



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 2094 OF 2011

BETWEEN

WHENCELAUSE GILBERT JUMBA SWINNERSTONE CLAIMANT

VERSUS

RYCE EAST AFRICA LIMITED
 RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Chahenza instructed by Chahenza and Associates, Advocates for the Claimant

Mr. Otenyo instructed by Makhandia and Makhandia Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND ULAFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 13th December 2011. This was amended through an Amended Statement of Claim filed on 11th October 2012. The Respondent filed its Statement of Response on 9th March 2012. The Claimant and two Witnesses for the Respondent Titus Chege and Daud Abdullahi, all testified on 24th May 2013 when the hearing closed. The dispute was last mentioned on 2nd July 2013 when Parties confirmed the filing of their Final Submissions and were advised by the Court Award would be delivered on notice.
2. The Claimant states the Respondent is a Limited Liability Company, running the business of motor vehicle repair and fabricating garage at Nairobi, Kenya. The Respondent employed the Claimant as a Welder and Fabricator, through a letter dated 17th October 2005. The Claimant was confirmed to permanent and pensionable terms on 18th October 2006. He earned several accolades during his employment, which included Ryce East Africa Employee of the Year 2008; Ryce Certificate of Recognition for Outstanding Service; and Alfa Motors Limited Staff of the Month in December 2004. He was promoted to become Head Mechanic. The Respondent however terminated his contract unfairly, on 29th August 2011. At the time of termination, the Claimant earned a monthly salary of Kshs. 44,000. He states that he had differences with a Co-employee named Mohammed Hussein who attempted to have the

Claimant repair his own private vehicle, which the Claimant declined, leading Hussein to instigate the Claimant's removal. He prays the Court to declare termination unfair and grant him:-

- a. A months' salary in lieu of notice at Kshs. 44,000;
- b. 12 months' salary in compensation at Kshs. 528,000;
- c. Severance pay at 15 days' salary for 6 years at Kshs. 153, 307;
- d. General and punitive damages for unfair dismissal; and
- e. Costs with interest calculated from the date of filing of the Claim.

3. The Claimant testified he is currently working at Midlands Company. He stated on 21st August 2011, he was to supervise employees who were working on 15 Toyota Landcruiser vehicles, which were destined for Southern Sudan. The employees were to fix bull-bars on the vehicles and convert others to be used as ambulances in that part of the world. The Head of Department advised that 3 of the cars should be left out of the undertaking. The employees had already started to fix the bull-bars. They were instructed to have the 3 cars stored at the bonded warehouse. The Head of Department later instructed that the 3 cars be taken to another company Singh & Company for conversion into ambulances. Whencelause was given the authority to forward the 3 cars to Singh. He drove the first 2 cars without a hitch. On collecting the last of the 3 cars to forward to Singh, the Security Officer at the gate Abdullahi Mohammed stopped the Claimant, and found a small polythene paper behind the driver's seat. In the paper were small balls, towing hook and brackets. The Claimant thought the Mechanic Daniel Wambua who was working on the particular Landcruiser had left the paper bag there. On going back to station, the Claimant was summoned by the Human Resource Manager Terry Mburu, the Workshop Manager Titus, and the Accountant Hassan. They alleged that he had attempted to steal the items found in the polythene bag. He was asked to record a statement the following day. The allegation was untrue, the Claimant holding that Hussein cooked up the allegation out of his personal differences with the Claimant. Terry called the Claimant later and told him he had been summarily dismissed. She stated that this decision was made because he had a bad relationship with Hussein. The Claimant vociferously told the Court he served as the Head of Department, and would not steal the items from his employer. Nothing belonging to the Client was lost. It was the Claimant's responsibility to ensure the cars were made and fabricated to meet the specifications. He did not have any letters of warning, and was not paid any terminal benefits.

