



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1592 OF 2011

EDWINE OTIENO OKELLO.....CLAIMANT

VS

NAKUMATT HOLDINGS LTD.....RESPONDENT

JUDGMENT

1. The Claimant filed his Claim on 19th September 2011 and the issues in the Claim were
 - a) Unfair dismissal of the Claimant contrary to Section 45 of the Employment Act 2007
 - b) Unlawful dismissal of the Claimant from employment
 - c) Failure to remit contractual gratuity
 - d) Failure to remit contractual salary and benefits due
 - e) Failure to issue Termination Notice
 - f) Failure to remit contractual leave allowance.
2. The Respondent filed an appearance and Defence on 4th October 2011 and averred that
 - a) the Claimant was paid his salary for July 2011 in full
 - b) The Claimant is not entitled to payment in lieu of notice by virtue of his summary dismissal
 - c) Leave days for the year 2012 had not accrued
 - d) Service pay or gratuity is not applicable as they are not provided for in the letter of appointment.
3. The matter came up for directions on 10th October 2011 where hearing was fixed for 21/5/2012.

4. The hearings took place on 21st May 2012 before Judge Paul Kosgei who was the predecessor of this Court under Section 33 of the Industrial Court Act. The appearances were as follows: Court Clerk: Kipsang David, Mr. Samwel Ogutu for Claimant and Miss Agnes Ndunda for the Respondent. The Claimant Edwin Otieno Okello testified. He stated that he was employed in 2008 6th September by the Respondent. He testified that on 21st June 2011 he was at work at electronic department. A customer bought a plasma television worth Ksh. 69,995. On 1st July 2011 he heard that it was not paid for and that it was lost. He was called to head office where he met Macharia of security. He was based at Lifestyle branch. Headquarters is at Mombasa Road. Macharia asked where he was on 21st June 2011. He said he had been transferred to Kiambu Road branch. Macharia said the television Edwin sold was lost and wasn't paid for.

5. Both Macharia and the Claimant checked the records and it is recorded that the Claimant sold it. He stated that when a customer comes you record the code on the book plus the price. He goes to cashier with receipt to pay. After paying security personnel are given the two receipts to take out the item bought. My job ends upon leaving the television at the front of the cashier.

6. The Claimant said he didn't know what happened. 8 people were there. On 7th July 2011 two of the staff were given a letter of suspension for 7 days. Claimant was told to come on that Friday and he returned on Friday. Four supervisors were there plus two security personnel. They met in private. When the staff were called four of the staff were told investigations showed four of them were involved, i.e. Claimant, Isaiah Onyango a security officer, Sungura of security and John Waoga of security. The Claimant was a shop assistant. The staff went out briefly and returned and Sungura was told to leave as he had no case. The remaining three staff were told they were responsible. The Claimant asked for time to investigate but he was told that he was disturbing them and told to go out. The security people remained. When he returned he was told the security people had agreed to pay for the television. Onyango Isaiah told the Claimant when they went to head office with money Respondent declined to take the money and they are still employees. The Claimant was later given a dismissal letter but the matter was not reported to police. His salary was Kshs.28,300 per month. The payslip was produced as Appendix 4. He was not given a certificate of service. He thus prayed for judgment as prayed in the statement of claim. He had served the Respondent for 3 years. He had earlier attended a disciplinary hearing on the ground that he had used a wrong gate at Lifestyle.

7. In cross examination by Ms. Ndunda, the Claimant stated that he was employed on 6th September and confirmed after three months in January 2009. He didn't have confirmation documents. He was a PTA teacher at Got Nyalgosi Primary School before going to Nakumatt. He didn't give a certificate of service from the school. The appointment letter provided for summary dismissal. He appeared before a disciplinary committee earlier on and was suspended for 7 days. After 5 days he received the dismissal letter. Matter was not reported to the police. Whoever lost the item or caused its loss must pay for it. He stated that "It was not me". He wasn't paid salary for July 2011 and June 2011. He was to go on leave in June 2011 the month the TV got lost. The claim includes notice pay, leave, three year service pay at rate of 29,399 per month. He had worked for two years and some months.

8. He admitted that the person in contact with TV was himself and security personnel. He stated the security were responsible for the loss and they agreed to refund the cost of TV. He didn't know who released TV from the door. He wrote a letter on 5th July 2011 on how he sold the TV. It is on the same day he was served with suspension letter. He was transferred to Kiambu Road on 30th July 2011. He reported and worked up to 7th July 2011 (seven days). The book contained transactions is with the Respondent. He never asked for certificate of service.

9. In Re-examination he stated that he was transferred to Kiambu Road in July 2011. He asked them to play the security footage. It showed the Customer and Claimant upto the ground floor. They said the TV got lost after delivery to ground floor. His probation was not extended and he couldn't have been on probation for 3 years. He was only warned for using wrong gate.

10. That was the close of Claimant's case and Hearing was re-scheduled to 26th September 2012 at 2.30

p.m. The case therefore proceeded before me on 26th September 2012 at 3.00 p.m. where the coram was as follows: Judge: Nzioki wa Makau, Court Clerk: Elly Jometho, Mr. Samwel Ogutu for Claimant and Miss Mutune for the Respondent.

11. Miss Mutune, I am ready calling one witness **Samuel Mubeja Odera**. He testified that he is a Human Resource Officer at Nakumatt Holdings stationed at Nakumatt Head Office along Mombasa Road and worked from 1995 to date. He became Human Resource Officer from 2001. He stated he knows Edwin Otieno Okello was the Respondent's employee stationed at Nakumatt Lifestyle and he was a shop assistant. He was employed on 6th September 2008. He had executed an employment contract. Refer to letter NHL-1 dated 6th September 2008. The employment was on probationary terms – three months and he was confirmed in January 2009. On 21st June 2011 one of our superiors who checks bulk items went to the department where he had placed Edwin. It is the electronics department on 1st floor. He was the only person there on the material date. He found that there was a plasma television set – Samsung which was sold (42" LCD) it was retailing for Kshs. 69,995/=. The customer went to the staff Mr. Edwin and identified the item. Normally we issue a receipt in triplicate, the customer keeps the white copy and the item because it is a bulk item which cannot be scanned at the till, the customer proceeds with the white copy to the till to pay and the staff takes the blue copy and sticks it on the item identified by the customer. The pink copy is left in the book. He followed all these procedures up to that point. He alleges, he took the item through the lift to the bulk section near the cashier and the place is guarded by our security guards. The security guards stamp the pink and the blue copy (attached to item), the attendant then can go back to his work place. On this date the procedure was followed to a certain extent but he erred to a certain extent. When he went with the item to the lift he did not show up at the bulk section. Both the blue and the white copy could not be traced. This initiated investigations in the shop. The pink copy was found in the shop section. They tried to trace the blue and white copy. They tried to locate using the till duplicate copy. This was done on all the tills and on that date no television was sold. We transferred him to a different branch. Our CCTV showed us that he discussed with a customer and took the item and packed it very well. The CCTV footage also showed him going to lift with item. We were expecting him with the TV at Bulk section near cashiers. We did not see it on the CCTV on the other part. All the three security officers at the bulk section denied receiving a TV on the material day. We confirmed with cashiers that on the items filled on that day there was no television till. It was not sold. There was no white copy plus receipt. After we discovered TV was missing management transferred the employee to Nakumatt Ridgeways. He was to report on 28th June 2011. He did not report to Nakumatt Ridgeways and after some time around 5th July 2012 we deemed it fit to suspend him. We invited him to disciplinary meeting. We had authority and power to transfer the staff within Kenya or where else we feel the staff is of value to the company.

12. Claimant attended the disciplinary committee meeting. The Claimant appeared at disciplinary meeting on 11th July 2011. In the disciplinary meeting there is a letter he owned up on what he says he did. He was interrogated on several issues on sales at bulk section. He did not however state how the item disappeared. Most likely he went to the basement. The staff who are charged with verification of bulk items also were charged with verification of bulk items also were summoned and they denied receipt of the item. Nothing implicated the staff but Edwin, could not explain where the blue copy went to, where the white copy went to or where the item went to. The committee recommended that the Edwin be terminated for theft of public company property as he is the one who served the alleged customer and wrote the receipts in triplicate and only the pink copy which is left in the book was found. He was dismissed. Edwin was aware he could be dismissed summarily for criminal acts. Summary dismissal would not attract any notice. He was dismissed on 13th July 2012 and later he came to claim dues. NHL 3 is the letter of dismissal dated 13th July 2012. He did not work in the month of July. We processed leave accrued from January to mid-June and overtime from month of June. The leave allowance was Overtime hours carried over were 2 hours for OT 1 – 170/=, there was 54 hours for OT 2 – 6,114/= and between January the accrued leave was 11.4 days was 4,841/=. The total payment was 11,125/=. Basic pay is 9,600/= House allowance 15% of basic 1,640/= Gross pay is 28,399/= On leave allowance the salary is basic plus house allowance which is Ksh. 11,040/=. He was not entitled to other sums.

13. The Claimant was servicing a SACCO loan and the loan as at end of June was Ksh. 23,512/=. Statutory deductions were to be paid to government but there was no PAYE. The amount due to him after statutory deductions 10,655/= and we used that to service the personal loan with the SACCO. Claimant came to claim pension payment on that date but he refused to sign the clearance form. We processed pension nonetheless. The pension was payable. We had wanted him to sign clearance form and hand over the company property in his possession. There is no money owed.

14. In Cross examination by Mr. Ogotu Advocate the witness stated that he works in Human Resource department and what transpired in the branch is reported to us. The report was by the Lifestyle manager. He stated that he sits in the Disciplinary Committee. We had three security officer and the claimant. On side of management we had Operations Co-ordinator, Human Resource Officer – Mary Mbithi, Human Resource Manager. There were security officers summoned. No shop assistants were summoned. The minutes of the committee are written but he did not produce any in Court. There was no request for the three employees to compensate the company. We have the CCTV cameras in the shop and the CCTV cameras did not show him on the floor in the bulk section. Most likely he went to basement. He was however not certain. The security officers are employed by Nakumatt Holdings. There are security officers on each floor and we also have those located at bulk section. The security is at entrances and exits. The lifts do not pass through main shops, one can bypass the main shop. There are security officers. I am not certain about the CCTV at basement. Familiar with most of the shop. Either a receipt or a card is used. If a card is used it is surrendered by attended to the cashier. The customer takes receipt to cashier and if card is used the attendant has to go back so customer can move to front of the queue. The receipts are taken as follows; white copy to customer, the attendant once he takes the item to the bulk section the staff stamp on the pink and blue copy. The security officers wait for customer to come with copy of receipt and security officers confirm the two tally. The CCTV does not show anyone coming out with bulk items on ground floor.

15. In answer to the question whether it is it normal to transfer or suspend someone, he stated that transfer in case we suspect a person guilty of some action. It is in discretion of company to transfer. The loss was not reported to the police. We did not wish to proceed that way. We did not want to punish the Claimant further. We did not see the need to go that way. We had enough ground for dismissal. The TV was not tilled in any of the tills. The blue copy and white copy were never seen by anyone. Edwin claims he took the pink copy and item to bulk section. He admits he dealt with customer. The pink copy was not stamped. There was no indication that the attendant was absent from work. The dismissal was justified. The receipt (pink) was written by him. He was charged of taking care of the company property, he was guilty of theft.

16. In Re-examination by Ms. Mutune Advocate, the witness stated that the CCTV showed Edwin going into the lift with the item but he did not come out of the lift on 1st floor. If he had taken the item to the bulk section, we have CCTV cameras which would have captured the movement. There was no evidence anyone handled the TV. He admitted to having filled the pink copy but the TV went missing.

17. It is not disputed that the Claimant was employed by the Respondent. The only issues in contention are the nature of the employment and the termination. The Claimant avers he was confirmed in employment in 2008. The Respondent denies this. What is clear is that the Respondent did not formally confirm the Claimant but the contract of employment did not suffer by dint of that failure. The fact that the Claimant continued to earn a salary and serve the Respondent in the capacity of Shop Assistant at a rate of Kshs. 680/- per day subject to statutory deductions. The letter provided the mode of termination which was explicit. The Contract provided thus on Termination

Should Nakumatt Holdings Ltd terminate your services for any reason, a months notice or salary in lieu of such notice will be given provided that Nakumatt Holdings Ltd may summarily dismiss you without such prior notice or payment in lieu thereof, if, in the Company's judgment such summarily dismissal is justified.

18. The Company alleges loss of a TV which the Claimant handled and which was lost during the Claimant shift. He was on duty and prepared the necessary documentation for the purchase and escorted the item to the lift. Nothing was seen on CCTV footage on the shop floor where items received by the Shop Assistants were ordinarily delivered for collection. The last staff to handle the item that was lost was the Claimant. In the Court's mind the proximate cause of the loss was the handling of the item by the Claimant and the Respondent was justified in summarily dismissing the Claimant after the investigations and inquiry conducted by the Respondent. The dismissal was not unfair in terms of the Employment Act and is therefore not to be disturbed. Due regard to the principles of natural justice were had as the Claimant was accorded opportunity to appear and explain the loss but he failed to satisfy the Respondent thereby provoking the dismissal in terms of the contract of employment.

19. Heavy weather was made by the Respondent on the issue of gratuity and in brief reprise, the Court gives the following guidance. Gratuity is governed by Section 35 of the Employment Act which the Respondent and its counsel would be well advised to familiarise themselves with.

20. The Claimant's claim fails and is dismissed but each party shall bear their own costs.

Dated and delivered in Nairobi on this 15th day of January 2013.

Justice Nzioki wa Makau

Judge