



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 359 OF 2012

KENNEDY MAKOKHA WEBUYELE.....CLAIMANT

VERSUS

EAST AFRICA PORTLAND CEMENT

CO. LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 6th March 2012 seeking resolution of a dispute he framed as wrongful and unfair dismissal and termination. He averred that he was employed by the Respondent with effect from 1st August 2003 as a sales representative and from 19th November 2003 redeployed to the position of Regional Sales representative in charge of Central region and due to his exemplary performance was posted to other regions in similar capacity. He averred that when he was redeployed to the position of Regional Sales Representative he was assigned a company vehicle to enable him shuttle between the depots in the region he was assigned to. He averred that in January 2006 he was redeployed to position of Marketing Officer based at the Headquarters of the Respondent at Athi River though his residence was in Nairobi. He averred that on 17th November 2008 he was transferred to the core region of Nairobi and given a vehicle to work. And that worked with diligence and without any problem until 12th November 2010 when he was suspended and given 7 days to respond to allegations of failing to adhere to laid down regulations in respect of the Respondent's vehicle. He responded on 19th November 2010. He averred that he was summarily dismissed on 13th July 2011 and on 22nd July 2011 he appealed against the summary dismissal which was reduced to normal termination on 3rd November 2011. He was paid some terminal benefits being 3 month's basic salary in lieu of notice and 3 months house allowance and accrued leave. He averred that his dismissal was effected without following the laid down procedure under Section 41(1) of the Employment Act. He further averred that the Respondent did not adhere to its own Company Rules and Disciplinary Code. He alleged discrimination as other staff whose vehicles had been stolen had not been dismissed and he thus sought a declaration that his termination was wrongful and unfair and therefore he was entitled to reinstatement without loss of benefits and alternatively payment of the maximum 12 months compensation for wrongful termination, bonus for the year 2009-2010, general damages, costs of the suit and any other relief the Court may grant.

2. The Respondent opposed the suit and filed a Memorandum of Defence on 12th October 2012. In the Defence the Respondent averred that the Claimant was its employee and the nature of his employment entailed constant travel and to facilitate this various vehicles were assigned to him during his employment with the Respondent. The Respondent averred that the Claimant was dismissed due to the loss of the Respondent's motor vehicle registration KAT 459X. It was averred that the Claimant's parking area/premises were not secure as there was no fence or guard at the premises as required by regulations. It was further averred that the tracking system of the vehicle had been tampered with at the Claimant's residence. It was averred that the Claimant was invited to a disciplinary hearing and the Claimant was invited to a further disciplinary hearing which resolved that the Claimant was culpable in the loss of the vehicle and the Claimant's case was presented to the Respondent's Executive Committee and the Claimant was subsequently dismissed from the Respondent's employment summarily. The Respondent averred that it considered the oral and written appeal submissions by the Claimant and the appeal committee reviewed the Claimant's termination from summary dismissal to normal dismissal and terminal benefits computed and paid. The Respondent averred that the Claimant was accorded a fair and lawful process before his termination in that the Claimant was issued with a show cause letter upon suspension and was granted audience at the disciplinary hearings, was heard on appeal and the decision to summarily dismiss him reduced to normal termination. The Respondent averred that the Claimant was thus not entitled to the prayers he had sought in his claim. The Respondent sought the dismissal of the suit with costs as the termination was fair within the meaning of the Employment Act.

3. The Claimant who was represented by Mr. Namasake testified before me on 3rd November 2014. He testified as that he was employed by the Respondent as a sales representative and was subsequently deployed to the regions as Regional Sales Representative and at all the time he served in the regions and the head office he was assigned various vehicles which were never stolen. He testified how he parked motor vehicle KAT 459X at 8.30 pm on 4th November 2010. He testified that his neighbor and the caretaker saw him park the vehicle and he was shocked to find it missing the following morning. He reported the matter to the police and the Respondent through his immediate supervisor Lucy Molonget. He testified that the police came to the scene and the police interviewed the caretaker and his neighbor who had witnessed him park the vehicle. The vehicle was tracked but was not recovered. He testified that he was given a show cause letter and he responded and was called for disciplinary hearings and later he was summarily dismissed. He testified that he appealed and the summary dismissal reduced to normal termination. He stated that he was discriminated against as the loss of the vehicle was not the first time this was happening and he testified that he was diligent in handling the car and was not responsible for its loss. He thus sought an award of the sums claimed in his claim.

4. In cross-examination by Mr. Molenje for the Respondent the Claimant testified that he did not expect any vehicle to be stolen from his possession. He testified that it was a company vehicle and it was branded on the door and had blue plates. He testified that he had driven the blue plates for 2 years on his return to Nairobi export office. He testified that he was not aware of Government regulations and that he used to fill a work ticket. He testified that he was aware that the residence or hotel where one would park the vehicle would have to be secure in terms of having someone to guard the car. He testified that where he resided there was a security person cum caretaker who kept watch over the vehicles. He testified that he did not know when the caretaker went to sleep and that he always found the caretaker there each morning. He testified that the reason for his termination was the loss of company vehicle though no criminal charges were preferred. He conceded that the vehicle would not have been stolen if the residence had a perimeter wall with guards present. He testified that he was given a show cause letter and asked to respond and he responded to the letter. He stated that he was invited for the first time and he explained his position and was invited for the second time and the meeting did not take off due to the absence of Car Track gadgets evidence. He testified that he appealed against the terminal dismissal and that he was paid his benefits and given a certificate of service. He stated that the company had no problem with his work and that as far as he was concerned he adhered to the laid down rules.

