



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 6 of 2012

**KENYA PLANTATION AND AGRICULTURAL WORKERS
UNION.....CLAIMANT**

-VERSUS-

JAMES FINLAYS (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th April, 2013)

JUDGMENT

The claimant **Kenya Plantation and Agricultural Workers Union** filed the memorandum of claim on 16.08.2012. The respondent **James Finlay (K) Limited** filed the memorandum of response on 28.09.2012. The claimant filed the cause on a claim of unfair termination of its member, the grievant in this cause, one Jacob Ochola. The grievant was employed by the respondent

as a mechanic at all material times.

The claimant prays that:

- a) **The honourable court do find that the action by the respondent unfair in the meaning of Section 49 of the Employment Act No. 11 of 2007 Laws of Kenya and order unconditional reinstatement without loss of benefits.**
- b) **The honourable court order the respondent to pay wages to the grievant for the period he was out of employment as a result of unfair dismissal.**
- c) **The honourable court order costs of the suit.**

The case was heard on 13.03.2013 and on 21.03.2013. The claimant called one witness, the grievant, **Jacob Ochieng Ochola**. The respondent's first witness (**RW1**) was its security personnel Richard Chepkwony and its second witness (**RW2**) was Peter Biwott, the human resource manager.

The grievant testified that he was employed by the claimant in February, 2001 until 26.10.2010 as a mechanic. His termination, he testified, was on account of alleged theft of twenty five litres of diesel in two containers, a twenty and five litres plastic containers respectively. It was on a public holiday on 20.10. 2010 and the claimant testified that he had attended the holiday celebrations at Kericho Town. He stated that the evening was wet

and rainy and he experienced difficulties in catching public transport vehicles from town. He managed to get the means late at about seven o'clock in the evening.

Upon alighting, he had to walk on a route through the tea bushes towards a river. On approaching the river, he was attacked by three men and a woman who **'planted'** on him two plastic containers filled with diesel whose volume was twenty and five litres respectively. In the process he had fallen on the ground and the men identified themselves as the respondent's security personnel and alleged that he had stolen the diesel from the respondent's fleet of motor vehicles. The men informed him that he had designed to hide the diesel in the tea bushes and to conveniently take it away at the time of his arrest. He was held at the Engineering Department till 21.10.2010 when he was taken to the Workshop Manager to record a statement and subsequently issued with the suspension letter. The grievant was suspended from work and it is not disputed that the management held meetings on 21.10.2010, 25.10.2010 and 26.10.2010 to hear and deliberate the case in the presence of the grievant and the shop stewards.

By the letter dated 26.10.2010 being **appendix C** on the memorandum of response, the respondent summarily dismissed the grievant. The letter

addressed to the grievant stated as follows:

“RE: SUMMARY DISMISSAL FROM EMPLOYMENT

Following several incidences where diesel fuel is siphoned from Company vehicles and sold, the Company Security team was given instructions to identify possible areas where such acts could be happening. On 20th October 2010, at around 4.00pm the Security Team on patrol found one twenty-litre and one five-litre plastic containers with diesel fuel hidden in a tea bush off quarry road. Following the discovery, a security team of three people was detailed to lay an ambush in order to apprehend the culprit (s).

At around 8.10 on the same day, you appeared at the scene where the diesel was hidden and tried to collect the same but dropped the containers and ran away when the Security Staff ordered you to stop and surrender. The Security Team chased you and arrested you after falling down along quarry road.

In your statement your movements around the time of your arrest are highly suspect and unconvincing. Your responses during the disciplinary meeting where two Shop stewards were present did not give clear reasons for your being at the scene where the containers with diesel were hidden. Further, your decision to run away from the scene despite the Security Staff identifying themselves to you strengthens the suspicion that you intended to collect the suspect fuel for personal gain.

As per clause 25(g) of the CBA, an employee who commits, or on reasonable and sufficient grounds is suspected of having committed any criminal offence against or to the substantial detriment of his employer's property is liable for summary dismissal. In view of your action(s), you are summarily dismissed from employment with immediate

effect as per the above referred CBA provision.

Please arrange to clear and handover Company property to your immediate Manager. You will be paid your terminal benefits (if any) upon your satisfactory handover.

Yours faithfully,

Signed

Human Resource Manager

Human Resource Department

Signed

Chief Engineer

Engineering Department”

As a motor vehicle mechanic, the witness stated that his work did not entail handling of fuel. That he only handled engine oils and security was provided throughout the time he was on duty.

RW1 testified that the events of the evening of 20.10.2010 were as per his statement being appendix A on the memorandum of response. The grievant had come to the scene at around 8.10 pm and headed to where the fuel was hidden. The grievant removed the fuel from its hiding spot upon which he asked him to surrender. He then, according to the witness, dropped the fuel

and started to run away from the spot. The security team pursued him and apprehended him. The witness stated that it was obvious that the grievant was linked to the fuel.

RW2 gave evidence that the grievant was suspended pending investigations. He explained that disciplinary proceedings were held on 21st, 25th and 26th. The shop stewards, the grievant and management had participated in the proceedings. The letter of summary dismissal was issued on 26.10.2010 following absence of shop stewards who being notified to be present, decided not to attend. Further, the labour officer recommended that the dismissal be reduced to normal termination as per **appendix F** and the respondent conceded to that recommendation as per **appendix H** on the memorandum of response. Accordingly, the respondent paid the grievant his final dues being two months pay in lieu of notice, accrued annual leave and leave travel allowance amounting to Ksh.40,816.30 as per the pay slip marked appendix H on the memorandum of response.

The issues for determination are:

- a) **Whether the due process for termination was followed.**
- b) **Whether the respondent has established that the reason for termination was valid.**
- c) **Whether the claimant is entitled to the remedies as prayed for.**

On the first issue, the claimant submitted that the grievant was not given an opportunity to defend himself as per **section 41 of the Employment Act, 2007**. Further it was submitted that the grievant was crucified

unheard as the rules of natural justice were breached. For the respondent it was submitted that the grievant admitted that several meetings were held to deliberate the case. Union representatives were present, scene visits were made and the grievant was given an opportunity to explain himself at the meetings.

In view of the evidence and the submissions, it is clear that the grievant was notified the case leveled against him and was accorded the chance for exculpation. The court finds that the grievant was accorded notification and hearing before termination on the alleged grounds of misconduct and the respondent complied with the provisions of section 41 of the Employment Act, 2007.

The second issue for determination is whether the respondent has established that the reason for termination was valid. The claimant submitted that the respondent had failed to establish that the grievant had stolen the diesel in issue and therefore, the termination was unfair under **section 43 of the Employment Act, 2007** which provides for proof of the reasons for termination and failing which, the termination shall be found to have been unfair. It was submitted that the respondent had failed to prove that the diesel in issue had been drawn from its motor vehicles and the source of the fuel remained unknown. The culprit in the theft, it was submitted for the claimant, had not been ascertained and it had not been shown that the diesel had been siphoned from the respondent's vehicles. Further, the respondent had not reported the alleged theft to the police and no investigation report had been produced.

For the respondent, it was submitted that clause 25(g) of the collective agreement and **section 44 (g)** entitled the respondent to dismiss the grievant on account of reasonable and sufficient grounds that the grievant was suspected to have committed a criminal offence against or to the substantial detriment of the respondent. That in the circumstances of this case, the respondent was reasonable in concluding that the grievant had siphoned diesel from its motor vehicles. The grievant, it was submitted, had given conflicting account of his destination to explain his presence at the scene at the material time of the arrest: he told the court he was going to his home after attending the holiday celebrations; in 2.3 of the memorandum of claim

he stated he had diverted to go and see his friend residing at **Dimbolil Village**

and; in his letter marked **JF3** on the memorandum of claim he stated he was

going to see his cousin. It was submitted that the conflicting evidence showed that the grievant was not telling the truth and his alleged ambush and being forced to carry the fuel was not an honest account. Further, he did not establish any ill motive on the part of the security personnel that would justify their '**planting**' of the diesel on the grievant.

To support the respondent's case, it was submitted that the employment relationship is one of highest good faith. The implied term of the contract of employment is that the employee must act with good faith towards his employer and must serve the employer honestly and faithfully. The success of the employer's enterprise, it was submitted, heavily rests upon the employee's integrity and honesty. The respondent referred the court to such holding in **National Union of Mineworkers and Another Versus Commission for Conciliation, Mediation, and Arbitration and, Two Others.**[1]

On the weight to be placed on the evidence by the parties, the respondent referred the court to **National Union of Mineworkers and Two Others**

Versus Commission for Conciliation, Mediation, and Arbitration and Another in which it was held that it is the onus of the employer to show that

the dismissal was fair. Accordingly, the starting point for assessing the versions presented by the parties during the hearing is to determine the extent to which the employer's version is more probable than not. If both versions by the employer on the one hand and the employee on the other are both probable, then, the court should decide which version is more probable by comparing the opposing versions.[2]

The court considers that under **sections 43 and 47(5) of the Employment Act, 2007**, the onus of the employer is to show that the grounds for termination or the reasons were justified and not that the termination was fair. However, the court upholds the cited holding on the principle to apply in assessing the versions of opposing employer-employee accounts of what may have transpired. The court also upholds that the employer-employee relationship is of high fidelity that must be maintained by the parties to achieve the desired outcomes of the engagement.

In the instant case, taking into account the conflicting accounts by the grievant about his alleged destination at the material time as well as th

absence of ill-will on the part of the security personnel, it is not probable that the diesel was **'planted'** on the grievant. The grievant was a mechanic. It is probable that he designed and had capacity to siphon fuel from the respondent's motor vehicles and is probable he was implicated as alleged. The court notes that the standard of proof is on a balance of probabilities and the grievant has given conflicting evidence to account for his presence at the scene in issue.

In the circumstances of this case and considering the high fiduciary expected in the employment relationship, the court finds that the respondent has established the reason for termination of the service of the grievant; at termination, the court finds that the respondent genuinely believed that the grievant was implicated in hiding the diesel in issue and the diesel most probably had been drawn from the respondent's motor vehicles. The court finds that the grievant was culpable as alleged by the respondent.

In view of the findings on the first and second issues, the court finds that for the third issue, the claimant is not entitled to the remedies as prayed for.

In conclusion, the memorandum of claim is dismissed and the claimant shall

pay the costs of the proceedings.

Signed, dated and delivered in court at Nakuru this Friday, 12th April, 2013.

BYRAM ONGAYA
JUDGE

[1] Case No. JR 2512/2007, Judgment by the Labour Court of South Africa at Johannesburg delivered on 16.08.2012 at pg. 25-26.

[2] Case No. JR.2910/08 Judgment by the Labour Court of South Africa at Johannesburg delivered on 03.02.2010 at page 10-11.