



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 959 OF 2013

JOHNSTONE MWENDWA.....CLAIMANT

VERSUS

KUL GRAPHICS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant in this suit avers that he was employed by the respondent on 8th January, 2004 as a store keeper and worked as such until March, 2013 when his services were terminated as a result of suspicion of being involved in breakage into the respondent's stores where some 5 film plates were stolen. According to him the matter was investigated by the police and he was exonerated.
2. The respondent however by a letter dated 11th April, 2013 asked him to explain the events leading to the alleged break in which he did.
3. On 4th June, 2013, the respondent issued him with a redundancy letter and paid him his terminal dues less Kshs.106,164/= allegedly being the cost of the lost film plates.
4. The respondent refuted the claimant's averments stating that the claimant being the person in charge was culpable and that the respondent took him through a disciplinary process where the claimant was unable to vindicate himself.
5. According to the respondent, the claimant's defence was inexcusable as he appeared clueless like other staff members yet the loss took place in the area where he was in charge. It was therefore decided to terminate the claimant's services. The respondent further stated that at the material time there was also a redundancy process going on and the respondent was not precluded from terminating the claimant on account of redundancy.
6. In his final submissions before the Court, the claimant submitted that the termination on account of redundancy was unlawful as the same was not sanctioned by the Ministry of Labour. According to him his dismissal arose on suspicion of having participated in stores breaking and when the police failed to charge him with any offence the respondent terminated his services under illegal ground of redundancy. He therefore sought an award of the Court as pleaded in paragraph 11 of his memorandum of claim.
7. Mr. Ouma for the respondent on the other hand submitted that the claimant was in charge of stores

particularly where the theft took place. It was not enough for the claimant to aver that since he was found by the police as having nothing to do with the theft, then he was blameless. The police were undertaking a criminal justice process arising from theft while the respondent was concerned with administrative process. According to Counsel as a result of the loss, it was within the respondent's right to take action on whoever it felt had a role to play in the loss. It therefore could not be said that the respondent did not have a valid reason to undertake a disciplinary process against the claimant.

8. Concerning redundancy, Mr. Ouma submitted that the respondent had a justifiable reason to undertake a redundancy process and the claimant was not immuned from the process.

9. This case presents a peculiar scenario where an employer after subjecting an employee to a disciplinary process and reached a decision that the employee be terminated for gross misconduct, instead decides to declare such employee redundant. From the pleadings and documents as well as submissions by Counsel, it would appear that there were no justifiable reasons for terminating the claimant's services. All that the respondent has said was that theft occurred in the areas where the claimant was in charge. No evidence was adduced on when the theft occurred and whether at the time it did the claimant was within reasonable reach to circumvent it. No internal investigation report was placed before Court showing the claimant was blameworthy. Whereas it is conceded that police investigations are geared toward a finding of criminal responsibility, the exoneration of the claimant and prosecution of his junior for the theft called for independent internal evidence placing blame on the claimant different or in addition to the evidence the police investigation yielded.

10. Whereas redundancy is a form of termination of employment, it is a special method of termination. Under section 2 of the Employment Act, redundancy is defined as loss of employment, occupation, job or career by involuntary means through no fault of the employee, where the services of an employee are superfluous. The claimant was accused of negligence or failure to prevent the theft at the respondent's premises. His loss of employment was therefore as a result of his own fault and could not be said to be redundancy.

11. The Court therefore finds that the conversion of the claimant's termination on account of negligence to termination on account of redundancy unprocedural.

12. The Court having found that there were no justifiable reasons for terminating the claimant's services, awards him as follows:-

	Kshs.
a. One month's pay in lieu of notice	36,374.00
b. 10 months salary as compensation for unfair dismissal	<u>363,740.00</u>
Total	<u>400,114.00</u>

13. Concerning the amount retained by the respondent on account of the lost film plates, the Court orders this released to the claimant as no evidence was placed before the Court assigning the value of the items lost to the amount retained besides as already observed, there was no reasonably sufficient evidence that the claimant was entirely to blame. Further the respondent has stated that the items were insured.

14. In conclusion the Court orders that the claimant be paid by the respondent the sum of Kshs.400,114/= on account of unlawful dismissal and unfair termination of services. For avoidance of doubt, this payment is in addition to any payment the claimant may have received on account of redundancy.

15. The claimant shall have costs of the suit.

16. It is so ordered.

Dated at Nairobi this 6th day of November 2015

Abuodha J. N.

Judge

Delivered this 6th day of November 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge