



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1085 OF 2010**

**EDWARD MUNYAO MUUMBI.....CLAIMANT**

**VERSUS**

**KAPA OIL REFINERIES LTD.....RESPONDENT**

**JUDGMENT**

1. The claimant in his memorandum of claim averred that he was employed by the respondent as a general labourer on 3<sup>rd</sup> July, 1996 and was thereafter promoted as a supervisor and later a sales clerk.
2. He worked until about 30<sup>th</sup> March, 2010 when he claimed his services were unlawfully terminated by way of summary dismissal without any justifiable cause.
3. The claimant further averred that no formal warning was given by the respondent nor was he accorded any hearing as per the rules of natural justice. He argued that there was no evidence that he stole the alleged goods that the alleged stolen bags of Toss detergent were found within the factory and nothing was lost.
4. The claimant therefore sought the order of the honourable Court for compensation for wrongful termination of employment.
5. The respondent on its part averred that on 30<sup>th</sup> March 2010 the claimant allowed 23 bags of 10kgs Toss Soap to leave the warehouse against a requisition sheet indicating that 18 bags were ordered for, meaning 5 bags left the warehouse without a requisition sheet. The claimant's supervisor Mr. Vijesh discovered the excess bags of Toss Soap at the loading bay. When this was discovered the claimant attempted to alter the requisition sheet to read 23 bags.
6. These actions, the respondent averred, tended to indicate that the claimant had a premeditated motive and was therefore trying to cover up.
7. Regarding the termination process the respondent averred that the claimant was accorded a hearing when he was asked to give an account of the misconduct as contained in his letter to the respondent dated 30<sup>th</sup> March, 2010. Upon receipt of this letter a meeting was held in Human Resource Office on 1<sup>st</sup> March, 2010 and the claimant was unable to exonerate himself from the offense committed.

8. According to the respondent therefore, it abided with section 41 of the Employment Act in dismissing the claimant. At the trial the claimant repeated most of his averments in the memorandum of claim. He denied altering the requisition sheet. He denied stealing from the respondent and argued that the mistake was no so serious to warrant dismissal. The respondent never lost anything and that the excess goods were returned. It was his testimony that he passed the excess goods without knowledge that they were in excess.

9. The respondent called one witness, a Mr. Anthony Nzika Mule who testified that he worked for the respondent as Time Office Clerk. It was his evidence that he received information that some bags of detergents that were leaving the warehouse were in excess by five and it was the claimant who authorized the removal. When this was discovered, the claimant was taken to the Human Resource Office to explain. He wrote a statement and was thereafter dismissed. In cross-examination he stated that the claimant had a supervisor and the supervisor had to countersign whatever was going out. Before signing, the supervisor must verify the order.

10. In his closing submissions to the Court, Mr. Mungata for the claimant submitted that the goods in question were found within the factory. They were not within the person of the claimant or found hidden elsewhere. They were found in the ordinary course of business.

11. It was therefore counsel's submissions that this did not warrant summary dismissal. According to Counsel, the daily duty of Vijesh who was the claimant's supervisor was to verify the goods packed as per the orders and there was no way in which excess bags could have left the loading bay.

12. Counsel further submitted that his client offered an explanation that the work-load was enormous and human error occurred which was excusable having regard to the circumstances. This according to counsel was the first error committed by his client since 1996. For this reason Counsel submitted that his client had succeeded in showing that the dismissal was wrongful and that the respondent was wrongful and that the respondent had failed to justify why it wrongfully dismissed the claimant and further that the reasons were valid and fair.

13. Mr. Ouma for the respondent, on the other hand submitted that the claimant's attempt to conceal excess bags of soap from the respondent and altering the requisition form to indicate 23 bags instead of 18, clearly showed the claimant had not made an innocent error in counting the goods but instead had a premeditated motive to steal the excess five bags of soap from the respondent. According to counsel therefore, the respondent lawfully summarily dismissed the claimant in accordance with section 44(4) (c) of the Employment Act, 2007. The Claimant was therefore not entitled to any compensation or payment of damages.