4. Cross-examined, the Claimant testified his role was to supervise Fabricators. He understood the need for the cars to be secure. He had been in charge of the section for 5 years. Once motor parts were removed, they were not to be stored in the specific car. He instructed a Mechanic Otieno along these lines. The first 2 cars were checked by Abdullahi; they carried nothing suspicious. The third car had the items. The items were not meant to be there. The Claimant drove the car. He drove alone. He had never heard of items lost in the section during his 5 years in employment. Terry told the Claimant she would enquire about the items from other employees such as Wambua. He was surprised the items were found there. He was in a hurry to get the car to Singh. He did not have any differences with Abdullahi. He found the items in the office when he went to record his statement. It is not true that he was caught stealing. His Claim is justified. He clarified on redirection that the Head of Security was Mohammed Hussein. Daud Abdullahi was a Security Guard. The soured relationship was between the Claimant and Hussein.

5. The Respondent's position is that the Claimant was its employee as stated in his evidence. He worked in the given position, but his salary of Kshs. 44,000 was inclusive of house rent allowance and subject to statutory deductions. He was in charge of the car when the Customer's items were lost. Termination was fair, and the Claimant is not entitled to any damages for unfair termination or at all. He was not diligent in employment.

6. Titus Chege testified the Claimant worked under him at the material time. The Workshop had several Sections including the Mechanical Section. The Claimant was Head of Panel Beating and Fabricators. Reports of stolen items from customers had been received by the Management from the Claimant's Section. Items were found in the car the Claimant was driving. His explanation on the presence of these items was not convincing. He did not deny the presence of the items in the car he was driving. Cross-examined, Titus testified that he did not witness the incident. The Claimant did not say that the particular car was being jumpstarted. The Claimant continued to work for 4 days after the incident. The Human

Resource Department was investigating. The matter was not reported to the Police. The Claimant alleged someone must have planted the items in the car deliberately. He said he had a grudge with Hussein. The items were valued at about Kshs. 5,000. Redirected, the Witness testified that the Claimant did not give the name of the person he alleged to have planted the items. He admitted the items were in the car.

7. Daud Abdullahi testified he had worked with the Respondent Company for about 7 years at the time of testifying. It was his job to inspect cars at the gate. No vehicle could move out of the gate with unauthorized items. On 28th August 2011, Abdullahi was at the gate. 3 Landcruisers were to be driven to Singh to be converted as ambulances. The first 2 cars were okay. The last carried hooks and brackets. The Claimant was driving the car. The items were in a small polythene bag. The Witness called the Head of Security Hussein. He gave Hussein the items. Abdullahi did not know what happened after this. There was nothing prearranged. Hussein did not ask Abdullahi to arrest the Claimant. Abdullahi has no grudge with the Claimant. He was just doing his job. Cross-examined, Abdullahi testified that the items were not hidden. He saw them in the car immediately he opened the door. He did not see the car come out of the Workshop. The Claimant was surprised the items were in the car. He said he did not know who placed the items there. Another employee Frank was driving the Staff car, and was ahead of the Claimant. Frank was waiting outside the gate for the Claimant. The Respondent prays for dismissal of the Claim.

The Court Finds and Awards-:

8. The Claimant was employed by the Respondent on 17th October 2005 as a Welder and Fabricator. He rose to become Head of Panel Beating and Fabricators, a subsection of the Mechanical Section. He worked for about 6 years. His contract of employment was terminated by the Respondent on 29th August 2011. The reason for dismissal was not particularized in the letter communicating summary dismissal, the Respondent simply stating that dismissal was as a result of gross misconduct. The Respondent undertook to pay the Claimant salary for the month of August 2011, 17 days of outstanding leave, leave traveling allowance for 2011, less statutory deductions and obligations to the company.

9. The questions raised by this Claim are whether the Respondent had valid reason or reasons to terminate the Claimant's contract of employment; whether the decision was arrived at fairly; and whether the remedies sought are merited.

10. There is common evidence that the Respondent was entrusted 15 Units of Toyota Landcruiser vehicles, by a Customer. They were destined to Southern Sudan. 12 Units were to have bull-bars fitted on them; while 3 of the Units were referred in a rush to another Company Singh, for conversion to be used as ambulances. The Claimant was assigned the task of delivering the 3 cars to Singh. It was also his general responsibility to ensure the safety of the cars during the process of conversion and fabrication. Parts removed from the cars were to be kept safely, away from the specific car under repair.

