



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 157 OF 2013

DAVID MBUVI KILONZOCLAIMANT

VERSUS

BAHARI [T] COMPANY LTDRESPONDENT

J U D G M E N T

The claimant claims accrued employment benefits plus damages for unfair and wrongful summary dismissal by the respondent.

The respondent on the other hand has denied the alleged unfair and wrongful dismissal but admits that the claimant is entitled to one months salary in lieu of notice, salary for August 2012 and pay in lieu of 50 days leave not taken.

The suit was heard on 4/11/2013 and 5/11/2013 when the claimant testified as CW1 while Mr. Nair Mohamed Kassim testified for the defence as RW1.

CLAIMANTS CASE

CW1 started to work for the respondent in 2004 and continued upto August 2012 when he was summarily dismissed for allegedly causing the loss of 29 jerricans of oil. Before the said loss he had overheard RW1 telling some mechanics on 7/7/2012 that if market was available he would sell the said oil. The key to the store was always kept at the keyboard at the reception and was accessible to many people. He maintained that the RW1 was the one who closed the offices after work.

On 9/7/2012 CW1 was sent to the store by the stores clerk Mr. Mwandawiro to collect empty files. CW1 went for the keys at the reception and on opening the store he found tyres and the files scattered all over the floor. He also noticed that 29 out of 34 oil jerricans were missing and reported the matter to the RW1 and Grace, the quality and systems manager.

RW1 called the security guards who denied any knowledge of the lost oil. The premises had concrete wall around it fitted with electric fence. It had 3 guarded gates and only one was in use. RW1 and CW1 reported the matter to the police and recorded statements but no one was charged. CW1 denied the theft because the only means to remove the stolen jerricans was by vehicle which he did not have.

He contends that he was not given any hearing before the summary dismissal and prayed for compensation. On cross examination, he denied ever keeping custody of the keys to the store and maintained that they were kept at the reception. He denied ever sending an SMS to the RW1 or any other

person after the dismissal to apologize for the lost oil.

He admitted writing statement on the loss of the oil but not as his defence because he was never the suspect for the lost oil.

DEFENCE CASE

RW1 is the respondents' administrator. He confirmed that the claimant was their employee and he was dismissed for negligence which had led to the loss of 29 jericans of oil while in his custody as the in charge of the store. He maintained that the CW1 was the record keeper of the stocks in the store. RW1 reported the matter to the police and recorded statement together with the claimant.

When the Director of the respondent returned from abroad, he asked the claimant and the guards to record statements after which he was dismissed because his explanation of the loss was not satisfactory. RW1 contended that in August CW1 send SMS to the Directors apologizing for not revealing security lapses at the premises which SMS was forwarded to Rw1 by the director. By the time of the said SMS the CW1 had already been dismissed.

RW1 admitted that the respondent was ready even before this suit to pay salary for August 2012, one month salary in lieu notice plus 50 days accrued leave. He denied that CW1 was entitled to two months notice before termination. He also denied that salary for September was payable because the CW1 never worked during the said month. He denied the claim for refund of NSSF and NHIF contending that they were all remitted during the claimants tenure of service.

On cross examination RW1 confirmed the CW1 was office messenger but also in charge of the stores and the record keeper. He admitted that one Saturday he send CW1 for oil from the store for use in a fork lift. He admitted that the oil cannot have been stolen by the claimant because there is no way he could have gone through the gate unnoticed.

He confirmed that the claimant never admitted any wrong doing in connection with the lost oil but he was never the less dismissed at the directors discretion. He admitted that the dismissal letter withheld CW1's dues until the lost oil was recovered. He clarifies that the lost oil was obsolete and a waste after staying in the store since 2004.

After the close of the hearing both counsel filed written submissions.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- 1. whether the summary dismissal amounted to wrongful and unfair dismissal.**
- 2. Whether the claimant is entitled to the reliefs sought.**

Whether the dismissal was unfair and wrongful

Termination is wrongful when it is done in breach of contractual obligation regarding termination notice. In this case the termination was wrongful because the defence has admitted it by agreeing to pay one month salary in lieu of notice. Termination is unfair when it is done in breach of statutory obligation regarding procedural fairness. In the present case the claimant denied any wrong doing which the Rw1 agreed when he stated in evidence that CW1 could not have passed the gate unnoticed. The claimants evidence that he was not given any hearing before termination is not contradicted by the defence. RW1 only said that the Director dismissed the claimant at his discretion after finding his statement unsatisfactory. RW1 did not demonstrate that the director gave the claimant a disciplinary hearing within the meaning of Section 41 of the Employment Act.

The said provisions requires that before dismissal for misconduct under Section 44 of the Act the

employer must explain to the employee the reasons for the intended dismissal in a language the employee understands. The employee must be given an option of being accompanied by a workmate or shop floor union representative if he is a union member. That before the decision to terminate is reached, the employee and his companion must be heard in defence.

The foregoing statutory obligation was not discharged before the summary dismissal on 27/8/2012. The law does not give employers any discretion to dismiss at will when misconduct is cited as the reason for the dismissal. Consequently the court finds and holds that the summary dismissal of the claimant by the respondent was both wrongful and unfair.

What remedies are available to the claimants

As earlier noted the respondent admitted the claim for August 2012 salary being ksh.11.45, 50 days leave being ksh.18,400 and one months salary in lieu of notice being ksh.11045. The claimant did not provide proof that he was entitled to 2 months notice before termination. He will therefore only get the admitted one month salary in lieu of notice. He will also get salary for August 2012 plus leave pay of ksh.18400 leave pay of ksh.18400 for the 50 days leave not utilized before the dismissal.

The court will also award 12 months gross salary for unfair termination. This works to ksh.132,540/

DISPOSITION

Judgment is entered for the claimant against the respondent as follows;

- 1. the summary dismissal of the claimant is declared wrongful and unfair.**
- 2. The respondent is ordered to pay to the claimant kshs. 173,030 plus interest at courts rates from 27/8/2012.**
- 3. costs and interest.**

Signed, dated and delivered this 24th day of February 2013

O.N. Makau

Judge