



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 297 OF 2013

BETWEEN

RICHARD THEURI NDERITU.....CLAIMANT

VERSUS

THE STANDARD GROUP LIMITED..... RESPONDENT

Rika J

CC. Edward Kidemi

Ms. Kayugira instructed by Munyao-Kayugira & Company Advocates for the Claimant

Mr. Gitonga and Ms. Kamau instructed by Makhecha & Gitonga Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Media Company The Standard Group Limited employed the Claimant Richard Theuri Wanjohi as a Driver, on the 13th November 2003. He was summarily dismissed by the Respondent on 10th January 2013. The Respondent alleged the Claimant failed to perform his duty with due diligence. The Claimant holds the Respondent summarily dismissed him on the ground that the Claimant had developed a physical condition which made it difficult for the Claimant to walk. The allegation that the Claimant failed to perform his duty with due diligence, was incorrect and diversionary, the actual reason being the Claimant's physical condition.

2. The Claimant alleges summary dismissal infringed his right to fair labour practices under Article 41 of the Constitution, and Section 41, 51 and 18 [4] of the Employment Act 2007. He filed a Statement of Claim on 7th March 2013 and Amended Statement of Claim on 17th May 2013, in which he seeks the following Orders:-

- a. Special damages of Kshs. 3,043,674 comprising salary for 10 days worked in January 2013 at Kshs. 9,986; 2 months' salary in lieu of notice at Kshs. 61,912; and the expected income for the remaining 8 years before retirement age of 55 years amounting to Kshs. 2,971,776.
- b. General Damages for unfair and unlawful termination of the contract of employment.
- c. Respondent to authorize payment of the Claimant's Pension Benefits.
- d. Respondent to issue the Claimant with the Certificate of Service.
- e. Interest; costs; and any other suitable reliefs.

3. The Respondent filed a Statement of Reply on 10th April 2013, and a Reply to the Amended Claim on 24th May 2013. The Respondent denies that the Claimant was diligent in the performance of his duty. Summary dismissal was in line with the provisions of the Employment Act 2007, and the Contract of Employment. There is no basis to grant the Claimant compensation and damages as prayed. The Respondent prays that the Claim be dismissed with costs.

4. The Claimant gave evidence, and closed his case, on 17th September 2013. The Respondent gave evidence through its Transport Manager Mr. Eric Nyangala on 28th January 2014. Hearing closed on 28th January 2014. The dispute was last mentioned on 24th March 2014 when Parties confirmed the filing of their Closing Submissions.

5. Mr. Nderitu testified he was first assigned to the KTN, a subsidiary of the Respondent, where he was driving the Company's Journalists. He was later assigned the role of transporting of Newspapers to various outlets. He was healthy at the time. In due course he developed a medical problem where his body would shake. He struggled to keep physical balance.

6. On 2nd January 2013, Newspapers were printed late. Nderitu was asked to relieve a Driver who had failed to report for duty. He would deliver Newspapers along two different routes. It was midday when he was asked to do this. He was accompanied by two loaders. The vehicle assigned to him was mechanically unsound. He discharged this role and went home.

7. After about two days, he was told by the Security Manager that the vehicle had consumed more than its normal share of fuel. This was on 10th January 2013. He was asked to see the Human Resource Manager the following day, 11th January 2013. He did so, and was issued the letter of summary dismissal. It was alleged the Claimant had siphoned fuel. The vehicle, from which he was said to have siphoned fuel from, was an old one, brought from the Respondent's Nakuru Branch Office to Nairobi Head Office for repairs. The Claimant went to see the Respondent's Human Resource Director on 13th January 2013, seeking his intervention. The Human Resource Director instead asked the Claimant to demonstrate that he had a physical problem. The Claimant walked in demonstration. The Human Resource Director was unimpressed and upheld the decision to summarily dismiss the Claimant.

