



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1307 OF 2011

BETWEEN

JOSEPH KIOKO MBITHI
CLAIMANT

VERSUS

AFRICAN AUTO SUPPLIERS LIMITED
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Omas instructed Omas Omosa & Company Advocates for the Claimant

Mr. Kuloba instructed by A.S. Kuloba & Wangila Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant initiated the proceedings herein by way of a Statement of Claim filed in Court on 4th August 2011. He states he was employed by the Respondent in the position of General Labourer from November 1997. He was summarily dismissed by the Respondent on 5th May 2010. The decision of his Employer was according to him unjustified and unlawful. He claims severance pay; terminal benefits; 3 months' salary in lieu of notice; unpaid leave; salary underpayments; transport allowance; and gratuity all totaling Kshs. 186,000. He also seeks general damages for wrongful dismissal, costs and interest.
2. The Respondent filed its Statement of Reply on 30th September 2011. It accepts the Claimant was its Employee, engaged as Casual Labourer with a monthly wage of Kshs. 11,500. His contract was terminated upon his own admission in writing, of an act of gross misconduct. Termination was lawful and fair. The Respondent prays the Court to dismiss the Claim.
3. The Claimant testified and closed his case on 7th May 2013. The Respondent's Owner Mr. Kantilal Vaghji Manji Kerai, Salesmen Mr. Ibrahim Osman and Daniel Otiang'a all testified on the same date 7th May 2013. The case for the Respondent wound up on 24th May 2013 when Mr. Kuloba for the Respondent, placed on the record a Motor Vehicle Seal, which was said to have been stolen by the

Claimant from the Respondent leading to the contested summary dismissal. The dispute was last mentioned on 9th July 2013 when the Parties confirmed the filing of their Final Submissions and were advised by the Court the Award would be delivered on notice.

4. The Claimant testified he served the Respondent faithfully for 13 years. He reported for work as was his routine, on the 5th May 2010. He did the cleaning of the office. When he finished doing so, he was stopped by Kantilal and asked to remove his clothes. He did not understand the extent to which Kantilal wished him to undress. The Claimant loosened his trousers. Kantilal directed him to stop that.

5. There was a boxful of spare parts behind the Claimant. Kantilal slapped the Claimant and pushed him inside Kantilal's office. Kantilal made the Claimant sit on the water-logged floor. The Claimant was made to lie on the floor with his back against the water-logged floor. Kantilal gave the Claimant a piece of paper and asked him to sign on it. The paper was much smaller than Respondent's annexure 'AASL 1.'

6. After this the Claimant was asked to go home. He returned on 12th May 2010 and asked for his terminal benefits. He was paid nothing. He was not told why his contract was terminated. His salary was Kshs. 11, 500 per month. He seeks the assistance of the Court in terms of his prayers.

7. Mbithi testified on cross-examination that he worked as a General Labourer. He was cleaning the office when the incident occurred, using a mop and a bucket. There was water in Kantilal's office. The place was not water-logged, but neither was it dry. He had not been asked by Kantilal to stop work anytime before the 5th May 2010. Kantilal beat him and shoved him inside. The only witnesses there were Respondent's witnesses. Mbithi did not report assault to the Authorities. He was treated, but did not carry treatment records to the Court. It is not true that he stole a spare part and concealed it in his clothes. He did not know the contents of the document he was forced to sign. 'AASL 1' was not signed by him. No Police Officers were called in. He conceded his claim for terminal benefits is not backed up by any contract. He was not a Member of the Trade union. He did not recall any Collective Bargaining Agreement which would apply to his situation. He was not advised of any redundancy situation at the workplace. He stated on redirection that he had all along worked for Kantilal. His Employer had not complained of theft in the past.

8. Kantilal testified he noticed something protruding from the Claimant's back, as the Claimant was cleaning the office. Something was stuffed in the Claimant's clothes. Mbithi removed his clothes and Kantilal personally recovered a motor vehicle seal from the Claimant. The Claimant recorded a Statement, marked as 'AASL 1' admitting his involvement. The Witness did not beat the Claimant or force him to lie on a water-logged floor. Kantilal only held the Claimant's hand, and directed him where to thumbprint. The admission was witnessed by another Employee Daniel Otianga. Mbithi was paid a monthly gross salary of Kshs. 12,070 which came to Kshs. 11,500 after deductions. Kantilal terminated the Claimant's contract of employment because he apprehended he would lose many other items, if the Claimant continued in business. There was no redundancy. Transport allowance was not in the contract, and neither was gratuity. No leave days are owed the Claimant.

9. He testified on cross-examination that the Claimant's records were available at the workplace. Mbithi was employed in 1997 and left in 2010. His first salary was about Kshs. 4,000 and the last Kshs. 11,500. Kantilal was not able to say whether other Employees witnessed theft of the seal. He personally removed the seal from the Claimant. Mbithi asked not to be taken to the Police, preferring to settle the matter with the Employer. The admission note was signed on 10th May 2010. The Claimant was dismissed on 10th May 2010. There was no written contract of employment. Kantilal did not slap the Claimant. Redirected, he testified that according to him the incident took place on 10th May 2010. He did not report the matter to the Police and decided to settle at the shop floor level.

10. Ibrahim Osman has worked for the Respondent for over 25 years. Mbithi was his colleague at the workplace. Some years back, theft of spare parts at the Respondent's business was rampant. On the material day Kantilal saw certain items protruding from the Claimant's back as the Claimant was sweeping. Osman was at the counter and witnessed the incident himself. It had become the habit of the

Claimant to exhibit aggression, whenever Management enquired about missing parts. On the particular day, Mbithi responded to Kantilal's enquiry with characteristic aggression. Daniel, an Employee of the Respondent, was called by Kantilal to witness the incident. An oil seal was retrieved from the Claimant's person. He was then asked to sit down, as Kantilal recorded his statement admitting to the offence. The Claimant was not beaten. He signed the statement in the presence of Daniel. He later went to the Manager and was informed '*kazi imekwisha.*'

11. The Witness testified on cross-examination that he was a Salesman, with 25 years experience at the Respondent's Business. He detested Mbithi's behaviour. This dislike was not the motivation for the Witness to give evidence against Mbithi. Osman was not able to say if the Claimant wore a jacket on the day of the incident. He denied, on redirection, that his evidence was in any way tainted by his detest for the Claimant's bad behaviour.

12. Daniel Otiang'a was employed by the Respondent in 1999 and worked with Mbithi. On 5th May 2010, Mbithi was cleaning. Kantilal suddenly called Otiang'a and in his presence, asked the Claimant to remove what was concealed on his back. The Claimant removed a crankshaft seal, and placed it on the table. Kantilal later asked Otiang'a to sign the statement recorded from the Claimant marked AASL 1. Otiang'a confirmed the serial number of the item was as recorded in the statement. Daniel did not witness the Claimant being beaten or forced to lie on the floor. Cross-examined the Witness stated he and the Claimant were slightly friendly. Not all persons could see what transpired in Kantilal's office. The incident took place on 5th May 2010. The statement is dated 10th May 2010. Otiang'a did not know why there was discrepancy in the dates. The Witness read the statement and signed. He did not know if the Claimant was paid terminal benefits. He did not witness the Claimant stealing the spare part. He confirmed on redirection that he signed the letter the same day the incident took place, but did not check if it was dated. The incident did not happen in secrecy. Other Employees came to learn about it. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Awards:-

13. The Claimant was employed by the Respondent as a General Labourer, between 1997 and May 2010. He earned a monthly net salary of Kshs. 11,500 at the time of his exit from employment. He left employment upon dismissal by the Respondent, on the allegations that he was caught having stolen from the Respondent, and concealed a crankshaft seal, in the clothes he was wearing. Was he dismissed for a valid reason, and fairly? Is he entitled to the prayers sought?

14. The evidence adduced by Mr. Kantilal, Mr. Osman and Mr. Otiang'a was consistent, corroborative, unshakeable and therefore credible. This evidence in sum, is that on 5th May 2010, the Claimant was found to have the stolen motor vehicle seal tucked under his clothes. The item protruded from his back as he did his cleaning duties. He was confronted by Kantilal, and the seal extracted from his person. He recorded a statement, which captures the details of the stolen item, and in which the Claimant admitted the employment offence. The seal was availed to the Court.

15. The Court believes the evidence given by the 3 Witnesses for the Respondent. There was no reason why the last two Witnesses who were colleagues of the Claimant, having served with him for over 10 years, would wish to swear falsely against the Claimant and endorse the decision made by their Employer to terminate the Claimant's contract of employment. The Claimant made an admission that he had stolen the seal. The Court does not see the dating of his statement as raising any significant doubt, on the veracity of the admission.

16. Termination was based on valid ground, in particular under Section 44 [4] [g] of the Employment Act 2007. Mbithi committed, or on reasonable and sufficient grounds was suspected of having committed a criminal offence against, or to the substantial detriment of his Employer, or Employer's property. On this score, termination rested on solid substantive justification and was fair.

17. There is considerable doubt whether the Respondent understood or implemented the minimum statutory termination procedure, created under Section 41 and 45 of the Employment Act 2007. Fair

procedure required the Claimant, upon being captured live stealing, be formally charged and allowed to defend himself at a disciplinary forum, in the company of his trade union representative if in a trade union, or in the company of another colleague of his choosing. He ought to have been read the specific charges, in a language understood by him, and given the full opportunity to explain or defend himself. These are the basic termination of employment standards, contained in Section 41 of the Act.

18. The Respondent did not observe any of these. Kantilal just asked the Claimant to undress, extracted the seal, roughed the Claimant a little, made him sign a confession and then terminated the Claimant's contract of employment. To this extent, there was failure in observing fair procedure. The Claimant is entitled to ***minimal compensation to redress the procedural violation, which the Court grants at 1 month salary at Kshs. 11,500.***

19. The Claimant did not establish that he was retrenched as a result of his position falling redundant, and severance pay is not awardable under Section 40 of the Employment Act 2007. If he intended to claim service pay under Section 35, this would not be available to him as his contract was terminated under other provisions of the Act, and not Section 35. He did not explain what his separate prayer for terminal benefits is about. Notice pay claimed at 3 months' salary was not supported by any contractual clause, other evidential material or provision of the law. This is the same for the claims for transport allowance, underpayment of salary, and gratuity. Even the figure of Kshs. 186,000 alleged to be the totality of these benefits, was not broken down under the specific items. ***IT IS ORDERED-:***

- a. ***Termination was unfair on account of procedure;***
- b. ***The Respondent shall pay to the Claimant 1 month salary in compensation at Kshs. 11,500; and***
- c. ***Other prayers are rejected.***

Dated and delivered at Nairobi this 18th day of February 2014

James Rika

Judge