5. In re-examination he testified that he had never been told not to park at his residence. He testified that his vehicle did not have an alarm system fitted.
6. The Respondent called Timothy Muiruri Githumbi and John Ole Kimanjoi. The first defence witness testified that he was a software engineer at Africa Fleet Management Solution and was aware of the vehicle KAT 459X which was stolen on 4th November 2010. He testified that the vehicle was reported stolen and on checking discovered that the system in the vehicle had been disconnected on 4th November 2010 at 10.27am and the GPS locator showed the last location as Ngong-Matasia. He testified that there is no access to the system from outside as you must access the dashboard. He confirmed that the vehicle could not send any data or information due to the immobilization.
7. In cross examination he testified that he was not the person who investigated the matter and the vehicle was disconnected at 10.27am. He stated that they checked and found the vehicle system had been disconnected. He testified that all vehicles have a user policy and the user has to take care of the vehicle and the system. He testified that the system is located in the vehicle dashboard and only the user knows where it is located. He testified that his colleague gave a statement and attended a disciplinary hearing. He however did not have the copy of the statement.
8. In re examination he testified that he knew the technical works of the fleet management systems.
9. The second defence witness testified that he was the head of HR & Administration at the Respondent. He testified that he knew the Claimant who was working with the company as a sales executive until exit from service. He testified that the Claimant was paid 3 months salary on termination. He stated that the Claimant was dismissed for negligence and failure to adhere to company procedures leading to loss of motor vehicle KAT 459X which was in the Claimant's possession. He testified that the Claimant was given a show cause letter and there was a disciplinary hearing. He stated that the vehicle has to be parked in a place secured with guards or at a police station as the vehicle is a government vehicle. He testified that the Claimant was given a chance to defend himself and even appealed. He testified that the Claimant was paid Kshs. 747,563.55 as terminal dues but he could not recall if a certificate of service was issued.
10. In cross exam he testified that the Respondent had not availed the guidelines. He stated these were in the public domain and he was not sure if the Claimant was aware of them. He testified that the Respondent took action on the Claimant due to the negligence and failure to adhere to company regulations. To the best of his knowledge the Claimant had not been accused of tampering with the system. He testified that the committee that sat on appeal considered the length of service of the Claimant and reduced the summary dismissal to normal termination.
11. On re examination he testified that there was a recommendation that the Claimant be reinstated back with a final warning. He stated that the disciplinary committee was of the view the Claimant had suffered and insurance was to compensate the loss. He testified that the management committee did not agree with the disciplinary committee and the verdict to terminate was to prevent future occurrences and was not a cost benefit analysis. He testified that the disciplinary committee makes recommendation which is either upheld or not. He stated that the latter – executive committee takes precedence.
12. Parties filed written submissions and the Claimant filed on 1st December 2014 and the Respondent on 17th December 2014. In his submissions the Claimant reiterated his evidence and submitted he had proved his case. He submitted that the dismissal was wrongful and unfair contrary to the law. He cited Section 45 of the Employment Act. He submitted that he was discriminated against as others whose vehicles had been stolen were not dismissed. He submitted that he was entitled to reinstatement and in the alternative maximum compensation.
13. The Respondent submitted that there was reason to terminate and adherence to the procedural requirements in terminating the employment of the Claimant. The Respondent submitted that the

Claimant had failed to prove his case. Reliance was placed on the cases of **David Getare Nyangau v Houseman General Contractors Ltd [2013] eKLR** and **Munga Omar Mnago v. Teachers Service Commission Cause No. 106 of 2012**. The Respondent submitted that the Claimant could not be reinstated as this would be contrary to Section 12(3)(viii) of the Industrial Court Act. The Respondent also relied on Section 49(4)(b) and (d) and Section 50 of the Employment Act.

14. The parties are in agreement that the Claimant was in possession of motor vehicle KAT 459X which was stolen on the night of 4th November 2010. It is not in dispute that the Claimant was not charged or accused of the theft of the vehicle. The Claimant was using the vehicle and states in his evidence that he was in the Ngong area on the morning of 4th and in the evening parked the vehicle at his residence in Jamuhuri estate. It is not in dispute that in the course of the night the vehicle was stolen from the compound. The first defence witness testified that the tracking device on the vehicle was noted to have been immobilized at 10.27am and the last GPS location given for the vehicle was Ngong-Matasia area. It is clear from this testimony that the vehicle was in the care of the Claimant at the time. The loss occurred that night and the Respondent was compensated by the insurer for the loss. The Claimant was given a show cause letter and he responded and the Respondent invited him to a disciplinary hearing. He was given a verdict of summary dismissal which was reversed on appeal to normal termination. He sought reinstatement and in the alternative compensation. He was firm in his view that he was discriminated against.

15. The Court in evaluating the evidence has established that the Claimant was accorded the procedural fairness in so far as the hearing contemplated in Section 41 is concerned. The Claimant was heard, appeal considered and a favourable outcome given. He asserts that there was discrimination as he was dismissed while others who had lost vehicles were retained. He unfortunately did not prove this assertion. Section 5 of the Employment Act outlaws discrimination. No evidence was however led by the Claimant to prove his termination was discriminatory and in the circumstances I find he was dismissed for just cause. A vehicle was lost while in his possession. His compound was without borders – unfenced and thus not a secure place to park the company vehicle. Whereas he may not have been privy to government regulations regarding the blue plates he drove he indicated knowledge of use of the vehicles owned by the Respondent. He was therefore careless in his handling of an asset of the Respondent for which Section 44 provided grounds to the Respondent to terminate. In the premises from the foregoing there is no merit in his suit and I dismiss this suit with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of **March** 2015

Nzioki wa Makau

JUDGE