11. It is agreed by the Parties that on 25th August 2011, small balls, brackets and towing hook were found in a polythene bag, inside the third and last car the Claimant was driving to Singh for conversion. The items were recovered by Security Guard Abdullahi, who the Claimant acknowledges, did not have any grudge against the Claimant. Abdullahi struck the Court as a conscientious and straightforward witness, who did not attempt to interpret facts, just giving a cold narrative. He had not prearranged anything with Hussein, who the Claimant alleges was the brain behind the Claimant's woes. The Claimant was not able to give a plausible reason for the presence of the items in the last car he drove out. The Respondent had reasonable and sufficient reason to suspect the Claimant had committed an offence against the Respondent's business; or at the very least, failed to perform his role properly and carefully, all employment offences under Section 44 [4] of the Employment Act 2007. The value of the items and the possibility that these items were planted in the car to fix the Claimant; or the likelihood that the car was being jumpstarted and the items somehow forgotten there by one of the mechanics; are all grounds in raising reasonable doubt in the culpability of the Claimant in a criminal enquiry. The standards required of the employer in determining if an employment offence has taken place, the standards in showing valid and sufficient grounds justifying termination, are less onerous than the standards necessary to sustain a criminal case against the Claimant. The Respondent was within its right to consider the explanation by the Claimant not to have displaced the Respondent's suspicion that the Claimant participated in the

employment offence. In the view of the Court, the Respondent had valid reason in terminating the Claimant's contract of employment. There was substantive justification under Section 43 and 45 of the Employment Act 2007.

12. The procedure adopted in carrying out the decision went below the minimum disciplinary procedure contemplated by the Employment Act Section 41 and 45. There was no letter calling on the Claimant to answer to any charges. There are no specific charges in a written form exhibited anywhere in the pleadings against the Claimant. The Respondent wrote statements from various witnesses who were involved in the movement of the cars, including the Claimant. There was no process of a disciplinary hearing, and the Claimant was not called to answer to any charges or defend himself in a formal disciplinary hearing under Section 41 of the Employment Act 2007. The letter of summary dismissal does not state specific findings against the Claimant, merely stating that he was guilty of gross misconduct. The law justifying dismissal was given to be Section 17 of the Employment Act, Cap 226 the Laws of Kenya. This law was retired in 2007, 4 years before the Claimant's dismissal. It is apparent that the Respondent did not see any need to avail the Claimant a fair procedure, having relied on a law that did not provide for such fair procedure, in an era when employment was at the will of an employer. This misconception had the effect of denying the Claimant the procedural guarantees created under the repealing Employment Act 2007. Termination was therefore unfair on account of procedure. The Claimant has not laid out factual or legal bases for grant of severance pay. He was not placed in a redundancy situation to justify severance pay under Section 40 of the Employment Act 2007. If his claim under this head was for service pay under Section 35, he did not demonstrate to the Court that he was not under any Pension Scheme. His pay slip shows he was a Member of the National Social Security Fund [N.S.S.F], which would take him out of the bracket of employees who are entitled to service pay under the Employment Act 2007. There was no attempt made to justify punitive and general damages. The Claimant has been granted compensation which is sufficient to redress his economic injury. In his evidence, he testified he has secured employment with Midlands Company. He has mitigated his loss as demanded by the Employment Act 2007, and additional punitive and general damages would be contrary to the law and the principle of a fair go all round. In sum, the Court Orders:-

- a. ***Termination was on valid ground;***
- b. ***The Procedure was defective, making termination unfair;***
- c. ***The Claimant is entitled to one month salary in lieu of notice, granted at Kshs. 44,000;***
- d. ***The Respondent shall pay the Claimant 7 months' gross salary at Kshs. 308,000 in compensation;***
- e. ***The total sum of Kshs. 352,000 shall be paid to the Claimant by the Respondent within 30 days of the delivery of this Award;***
- f. ***No order on the costs and interest.***

Dated and delivered at Nairobi this 23rd day of January 2014

James Rika

Judge

