



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA**

**CASUE NO. 45 OF 2015**

PAUL MWASATU MAGANGA .....1<sup>st</sup> CLAIMANT

ROBERT ONYAGO TIEMA .....2<sup>nd</sup> CLAIMANT

HARON OKINDO OMAE.....3<sup>rd</sup> CLAIMANT

VERSUS

G4S KENYA LIMITED.....RESPONDENT

**J U D G M E N T**

**Introduction**

1 The claimants herein filed separate suits against the respondent claiming terminal benefits plus compensation for unfair termination of their employment by the respondent. The second claimant and third claimant filed ELRCC No 451 of 2014 and 452 of 2014 respectively but the same were consolidated herewith on 4.5.2015. They all accused the respondent for terminating their employment without any notice or just cause and without according them a fair hearing.

2 The respondent denied liability for the claimant’s alleged unfair dismissal. According to her the claimants were guilty of negligence of duty which led to loss of money which was assigned to them for transit from Kilanguni Serana Lodge for banking at Barclays Bank of Kenya at Voi. In addition the respondent averred that the claimant were given a fair hearing but failed to give a satisfactory defence.

**Summary of Claimant’s Case.**

3 The first claimant filed his witness statement on 5.2.2015 stating that he was employment by the respondent in year 2002 and worked up to 31.1.2014 without any problem. That during his service he rose in the ranks from a driver to the managerial position of Assistant Cash Services. That on 31.1.2014, in the company of second claimant, AP Chemngo and Wildred Ouko Adhiambo carried cash on transit from Kilanguni Hotel towards Barclays bank, Voi branch. The 2<sup>nd</sup> claimant was their driver but they were escorted by a chase car with 2 armed Administration police officers (Aps) driven by the 3<sup>rd</sup> claimant. On reaching Voi they went to pick another load of cash for banking at the Diamond Trust bank. All the 3 claimants and one Ap went into the Petro petrol station and left Wilfred Odhiambo in the CIT car and the other Aps still in the escort car. However, when the claimants returned, they found Robert Odhiambo not in the ICT car and the metal cash box open and the money missing. Up on enquiry, the Aps told them that Robert had gone to the washrooms. He was however nowhere to be seen. The claimants alerted the respondent’s branch manager at Voi, Mr. Caleb Mweresa who came immediately. The police were also alerted. Later on the claimants were arrested and charged with stealing but after trial they were found

innocent and acquitted.

4 The first claimant was suspended from work by letter dated 1.2.2014 for gross negligence performance of duty. He was however directed to report daily to his immediate manager except on weekends. After the suspension letter, the first claimants never received any further communication and he construed that the respondent has unfairly dismissed him. He maintained that he had served the respondent for 16 years with clean record and that is why he had been promoted severally and his basic salary increased to Ksh 30,360 per month.

5 The second claimant filed his written statement on 19.9.2014 stating that he was employed by the respondent as a driver on 15.10.2008 but was given permanent status by letter dated 1.2.2010. His salary was increased over time from Ksh 12,714 to Ksh 33,285.88 per month. On 11.2.2014 he was dismissed from work by the respondent on ground that he had been charged with stealing money on transit in criminal case No. 105 of 2014 at Voi. That the said dismissal was not justified or backed by law because the claimant was later found innocent and acquitted by the court. He therefore prayed for his terminal dues.

6 The third claimant filed his statement also on 19.9.2014 stating that he was employed by the respondent on 26.9.1998 as a guard earning Ksh 3,000 per month. He was later promoted to Radio Alarms commander and later became a driver earning Ksh 32,000 per month. In February 2014, he was arrested and charged with stealing money while on transit but he was later acquitted. That in the same February 2014 he was demised from employment by the respondent on ground of negligent performance of duty which led to theft of clients' money. He maintained that the reason cited for his dismissal was not justified or backed by any law.

### **Defence Case**

7 Jacob Isaya recorded his statement by hand on 1.12.2014 alleging that the claimants were guilty of negligent performance of duty which led to lose of client's money at Voi. According to him the claimants breached Cash In Transit (CIT) procedures. David Itubia Njuguna recorded his statement on 6.11.2014 and also accused the claimants of flouting CIT procedures as a result of which money for a client was stolen by a crew member. He also stated that he served the claimants with suspension letters and notice to attend disciplinary hearing on 11.2.2014 which they all attended. That after the hearing the claimants were found guilty of negligent performance of duty and were summarily dismissed and issued with certificate of served and their dues processed.

8 David Wanjohi Keroga recorded his statement on 11.2.2014 before the filing of this suit. It was possibly meant for other proceedings. He echoed the statement by Jacob Isaya and David Itubia above in accusing the claimant of negligent performance of duty as a result of which money for client was stolen. According to him the claimants started to breach the cash in transits procedures at Kilanguni and continued at Voi petro petrol station. He also blamed the Aps in the chase car of negligence of duty by allowing the Radio operator Mr Odhimabo to leave the cash transit car.

9 He blamed the first claimant for failing to ensure that the vault door was securely locked, leaving the chase car unmanned, and delegating the remote button to the Raido operator who stole the clients' money. He blamed the second claimant for flouting procedure by failing to assist the first claimant in ensuring that the vault door was locked. He concluded by stating that the claimant were subjected to disciplinary hearing and were all dismissed for the said negligence.

### **Analysis and Determination.**

10 After carefully perusing and considering the pleadings, witness statements and written submissions filed by all the parties, the court finds no dispute in the fact that all the claimants were employee of the respondent. There is no dispute that the claimants had dealt with cash in transit for a long period of time. There is further no dispute that on 31.1.2014, money was stolen from the respondent's vehicle which in transits by the claimant's from Kilanguni Lodge to Barclays bank Voi branch as a result of which the

claimants were dismissed summarily. The issues for determination are whether the dismissal of the claimants was unfair and unjustified, and whether the reliefs sought should be granted.

### **Unfair and Unjust Dismissal.**

11 Under Section 45 of the EA, termination of employment is unfair unless the employer proves that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case, the court finds no difficult in holding that a fair procedure was followed in terminating the claimant's services. First they were suspended and invited to a physical hearing before a disciplinary committee constituted by the respondent. Second, they were allowed to be accompanied by a fellow employees of their choice or shop floor minor representative during the hearing. Third, the committee explained the charges to claimants and even alerted them vide the hearing notice of the consequences of the proceedings including summary disposal and warning. Fourth, the clients and their minor representative were allowed to make their defence before the committee made its decision that all the claimants were guilty of negligence in performing their duty on 31.1.2014 as a result of which client's money was stolen. There after the claimants were given certificate of service and their dues allegedly assessed.

12 The foregoing proceedings were in consonance with the procedure provided under Section 41 and 51 of the E.A Section 41 of the E.A provides that before an employer dismisses an employee for misconduct or poor performance under Section 44 of E.A, he shall first explain the reasons of the intended dismissal to the employee in a language he understands. That the employee shall be accompanied by a fellow employee of his choice or shop floor union representative both of who shall be entitled to respond to the employer's allegations before a decision to dismiss is arrived at.

13 Section 51 of E.A on the other hand provides that after termination of the employment contract, an employer shall give to the employee who has worked for over 4 weeks, certificate of service stating the name and address of the employer, name of the employee, the nature and usual place of employment of the employee, the date when the employment commenced and when it ended and any other particulars as maybe prescribed. In this case, the procedure followed by the respondent in dismissing the claimants was fair.

14 As regards the reasons for the termination, Section 43 of E.A puts the burden of proof on the employer whenever an employee challenges the termination in court proceedings like in this case. The reason for dismissal cited in the dismissal letters was gross negligence in performing their duties under Section 44 (4) (c) of the E.A. The particulars of the offence included first, failure to secure client's property leading to its loss and second, flouting cash in transit procedures. The said reason for dismissal was the same cited in the suspension letter and upon which the claimants were convicted during the disciplinary proceedings. The question that arises is whether the respondent has discharged his burden of proving a valid and fair reason to justify the summary dismissal of the claimants on 11.2.2014.

15 The court has carefully considered the evidence on record for both sides regarding the reason for the dismissal. The claimants denied that they were negligence during the incident when money was stolen from the G4s vehicle by their Radio operator Mr. Robert Odhiambo. They have produced as evidence, the typed proceedings and judgment of the lower court in Voi Criminal case No. 105 of 2014 to prove that they were found innocent and acquitted. On the other hand, the respondent has produced typed proceedings of the disciplinary hearing to prove that the claimants were found guilty of gross negligence of performance of duty.

16 Under Section 47 (5) of the E.A, the burden of proving unfair termination lies on the employee. This burden is however as heavy as merely alleging that the reason for termination was not valid and fair. Thereafter the burden shifts to the employer to justify the reason for the termination. In this case the court finds on a balance of probability that the first and third claimants have proved their respective cases and the respondent has not rebutted the same. However the court is satisfied from evidence that the case for the second claimant must fail as far as unfair termination is concerned.

17 The reason for finding that the first and third claimants were unfairly dismissed is that, the evidence

on record does not support the respondent's allegation that the said claimants were guilty of negligence in performance of their duty. The first claimant was the commander of the crew and the defence witnesses alleged in their statements and disciplinary proceedings that he was supposed to ensure that the vault containing the money in the car was securely locked. The basis of the said allegations is the golden rules on cash in transit (CIT). The said rules were not produced as exhibit in this case. In any case the golden rule No. 3 cited by the defence is only to the effect that a CIT vehicle should never be left unattended whether empty or with consignment. That was never the case herein. The claimants left the radio operator inside the CIT vehicle and a chase car with armed police officers on guard. He denied that he had the custody of the said remote control button and pleaded ignorance of such responsibility. The court finds that whereas ignorance is no defence, the respondent has failed to prove before this court that the 1<sup>st</sup> claimant had the sole responsibility of keeping custody of the remote control button.

18 In addition was alleged that the first claimant delegated the remote control button for opening the vault sliding door to the Radio Operator according to the proceedings of the disciplinary hearing. That the claimant had the responsibility of keeping the remote control button. The court has considered the evidence adduced by prosecution witness in the criminal case No 105 of 2014. Pw 1, was Mr. Caleb Mwerasa, the branch manager of the respondent at Voi. He told the court that the team leader and the driver of the CIT vehicle was supposed to ensure that the safe in the vehicle was securely locked. On cross examination however he stated that it is the driver of the CIT vehicle who controls the opening and closing of the safe.

19 The foregoing evidence was corroborated by the evidence of Pw 2, David Katuta Kitem, a telecommunication engineer who stated that

***“it was not possible to open the safe unless with the assistance of the driver. When someone is inside the vehicle one could manually open the single door only but not access the safe door.”***

He confirmed that the gadget for closing and opening the safe door is situated in the driver's dashboard.

20 The first claimant never sat in the front cabin of the CIT vehicle according to pw 1 above. Consequently the court finds that the first claimant never opened or closed the safe. Accordingly to his evidence in the said criminal proceedings when he testified as Dw1, he stated that it is the driver (second claimant herein) who took the cash box from the CIT van safe and brought to the petrol station office and left the Radio operator Mr. Odhiambo inside the CIT vehicle. The first claimant should not therefore be blamed generally for the wrongs of other persons.

21 As regards the third claimant the court finds nothing wrong with his absence from the chase car. One wonders how he was to prevent theft of the money by the Radio Operator from the CIT Van. The respondent has not proved that it was the responsibility of the chase car driver to restrict the Radio operator inside the CIT vehicle and to watch over him so that he did not steal the money. Likewise, no evidence was tendered to prove that the chase car driver was not supposed to leave his car while the team leader and the CIT vehicle driver went to collect the cash. The question that begs from the foregoing is what is that which in the cause of his employment, the third claimant did or did not do or did wrongly that caused the Radio operator to access the safe in the CIT van and stole the client's money. In this court's considered view, there is nothing wrong that the third claimant did that can be deemed as negligence of his duty. Consequently the court finds and holds that the first and third claimants were not negligent in performing their duty on 31.1.2014 and as such their dismissal was unjustified and unfair within the meaning of section 45 (2) (a) and (b) of the E.A. They were not capable of opening the safe without the assistance of the driver (second claimant) and no evidence was produced to prove that they colluded or conspired with the second claimant to leave the door to the safe open in order of the Radio operator to steal money. Likewise the respondent did not prove that the second claimant was incapable of deliberately leaving the door to the safe open or making a wrong judgment in locking the door to the safe even after the team leader asked him to securely lock the safe.

22 As regards the second claimant the court is not in difficulties in finding that he was negligent in performing his duty. No one could open or close the safe without his assistance. Without his input using

the dashboard gadget, no one could open the safe even with the remote button. Consequently the court finds and hold that the second claimant opened the safe to collect cash box and failed to close the safe either deliberately or through error of judgment. He was therefore negligent in his duty within the meaning of section 44 (4) (c) of the E.A and that constituted a valid and fair reason for dismissing him from employment. He shall therefore carry his cross alone in this matter. It is unfortunate that he caused loss of precious employment to the other claimants.

### **Reliefs**

23 In view of the finding above the dismissal of the first and third claimant was unjustified and unfair, the court awards them damages as provided for under Section 49 (1) of the E.A. In consideration of the claimants long service of 16 years with a clean record of discipline each and the fact that they may not secure a similar employment in the security industry in view of the circumstances under which they were dismissed, the court awards them the maximum compensation of 12 months gross salary for the unfair and unjust termination. They will also get one month salary in lieu of notice under Section 35 of the employment Act for lack of any evidence to support a claim for an award of 2 months' salary in lieu of notice.

24 The first claimant is awarded house allowance for the 3 years immediately before filing of the suit in line with the time bar constructed by Section 90 of the E A. The said Section limits the time for lodging suit in respect of a right under the Act to 3 years. In that regard the claimant filed his suit in 2015 and will get the arrears in house allowance for year 2012 and 2013. He prayed that a rate of 15% of the basic pay be used to assess the monthly house allowance. The court finds that request reasonable and exercise discretion to award a rate of 15% of the basic pay as the reasonable house allowance. The respondent never proved that the monthly pay received by the first claimant was a consolidated pay or whether she provided housing to the first claimant as required by the law. Under Section 31 of the E A an employer is bound to provide, at his expense, reasonable housing to his employee either at or near the place of work or shall pay to the employee such sufficient sum of rent, in addition to the salary, as will enable the employee to obtain reasonable accommodation.

25 The claim for salary form January 2014 till now is not tenable. The three claimants will not therefore earn for no work done after dismissal on 11.2.2014. Such award is only available in case an employee is reinstated under Section 49 (3) of the E A and not in the present circumstances. All the three claimants will however each get salary for the 11 days of February 2014 that they remained in the employment before dismissal. The same was acknowledged in the dismissal letter among other entitlements which have not been prayed for herein. The claim for public holidays is dismissed for want of evidence and particulars.

26 The following is the summary of awards made in favour of each respective claimant.

#### **Paul Mwasafu Maganga**

One month notice	30,360
Compensation	388,608
Arrears in house allowance	109,296
Salary for February inclusive	
Of house allowance	<u>13,535.10</u>
<b>Total</b>	<b><u>541,799.15</u></b>

#### **Robert Onyango Tiema**

Salary for February 2014	
Inclusive house allowance	<u>11,733.35</u>
<u>Haron Okindo Omae</u>	
One month Notice	32,000
Compensation	384,000
Salary for February 2014	<u>11,733.35</u>
<b>Total</b>	<b><u>427,733.35</u></b>

**Disposition**

27 For the reasons stated above, judgment is entered for claimants against the respondent for an aggregate sum of Ksh 981,265.85 to be shared as indicated above. Costs of the suit and interest is only awarded to Paul Mwasafu Maganga and Haron Okindo Omae. Each party in ELRCC No 451 of 2014 will bare their own respective costs. A copy of this shall be

filed in ELRCC 451 of 2014 and 452 of 2014. It is so ordered.

**DATED and DELIVERED at MOMBASA this 2<sup>nd</sup> day of October 2015.**

**ONESMUS MAKAU**

**JUDGE**

2.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

**ONESMUS MAKAU**

**JUDGE**