



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1768 OF 2013

GERALD SHIAMALACLAIMANT

VERSUS

TRUST FOR AFRICAN ROCK ART.....RESPONDENT

JUDGMENT

Gerald Shiamala, the Claimant herein filed this case against Trust For African Rock Art, the Respondent alleging wrongful and unfair termination of his employment and failure to pay his terminal dues. The Respondent is a non-governmental organization involved in creating awareness on importance and endangered state of African Rock Art. It is largely donor funded and has its offices in Karen, Nairobi.

The main facts of this case are not contested. The Claimant was employed by the Respondent as a gardener in June 2001 and terminated in June 2013. This is confirmed by the certificate of service (titled as "Recommendation of Gerald Shitambasi") attached as one of the appendices in the Claimant's bundle of documents which is marked as Appendix I. The reason for termination is that the Claimant was responsible for loss of a spare wheel which was in the garden store for which he was responsible.

According to the evidence on record, the Claimant proceeded for leave on 19th March 2013. He left one Grace, a temporary employee, to relieve him while on leave. He left the keys to the garden store with Grace. On the second day of his leave he was called by a driver who informed him that the key he left with Grace got lost. When Grace noticed the keys were missing she reported to John Githinji a driver, who together with the guard helped her to look for the key but they did not find it. The key was found the following morning on a metal frame in the shamba.

On 8th April, 2013 the claimant was called by Githinji who asked him where the spare wheel was. The claimant informed Githinji that it was in the garden store. On 17th April, 2013 the claimant was called by John Gitau, the Receptionist who asked him to go to the office to help resolve a problem. The Claimant went to the office at 2 pm and found everything had been removed from the store. He was asked where the spare wheel was and he said he had left it in the store and if it was not there he did not know where it was. He reported back to the office on 18th April, 2013 as he had been instructed. There was a meeting attended by the Claimant, the day guard Adan, the 2 drivers John Githinji and Romeless Khakabo, the secretary Eunice Mbindyo and the Accountant Geoffrey Mburu (RW1). At the meeting Adan confirmed that it was Githinji who found the lost key. On 19th March the claimant attended another meeting in the Chief Executive Officer's office where they discussed about the lost keys. The CEO who was going on safari told him that the issue will be discussed when the Claimant resumed duty after his leave. The Claimant reported back from leave on 15th May 2013.

On 27th May 2013 the Claimant was called to another meeting in the office of the Executive Chairman

Mr. David V. Coulson. In attendance were Gerald, Romeless, John Githinji, Richard Munyao the cook, John Gitau and Geoffrey Ndungu. The meeting discussed the lost spare wheel. On 30th May, 2013 the claimant was issued the letter of dismissal. He was not paid any terminal dues.

The Claimant prays for payment of 1 months salary in lieu of notice and maximum compensation of 12 months salary. His last salary was Kshs.20,000/= per month.

The Claimant's case is that the spare wheel was in the store when he proceeded on his annual leave while the Respondents case is that although there was no proof that the Claimant stole the wheel, the loss was due to his negligence. RW1 testified that he discovered that the spare wheel was missing when he was carrying out stock taking.

I have considered the pleadings, the evidence on record and the testimony adduced in court.

The issues for determination are whether the dismissal of the claimant was fair, and whether he is entitled to the prayers sought in the Memorandum of claim.

For dismissal to be fair, the employer must comply with section 41 and 43 of the employment Act. Section 41 provides for the procedure for disciplinary proceedings while section 43 provides for proof of grounds of dismissal.

In the present case the Respondent has submitted that the dismissal was fair as the Claimant was subjected to a disciplinary hearing in the meetings held on 8th April and 27th May, 2013. The Respondent submitted that the claimant was found negligent in handling the keys to the store which led to the loss of the spare wheel.

From the evidence on record the claimant is alleged to have been negligent in handling the store keys by failing to keep the spare garden store keys in the key rack as per policy, for losing the 2 spare keys to the store and negligence arising from an incident in which he had left the key and padlock hanging on the lock of the store over a weekend. These incidents however occurred long before the discovery of the lost spare wheel. There was no direct evidence connecting the Claimant to the loss. As aptly stated in the letter of dismissal which states **“while we do not have clear evidence that you were directly responsible for the theft of the tyre, it is evident that the theft occurred due to either (to) your involvement or negligence”**.

This statement Contradicts the minutes of the meeting held on 27th May 2013 which only dwelt on negligence in handling the keys and not on the loss of the spare. The minutes did not make a finding that the claimant was responsible for the loss of the spare wheel. There were no conclusions in the minutes. There were only recommendations as follows:

1. Lock change – for the gate to the garden – it appears there is someone out for mischief in our midst.
2. All keys – to be held by John by the Accountant and the gardener to be picking every morning.
3. Disciplinary action should be meted out on the culprit (s).
4. Urgent audit of all our other fixed assets and regular checks thereafter.

There was no finding whether the spare wheel got lost before or after the claimant took leave. The minutes however disclosed that the keys to the store got lost while the claimant was on leave. This means that there was possibility that the spare wheel was stolen when the key was lost. The claimant was on leave at the time and there is no evidence placing him at the premises at the time.

I also find another fault with the minutes. They are an analysis of the writer of what transpired at the meeting. There is no record of exactly what each person at the meeting said. They are more of findings rather than minutes.

In addition, the minutes do not specify what charges were preferred against the Claimant and finally the

minutes do not have any findings as already observed above. The meeting appears to have set out to establish if the Claimant was responsible for the loss of the spare wheel but only established previous incidents of negligence in handling the store keys by the Claimant.

For the foregoing reasons I find that the dismissal of the claimant was unfair for failure to prove valid reason for termination and for want of fair procedure.

Having found that he was unfairly dismissed, the Claimant is entitled to the reliefs set out in Section 49 of the Employment Act. The Claimant prayed for only 2 remedies; 1 month's salary in lieu of notice and 12 month's salary as compensation for unfair dismissal.

Section 49(1) (b) provides for payment of salary in lieu of notice while section 49 (1) (c) provides for compensation upto a maximum of 12 month's salary.

I find that the Claimant is entitled to 1 month's salary in lieu of notice in the sum of Kshs.20,000=.

I also find that the Claimant is entitled to compensation for unfair termination. Having worked for the Respondent from June 2001 to May 2013, a period of 12 years, I find that he is entitled to maximum compensation on account of his long service. I therefore award him Kshs. 240,000/= being 12 months salary.

The upshot is that I give judgment to the Claimant in the total sum of Kshs.260,000/=. The said sum shall attract interest at court rates from date of judgment to the date of full payment.

Read in open Court this 7th day of October, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Njuguna for Respondent

Gerald Shiamalla, Claimant present in person