14. The issue in dispute in this matter seems to me to be whether the respondent was justified in dismissing the claimant from its services. There seem to be common ground over the reason for dismissal as well as process followed in the dismissal that these are not disputed.

15. The claimant herein was dismissed summarily, Under section 44(1) of the Employment Act. A summary dismissal shall occur when an employment contract is terminated without notice or a shorter notice than to which the employee is entitled by any statutory provision or contractual term. Section 44(4) enumerates some of the grounds that can warrant a summary dismissal and relevant to this case includes where an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract, to have performed carefully and properly.

16. It is no doubt that the claimant as a sales clerk in charge of servicing sales order was under duty to perform his work diligently. The question which is bubbling in this dispute is whether the incident and the circumstances thereof warranted a summary dismissal. According to the claimant, no goods were lost and that he was overwhelmed by work and the discovery of the extra 5 bags of soap by his supervisor was in the course of the latter's duty and meant he never intended

any impropriety.

17. The respondent on the other hand maintained that the removal of the extra bags of soap from the warehouse without a requisition and an attempt to alter the requisition sheet to accommodate them, was not only negligent but also smacked of dishonesty.

18. Under Section 45(5) of the employment Act, in deciding whether it was just and equitable to for an employer to terminate the employment of an employee, the Court considers among others, the practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any previous warning letters issued to the employee.

19. Whereas the Court must not be seen to be substituting its own views of fairness with the prerogatives of management in dealing with staff issues, a certain measure of reasonableness must be seen to exist in the decision taken and understand if it was the best in that circumstances. What is best, however will vary from case to case depending on the nature and operations of an organization.

20. In order to give a better understanding of what unfair termination of employment is all about, Lord Denning in the case of **British Leyland UK Ltd v. Swift (1981) IRLR 91** stated as follows:-

**“The correct test is: -Was it reasonable for the employers to dismiss him?- If no reasonable employer would have dismissed him,- then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view, another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him”.**

21. Further the South African Labour Appeals Court decision in **Engen Petroleum Ltd v. Commissioner for Conciliation Mediation and Arbitration and Others (2007) ZALAC 5** has observed that a dismissal could be found unfair by reason of the fact that, although the employee was guilty of misconduct, dismissal as a sanction was excessive in all the circumstances of the case and therefore unfair. Regarding willfulness of the claimant’s conduct, the Court will seek reliance on the Canadian case of **RV. Arthurs exparte Port Arthur Ship building Co. (1967) 2 OLR 342** where it was held that:-

**“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the duties, or prejudicial to the employers business, or if he has been guilty of willful disobedience to the employer’s orders in matters of substance, the law recognized the employer’s right to summarily dismiss the delinquent employee....”**

22. From the above, it can be said that summary dismissal requires willful conduct. Inadvertence, mistaken belief or accidental omission cannot therefore constitute grounds for summary dismissal.

23. The claimant herein in his defence has argued that since his employment in 1996 he has never had any disciplinary issue in the course of his work. He further stated that due to pressure of work he inadvertently loaded the five extra bags for dispatch. This was detected by his supervisor a Mr. Vijesh who in any event had a duty to cross-check any consignments before loading. According to the claimant this mistake did not warrant the action taken by the respondent.

24. The Court has reviewed the circumstances of the claimant's dismissal in the light of provisions of section 45(5) of the Employment Act, previous case law on the matter and is of the view that the claimant's dismissal was an excessive sanction taking into account the omission by the claimant and therefore declares the dismissal unfair.

25. The Court therefore awards him:-

**Kshs.**

(a) Three months' salary in lieu of notice.....42,315.00

(b) Seven months' salary as compensation for

Unfair dismissal.....98,735.00

141,050.00

26. The claimant is further awarded terminal dues as set out in his dismissal letter dated 1<sup>st</sup> April, 2010 if not paid already.

27. The respondent shall issue the claimant with a certificate of service.

28. The claimant shall have costs of the suit.

29. This award is subject to statutory deductions.

30. It is so ordered.

Dated at Nairobi this 17<sup>th</sup> day of July 2015

**Abuodha J. N.**

**Judge**

Delivered this 17<sup>th</sup> day of July 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**