



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 478 OF 2010

SAMSON MABEYA ONCHARI.....CLAIMANT

VERSUS

HOME GROWN (K) LTD..... RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent by a letter of appointment dated 1st October 2000 as a driver at a monthly salary of Kshs 6,070/= and a house allowance of Kshs 910.
2. The claimant worked continuously until the 16th December 2009. At the time, the Claimant earned a gross salary of Kshs 15,753.

Particulars of Claim

3. The Claimant was summarily dismissed from employment on 16th December 2009 on allegations of theft of one bale of wheat flour from the canteen store. On 9th December 2009 he was served with a letter of suspension pending investigations into the matter.
4. On 16th December 2009 the Claimant was served with a letter of summary dismissal. The reason provided in the letter for the dismissal was that investigations carried out revealed that on 8th December 2009, the Claimant was an accomplice in theft from the company premises of a bale of wheat flour and two packets of Delmonte Juice which he carried out in a company vehicle assigned to him.
5. That the claimant made a statement in which he admitted the misconduct. That as a result the company had lost trust in the claimant hence the summary dismissal.
6. In his defence the Claimant told the Court he ordinarily delivered personal parcels signed for the Managers, Directors and Senior Staff of the company. That on the material day he was asked to deliver a parcel for a Manager by the name Ken Obondo to his house in South B. The Manager worked in the procurement unit as a Canteen Manager.
7. The luggage did not have a gate pass but that was normal. He complied with the directive and delivered the parcel. In the evening the Claimant returned the Motor vehicle and went home but was summoned the following day by the Security manager who inquired as to the parcel the Claimant had delivered.
8. It is the Claimant's case that he did not know what was contained in the sealed carton marked Ken Obondo. He also took flower samples and Soil. The Security Manager told the Claimant to sign a statement, the Manager had drafted and go back to work. However, upon signing the statement the Security Manager called a security officer to escort the Claimant out of the company premises. The Claimant had no opportunity to read the statement he was made to sign. The Claimant was then given the letter of suspension followed by the dismissal letter on 16th December 2009.

9. The Claimant denies being an accomplice to theft from the canteen. On 17th December 2009, the Claimant wrote an appeal but he never got a response from the Respondent. The Claimant was not called to a disciplinary hearing before the dismissal nor was he given a show cause letter while on suspension.
10. The claimant was paid Kshs 7,812.89 upon dismissal. The Claimant seeks;
 - a. One month salary in lieu of notice Kshs 15,757
 - b. Prorata leave 2,100
 - c. Kshs 8,401 for days worked
 - d. Gratuity @ 15 days for every year worked 78,765
 - e. 12 months compensation for the unlawful dismissal
11. The Claimant testified under oath in support of his case. He does not deny loading the parcel and delivering it to the Manager's house as was the practice. He said that a work ticket for the delivery was filled and signed by the security and procurement departments for direct route to South B. He insisted that he did not require a gate pass to deliver parcels for management staff. These are the instructions he received when he joined the Respondent company and had continued to work that way until the date of his summary dismissal.
12. The Claimant signed a petty cash voucher upon payment of Kshs 7,812.89 for days worked. The Claimant said he was entrusted with a lot of money and goods and never stole. He was perturbed by the allegations that he had colluded with his superior to steal a bale of wheat flour then deliver same openly to the Manager's house.

Statement of Response

13. The Respondent filed a response to the statement of claim in which the Respondent admits having employed the Claimant as a driver. The Respondent admits summarily dismissing the Claimant but upon following due process. That it was proved beyond any doubt that the claimant colluded with his seniors to steal from the company.
14. That the claimant admitted his role in the theft hence he did not perform his duties diligently and in an honest manner. The Respondent was given opportunity to call witness(s) upon close of the claimant's case on 11th December 2014 and again on 9th February 2015 and on 21st April 2015.
15. In fact on 21st April 2015 Counsel for the Respondent did not appear in Court at all. Upon application by counsel for the Claimant, the Court deemed the defence case closed. Both parties were given opportunity to file final submissions. The Claimant filed its submission on 23rd July 2015 and served the Respondent. On 30th July 2015 the Respondent was given last chance to file written submissions by close of business but to date did not file any.

Determination

16. The Claimant has demonstrated that he was employed by the Respondent as a driver on 1st October 2009 and worked continuously until 16th December 2009 when he was summarily dismissed for alleged collusion with his superiors to steal a bale of wheat and delivered the same to the Manager's house.
17. The claimant gave an explanation in court that this was a normal delivery made to a manager's house in the course of his employment and was customary for him to make such deliveries for various superiors.
18. The explanation given by the Claimant is reasonably probably true and he has discharged his onus on a balance of probabilities that he did no wrong and therefore the summary dismissal was not for a valid reason.
19. The Claimant further explained that he received no letter to show cause and was not subjected to a disciplinary hearing so as to defend himself before the summary dismissal. The evidence was not rebutted by the Respondent. The Claimant has demonstrated therefore that the summary dismissal was not done in terms of a fair procedure.
20. The conduct by the Respondent was in violation of sections 43 as read with Section 45(1) and (2) of the Employment Act, 2007. The Court finds that the summary dismissal was wrongful and unfair and the Claimant is entitled to the terminal benefits as claimed in the statement of claim and

payment of compensation for wrongful and unfair dismissal in terms of Section 49(1) (c) as read with section 49(4) of the Act.

21. The Claimant had served the Respondent diligently for a period of 10 years. He clearly wanted to continue serving the Respondent. The employment was prematurely curtailed and he has suffered loss and damage. He was not paid terminal benefits except salary for days worked in the month of December 2009 and was not given a certificate of service to enable him look for another employment easily. He was a man of little education and found it difficult to obtain alternative employment.

22. The Claimant is awarded 10 month's salary as compensation for the wrongful and unfair dismissal which was effected without notice in the sum of Kshs 150,753

23. The Court also awards the Claimant;

- i. One month salary in lieu of notice in the sum of Kshs 15,753
- ii. Prorata leave Kshs 2,100

The Claimant was clearly registered with NSSF and the dues were deducted from his salary

24. The Claimant has therefore not proved that he was entitled to payment of gratuity upon dismissal since he is pensionable.

25. In the final analysis the award to the Claimant is;

- i. Kshs 150,573 Compensation
- ii. Kshs 15,573 in lieu of notice and;
- iii. Kshs 2,100 in lieu of leave

Total Award Kshs 168,606

26. The award is payable with interest at Court rates from date of the judgement till payment in full. The Respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 6th day of November 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE