an employee of his choice during the disciplinary meeting. Counsel relied on the previous decisions of this court namely **Rebecca Ann Maina & Others VS Jomo Kenya University of Agriculture and Technology** and **Stanely Auti v National Water Conservation & Pipeline Corporation**.
12. Counsel for the Respondent, Mr. Mbaabu submitted that the Respondent's witness DW1 explained that the Claimant failed to satisfactorily explain why he contravened instructions and signed delivery note for more fuel than was delivered. Concerning disciplinary hearing counsel submitted that the law under Section 41 of the Employment Act does not envisage a situation where every employer has to conduct a tribunal type of proceedings with a court set up. According to counsel, once the entire circumstances in the evidence is considered, it will clearly show that the Claimant was given a hearing, offered an opportunity to defend himself but failed to give any sufficient defence and was consequently dismissed. Regarding authorities in support of the claim, counsel submitted that they echo what is contained in the Employment Act. However it is upon the Claimant to bring out the facts to place himself within the law quoted.
13. The Claimant was summarily dismissed, on 11th December, 2012 on the ground that he was given instructions in June, 2012 not to be receiving, storing and issuing fuel supplied to the company but ignored the instructions and continued to involve himself in fuel issues. According to the letter, his involvement in fuel issues led to the company being billed for a supply of 3,800 litres whereas the amount supplied was 2970 litres from Pac Oil. The letter informed the applicant that an employee who knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer is guilty of gross misconduct for which summary dismissal applies.
14. Section 44(3) of the Employment Act makes it permissible for an employer to summarily dismiss an employee when an employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. Subsection (4) enumerates situations which may justify summary dismissal. The Section however places a rider that the enumeration of such matter or the decision of an employee to dismiss an employer summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matter not mentioned in the section constitute

justifiable or lawful grounds for dismissal.

15. The claimant was dismissed on account of breaching Section 44(4)(e) which provides;
- i. **4 (e) “an employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer”**
16. The Claimant was accused of getting involved in fuel issues after he had been asked in writing not to do so by the Respondent’s HR Manager. This led to him signing for the receipt of 3,800 litres of fuel while only 2,970 litres were received. The company was consequently billed by Pac Oil for 3,800 litres.
17. The Claimant in his defence has stated that his involvement in fuel issues after he had been told not to do so was as a result of verbal instructions from a Mr. Mehul who he says was one of the Respondent’s Directors. This implies that the Claimant is disputing that the facts giving rise to the summary dismissal do not constitute justifiable or lawful grounds for dismissal.
18. DW1 in his evidence before the court stated in cross-examination that the Claimant could carry out any other duty as allocated from time to time. He further stated that there could have been a possibility that the Claimant was asked to handle fuel. The testimony by DW1 this far gives the impression that the ground relied on for dismissing the Claimant was rebuttable.
19. In the Canadian case of **R.V. Arthurs ex parte Port Arthur Ship building co. (1967) 2DLR (2ND) 342** it was held.

“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the duties, or prejudicial to the employers business, or if he has been guilty of willful disobedience to the employer’s orders in matter of substance the law recognized the employer’s right to summarily dismiss the delinquent employee...”

20. From the foregoing it may be said that summary dismissal require willful conduct. Inadvertence, mistaken belief or accidental omission can therefore not constitute grounds for summary dismissal. In another Canadian case of **Yeager v R.J Hastings Ltd (185) WWR, 218** it was observed that;

“An essential characteristic of any conduct which justifies dismissal is its willful nature for it is this feature of conduct which gives rise to inference that the servant intends no longer to be bound by his contract of service with the result that the relationship is struck fundamentally”.

21. The employer bears the onus of demonstrating just cause for immediate dismissal on a balance of probability. The conduct must be such that the employment relationship can be terminated without notice. A simple finding of employee misconduct however will not necessarily demonstrate just cause.
22. The Respondents witness DW1, stated that there could be a possibility that the Claimants could have been authorized to handle fuel after to the notice that he should not do so. Besides there was admission by the Respondent that Pac Oil actually supplied 2,970 liters of fuel instead of 3,800 litres ordered by the Respondent. No accusation of connivance or collusion with Pac Oil was alleged against the Claimant. In his defence he said signing for 3,800 litres instead of 2,970 litres was accidental and he realized after he had signed. This conduct cannot be said to be willful to justify summary dismissal. To this extent the court reaches the finding that the Claimant was wrongfully dismissed and reduces his termination to normal termination as per contract with benefits. The court having so found, section 45 of the Employment Act prohibits unfair termination of employment. It further provides that a termination shall be unfair if the employer fails to prove that the reason for termination is a fair reason.

23. Where this court reaches a finding that an employer has been unfairly dismissed, the court has among other powers to order up to twelve months wages as compensation.

24. In this particular case the court awards the Claimant six months wages as compensation for unfair termination of employment.

25. In conclusion the Respondent shall pay the Claimant;

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| a. One month's salary in lieu of notice | 26,923 |
| b. Salary for 4 days worked in November | 3,588 |
| c. Salary for 11 days worked in December | 9,867 |
| d. Six months' wages | |
| <u>161,538</u> | |

201,916/=

e. Costs of the suit.

26. The Respondent shall further issue the Claimant with a certificate of service.

Delivered this 13th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge