



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 1003 OF 2011

BETWEEN

PAUL MUTISYA MUENDO
 CLAIMANT

VERSUS

CHARLES THIONG’O HUMAN RESOURCE
 DIRECTOR,

A.I.C. KIJABE HOSPITAL..... 1ST
 RESPONDENT

THE BOARD OF GOVERNORS, A.I.C
 KIJABE

HOSPITAL.....2ND
 RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Mugu Advocate instructed by E.N. Mugu & Company Advocates for the Claimant

Mr. Masese Advocate instructed by the Federation of Kenya Employers [F.K.E.] for the Respondents

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. This Claim was initiated through a Statement of Claim filed by the Claimant on 24th June 2011. The Federation of Kenya Employers filed a Statement of Reply under Protest on 8th February 2013 and an Amended Statement of Reply on 19th February 2013. The Claimant closed the pleadings with the filing on 26th April 2013, of the Reply to the Amended Statement of Reply.

2. The Claimant testified on 11th February 2013 and on 2nd May 2013 when he wound up his case. The Respondent testified through its Engineer and Facility Manager Collins Muiruri Mwangi on 19th June 2013 when the hearing closed. The dispute was last mentioned on 19th July 2013, when the Parties confirmed the filing of their Final Arguments and were advised by the Court Award would be delivered on notice.

3. The Claimant's position is that he was employed by 2nd Respondent as a Mechanic on 3rd January 2002. He was confirmed on 2nd April 2002. He was the Mechanic for both the Hospital's Vehicles and Machinery, earning a monthly basic salary of Kshs. 11,655 and 23% of the basic salary as the house rent allowance. He worked well, and in 2007, was awarded a certificate of recognition by the Executive Director of the 2nd Respondent for 'faithful service.' There was a change in the leadership of the 2nd Respondent in early 2011. In April of the same year, the Claimant received a letter from the human Resource Director asking him to 'show cause' (sic). The allegations against him were:-

- Poor maintenance of vehicles;
- Misappropriation of hospital resources;
- Procurement and replacement of non-genuine motor vehicle parts; and
- Failure to perform with diligence as 'supervisor in ensuring resources were well utilized and that the hospital got value for its money.'

The Claimant responded to the letter. On 15th April 2011, he was sent on compulsory leave. On 6th May 2011, he was summarily dismissed under Section 44 of the Employment Act 2007. He disputes the substantive justification given by the Respondents, and the fairness of procedure adopted in effecting the dismissal decision. He seeks:-

- a. General Damages for unfair and unlawful dismissal;
- b. Costs; and
- c. Any other relief the Court may deem fit to grant.

4. He first saw the document titled 'Vehicle Report on Irregularities in Mechanic Department from 3rd December 2010 – 4th April 2010,' in the Amended Statement of Reply. He did not see it during his employment. The document was unsigned, and did not implicate the Claimant. The Report mentioned other employees such as Benson, who was one of the Mechanics under the supervision of the Claimant. The Respondent alleged in its Reply that the Claimant was careless; but the details of the carelessness were not given to the Claimant. No details were given on the misappropriation of hospital resources. He was only paid salary for May 2011. It was not true that he discharged the hospital from further obligation. It was his wife, who worked for a cafeteria within the premises, who signed the acknowledgement. Other Mechanics who served under the Claimant mentioned in the Respondent's Report were Macharia and Wanyoike. The two also were used as Drivers. The Claimant did not determine what duty they performed.

5. The Claimant explained there was a Purchasing Department, separate from where the Claimant worked in. This Department would purchase spares for the Claimant's Department. The Claimant did not at any time accompany the employees, who were sent to purchase motor parts. The Respondent's Toyota Land Cruiser vehicle was purchased brand new, while other vehicles were purchased second hand. These vehicles were persistently breaking down. At the time the Claimant left however, all the vehicles were motorable. One of the vehicles under the repair of the Claimant, registered as KAN 364 N, an Isuzu NKR, was sold to Kijabe Academy. The Claimant operated a garage after termination and was retained by some of the 2nd Respondent's doctors to repair their vehicles. He repaired the 1st Respondent's Board Chairman's vehicle. The Claimant worked well and was not careless with his work. Muendo occasionally complained about incompetent drivers, some who were transferred from other departments.

6. Answering questions from the Advocate for the Respondent, the Claimant testified his department used to have motor vehicle defect reports in the morning. There were routine oxygen checks on the oxygen cylinders. He reported to the Hospital Engineer. Muendo is a graduate of Form 4, and trained as Motor Vehicle Mechanic, Grade 1. He used to have meetings with the Hospital Engineer. The Hospital Engineer

was not an Automotive Engineer and depended on the advice of the Claimant on maintenance of the vehicles. There was an independent Purchasing Department. The Claimant specified what spares were required through the Internal Order Book. There would be three quotations, out of which the Head of Department would approve one. The purchasers would then buy the spares and forward the purchase receipts. It was not the Claimant's duty to confirm specification.

7. He was sent on compulsory leave but was not advised on the nature of the investigations that followed. The Claimant's department carried out almost all motor vehicle repairs, except on specialized areas such as electrical wiring, which role was outsourced. Drivers were assigned duties by Resources the Administrative Assistant, not the Claimant. He raised the issue of incompetent Drivers with the Hospital Engineer. On 19th April 2011, the Claimant appeared before the Management. 4 Mechanics who worked under him also appeared. He was questioned about motor vehicle parts. It is not true that he told the Panel it was hard to distinguish between genuine and fake parts. Theft of spares sometimes took place at the workplace. The discharge on payment of Claimant's dues by the 2nd Respondent was signed by the Claimant's wife. The Claimant authorized his wife to collect what was offered by the 2nd Respondent. The discharge was written in his name. He did not caution his wife about signing. He received the money.

8. No reason was given for the dismissal. Poor motor vehicle maintenance had been discussed in the meeting of 19th April 2011. Motor vehicle clutches were damaged through overloading and incompetent driving. He was not shown the investigation report. He saw some receipts but was not told what they represented. He did not report the dispute to the Ministry of Labour but came to the Court directly.

9. On redirection the Claimant testified the dismissal letter referred to careless and improper use. Nothing specific was mentioned. No particular case of misappropriation of funds was given. He had nothing to do with the receipts referred to by the Advocate for the Respondents. He was not given details of the accusations, and it was hard to defend himself without such. His wife was generally known to the Respondents. The Claimant did not know who signed the discharge from the Human Resource department. He was just called by the Human Resource Office and asked to collect his dues. No details of the dues were communicated to him. He would not purchase motor vehicle spares without involving the Hospital Engineer. He was not shown any evidence in the Panel deliberations of 19th April 2011. He asks the Court to uphold his Claim.

10. The Respondents concede the Claimant was employed by the Hospital as a Mechanic, earning a basic salary of Kshs. 11,655 per month and 23% of the basic as house rent allowance. Irregularities in the Mechanical Department were detected on 15th April 2011, and the Claimant placed under compulsory leave. Investigations carried out revealed the Claimant was involved in dirty deals with Suppliers of motor spares and repairs, inflating prices and labour costs. He was summoned on 19th April 2011, together with his Co-employees of his Department, to a disciplinary hearing before the Disciplinary Committee. He was found guilty of carelessness while performing duty, resulting in poorly maintained vehicles. He was found to have failed to take due diligence in ensuring the hospital got value for its money. He was consequently dismissed on 6th May 2011. He cleared with the Claimant on 8th June 2011 and was paid his dues.

11. Engineer Collins Muiruri Mwangi testified he is the Facility Manager, Kijabe Hospital. He has been an Engineer for 7 years. The Hospital had at least 5 different Departments. His duties were to set up systems and ensure they were running. He worked with Heads of Departments to ensure processes were followed. The Claimant was one of the Heads of Departments.

12. The Claimant was the Chief Mechanic. Mwangi found the Claimant in employment. The Hospital is an essential service industry, and transport is a key component in the success of the business. The Hospital uses ambulances. An ambulance has to be functional, as it is a matter of life and death. There were persistent breakdowns when the Engineer joined employment. Mwangi sat down with the Claimant to forge a way forward. The Claimant gave a laid-back response, saying that nothing could be done, as the problem was with the vehicles. Mwangi examined how long the spares lasted, and came to the realization they had a short lifespan. He prepared a report, titled 'Vehicle Report on Irregularities in Mechanic

Department from 3rd December 2010- 4th April 2010.’ The Order Book, which was in the care of the Claimant, was used in making spare part requisitions. Receipts; costs of purchase; dates; and recurrent purchases were examined and found irregular. On 10th April 2011, one of the vehicles was inspected at an independent garage and found to have bootlegged spares, which caused a breakdown. A clutch lasts up to 2 years. The Hospital was buying clutches after every 4 months. Muendo gave the specifications and was part of everything wrong with the Department. He was summoned before a Disciplinary Panel, and in response to the findings by Engineer Mwangi, explained that he was not the person responsible for purchasing of spares. He used to send his juniors to purchase. The Respondents called most of the companies whose names appeared on the receipts; these were discovered to be phonies. Procurement Officers were not conversant with the spare parts market, and relied on the information supplied by the Claimant in determining what to buy. Kshs. 771,893 was lost through the Claimant’s negligence.

13. Engineer Mwangi testified on cross-examination that he had a background in structural engineering. He holds MBA in Organizational Management. There was an Officer in Engineer Mwangi’s docket before Mwangi joined. This Officer did not have a technical background. The Claimant’s core area was motor vehicle, as there was a Bio-med technician who attended to the Hospital’s Medical Machines. Mwangi set up a system for capturing of data using electronic forms, which showed how many trips the vehicles made. The Claimant was not consulted in creation of this system.

14. The Heads of Department would write to Mwangi in case they needed something. If he declined their requests, they would not go ahead and purchase. The Claimant did not need the approval of the Witness to engage the Procurement Department. Muendo occasionally bypassed the Engineer, such as on the 22nd April 2011, when he placed an order for the pump. There were 4 of 5 vehicles when Mwangi joined. He came to learn 2 of these were bought second hand. The lorry was bought second hand and used to transport Hospital Staff and Goods. Mwangi was not aware that the Claimant had taken vehicles for repair at Unicorn Garage in Westlands before. The garage was recommended by the Procurement Department. At the time the Engineer joined, the Procurement Department and the Claimant were responsible for prequalification of garages. It was not possible to find the garages where the Claimant took the vehicles because their given addresses were irretraceable. He was dismissed for occasioning poorly maintained vehicles. There was a broken down vehicle every other day. Anyone reading the investigation report could read misappropriation of resources in it. He was found guilty of placement of non-genuine spares. The Engineer did not know if the Claimant received a certificate of merit from the Hospital in 2007. The whole Transport Department was sacked. Every Head of Department kept an Order Book. The Respondents urge the Court to dismiss the Claim.

The Court Finds and Awards:-

15. Patrick Mutisya Muendo was employed by the A.I.C. Kijabe Hospital as a Mechanic, commencing 2nd April 2002. He earned a basic salary of Kshs. 11,655 and 23% of the basic [Kshs. 2,680] as a house rent allowance –total Kshs. Kshs 14,335 per month. He was sent on compulsory leave on 15th April 2010, on the ground that the Hospital was carrying out investigations on irregularities detected at the Claimant’s Mechanical Department. This exercise was carried out by the Claimant’s Supervisor Engineer Mwangi, who compiled a report. The Claimant was subsequently called to a disciplinary meeting on 19th April 2011, as did his fellow Mechanics from his Department. The Claimant denied that his Department purchased bootlegged spare parts. He told the interviewing Panel that he always verified the receipts, and did not go personally to purchase the items. At the end of the interview process, it was determined to terminate the contracts of two employees, while the Claimant was called upon to show cause why disciplinary action should not be taken against him. The Hospital decided to outsource the vehicle maintenance function as a stop-gap measure.

16. The Claimant wrote on 25th April explaining that the Hospital Vehicles and Equipment under the Mechanical Department were the best maintained. All, despite of their over ten years of use, were in good motorable conditions. The Department had saved the Hospital substantial funds over the years. The Disciplinary Committee reconvened on 5th May 2011, and decided that the Claimant had engaged in acts of gross misconduct. On compassionate grounds, the Panel recommended that the Claimant should be

prevailed upon to resign, and would receive all his terminal dues. It is not clear if the Claimant was asked to resign, but the letter of summary dismissal was written the following day 6th May 2011. The reasons for summary dismissal were listed as below:-

- There was carelessness and improper maintenance of the vehicles as required, resulting to poorly maintained vehicles;
- Sufficient evidence leading to the belief that there was serious misappropriation of Hospital resources in the purchases of spare parts for the vehicles;
- Procurement and replacement of non-genuine motor vehicle parts, thus causing damage to the vehicles and additional maintenance costs; and
- Failed to take due diligence in ensuring the hospital got value for its money.

17. The issues raised by the dispute are whether these grounds, amount to valid reasons to justify summary dismissal; if in the affirmative, whether the decision was arrived at fairly; and if dismissal was unfair in both or either of the cases, what remedies should be availed to the Claimant.

18. The Claimant was the Chief Mechanic, and overseeing the entire fleet of the Hospital's vehicles. The vehicles were integral to the functioning of the Hospital, as its core function is in the essential service industry. Engineer Mwangi was right, in characterizing the work of the Respondents as a matter of life and death. It was important that there was unquestionable aptitude to duty, by the Officers serving the Mechanical Department.

19. Unfortunately, the employer had reason to find that Muendo and the employees under his supervision had not lived up to this high expectation. There is no doubt the vehicles kept breaking down; the clutch plates did not last; and purchase receipts in the hands of the Respondents were questionable. There were reasonable suspicions that bootlegged spare parts were purchased either with the active participation, or through the negligence of the Chief Mechanic. When asked to explain, the Claimant shifted the blame to Procurement or to the junior Mechanics who he assigned the duty to go to the market and buy the spares. He did not take the Responsibility demanded of his Office, but opted to blame other individuals, and when not blaming those individuals, attempted to justify improper performance of duty on the condition of the vehicles. He explained at times that the vehicles were in good condition, while at other times he would lament about their old age. Parts were stolen from the Hospital's new Bus and a Truck. In replacing the parts, the Hospital was overcharged, and again the Claimant opted to deny responsibility, stating he was not involved in the replacement process and did not take notice of the inflated prices.

20. The Hospital took action against the entire Mechanical Department. The Court is convinced this was based on valid reason. The Claimant's active participation, or negligence in his supervisory role, harmed the productivity of the entire enterprise. There were valid reasons, and summary dismissal was on this score fair.

21. Was the procedure fair? The Claimant was placed on administrative leave on 15th April 2011. Investigations were carried out and a report made in writing. He was heard on 19th April 2011, and asked to give reason why he should not be summarily dismissed. He wrote on 25th April 2011, insisting even in the face of all the evidence to the contrary, that the vehicles were in good condition, and that "*vehicles and equipment under mechanical department are best maintained.*" The Disciplinary Committee reconvened where a decision was made to have the Claimant prevailed upon to resign. The letter of summary dismissal followed on 6th May 2011, stating the specific grounds upon which he was found guilty. Although the Claimant testified during the Court hearing that no specific charges were given to him, and that he found it hard to defend himself therefore, the proceedings before the Disciplinary Panel capture specific allegations which the Claimant was called upon to answer, and to which he answered. He was thereafter paid his terminal benefits comprising salary for days' worked. He has not claimed any other terminal benefits. He only claims damages for unfair and unlawful dismissal. There is no question raised that he was not paid the correct terminal benefits. The procedure on the dismissal was fundamentally in conformity to the basic statutory disciplinary procedure, and therefore termination was fair on the second score.

22. In sum, the decision was in good faith, non-arbitrary and without discrimination. All the employees of the Department were separated from the Hospital. Dismissal was proportionate to the substantial harm done to the Hospital. The Claimant neglected his duty, performed poorly and improperly, and his overall conduct, particularly considering he was in a supervisory role, was detrimental to the essential business carried out by the 2nd Respondent. His warts and all were not something a reasonable man could be expected to overlook, having regard to the nature and circumstance of his employment. ***The Court upholds the decision of the employer summarily dismissing the Claimant. The Claim is disallowed. There shall be no order on the costs.***

Dated and delivered at Nairobi this 5th day of February 2014

James Rika

Judge