



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 401 OF 2014

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

M/S CMC MOTORS LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a Claim for damages for unfair dismissal of the 2 grievants from employment by the respondent on 10.12.2012. The reason for dismissal of the grievants was gross misconduct in that they negligently performed their duties which led to the loss to the respondent. It however the claimants' case that the accusation were false and the grievants were never given fair hearing before their dismissal.
2. The respondent has however denied liability and averment that the reason for dismissal was valid and the grievants were given a fair hearing before their dismissal.
3. The suit was disposed of by way of written submissions and the pleadings.

CLAIMANTS' CASE

4. Mr. Khamis Sumba (1st grievant) was employed by the respondent on 1.10.1981 in the Stores Department. His duties were to receive and dispatch parts as and when directed by the Store Supervisor or Parts Manager. He worked diligently for 32 years without any disciplinary cases until 10.12.2012 when he was dismissed from employment on allegation that his Password had been used in perpetuating theft of parts. By then his basic salary was kshs.41,088 plus House Allowance of kshs.7,178 per month. According to him he was never accorded any hearing to defend himself and to be represented by his union. He contended that the alleged fraud ought to be blamed on his seniors including Stores Clerk, Supervisor and Parts Manager who used to enter the data in the computers and who have since been dismissed.
5. Mr. Evans M. Nyambane (2nd grievant) was employed by the respondent on 11.8.2003 as in-charge of warehouse in Mombasa branch. He used to work with the Warehouse Manager Mr. Matata, the Store Clerk (Mr. Fondo) and the Dispatch Clerk (1st grievant). His duties were mainly to issue Parts upon requisition by the Manager or Supervisor. He also did Car Paint mixing- He however never used to work through out because at times he would be absent in which case other people performed his duties. On 10.12.2012, he was dismissed from employment on allegations that he issued parts to the Warehouse Manager and Warehouse Supervisor without chargeable documents and further that his password was being used in the alleged theft. It is his case that he

gave his password to the Supervisor and the Manager because it was an order from his Seniors under whose instructions he was working. He maintained then he was not accorded a hearing before his dismissal. Both grievant's pray for declaration that their dismissal was unfair and that the should bereinstated them or awarded them salary in lieu of notice, 12 months salary on compensation for unfair dismissal, one month salary for baggage allowance, one month leave and salary for 10 days worked in December 2012.

DEFENCE CASE.

6. Then respondent contends that there was valid reason for dismissing the claimants being negligent performance of duty that led to loss of property and finances to the respondent. It is submitted for defence that a security report dated 29.5.2012 confirmed that there was loss of parts valued at over kshs.1000,000 when the 1st grievant dispatched items. As regards the 2nd grievant, the respondent submits that his password was used by other staff to issue parts. His is therefore accused of negligence in failing to secure his Password as a result of which the respondent lost property.
7. In addition, the respondent submits that the grievants were given opportunities to defend themselves between 29/5/2012 and 10;/12/2012 when they were dismissed. According to the respondent, the grievants among other employees were accorded a chance to respond to the allegations during the investigations. The respondent has relied on the statements recorded by the grievants on 7.6.2012 and 6.6.2012 during the investigations as the proof that the grievants were indeed given a hearing before dismissal. Consequently the respondent maintains that the dismissal was valid and lawful and the grievant not entitled to compensation.
8. As regards the reliefs sought, the respondent admits the claim for leave earned, salary for the 10 days worked in December 2012 and leave travelling allowance. She has however denied liability to pay Baggage allowance, service gratuity, and salary in lieu of notice. She maintains that baggage allowance is only payable on retirement on ground of age ill-health. Service gratuity on the other hand is only payable when the employee is not terminated on disciplinary grounds.

ANALYSIS AND DETERMINATION.

9. After considering the pleadings, evidence and submissions filed, it is clear that the grievants were employed by the respondent. There is also no dispute that in May 2012, VW special tools went missing between Mombasa Workshop and Nairobi office. Several employees were interviewed in an investigation that culminated in finding that the 2nd grievant had the burden of explaining the whereabouts of items because he is the one who packed the box and if he fails, he ought to pay kshs.60,984.28 as the replacement cost. Lastly, there is no dispute that, on 24.7.2012, the Group Human Resources Manager, Communicated the verdict to the 2nd grievant *vide* the 1st warning letter dated the same date and which also condemned him to pay kshs.60,984.28 being the value of the lost special tools. Thereafter the grievants continued with their employment until they were summarily dismissed on 10.12.2012. The issued for determination are whether the summary dismissal of the grievants was unfair and whether the reliefs sought ought to issue.

UNFAIR TERMINATION

10. Under section 45 of the Employment Act, termination of employment is unfair unless the employer proves that it was founded on valid and fair reason and that it was reached after following a fair procedure. The reasons for termination cited by the summary dismissal letters dated 10.12.2012 was negligence by the grievants through sharing of their Passwords with other employees who used it to remove parts from the store without pay. The time when such misuse of the password was done was not stated. The value of the parts lost through such negligence was not proved. The loss allegedly suffered by the respondent through the alleged grievants' negligence remains a mystery only known to the respondent. Section 43 and 45 of the Employment Act puts the burden of proving the reason for dismissal in proceedings like this, on the employer. That burden was however not discharged. Even if the reasons had been proved, the same should not have been a fair reason upon which to dismiss the grievants considering the fact that they were

asked to reveal their Passwords by their Supervisors, of whom they could not disobey.

11.As regards procedural fairness, section 41 of the Employment Act provides in mandatory terms that an employer should not dismiss his employee for gross misconduct under section 44 of the Act without first explaining the reason to the employee and inviting him to defend himself.The said proceedings must be in language of the employees understanding and the employee must have the right of being accompanied by a fellow employee or shop floor union Representative of his choice. The above procedure was not followed in this case before the dismissal of the grievants for negligence. Although the respondent argued that the grievants were given a chance to defend themselves during their investigations done between May and July 2012, that submission is both misconceived and wrong. The truth of the matter is, that the proceedings done between May and July 2012 related to some to some special tools which were lost while in transit from Mombasa to Nairobi. The said proceedings culminated with a guilty finding against the 2nd grievant who was only issued with a 1st warning letter and condemned to pay the value of the Lost Special tools. That penalty rested the matter and the grievants continued with their employment. Under section 45 of the Act the respondent was barred from dismissing the grievants for the alleged negligence without giving them fair hearing under section 41 of the Acts before dismissing them. The respondent cannot therefore rely on earlier concluded proceeding to dismiss the grievants on new charges arising after the close of the concluded proceedings. A fresh disciplinary hearing should have been accorded to them. Consequently the court finds that the dismissal of the grievants was unfair and unjustified for the reason stated above.

RELIEFS

12.In view of the finding above, the court declares the dismissal of the grievant, to be unfair. The Court will however not order their reinstatement to their employment but will instead award each one of them damages under section 49 of the Employment Act. Under the said provision, an done unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. Each claimant will get all 12 months gross pay as compensation for unfair termination for the reason that they both had served for along period of time and they were not availed the protection of the law by the respondent. Instead the respondent dismissed them with impunity and tried to cover up her unfair labour practice by producing proceedings of previous cases wherein the grievants were heard not dismissed.

13.In addition the grievants will get salary in lieu of notice as provided for under clause 15 of the Collective Bargaining Agreement (CBA). 1St grievant served for over 15 years and hence he gets 3 month salary in lieu of notice. The 2nd grievant on the other hand worked for about 9 years and therefore he gets 2 months salary in lieu of notice. The grievant will also gets one month salary as Baggage allowance, and service gratuity as per clause 30 and 15 respectively of the CBA because their termination on disciplinary reason has herein above been lifted. They will also each get one month leave and leave travelling allowance on *provata* basis plus salary for 10 days worked in December 2012. On 5.12.2014 the parties agreed that each grievant be paid kshs.16,089 as salary for the 10 days worked in December 2012 plus kshs.5,221 and kshs.5,622 as the leave travelling allowance to the first and second grievant respectively. The respondent has admitted to pay kshs.40,089 and 43,171 to the 2 grievants respectively for leave days as prayed in the suit. The leave travelling allowance and the salary for December 2012 have already been paid to the grievant.

14.The summary of the award to each grievant is as follows:

Khamis Sumba

(a) 3 months salary in lieu of notice.....144,798

(b) Service gratuity.....847,873

(c) Baggage allowance.....	48,266
(d) Leave outstanding.....	40,089
(e) Compensation for unfair dismissal.....	<u>579,192</u>
	<u>1,660,218</u>

Evans M. Nyambane

(a) 2 months salary in lieu of Notice.....	96,516
(b) Service gratuity.....	246,115.80
(c) Baggage Allowance.....	48,266
(d) Compensation for unfair dismissal.....	579,192
(e) Leave outstanding.....	<u>42,171</u>
	<u>1,013,260.80</u>

The above awards will accrue interest from 10.12.2012 till payment in full.

DISPOSITION

15. For the reasons stated above Judgment is entered for the claimant declaring the dismissal of the grievants unfair and awarding the aggregate sum of ksh.2,673,478.80 plus costs and interest.

Dated, signed and delivered this 15th May, 2015.

O.N.Makau

Judge.