



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2013 OF 2012

PETER NGUNJIRI CLAIMANT

VERSUS

CHANDARIA INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The suit was commenced vide a Memorandum of Claim dated 4th October 2012 on 5th October 2012.
2. The Claimant seeks compensation for unlawful and unfair termination and payment of terminal benefits to wit;
 1. one month salary in lieu of notice;
 2. severance pay;
 3. untaken leave days.

3. Particulars of Claim

The Claimant was employed as driver by the respondent vide letter dated 15th February 2000 at a gross salary of Kshs.8,300. He was entitled to 25 working days leave per year and one month termination notice or payment of one month's salary in lieu thereof;

4. The Claimant worked continuously until he was dismissed from his employment on 9th February 2012 on allegations that he had colluded with his turn-boy to steal copper cables from the company store.
5. At the time of dismissal the Claimant earned a basic salary of Kshs.19,853.02 and house allowance of Kshs.3,200.
6. The duties of the Claimant included driving a truck; to be involved in loading and off-loading goods

from the truck; to count and sign for all goods loaded in the vehicle; and keeping the motor vehicle in good state of repair and service.

7. The Claimant testified in support of his case and told the Court that on the material day he reported to work in the morning and found the truck already loaded with garbage for delivery to Thika dumping site. That himself and the turnboy by the name of Ndirangu delivered the garbage as scheduled.

8. The turn-boy alerted him that a large copper wire piece fell out of the truck and was covered by garbage and that he should stop to pull it out. The Claimant declined to co-operate and drove-off for a distance and stopped. He was later dismissed from work for having collaborated with his turnboy to steal the copper wire from the store.

9. Statement of Response

The Respondent filed a Reply to the Memorandum of Claim dated 14th January 2013 in which it admitted that the Claimant was employed as a driver on 1st January 2000 and he worked continuously until the 7th February 2012 when a report was made regarding theft of copper wire at the Thika dumpsite. That one Mr. Richard Ndoria, the Transport Officer, spoke to the Claimant by telephone and instructed him to remain at the site to safeguard the wire, but the Claimant drove off from the dumpsite contrary to instructions.

10. Upon arrival at the dumpsite, the Transport Officer Mr. Richard Ndoria together with the turnboy John Ndirangu were informed by unidentified people that the copper wire had been loaded into a pick-up and was taken away.

11. It was later discovered that the store where the copper wire was kept had been broken into and the cables were missing.

12. The Respondent avers that he had good reason to dismiss the Claimant and the turnboy for participating in theft of the copper cables and failure to obey instructions to safeguard the wires when instructed to do so by telephone.

13. The letter of dismissal dated 22nd February 2012 was presented to Court as evidence. The Respondent informed the court that the Claimant was on 9th February 2012, suspended from duty to allow investigations to take place.

14. That the Claimant gave an explanation in which he admitted that copper cables were dumped at the dumping site at Kangoki Thika.

15. The Claimant explained that he was afraid to await at the dumpsite due to a previous incident when violence erupted over dumped materials.

16. The Claimant explained that the Respondent knowingly allowed pieces of wire to be mixed with garbage to be collected by 'chokora' to safeguard the trucks.

17. The Respondent denied that it had authorised copper wire to be dumped as happened on that day and accused the Claimant and the turnboy of conspiring to steal the same.

18. The Respondent through its two witnesses (RWI) Richard Robert Ndoria, the Transport Officer and RW2 Joash Mbulika, Human Resource Officer, insisted that the Claimant had knowingly refused to co-operate to recover the dumped wire and had left the dumpsite contrary to instructions given by the Transport Officer. RWI, told the Court that the Claimant was an accomplice and was therefore lawfully dismissed.

Determination

19. Upon a careful evaluation of the evidence adduced, the Court finds that the Claimant delivered garbage to Thika dumpsite in a tipper lorry.

Upon tipping the load into the dumpsite by the turnboy, he was alerted that a large copper wire cable which was in the truck had been covered by garbage. The turnboy then alerted RWI of the matter and RWI instructed the Claimant to wait at the dumpsite until he arrived at the dumpsite.

20. It is clear that the Claimant did not follow the instructions to wait at the dumpsite and the copper cable was collected by an unknown person in a pick-up.

21. It is the Court's considered view that the Claimant failed to obey instructions from his superior and was properly suspected to have participated in the break-in and theft of the copper cable which he conveyed to the dumpsite on the material day,

22. It is the Court's view that the Respondent had lawful reason to dismiss the Claimant from his employment. The Claimant, was paid upon termination;

1. salary for days worked up to 8th February 2012; and (i) payment in lieu of twenty five (25) leave days.

23. The Claimant acknowledges receipt of the payment. The Claimant however seeks payment of one month salary in lieu of notice in the sum of Kshs.21,248.20, and gratuity for years worked for the Respondent.

24. In his own testimony, the Claimant admitted that he was registered with NSSF and NHIF and the employer had duly remitted contributions. The Claimant is therefore not entitled to payment of severance pay and / or service gratuity.

25. According to the letter of dismissal, the Claimant was not summarily dismissed. He is therefore entitled to payment in lieu of notice in the sum of Kshs.23,053.02 as prayed. The Court awards him accordingly.

Clearly the Claimant was aware of the reasons for dismissal and had been provided with opportunity to explain himself.

26. The dismissal was therefore lawful and in terms of a fair procedure in terms of **Section 45(1)** as read with **Section 45(2)(a) & (c)** of the Employment Act, 2007.

27. In the final analysis, the respondent is to pay the Claimant;

1. one (1) month's gross salary in lieu of notice in the sum of Kshs.23,053.02. This is payable with interest at Court rates from date of the judgment till payment in full.
2. each party to meet their own costs of the suit because both are partly successful.

Dated and Delivered at Nairobi this 5th day of June, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE