



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2551 OF 2012

WILLIAM NYAMONGO.....CLAIMANT

VERSUS

ROY PARCEL SERVICES LTD.....RESPONDENT

JUDGMENT

1. The claimant in this suit averred that he was employed by the respondent in 2006 as driver earning a monthly salary of Kshs.16,748 and house allowance of Kshs.2,512/=.
2. According to him, he served the respondent diligently until 4th September, 2012 when his services were wrongfully terminated without notice or payment in lieu thereof.
3. The claimant averred that in the course of duty he had some items stolen from the back of a vehicle he was driving without his knowledge. He reported the matter to Sachagwan Police Patrol Base and recorded a statement. The respondent proceed to dismiss him on account of this loss.
4. The claimant therefore sought from the Court an order that the respondent pays him Kshs.385,940/70 which he particularized in his memorandum of claim.
5. The respondent on its part averred that the claimant was summarily dismissed due to gross negligence. This according to the respondent occurred when the claimant was entrusted with valuable client's assorted goods to deliver to Kisumu but failed or omitted to lock the truck while in transit leading to loss of the consignment.
6. The respondent further averred that the claimant had received numerous warnings regarding misappropriation of cash and siphoning of diesel from trucks.
7. Consequently the respondent counterclaimed from the claimant the sum of Kshs.759,349/54 on account of the lost consignment misappropriated money and siphoned diesel.
8. At the trial, the claimant reiterated the averments in the memorandum of claim and stated that he was dismissed through a letter dated 4th September, 2012 and that the letter did not state the reasons for which he was being dismissed. He further stated that prior to dismissal, he was never given a show cause letter and was never subjected to any disciplinary hearing.
9. It was his evidence that he locked the vehicle and never failed to do so as claimed by the

respondents. He stated that he never went on leave for 3 years and was never paid in lieu of leave.

10. In cross-examination he denied ever siphoning fuel but admitted that deductions were made from his salary on account of siphoned fuel. He further stated that he was informed of the loss of Kshs.69,354.54.

11. Regarding loss of consignment, it was his evidence that robbers stole from the vehicle while in motion.

12. The respondent on the other hand called one witness a Mr. Joseph Chege Mwangi who stated that the claimant was assigned to transport goods to Kisumu and he (the claimant) and the turnboy witnessed the loading of the consignments. It was his evidence that the claimant called him around 4.00 a.m. to report the loss of the consignment and he advised him to report the issue to the police.

13. According to Mr. Mwangi, the claimant was to securely lock the vehicle using a screw nut under the vehicle and that it was not possible to remove the lower screw and metal on the upper part when the vehicle was in motion. It was thus his evidence that the claimant was culpable as he did not properly secure the vehicle. According to him the management decided to terminate the claimant and recover the loss of the consignment from him. He produced documents in support of the counterclaim against the claimant.

14. In cross-examination he stated that the claimant's dismissal letter did not assign any reason for termination. He was also not aware if the claimant was given any show cause letter.

15. In his closing submissions to the Court, Mr. Nyabena for the claimant submitted that the respondent wrongfully dismissed the claimant without notice or payment in lieu thereof and that he was never issued with notice to show cause prior to his dismissal as required by section 41 of the Employment Act or principles of natural justice. On the issue of investigations into the loss of the consignment, counsel submitted that the claimant was never accorded a fair hearing.

16. Regarding leave, counsel submitted that no documentary evidence was tendered by the respondent to show the claimant went on leave.

17. Counsel further submitted that the dismissal letter did not contain any reason why the claimant was being summarily dismissed as required by section 41 of the Employment Act.

18. Regarding counterclaim, counsel submitted that no evidence was led by the respondent to prove on a balance of probabilities that the claimant owed the respondent the sums counterclaimed. According to counsel no receipts were produced to prove the value of the alleged loss and no evidence was submitted to prove that the respondent ever paid the amount claimed to third parties.

19. Counsel for the respondent on the other hand submitted that the claimant's employment was riddled with misdemeanors and warnings. According to Ms. Rashid, on 6th September, 2010 the claimant siphoned 20 litres of diesel and was warned. In August, 2012, the claimant misappropriated Kshs.69,345.54 which he collected from the customers while delivering goods.

20. Regarding the loss of the consignment to Kisumu, counsel submitted that claim by the claimant that it was stolen by Highway robbers while the vehicle was in motion was not true. Investigations revealed that the vehicle had two locks on the rear door. One lock was under the vehicle floor and was not locked yet the claimant was given money to purchase the padlock. Counsel further submitted that the goods that were stolen could not be removed while the vehicle was in motion as claimed by the claimant.

21. Regarding counterclaim, counsel submitted that the respondent lost valuable clients and

money and had to pay for the lost items to their clients. According to Counsel, the claimant was guilty of willfully neglecting to perform his work yet he was under duty to securely lock the vehicle under his custody.

22. The claimant was summarily dismissed with effect from 23rd August, 2012. This decision was contained in a letter dated 4th September, 2012 attached to the claimant's memorandum of claim.

23. Prior to this the claimant had on 31st July, 2012 been suspended from duties pending investigation over loss of goods which occurred on 27th July, 2012. The memo of suspension accused the claimant of failing to lock the vehicle as should have been done and that was negligence on his part.

24. By a memo dated 13th August 2012 the disciplinary team investigated the loss of consignment incident and became of the view that the claimant was blameworthy. The team therefore recommended that he be dismissed from service and that the management looks for ways to recover the misappropriated amount. The team however advised that the claimant be accorded a fair hearing before any of the actions is taken. No evidence was adduced before the Court to show the claimant was accorded a hearing prior to his dismissal. He was therefore justified in disputing the manner of dismissal.

25. The claimant herein had a history of disciplinary issues ranging from siphoning of fuel to misappropriation of funds. He did not credibly dispute these accusations in his evidence before Court and infact admitted that funds were deducted from his pay to recover the misappropriated funds. These were reasons enough to summarily dismiss the claimant.

26. A summary dismissal only refers to a dismissal without notice or less notice than the one an employee is entitled to. It however does not waiver or vary fair hearing procedure and justification for reasons for termination as provided under section 41 of the Act. In fact section 41(2) requires that before summarily dismissing an employee the employer has a duty to hear and consider any representations which any employee may make on the accusations against such employee. The foregoing not having happened with regard to the claimant the Court declares his dismissal justifiable in terms of reasons but at the same time declares such dismissal unfair for want of fair procedure in carrying it out.

27. Where an employee has been unfairly dismissed, the Court has power to award up to 12 months wages as compensation for such dismissal. The quantum of such an award vary in each case depending on its circumstances. In this particular case the Court is of the view that there were justifiable reasons for dismissing the claimant but for want of fair procedure, the dismissal became unfair. The Court in the circumstance will award nominal compensation to the extent of one month's salary only. The claimant will further be entitled to salary for the period he was under suspension prior to his dismissal.

28. The claims for leave and house allowance were reasonably controverted by the respondent and would not be allowed.

29. Regarding the respondent's counterclaim, this was not sufficiently proved. The respondent merely exhibited demands by 3rd parties for payment for the lost consignment but nothing was exhibited of the actual payment made. Besides the law of transportation of goods is usually that this is done at owners risk and appropriate insurances are usually taken to cover such eventualities. The counterclaim therefore fails and is hereby dismissed.

30. In conclusion the respondent shall pay the claimant the sum of Kshs.30,505/=.

31. There will be no order as to costs.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge