



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 398 OF 2013

JULIUS SHIKANDA MWAKHACLAIMANT

VERSUS

G4S SECURITY SERVICESRESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant has sued the respondent claiming ksh.164,124 as employment terminal benefits and compensation for wrongful and unfair termination.
2. The respondent has denied liability and averred that the dismissal of the claimant was justified under Section 44 of the Employment Act for the reason that the claimant had committed misconduct against the employer. In addition the claimant was imprisoned for more than 14 days which justified his dismissal under Section 44 of the said Act.
3. The suit was heard on 26/6/2014 and 27/6/2014 when the claimant testified as CW1 while the respondent called Roselyne Wamukonya and Stanley Ziro as RW1 and RW2 respectively.

CLAIMANT'S CASE

4. CW1 told the court that he was employed as a security guard by the respondent on 1-2-2002 according to the letter of appointment produced as exhibit 1. Later he was promoted to the Alarms Services and finally appointed as Radio Operator for Money escort. He produced a payslip to show that as at December 2010 his salary was ksh.9675.
5. On 3/8/2011 he was on duty with his commander and driver going to replenish ATM points for Standard Bank. While at Kilifi pesa point, the crew was called back to the office at Likoni Nakumatt. Immediately they arrived they were arrested by police. He recorded statement and on 4/8/2011, he was charged in court with stealing by servant. He remained in custody until 16/8/2011 when he got a surety for his bond.

After release, CW1 went to the office to see the manager Roselyne who send him away telling him to wait until he was called because his case had not been concluded.

6. On 31/8/2011, CW1 was called to the office and was given a letter for summary dismissal dated 4/9/2011. He did not check the date of the letter. The reason for dismissal was that CW1 had been

remanded in police custody for more than 14 days. The dismissal took effect from the date of the dismissal letter (Exh 2). The letter offered to pay salary for the days worked upto 4/9/2011 plus leave earned. CW1 admitted that he last went for annual leave in April 2011.

7. He however brought this suit praying for service pay, salary in lieu of notice, house allowance for August to October 2011. He produced his payslip for July 2011 as Exh 5.

8. On cross examination by the defence counsel, CW1 admitted that he was a member of NSSF. On 3/8/2011, CW1 contended that he saw his commander counting money inside the car and he told CW1 to wait outside the car because the space in the car was small. CW1 stated that the money they were transporting was kept in sealed cassettes and it could not be accessed without cutting the seal. He admitted that money was allegedly found under his car seat but he denied being shown the money. He maintained that he was released after 12 days and went to the office only to be turned away. He maintained that he was not bound to handle money during the ATM replenishment.

DEFENCE CASE

9. RW1 is the respondent's Cash Services Manager Mombasa branch. On 3/8/2011, she gave money in sealed cassettes for replenishment of several ATM's for Stanchart including Shell Digo and Mobil among others. She gave two cassettes for Shell Digo, one loaded with ksh.2,000,000 in ksh.1000 notes and the second with ksh.400,000 in ksh.500 notes. The Shell Digo ATM was never replenished due to power outage and the crew send the money back to the office through another company car. When RW1 checked she found the money in the ksh.500 cassette intact. However there was a deficit of ksh.610000 in the Ksh.1000 cassette. Josephine Kimani RW1's supervisor also verified the money and confirmed the deficit.

10. RW1 then called the vehicle with the CW1 back and took it to the bullion check. In the vehicle was CW1 (Radio Operator), George Onyango (commander) Mdoe Mkalla (driver) and Joseph Mukala (ATM supervisor). RW1 oversaw the offloading of the cargo in the van and a bag containing ksh.375000 which Joseph Mukala said he recovered from CW1's seat while at Kilifi. RW1 and her colleagues searched the vehicle further and found ksh.233000 starched behind CW1's seat in the van. All the money was recovered save for a deficit of Ksh.2000.

11. RW1 explained that CW1 as the Radio Operator was not to leave his chamber within the van at anytime. The only other person at the chamber was a police officer who leaves the van when the cassettes with the money are being taken out to the ATM's. She contended that loose cash was not handled in the car.

RW1 confirmed that CW1 his driver and the commander were arrested and charged with stealing by servant and none of them returned to work within 14 days after the arrest.

12. The respondent thereafter dismissed them. On cross examination by the claimant's counsel, RW1 confirmed that CW1 was a Radio Operator and not in charge of shipment of money to ATMs. She confirmed that the money was kept in a Volt in the front compartment of the van which could only be opened with assistance by a person in the drivers cabin of the pick up. She confirmed that CW1 could not access the volt except if assisted by a person with the knowledge to open at the driver's cabin.

13. RW1 confirmed that although the respondent has a disciplinary mechanism, the same was not followed because the claimants were arrested before any disciplinary hearing were conducted.

14. RW2 is the respondent's District Cash Services Manager Nakuru. On 3/8/2011 he was attached to the Malindi branch. On that day he was called by his boss, Joseph Mukala (ATM's supervisor) Coast Region to go to Kilifi for taking and handling over of the ATM. The ATM was previously under Malindi but there was a request for loading to henceforth be done from Mombasa. When he arrived at Kilifi at 12.30 pm he found the crew from Mombasa including CW1, Mdoe (driver) Onyango (commander) and Mukala himself inside the escort car while the rest were in the pick up (blue vehicle). All the people went to he

ATM except CW1 who remained in the blue vehicle. After removing the cassettes from the ATM, RW2 and the commander took the money to the blue vehicle where CW1 was still sitting in his compartment. They were to count the money before the handing over of the ATM. In order to create space for the said exercise, CW1 left the van with permission granted by the control room (Kilifi).

15. RW2 folded the CW1's seat in order to create more space but was surprised to see 3 bundles of cash fall from the CW1's seat. RW2 called the driver and the commander and enquired about the money but they denied ownership of the money. He however did not enquire from the CW1. RW2 then called Mukalla who ordered Onyango to keep the money inside the Volt. According to RW2, the money ought not to have been under the CW1's seat. All the money must be kept in the Volt in sealed cassettes. He contended that money could be stolen from a sealed cassette using 2 iron bars from the money dispensing side of the cassette.

RW2 explained that the escort crew does not count the money before leaving office. The money is counted by the Volt people who issue a loading certificate showing the money loaded.

16. On cross examination by the claimant's counsel, RW2 confirmed that the escort crew was under supervision of the commander. RW2 confirmed that the Volt in pick up is spacious and it is bullet proof. He explained that the volt could only be opened from the Control Room.

He confirmed that the Radio Operators compartment could only accommodate two people seated. He confirmed also that the Crew Commander took control of the Radio Operator's room when CW1 went outside the blue vehicle at Kilifi. He also confirmed that a Police Officer seats with the Radio Operator guarding the money but he leaves the vehicle to take money to the ATM machine. RW2 admitted that he recorded his statement after one week.

17. After the close of the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

18. The employment relationship is not disputed. It is also not in dispute that CW1 was arrested on 3/8/2011 and charged with a criminal offence on 4/8/2011. It is also not in dispute CW1 was subsequently dismissed summarily from his employment by the respondent on 4/9/2011.

The issues for determination in this case arising from the pleadings, evidence and submissions are:

- a. **Whether the dismissal of the claimant was wrongful and unfair.**
- b. **Whether the relief sought ought to issue.**

Unfair termination

19. The claimant has pleaded in paragraph 10 of the claim that his dismissal was unfair within the meaning of Section 45 of the Employment Act. The said provision states that termination of employment is unfair unless the employer proves that the reason for termination was valid and fair and that the dismissal was arrived at after fair procedure. The reason for the dismissal in this case is captured in the following excerpt from summary dismissal letter dated 4/9/2011:

“you have remained in police custody for over 14 days with effect from 17th August 2011. Consequently, this letter serves to advise that you have been dismissed from the services of the company with effect from the date of this letter as per clause 44 of the Employment Act, 2007.”

20 CW1 denied in his evidence that he was confined in police custody for over 14 days. He produced proceedings of the criminal case No. 2454 of 2011 to prove that he was charged in court in 4/8/2011 and secured release on bond on 16/8/2011 which is about 12 days after the date of arrest. He contended that he reported back to the office after release on bond but RW1 turned him away because of the pending criminal case.

RW1 however denied that CW1 reported back to work as alleged.

21 The foregoing contest notwithstanding, the reason cited for dismissal was not that CW1 failed to report to work within 14 days of his arrest but that he remained in police custody for more than 14 days. The burden of proving that CW1 remained in the police custody for over 14 days was on the respondent according to Section 45 of the Employment Act but she did not do so. Consequently the court finds in favour of the claimant that the reason cited for dismissing him by the respondent was not valid.

22 In addition RW1 confirmed on oath that the disciplinary mechanism for the respondent was not followed before the arrest of the CW1. She did not also prove that the procedure provided under Section 41 of the Employment Act was followed. The said section provides that before an employee is dismissed from work under Section 44 of the Act on ground of misconduct, poor performance or incapacity, the employer shall first accord him a hearing in a language he understands and in the presence of union representative of coworker of the said employees choice. The procedure followed to dismiss the claimant was therefore not fair.

23 Consequently, the court finds on a balance of probability that the summary dismissal of the claimant was unfair, both substantively and procedurally, within the meaning of Section 45 of the Employment Act. The dismissal was also wrongful because without a valid reason the contract of employment required service of notice before termination.

RELIEFS

24 Under Section 49 of the said Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued employment benefits plus upto 12 months gross salary for unfair termination.

25 CW1 prayed for one month salary in lieu of notice being Ksh.10,972. The payslip for July 2011 indicated a gross pay of over kshs.15000 per month. The court awards only ksh.10972 as prayed. The claimant confirmed in evidence that he was not able to secure another employment after the unfair dismissal until June 2012. That was a period of 8 months. He had prayed for 12 months salary for unfair termination. The court will award him gross salary (kshs.15837.50) for 6 months being ksh.95,025 for the unfair dismissal. The prayer for gratuity is dismissed.

DISPOSITION

26 For the reasons and findings stated above, the court enters judgment for the claimant for ksh.105,997. The claimant will have costs and interest.

Orders accordingly.

Dated, Signed and delivered this 3rd October 2014.

O. N. Makau

Judge