



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC. CAUSE NO. 536 OF 2014

JAFFAR MOHAMED.....CLAIMANT

VERSUS

READY CONSULTANCY CO. LTD.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a claim for damages for unlawful termination of the claimant's employment by the Respondent on 25/7/2012. It is the Claimant's case that his dismissal was malicious, without prior notice, any reason and without following the procedure provided under the Employment Act.
2. The Respondent has denied liability for unlawfully termination and averred that the summary dismissal was lawful because the Claimant had committed gross misconduct. In addition the Respondent avers that the claimant was paid all his lawful dues after the dismissal and nothing more is payable to him.
3. The suit was heard on 13/5/2015 when the Claimant testified as Cw1 and the Respondent called Mr. Ibrahim Bocha as Rw1. Thereafter both parties filed written submissions through their respective counsel.

CLAIMANT'S CASE.

4. Cw1 was employed the Respondent in May 2011 as a mechanic based at Mombasa maize millers. (MMM) workshop. His salary was kshs.17,000 per month. He worked well until 18/7/2012 when he was called by the Human Resource Manager to the Workshop Manager's office together with other mechanics and Turnboys and told that a flange for a propeller shaft had gone missing at the workshop. They were then each asked the whereabouts of the said flange but no one knew about the lost flange. After denying knowledge and the whereabouts of the alleged lost flange, the mechanics including Cw1 were dismissed verbally on the spot. However, later, Cw1 received a dismissal letter dated 25/7/2012 and a Certificate of Service and was paid salary of kshs.8,574 for the 18 days worked in July 2012. He contended that the payment vouchers he signed and the Certificate of Service were post dated 2/8/2012 and 3/8/2012.
5. The reason for the dismissal cited in the letter was that Cw1 had committed theft. He however denied the said offence. He also denied even committing any other misconduct while at work. He further denied even being served with any warning letter by the employer. He contended that the

workshop was accessible to many people including mechanics, turnboys, drivers, store keeper and store clerks who had the opportunity to steal the flange. He maintained that the Store keeper was the custodian of all the items in the store. He further maintained that a flange is a big item weighing about 10 kgs which cannot be pocketed. He argued that even it was possible to pocket it, no one could pass the gate with it because the security guards used to search every one when getting out of the premises. He further stated that the compound is served by CCTV Cameras which could have caught him if he stole the flange. He therefore maintained that he was not proved to have stolen otherwise he would have been taken to police and charged with a criminal offence. He therefore prayed for one month salary in lieu of notice plus compensation of 12 months salary.

6. On cross-examination by the defence counsel, Cw1 stated that he worked for 1 year 3 months. He confirmed that Ibrahim and Baya attended the meeting where the mechanics were questioned about the lost flange. He maintained that Mr. Muhidin told them that their job was over even after denying the offence of stealing the flange. Cw1 denied knowledge of the value of the flange although he used to deal with flanges on a mechanic. He further denied knowledge of the person who stole the flange because the store is accessible to many people.

DEFENCE CASE

7. Rw1 is the acting Human Resource Manager for the Respondent. He confirmed that Cw1 was formerly employed by the Respondent as a mechanic earning KShs.17000 per month. Cw1 was based at MMM workshop. On 18/7/2012, the workshop manager reported loss of a flange for a motor vehicle while in the custody of Cw1. He called all the 11 mechanics including Cw1 to a meeting in the workshop manager's office for investigations. After questioning all the mechanics they named Cw1 as the person responsible for the loss of the flange. That when Cw1 was given a chance to explain how the flange disappeared, he did not defend himself. He was therefore dismissed together with some of the other mechanics. The Turn boys were however not dismissed. Rw1 maintained that a flange is so crucial that a vehicle cannot move without it.
8. On cross examination by the Claimant's counsel, Rw1 cited Juma Khatib as one of the mechanics who named Cw1 as the thief. Juma was however also dismissed, because the investigations showed that he was also involved in the theft. Rw1 admitted that the Reporters of the offence never explained how Cw1 stole the flange. Rw1 could not tell the Registration number of the vehicle to which the flange belonged. He admitted also that he did not know how a flange looks like. He did not produce the report of the investigations of the flange.
9. Rw1 contended that Cw1 was invited to the hearing verbally and given the option of being accompanied by a colleague as his witness but he did not bring any. Rw1 did not give the identify of the vehicle which Cw1 was working on. He stated that there was no register for items which are given to the mechanics to fix on vehicles at the workshop but there is stores register which shows the vehicle to which the spares are to be fixed. Rw1 did not however produce the said stores register as exhibits

ANALYSIS AND DETERMINATION

10. After considering the pleadings, evidence and submissions, it is not disputed that Cw1 was employed by the Respondent. There is also no dispute that Cw1 was summarily dismissed on 18/7/2012 for gross misconduct, namely theft and that he was paid his salary for the 18 days worked in July 2012. The issues for termination are whether the dismissal was unlawful and whether the reliefs sought should be granted.

UNLAWFUL DISMISSAL

11. The Claimant believes that his dismissal was unlawful because the reason for the dismissal was not valid. He denied that he stole any flange and maintains that such theft was not proved and it

was not possible to steal a flange and pass it through the security inspection at the gate. The Respondent has on the other side maintained that after receiving the report of the theft, she carried out investigations by questioning all the mechanics and the Turnboys all of whom pointed at the Claimant as the thief. The Respondent however admitted that she dismissed a number of the other mechanic along side the Claimant. Rw1 contended that the dismissal was because theft was gross misconduct under **Section 44** of the Employment Act. He further contended that the Claimant was given a fair hearing and advised of his right to be accompanied by a fellow employee as his witness but he chose to attend on his own. The date and the place for the hearing was however not stated nor was the person(s) who conducted the hearing identified.

12. The court appreciates that internal disciplinary process at the workplace is not the same as court process. At the end of the day the employer as the decision maker is entitled to exercise discretion mainly based on his own subjective judgment under **Section 43 (2)** of the Employment Act. The said provision states thus:

“(2) The reason or reasons for termination are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

13. The foregoing is however subject to **Section 45(2) (b)** of the said Act which provides that the employer must prove that the reason for termination is fair reason related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer. Consequently, it is not enough for the employer to prove that he had valid reasons to dismiss the employee. He must also prove that the reason was fair with respect to the Claimant's conduct among the other considerations stated under the **Section 45 2(a)** of the Act.

14. In this case, the Respondent alleged that a flange had been stolen. That is valid reasons to warrant dismissal if proved. He did not however prove, that indeed there was a lost flange. He relied on mere verbal report from the workshop manager without any evidence that any flange was lost while in the custody of the Claimant. The said workshop manager was never called as a witness in this case to prove that a flange was indeed placed under the Claimant's custody and disappeared. Consequently the alleged loss of flange remains hearsay to this court.

15. In addition the fact that the Respondent dismissed several mechanics means that there was no evidence to identify the alleged thief further to the foregoing, the evidence by Claimant that it was not possible to steal a flange because of its size, weight and the security checks was not rebutted. Lastly the Respondent confirmed that the workshop was accessible to many people who also had the opportunity to steal the flange. Having considered all the above matters the court finds that the Respondent did not prove a valid and fair reasons upon which the Claimant was dismissed.

16. As this court has held elsewhere, although the test for the reason for termination is subjective, the fairness of the reason calls for an objective test. Hence the court has the powers to evaluate the reason and see whether it was fair in the circumstances of the case including the conduct, capacity or compatibility the employee, or the employers operational requirement. Any other interpretation of **Section 45 (2) (a) & (b)** of the Employment Act would allow the employers to revert to the hitherto common law capitalistic position where the employer employed her employees at will.

17. As regards the procedural fairness, the court has considered the evidence by Rw1 and found that the meeting between him and the 11 mechanics including the Claimant did not amount to a fair hearing as contemplated under **Section 41** of the Employment Act. The said provisions of the law require in mandatory terms that before an employer dismissed an employee for misconduct under **Section 44** of the said Act, he shall accord the employee a hearing in a language he understands. The employee is entitled to be accompanied by a fellow employer or shop floor union representative of the accused employees choice. During the hearing the employer is bound to explain to the employee the reason for which a dismissal is contemplated and then invite the employee and his companion to respond before the decision to dismiss is made.

18.The foregoing procedure should not necessarily take the form of court proceedings. However for the process to be fair the accused employee must be made aware of the nature and the consequences of the proceedings and then be advised on his rights including the right to be accompanied by a fellow employee of his choice. In this case Rw1 just summoned all the mechanics and turnboys to the office and asked them to tell him the whereabouts of a flange to which there were all strangers. That was not a fair hearing within the meaning of **Section 41** of the Employment Act. The employer must explain the reason for the intended dismissal before inviting the accused employee to respond. What is meant by explanations of the reason is that, the employer must state the basis (evidence) upon which he honestly believes that the employee should be dismissed. Any other interpretation would mean that the employee will have nothing to respond.

19.In this case, Rw1 never explained how the flange got lost and why Cw1 should be held liable. He never even allowed the workshop manager to present his accusation. Rw1 just believed what the workshop manager told him privately about the alleged stolen flange and just called all the mechanics and turnboys to tell the whereabouts of the flange. That was unfair procedure and it rendered the summary dismissal unfair within the meaning of **Section 45** of the Act. Consequently the answer to the first issue for determination is in the affirmative.

RELIEFS.

20.In view of the findings above that the dismissal of the Claimant was unjustified and unfair, the prayer for declaration that the dismissal was unlawful is granted as prayed. Similarly the Claimant is granted the prayers for damages under **Section 49(1)** of the Employment Act. He will get one month salary in lieu of notice being ksh.17,000 plus 6 months gross salary as compensation for the unjustified dismissal being kshs.102,000. The court did not award the maximum statutory award of 12 months pay after considering the fact that the Claimant had not served the Respondent for long and also the fact that with due diligence, the Claimant could have secured an alternative employment within six months. The prayer for General damages for wrongful dismissal is dismissed because the same is covered by the award of one month salary in lieu of notice. It is now trite law that damages for breach of contract is equal to the total earning for the notice period which has commonly become known as pay in *lieu* of notice.

DISPOSITION

21.For the reasons an findings made above, judgment is entered for the Claimant declaring his summary dismissal unlawful and awarding him kshs.119,000 plus costs and interest. It is so ordered.

Dated, signed and delivered at Mombasa this 17th day of July 2015.

O. N. Makau

JUDGE