



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO 572 (N) OF 2008

(Before: D.K.N.Marete)

JOHN NGISA MARUBE.....CLAIMANT

VERSUS

TRITON GAS STATIONS LIMITED.....RESPONDENT

JUDGEMENT

On 7th October, 2009, the claimant instituted this matter vide a Memorandum of Claim dated 2nd October, 2009. The issue in dispute is therein cited as;

Wrongful, unlawful and illegal termination and refusal to pay terminal dues to the above named claimant.

The respondent in reply filed a Memorandum of Reply dated 17th May, 2010 on the following day.

The matter came for mention on 3rd November, 2009 and severally thereafter for hearing in which times the respondent struggled to file his response. Ultimately, when the matter came for hearing on 5th July, 2010, counsel for the parties agreed to entirely proceed on the basis of written memoranda which leave was granted by court for filing of the same. The written submissions were subsequently filed on the 20th July, 2010 and 5th August, 2010, for the claimant and respondent respectively.

The claimant’s case and submissions is that the claimant was employed by the respondent as a pump attendant on 1st March, 2006 and put under probation for three months. He was subsequently confirmed as a permanent employee by way of a contract of employment dated the 13th December, 2006. In October, 2006, the Claimant was promoted to the position of Supervisor and later Station Manager in March, 2008.

He further submits that on 18th April, 2009, he was called by the station accountant to his office and informed that the office safe was left open the previous night and some money had gone missing. On 1st June, 2009, the claimant was wrongfully and unlawfully terminated from employment.

The claimant’s submission is that the respondent’s letter of dismissal dated 1st June, 2009 on grounds that he had been negligent in his duties as Station Manager and other allegations of giving wrong reports and not banking customers monies in the company’s account are not backed by any cogent evidence as these are only backed by police statements which are not concrete as the Claimant was not charged or found guilty in a court of law.

He further submits that the allegation of negligence in the performance of his duties, leading to a loss of Ksh.198,926/= from the station's safe are unfounded because the responsibility of keeping the money and even safe keys was in the station's accountant and not the claimant. The police statements form a case of easy accessibility to the station safe by the pump attendants and therefore the claimant is blameless and cannot be implicated in the mess. The claimant further denies the allegations of making wrong reports and failing to bank customers monies in the company account as unsubstantiated.

The claimant further submits that his termination of employment was in disregard of S.41(2) of the Employment Act, 2007 which affords him an opportunity to present his side of the story and have the same considered. Lack of observance of the rules of natural justice therefore made a fool of the process and termination of the claimant thereby rendering the same unsustainable.

The respondent in a memorandum of reply dated the 17th May, 2010 denies the claim with an exception, as usual, of the descriptive aspects expressed in paragraphs a, b and c of the claim. She further submits that the claimant was employed on 1st March, 2006 by the Respondent under a contract of service dated 13th December, 2006 and was promoted to various levels culminating in that of a Station Manager at the time of termination. His last salary was Ksh.28,000/=. He was on 18th November, 2008 transferred from Kabete Service Station to Naivasha in the same capacity-Station Manager.

The respondent in denying the claim asserts that the transfer to Naivasha of the claimant was not on promotion. He submits and accuses the claimant of not informing the employer of the station theft, the same having been known to him by virtue of his being the custodian of the safe and the only officer who had the keys to the safe wherein Ksh.198,926/= was stolen. He further denies that the safe was left open or any knowledge of the whereabouts of the stolen money. The matter was thereon reported to the police and the claimant arrested as first suspect, on investigation.

The respondent denies liability to the claimant in terms of terminal dues as laid out in the claim and submits that all dues owing to him were paid on termination. She prays that the matter be dismissed with costs.

The respondent in her written submissions reiterates the contents of her response to the claim and submits that the Claimant was summarily dismissed for gross misconduct leading to a loss of Ksh.198,926/= which was entrusted to his custody as Station Manager. That this dismissal was lawful and justified and in accordance with the letter of appointment dated 13th December, 2006 and his terminal dues all paid up.

The issues for determination therefore are:-

1. Whether the claimant's dismissal was unlawful, wrongful and unfair?
2. Whether the claimant is entitled to the prayers sought?
3. Who bears the costs of the cause?

The 1st issue for determination is the fairness, legality and wrongfulness of the summarily dismissal of the claimant. The parties hold opposing positions on this and this is for good measure: we operate in an adversarial system of resolution of disputes.

The facts of the case as expressed by the respondent, the claimant was clearly negligent and in some big way abetted and or aided in the loss of the Ksh.198,926/= belonging to his employer. He was also negligent of not banking the bank customers money (proceeds from fuel sales) in the company account as was procedure and also giving wrong reports with the intention to deceive or defraud the respondent. This to me amounts to gross misconduct and is indefensible on the part of the claimant.

Police investigations in the matter also pointed out to the claimant. The statements recorded by the witness, most of whom were the claimant's colleagues at work point to some unusual movements of the claimant on the eve of 17th April, 2010, the night of the breakage of the safe and loss of the monies. He was seen entering the premises at odd hours and through an odd route by the night watchman. His standing position in some uninhabited incomplete building next to the station does not aid the claimant's

story either.

The Respondent sought to rely on the authority of **Kibe Vs The Attorney General, (2003) KLR 238** where the Court of Appeal held that;

...the Appellant in failing to alert the Cashier or assistant to lock the door had neglected the duty he had been employed to perform. Notwithstanding the acquittal in criminal trial, an award of punishment including dismissal as had happened may still be imposed to discipline him.

The law on the subject is succinct and clear;

44.(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
- b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*
 - (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
 - (d) an employee uses abusive or insulting language, or behaves in a manner

insulting; to his employer or to a person placed in authority over him by his employer;*
 - (e) an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*
- f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*
- g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's*

property.

Summary dismissal is clearly spelt out under Section 44, Employment Act above cited and the instant case is the province of sub section (3) and (4) (c) and (g) of the Act.

In Muthuuri Vs National Industrial Credit Bank Limited (2003) KLR 146

Honorable Justice Ringera (as he then was), in dismissing a similar suit held that;

...the Plaintiff's contract having been terminated in accordance with Clause 5(b) of the contract of service the plaintiff was lawfully terminated.

He went further to find that in a pure case of master and servant the question does not all depend on whether the master gave the servant a hearing. It depends on whether the facts emerging at trial prove breach of contract.

I would, in the circumstances hold that the respondent's position and submissions hold the day and that the summary dismissal of the Claimant was lawful, if not overdue. One cannot be heard to invoke the concept of natural justice in circumstances where there is clear breaching of contract or involvement in criminality on the part of the employee. The rules of natural justice and particularly the right to a hearing envisages a situation where there may be an error or misunderstanding of the circumstances of the termination of employment and these call for an explanation (hearing) on the part of the culprit employee. The absence of the same, like in the instant case does not in any way make the process of termination defective. The facts are self telling and exonerating.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. It is obvious that if there is a finding of a lawful termination, the claimant would not be entitled to the relief sought. He therefore loses out on the prayers sought and I find as such.

The last issue for determination is where the costs of the case shall be pinned. That costs follow the event is the accepted principle and practice. The claimant is therefore condemned to costs. He shall bear the costs of the case.

I therefore dismiss the claim with costs to the respondent.

Dated, delivered and signed 20th day of June, 2013.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Momanyi instructed by Nchogu, Omwanza & Nyasimi Advocates for the claimant.
2. Mr. Kimondiu instructed by Robson Harris & Co. Advocates for the Respondent.