8. Questioned by the Respondent's Advocate, Nderitu told the Court, the vehicle assigned to him from Nakuru was registration KAX 860 X. It had been brought to Nairobi for servicing. It had not been serviced when given to the Claimant. One light was not functioning. The exhaust pipe was faulty. He was given a memo and asked to explain why his vehicle had consumed excessive fuel. He explained that he had driven to Tigoni and Westlands, and passed through many other places. He did not concede that he siphoned fuel. It was after his explanation that he was summarily dismissed. He did not know a man called Hilary Rotich. He did not know of other Drivers who were summarily dismissed on the allegation that they had detoured from their designated routes, and gone into Eastleigh. He was asked to demonstrate how he walked by the Human Resource Director. He already had the letter of summary dismissal at the time he was called upon to demonstrate. He was asked to clear with the Respondent; he has not cleared to-date. He does not wish to be reinstated. It was true the fuel consumed was high. He had done delivery work for 4 to 5 years. His Loaders were experienced persons. His contract had a termination clause,

providing for 2 months' notice of termination. This did not warrant unfair termination.

9. The Claimant clarified on redirection that he filled a check list, before he took the vehicle for use. He testified that the vehicle was 'mono-eyed' and had not been serviced. He was not asked why he had detoured to Eastleigh; the question was about the high fuel consumption. He explained there was a mechanical problem. The letter of summary dismissal stated the Claimant did not perform his duties with diligence. He did not clear with the Respondent. His Advocates wrote to the Respondent before coming to Court. There was no response. Dismissal letter did not say anything about the Claimant's terminal dues. He did not agree that he siphoned fuel. There was no prescribed route. What was prescribed was the destination. He was not given a notice before termination. Mandatory retirement age at the Respondent was 55 years. He has not secured alternative employment. He seeks pay for the remaining years of his contract of employment. He did not have any disciplinary issues before the incident which led to summary dismissal. He prays the Court to uphold the Claim.

10. Eric Nyangala told the Court that the Claimant worked for the Respondent as a Driver, distributing Newspapers. He signed a Contract of Employment and also, a Code of Conduct. Drivers were assigned vehicles from day to day. On different dates, he could be assigned a different vehicle. There was in place a Drivers' Rota. Vehicles were all fuelled at night. The Driver would examine the Vehicle before driving it, and tick on the list for damaged parts.

11. The Claimant was assigned Motor Vehicle KAX 860 C a pick-up double cabin. There was a vehicle maintenance job card, generated through the computer. The vehicle was shown to be in good mechanical condition. Nyangala testified the Claimant was assigned the Westlands and Guru Nanak routes. His vehicle was monitored. It was expected it would consume 20 litres of fuel at most. It had consumed 42.61 litres at the end of the journey. The Respondent had experienced fuel siphoning before, and came up with the tracking device to minimize the vice. There was put in place an electronic fence. If the vehicle drove beyond this fence, an alarm was triggered. The Claimant was expected to drive from Mombasa Road to Tigoni then Guru Nanak. He veered off to Ngara Road instead. There was another vehicle serving Ngara Road. At 2.23 a.m. the Claimant's vehicle was tracked to Eastleigh, at a Street named Kunguru. It was off the designated route. Offloading of the Newspapers takes less than 2 minutes; the Claimant spent about 13 minutes at Kunguru Street. Nyangala testified after installing tracking devices, the Respondent had mapped out the fuel siphoning dens. The Claimant was not supposed to drive beyond Juja Road, and was not able to explain what took him to Kunguru Street. He was given a letter to show cause why he should not face disciplinary sanctions. He admitted in a meeting before the Human Resource Manager that he was engaged in fuel siphoning, justifying his offence on the pressure exerted upon him by the demands of school fees. He was dismissed for fuel siphoning, not anything to do with health issues. He had been sick previously, and had not been summarily dismissed on account of his illness.

12. Nyangala told the Court on cross-examination that he had worked for 2 years, having joined the Respondent in 2012. The Drivers filled a checklist, before driving any vehicle. He was not aware that the Claimant indicated anything was wrong with the vehicle. The checklist would be left with the Transport Manager. The Respondent did not attach the checklist to the vehicle maintenance job card. Nyangala maintained the vehicle was well serviced. The particular vehicle was serviced on 27th December 2012. There was no chance the vehicle sustained damage in the interim period. It was not possible the exhaust could have been damaged in the interim period. The vehicle was brought in from Nakuru on 27th December 2012. It only had a battery problem. The Respondent did not determine the exact route to be followed by the crew in delivery of Newspapers.

13. The Claimant was assigned the Westlands route. He was given an additional route- suburban 2, beginning at Mombasa Road and terminating at Guru Nanak. Nyangala testified this point is close to Pangani and Ngara. There was no exact map which Drivers were expected to follow. The Claimant was at Eastleigh for 13 minutes. He responded to the letter to show cause why disciplinary action should not be taken against him, through word of mouth. Nyangala was not sure if this took place on 10th January 2013 or 11th January 2013, but agreed the letter of summary dismissal is dated 11th January 2013. He was not aware if the Claimant wrote a report as suggested in the dismissal letter. It is true he admitted that he was engaged in fuel siphoning. He was summarily dismissed. Nyangala testified he was not aware that there

were steps which were supposed to be followed leading to the summary dismissal. The Claimant must have gone to the Human Resource Director after the meeting involving the Human Resource Manager. Nyangala confirmed on redirection that all vehicles were taken to the garage for servicing. Normal servicing was done after every 5000 Kilometres. Any defects cropping up in between this, were immediately addressed. The Respondent did not use un-roadworthy vehicles. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

The Court Finds and Awards:-

14. The Claimant was employed by the Respondent Media House as a Driver, on 13th November 2013. His duty was to deliver Newspapers to designated areas. He would be accompanied by Loaders while discharging this role. His salary is captured in his December 2012 pay slip at a monthly taxable gross of Kshs. 30, 956. He was summarily dismissed on 10th January 2013. The grounds for this decision are stated in the letter of summary dismissal to be:-

- The Claimant performed his duties without due diligence..
- He went off the designated route on 2nd January 2013.
- He veered off to an area that was notorious for fuel siphoning.
- His vehicle consumed in excess of the expected fuel.

15. There was nothing mentioned in the Respondent's justification of its decision, about the Claimant's illness. The Court has seen nothing to support the Claimant's allegation that he was selected for dismissal on the actual ground of his physical condition, these other reasons being colourable reasons, given by the Respondent to cover up the actual reason for its decision.

16. In his Amended Claim, the Claimant avers he first fell ill in 2007, was treated at Agha Khan Hospital and continued to discharge his role without any problems. It was only in 2013, when the Human Resource Director wondered how the Claimant was able to drive with his impairment. The Court does not think the Claimant was summarily dismissed because of his impairment, this impairment having been present from 2007. It would seem the Claimant, with all due respect, threw the suggestion that he was victimized on account of his physical condition into the equation, to attract the sympathy of the Court. The Court is convinced the decision by the Respondent was based on the specific reasons given in the letter of summary dismissal, the arising issues being *whether these were valid and fair reasons; whether the decision was arrived at following a fair procedure; and whether the Claimant merits the prayers listed under paragraph 2 of this Award*. These are the questions which arise under of Sections 41, 43, 45 and 49 of the Employment Act 2007.

17. In answer to the first question, the Respondent stated that the Claimant performed his duties without due diligence. The Court understood the other three grounds, which were that the Claimant went off the designated route on 2nd January 2013, veered into an area which had been fence-ringed as a fuel siphoning den and in the end returned his vehicle with excessive litres of fuel consumed, were details of the Claimant's performance of duties without due diligence.

18. The Claimant did not deny that his vehicle returned to base having done 199 Kilometres, with markedly high fuel consumption. He explained that this may have resulted from the defects in the vehicle. He complained the vehicle had a problem with the exhaust and was 'mono eyed.' The 'mono eye' in the view of the Court was unrelated to high fuel consumption. There was no complaint about the exhaust when the vehicle was brought from Nakuru for servicing. The Claimant did not point out these defects in the vehicle maintenance job card. On 29th December 2012, the particular vehicle was listed for normal service, replacement of tail light and parking lights. These are routine checks and minor repairs, which would not, in the view of the Court, result in high fuel consumption about 4 days later on 2nd January 2013.

19. Furthermore the reason for high fuel consumption was attributed to another source by the Respondent. There really was no high fuel consumption, but a credible case of fuel siphoning. The Claimant may not

have been given the specific direction to follow in reaching designated destinations, but was not able to explain what he stopped over at Eastleigh's Kunguru Street to do, for 13 minutes, at the late hour of 2.20 a.m. He did not give this Court a satisfactory answer on the question what he stopped to do at Kunguru Street, a point marked as a fuel siphoning area in the Respondent's Data Map. The Claimant did not discount the evidence of ill motive over this detour, or challenge the Data Map and the other evidence relating to his 13 minute stopover at Eastleigh.

20. The grounds given by the Respondent in justifying summary dismissal are well –founded under Section 43 and 45 of the Employment Act 2007. The Claimant was bound by his contract of employment not to engage in activities which would be in conflict with his duties, and to devote his time and attention in promotion of the Respondent's business. The detour to Eastleigh cannot have been in adherence to this contractual obligation. He signed a Code of Conduct on 29th December 2009. He was bound to serve honestly and not engage in any vehicle pilferage, carrying unauthorized goods or passengers, or engage in fuel siphoning. Nderitu did not observe the duties imposed on him by these workplace instruments. There were valid and fair reasons preceding summary dismissal. He did not use the fuel apportioned to him, in the right way. There was reasonable ground to suspect him of having committed a criminal offence against his Employer's property. He veered off to an area, and stayed for 13 minutes in an area, he was not instructed to pass through by the Respondent. This was an area where the Respondent suspected its fuel was being siphoned from. Either way the Claimant would be deemed to have engaged in employment offences under Section 44 [4] of the Employment Act, warranting summary dismissal. The reason for termination would be deemed fair under Section 45 of the Employment Act, as the Claimant's conduct was a matter of grave concern. In all the Court is satisfied that the decision by the Respondent to summarily dismiss the Claimant was founded on fair reason, and valid on substantive justification.

21. There is cause to doubt the fairness of the procedure. The Respondent wrote a formal memo asking the Claimant to explain himself. Nyangala testified the Claimant was asked to explain himself by word of mouth. His response is not recorded anywhere in writing. There was a three way meeting involving the Claimant, Nyangala and the Human Resource Manager on a date the Respondent was not sure about. There are no minutes recording this meeting. There is in short, no evidence of a disciplinary hearing that took place before the Claimant was summarily dismissed. Worryingly, Nyangala testified he was not aware any steps were to be followed leading to the summary dismissal decision. ‘‘ All I know is that he was summarily dismissed,’’ said Nyangala. The Respondent did not honour the Claimant's procedural protections given under Sections 41 and 45 of the Employment Act 2007. There were no formal charges; the Claimant is not shown to have been explained to the nature of the offences facing him in a language understood by him at a formal disciplinary hearing; and was not accompanied by a Trade Union Representative at the shop floor level or a Workmate of his choice at any hearing. Fair procedure was lacking.

22. In effect summary dismissal was substantively justifiable, and on that score fair. It was procedurally deficient and on this score, unfair. The Claimant therefore merits compensation commensurate with the procedural breach, which ***the Court assesses and grants at 4 months' gross salary, computed at Kshs. 123,824 in compensation for unfair termination.***

23. There would be no justification in allowing the claim for 2 months' salary in lieu of notice. The Claimant was engaged in gross misconduct for which the Respondent would be entitled to summarily dismiss. The claim for anticipatory salary over a period of 8 years is likewise unmerited. It would not be a fair remuneration, earned or deemed earnable by the Claimant through his toil. He would not have rendered any service to the Respondent and there would be no reason to hold that he was denied the anticipated years of work and income by the Respondent; to the contrary, the Claimant engaged in conduct which led to the adverse decision terminating his employment prematurely. The claim for release of Pension Benefits should correctly be addressed to the Scheme Trustees. The Claimant did not make himself clear in what way the Respondent was an impediment in his accessing Pension. ***The Claimant is entitled to the certificate of service. He similarly merits salary for the 10 days worked in January, 2013, at Kshs.11,906.*** There shall be no order on costs and interest. In sum:-

[a] Termination was justifiable and based on valid reasons, but was carried out without regard to fair

procedure;

[b] The Respondent shall pay to the Claimant 4 months' gross salary in compensation at Kshs. 123,824, and salary for 10 days worked in January 2013 at Kshs.11,906 – total Kshs.135,730 within 30 days of the delivery of this Award;

[c] The Respondent to release the Claimant's certificate of service forthwith; and

[d] No order on the costs and interest.

Dated and delivered at Nairobi this 4th day of July 2014

James Rika

Judge