



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1152 OF 2011

TITUS KIMANZI MBINDI.....CLAIMANT

VERSUS

TOWN CHIC LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant Titus Kimanzi Mbindi sued the Respondent Town Chic Limited for his unlawful dismissal on 21st May 2011. He claimed that he was not paid for May and sought 2 months salary in lieu of notice, unpaid leave for 3 years, 2 weeks leave pay for 2 years, overtime as well as general damages. He also claimed costs of the suit. He testified that his salary per month was 10,000/=. After his dismissal he went to Labour on 7th June 2011 and was given a letter to take to the Respondent and when he returned to the Labour Offices on 20th June 2011 he met the Respondent's owner Mr. Davis Munene. The amount he sought is Kshs. 258,000/= made up of leave, overtime pay, salary for days worked and the notice for 2 months plus costs.
2. Davis Munene the proprietor of Town Chic also attended Court and availed a witness Mr. Marvin Omondi Aria. He testified that on 21st May 2011 there was an incident at Town Chic where the Claimant was a supervisor. The Claimant was accused of involvement in illegal sale of oil. The witness testified that he was used by the Claimant as an assistant to transport the oil to the buyer. He testified that it was not the first time and the incident on 21st May 2011 is when the company discovered the sale of oil without authority. There were 4 people involved and the Claimant was one of them. When the oil was intercepted the Claimant had travelled up-country for a funeral. He was summoned to the office by the proprietor and the case was reported to the police and he was interrogated alongside Juma and Ken the buyer, a former guard who had left employ of the company. He admitted his involvement and sought for forgiveness but as the case was before police and he stepped aside to allow for investigations to continue. He was away for 4 months and after investigations he asked for re-employment and was allowed to resume.
3. In Cross Exam by Mr. Ngala for the Claimant he testified that there was an incident in which he was involved in though his name was not on paragraph 6 of the Claim. The matter was reported to the police and police investigated and the Claimant was not charged in any criminal case. He testified that the Claimant was paid the amounts labour office had asked the employer to pay. The amount which was paid was 12,333/= but the Claimant refused to sign though the money was paid. He conceded there is no pay for notice and the witness did not know for sure if the Claimant

went for leave in 2007. The employees used to work for 11 hours as agreed with company.

4. He testified that he was approached by the Claimant who claimed legal for him to sell the used oil. He denied that he stole from his employer and stated that he was still in employment with the Respondent. He had resigned so that investigations could be undertaken. The police investigated and no one was charged. He conceded that the police did not charge the Claimant.
5. In Re-Exam by Miss Nasser he testified that he had explained what happened as regards the theft and that he did not steal or aid the Claimant with theft. He was a cook and he used to cook chips. The oil used would be put in containers and the Claimant had said that he was allowed to sell the oil by company. He thus thought the deal was sanctioned and he would pick the funds from the buyer for the purchase of the oil. The Claimant claimed the funds would be placed in the cash box. The police were called and the staff were interviewed. The theft was in both offices and the guard who was involved was interrogated and named the rest. He accepted that he had illegally transported the oil and resigned and stayed out for 4 months. He was dismissed 21st May 2011 and was not given notice of termination of service. He testified that the District Labour Officer gave the employer a notice to pay and the money was paid
6. In re-examination by Mr. Ngala he testified that he did not steal and on return when he was not allowed to resume went to labour. He denied absconding and the amount the Labour Officer said the Claimant should get was not sufficient as it was 12,000/- only.
7. The Respondent called 2 witnesses. The first witness Marvin Omondi Aria testified that he was an employee of the Respondent and that the Claimant was a supervisor at the Respondent. He testified that the Claimant was involved in the sale of oil and that this was illegal. He testified that he was asked as an assistant to transport the oil to the client. The incident on 21st May 2011 is when the company discovered the sale of oil without authority. He testified that there were 4 people involved. They were interrogated by the Police and he accepted his involvement and sought forgiveness. At the time the Claimant had travelled up country for a funeral. During the time the case was being investigated by the Police he stepped aside and allowed the investigations to be concluded. He was away for 4 months and he later asked for re-employment and he was hired.
8. In cross-examination by Mr. Ngala the witness testified that the Police investigated the matter but the Claimant was not charged with any criminal offence. He denied the report to the police was intended as a cover up. He testified that the Claimant was paid a sum of 12,333/- but the Claimant refused to sign for the payment. He testified there was no notice pay. He had no problem with the demand for 3 hours overtime pay sought by the Claimant as they worked for 11 hours each day. He stated that the Claimant had told him it was legal to sell the oil only to realise there was no authority to do so.
9. In re-exam by Miss Nasser he testified he did not steal the oil and that the Claimant told him the Claimant had been authorised to sell the used cooking oil. He accepted he had illegally transported the oil.
10. The second witness for the Respondent was Davis Mnene a director of the Respondent. He testified that he knew the Claimant who was his employee. He testified that the Claimant sought permission to go for a funeral on 21st May and during that time a watchman was found with a 5ltr consignment of used oil. On interrogation he stated that the oil was for an employee who ran away. Further interrogation indicated that the Claimant was the mastermind and that there were 2 errand boys one of whom was Marvin the first witness for the Respondent. On calling the Claimant on phone the Claimant denied involvement and when the askari spoke to him he referred to the used oil. After the funeral the Claimant returned and the Claimant asked for dues. He asked the Claimant to give him time to cool down as he was still smarting from the betrayal and the next thing he received the following week was a letter from the Labour Office relating to the Claimant. The Claimant wanted leave days and service pay at the rate of 15 days for each year worked. He

did not know the outcome of the police investigations and that after hearing the parties the Labour officer asked the money be deposited to the office and this was done. He testified that the Claimant was engaged on 18th January 2005.

11. In cross-exam by Mr. Ngala he testified that the Claimant was away on 21st May at a funeral and the Claimant was to resume on 23rd May. He testified that the night guard was the one who was found with the oil and the Claimant was the mastermind and had been selling the oil for a long period. The Claimant did not return on the date he was meant to return but a few days later. He testified that the Claimant was not dismissed and was instead to wait for a bit of time. He testified that he could not have hired the Claimant in 2004 as the business commenced in 2005. The Labour officer determined that 28 leave days were due and these were from 2010-2011. He testified that the Claimant went on leave in 2008 and the 28 days were a result of the days taken in previous years. The Claimant did not go on leave in 2005 but he went on leave in 2007. The Claimant worked for 11 hours with a lunch break and two breaks for tea and earned 10,000/- a month. He reiterated that the Claimant was the mastermind and architect of the scheme to pilfer the used oil.
12. In re-examination he testified that the Claimant was the main player as confirmed by the courier. He was not responsible for the police investigations. A witness who was intended for the Respondent was barred from testifying as he had sat through the testimony of the second witness. The Respondent thus closed its case and the parties filed submissions.
13. The Claimant submitted that the claim he had related to his salary for days worked in May less the 4,000/- advance Kshs. 5,993/-, 2 months salary in lieu of notice Kshs. 20,000/-, unpaid leave Kshs. 20,979/- 2 weeks leave pay 9,324/-, overtime for 6 years Kshs. 170,011.63. It was submitted that the theft of oil occurred when the Claimant was away and the investigations were not concluded. The Claimant cannot therefore be presumed to be guilty. The pay for 21 days worked in May 2011 was not disputed and this was due. The Claimant thus prayed for the Court to find in his favour and award him the sums claimed.
14. The Respondent submitted that the Claimant's evidence was not corroborated. It was submitted that the Respondent's evidence was cogent and that the discovery of the theft of cooking oil implicated the Claimant. At the time the theft was of unused cooking oil and the Claimant attempted to suggest it was used oil. The Claimant declined to resume from his short leave as expected and only returned later. It was submitted that the Claimant misled the staff into thinking that the sale of the oil was sanctioned by the Respondent's. The Respondent submitted that the Claimant absconded duty as a result of the theft incident and thus the suit ought to be dismissed.
15. The main issues for determination are three.
 - a. Was the Claimant dismissed by the Respondent and if so was the dismissal unlawful and/or unfair?
 - b. Was the Claimant entitled to pay for leave not taken as well as days worked?
 - c. What other reliefs is the Claimant entitled to?
16. The Claimant was employed by the Respondent in January 2005. The Claimant was able to work for the Respondent until an incident on 21st May 2011 involving the theft of cooking oil. It was after the incident that the Claimant who had been on short leave to attend a funeral failed to return to work. He however came to the premises of the Respondent and sought his dues. He was asked to give the director some time and he thereafter went to the District Labour Officer who summoned the Respondent's officials to the Labour Office. At the office the dues for the Claimant were calculated. The incident had been reported to the Police who had carried out their investigations and did not charge the Claimant or any other employee. The Respondent deposited the sums the Labour Officer held to be due which was a sum of Kshs. 12,333/- on 21st July 2011.
17. The Claimant was implicated in theft of oil in May 2011. The Employment Act 2007 provides as

follows under Section 44(4)(g):-

44(4)(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

18. This Section provides that if on reasonable and sufficient grounds an employee is suspected of having committed a criminal offence against or to the substantial detriment of his employers property, the employer can summarily dismiss the employee. In the case before me, the Claimant absconded duty and was not dismissed. He did so because he was suspected of the theft of cooking oil. The effect of absconding duty is a termination of employment for which the employer cannot be held liable. In the premises there would be no notice payable to the Claimant for the termination. His letter dated 6th July 2011 to the Managing Director of the Respondent headed Terminal Dues was to the effect that he had worked for six and a half years as a supervisor and that he was terminated on 21st May 2011. He sought salary for May 2011 and notice pay for one month. He also sought leave pay and overtime for the 6 years which worked out to Kshs. 113,341 and certificate of service.

19. The Claimant's dues if any would relate only to the leave not taken, days worked and overtime pay if proved. The Claimant testified that he worked for 11 hours. The Respondent did not avail any records and the overtime due would be for the 3 hours extra. This would work out to Kshs. 113,341/-. The Claimant is entitled to collect the Kshs. 12,333/- which comprises of his pay for the days worked in May 2011 and the leave dues computed and paid to the District Labour Office.

20. In the final result the Claimant will be paid Kshs. 113,341/- being overtime for period worked. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of June 2014

Nzioki wa Makau

JUDGE