



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2343 OF 2012

PETER ODHIAMBO ORIWO.....CLAIMANT

VERSUS

LABCHEM LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent on 19th November 2012 seeking resolution of a dispute he framed as unlawful and malicious termination of employment. He averred that he was employed as a driver in May 2006 and served in that capacity until 14th April 2011. He averred that his termination was without notice and that at the time he was earning a monthly salary of Kshs. 15,947/-. He averred that he reported to work as usual and was confronted by the general manager of the Respondent in the company of policemen who arrested the Claimant. He averred that he was taken to Mombasa Road police post and no reason was given for the arrest. He was notified at the station that the general manager had lodged a complaint of theft by servant. The Claimant averred that he was not given an opportunity to explain and added that he was a driver and not involved with stores. He was released unconditionally the next day. He averred that he was not allowed back into the Respondent's premises by the guards at the gate. He averred the termination did not accord with Section 41 of the Employment Act and thus sought leave pay, one month salary in lieu of notice, payment for the remainder of the contract, service, certificate of service, compensation of 12 months salary, interest on the sums claimed as well as costs of the suit.

2. The Respondent filed its defence on 11th January 2013. In the defence, the Respondent averred that the Claimant was employed as a driver from the year 2008 until April 2011 when the Claimant left and/or absconded. The Respondent averred that the Claimant in collusion with the storekeeper would collect goods not authorized and deliver the same to a destination not authorized by the Respondent. The Respondent established that the goods were given to the Claimant by one Francis Mukhalo Lukatiba who directed where the goods would be delivered. The Respondent reported the matter to the police and the Claimant was after arrest released on police bond. Once the Claimant was released by the police he did not report back to the Respondent and/or communicate until a demand letter was written by his advocate. The Respondent denied service from 2006 and averred that the complaint to the police was valid and backed by statements and exhibits and there was no malice or false information made to the police. The Respondent averred that the Claimant was given an opportunity to explain his conduct but could not explain and would only say that he will not repeat the same. The Respondent averred that there was no evidence placed before the Court that the Claimant was given an unconditional discharge by the police or cleared of the offence. The Respondent averred that the Claimant was not declared redundant or on fixed contract. The Respondent thus sought

dismissal of the Claimant's suit with costs to the Respondent.

3. The Claimant testified on 19th September 2013. He testified that he was employed by the Respondent in 2008 as per his contract annexed to the memorandum of claim. He stated that he was paid Kshs. 13,500/- as basic plus house allowance of 2,015/- a month. He testified that on 13th April 2011 he reported to work and was sent to the godown by the general manager Diresh Shah. He testified that at the godown he was given a complimentary slip and invoice and gave it to the storekeeper Francis Lukatiba Mukhalo. He testified that the goods were taken to the customer Crown Berger Limited. He was in the company of two truck helpers and the goods were received and invoice stamped. He went back to the godown and while loading the truck a second time the general manager came in the company of 2 armed policemen and the Claimant was arrested together with the storekeeper. He stated that the next day he recorded a statement and was released and reported to work after a few days. He testified that he was not allowed back in when he went and was advised that he would be called. He waited for a few days and sought legal help. He testified that his lawyer wrote a demand letter and the company did not respond.

4. In cross-examination by Mr. Mbabu for the Respondent, the Claimant testified that if he was sacked he would have been given a letter. He insisted that he was engaged in 2006 but conceded that he had not produced any evidence to this effect. He testified that he was given a slip which had the goods they were to pick from stores and that he took the goods from the store and delivered them to Crown Berger. He confirmed that he carried 200 litres of methylated spirit in 25 drums and that there were no other goods carried other than that. He denied carrying goods without authority to Crown Berger. When he was arrested he was taken to the police station directly from the store and testified that he was not taken anywhere else. He denied that there was bad blood between him and Justus the loader and stated that Justus left Crown Berger on his own. He denied questions put to him that the reason he left Justus behind was because of a disagreement he had with Justus about the unauthorized goods he had carried in his truck. He testified that he wrote a statement and explained himself. He testified that he went to work after 4 days and was not allowed into the premises. He testified that his lawyer had been asked to quantify his claim and there stated that he did not recall if his lawyer quantified. The leave he sought was for the balance of 17 days in 2011.

5. In re-examination he testified that he did return with Julius and did not see Julius at the godown. The Claimant testified that he did not know what was stolen. He stated that he did not abscond from duty and the letter accusing him of absconding from duty is from the lawyer and not the employer.

6. The Respondent called Jairus Maded who testified that on 13th April 2011 he left Labchem with the Claimant to the stores on Mombasa Road where they had been sent by the boss to load 25 drums of white spirit. He testified that when they finished loading the drums he informed the Claimant so that they go but the Claimant told him there were more goods to load. They later loaded 4 bags of ammonium bicarbonate and he asked the driver where the 4 bags were to be delivered and the driver did not respond and neither did the storekeeper. He was hit on his shoulder by the driver and got out of the truck and reported to the general manager. He stated that he knew where the goods had been delivered and took the general manager to Crown Chemicals next to Crown Berger where the secretary confirmed the Claimant had dropped the 4 bags and would collect payment later. He stated that policemen came to Crown Chemicals and questioned the staff there, arrested two and took the 4 bags. The 2 were categorical that the bags were sold to them by the Claimant and the Claimant and the storekeeper were arrested. He testified that he did not know what happened at the police station. He stated that he is not Justus but Jared.

7. In cross-examination he testified that the procedure for collection of goods at godown is as follows- the first step is the driver must have a delivery note for the goods he has gone to collect; if there is no delivery note for the goods that is theft. He stated that complimentary slip is for collecting cheques from customers or a statement. At the godown only a delivery note would allow collection of goods. He testified that after he was beaten by the Claimant he left his colleague Dennis the other loader.

8. The parties adjourned the case so that the defence could call the other witnesses and on the next hearing date there was indication that parties were attempting a settlement. The settlement did not materialize and no hearing was scheduled in 2014. The case was finally fixed for hearing on 10th December 2014 for further hearing on 16th March 2015. On 16th March 2015, the Respondent called the general manager of the Respondent and the police officer involved in investigations as the second and third defence witnesses.

9. The 2nd defence witness testified that he knew the Claimant a former driver of the Respondent. He testified that the Claimant worked with him from 1st May 2006 to 13th April 2011. He testified that on 13th April 2001 he got a call from Jared who informed him that the Claimant and the storekeeper had loaded unauthorized goods. The police were involved and took statements from the concerned. Out of sympathy his father did not want to pursue the matter further. He testified that he waited for them to come back but instead got a letter from the lawyer seeking a colossal sum. He texted the Claimant who did not come and instead initiated Court case. He testified that goods are only removed from stores with a document from him or his brother and delivered according to instructions. He testified that the Claimant had taken some leave days and once the balance was pro-rated the Claimant was only entitled to 8 days leave. He stated that the Claimant had received pay for March 2011 and advance for April 2011 and upon release by police he did not turn up for work. He testified that the Respondent did not sack the Claimant. He stated that the letter from his advocates sought the computation of the Claimant's dues for settlement.

10. In cross-examination he testified that the goods were delivered to an unauthorized place. He conceded that he knew the company and that his company had had prior dealing with Crown Chemicals and had supplied the same goods – sodium bicarbonate. He testified that it is an offence to take stolen goods and the storekeeper at Crown Chemicals was questioned. He denied that the Claimant was denied access to the Respondent's premises. He confirmed payment of NHIF and NSSF. He testified that he never wrote a letter terminating the employment of the Claimant. He testified that after his father forgave them he used to ring them. He had reported the case to police as OB 11/13/04/2011 and his father was there with him.

11. In re-examination he stated that he did not send out a letter but called, texted the Claimant and the accountant sat with the storekeeper twice.

12. The final witness called was PC Moses Kazungu of Mombasa Road Police Post Embakasi police station. He testified that he recalled receiving an allegation of theft at Labchem and in company of a fellow police officer accompanied the complainant to the Respondent and found the driver and turnboy who had gone with vehicle to deliver goods at the wrong premises. He investigated and established that the bags had been stolen. He recorded statements and the owner agreed to forgive them and wrote a withdrawal statement. He confirmed that the Claimant was one of the theft suspects.

13. In cross-examination he testified that the theft was investigated and the goods were found in a company at Industrial Area. He could not recall the company. He testified that he recorded the statement of the Claimant and the complainant.

14. The parties agreed to file written submission. The Claimant filed submissions on 30th March 2015 and the Respondent filed submissions on 15th April 2015. The Claimant submitted that the Claimant was arrested for an alleged theft and was subsequently released but was not allowed back to the premises of the Respondent. He submitted that after release he tried to pursue his dues from the Respondent and that he was not given a hearing prior to dismissal. He submitted that the Respondent did not adhere to the provisions of Section 41 of the Employment Act. The Claimant relied on the cases of **Samson Makamu Luvutse v Nakuru Spare House Limited Cause No. 396 of 2013**, **Peter Rambeka Oinga v Mabroukie Estate Cause No. 574 of 2010**, **George Onyango Akuti v G4S Security Services Kenya Limited Cause No. 107 of 2013**, **Elijah Kipkoross Tonui v Ngara Opticians Cause No. 871 of 2012** and **Alphonse Maganga Mwachaya v Operation 680 Limited Cause No. 146 of 2012**.

15. The Respondent submitted that the Claimant testified and did not call any other evidence. It was submitted that he narrated what was in the statement of claim without giving any other or further facts. The Respondent submitted that on cross-examination the Claimant confirmed that he was arrested alongside a colleague on allegations of theft. The Respondent submitted that it called three witnesses the first of whom gave an account of what happened on 13th April 2011. He testified how he found out the Claimant had together with Francis Lukatiba had been stealing goods from the Respondent. The second witness testified how the goods are procedurally removed from store while the third testified how the arrests were made. The Respondent submitted that it responded to the demand letter and alleged the Claimant had absconded and this was not controverted. The Respondent submitted that the Claimant was not entitled to the sums claimed.

16. The Claimant alleged dismissal from employment. The Respondent denied dismissal and alleged desertion. What is not contested is that the Claimant was employed by the Respondent and was arrested on 13th April 2011. After the arrest the Claimant was taken to the Mombasa Road police post and was released the next day. The Claimant did not resume his employment as expected. The Claimant asserts that the failure to return to work was the warning given by the director who was the father to the second defence witness. The Respondent on its part holds the position that the Claimant absconded from duty.

17. Section 41 of the Employment Act provides the procedural fairness required of the employer. It is only applicable where there is a termination. The Claimant failed to prove his case. He who alleges must prove. From the evidence and material before the Court there was no termination displayed in the Claimant's case. The Claimant was clearly informed that he was deemed to have absconded duty and tabulation of dues sought from his lawyer. There was no rebuttal to the letter. No tabulation of dues was made. I therefore find that the Claimant has not proved his case on a balance of probabilities. The Claimant is however entitled to receive his terminal dues namely payment of leave days not taken and the pay for days worked. These will be computed by the Respondent and paid. The Claimant is also entitled to a Certificate of Service in terms of Section 51 of the Employment Act. As the claim was largely unsuccessful each party will bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 25nd day of **May** 2015

Nzioki wa Makau

JUDGE