



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO. 9 OF 2013**

**(Nairobi Cause No. 1021 of 2010)**

**SIMON MUTAHI WAITINI .....CLAIMANT**

**VERSUS**

**MOUNT KENYA SAFARI CLUB LIMITED .....RESPONDENT**

**J U D G M E N T**

By a memorandum of claim filed in court on 3rd September 2010 the claimant brought action against the respondent claiming that the latter “without any shred or colour of right, unilaterally, unfairly, unlawfully and illegally summarily dismissed him from employment on allegation of fuel theft...”

According to the memo of claim, the claimant was employed by the respondent on 1st October, 2006 in the position of out doors facilities manager stationed at the respondent's club in Nanyuki at a monthly salary of Kshs.84,000.

As a result of the alleged unlawful termination, the claimant seeks from the respondent, payment of Kshs.1,008,00 as gross salary from date of dismissal, Overtime in the sum of Kshs.414,720, Sundays at Kshs.149,760 and Public Holidays at Kshs.77,000. The claimant further claims what he describes as accrued service.

The respondent on its part denies the claimant's claim and avers that the claimant was abusing his authority/office by instructing one of the respondent's employees to wash his personal car on the respondent's time using respondent's water and that the claimant's car was being fueled using the respondent's petrol without any prior authorization by the respondent. According the the respondent, these acts amounted to gross misconduct warranting a summary dismissal. According to the respondent, the claimant's summary dismissal was procedural and justified and that it complied with all the relevant provisions of the law.

By a supplementary memorandum of defence filed 29th June, 2011 the respondent further averred that at all material times in the course of his employment, the claimant was aware of the code of practice which prohibited the unauthorized use of company employee or property for private purposes whatsoever.

Regarding leave the respondent averred that the claimant was transferred to the respondent on 1st July, 2007 and paid all his accumulated holiday/leave dates by one lumpsum payment.

According to the respondent, upon termination of the claimant's services the respondent duly informed the District Labour Officer of the dismissal and forwarded the cheque in respect of the claimant's dues to the said officer together with a schedule of calculation of the dues.

In conclusion the respondent reiterated that it had reasonable and sufficient grounds to summarily dismiss the claimant from its employment as it did under section 44(g) of the Employment Act.

At the hearing of the claim only the claimant testified on his behalf while the respondent called two witnesses. The claimant reiterated most of the averments in his memorandum of claim such as his date of appointment to the respondent's employ, his position and the circumstances under which he was terminated and the reasons why he disputed the termination of his employment. Of paramount importance to this judgment is the circumstances leading to the termination of the claimant's employment. According to him he was summarily dismissed on 7th October, 2008 on the allegation that he was found stealing petrol from the respondent. He testified that this was not true. He stated that the security officers claimed that his car was being fueled by another employee on his instructions. It was his evidence that at the material time he was doing other duties and was surprised by these allegations. He testified that he later learnt that the employee in question was called George. He stated that he was consequently suspended and produced the suspension letter as exhibit before the court. The suspension was extended and upon the expiry of the extended period he was arrested when he reported to work and detained at Naromoru Police Station. He was later bonded and asked to attend court at Nanyuki but when he attended court no charges were preferred against him as the police file was unavailable. He has since then never been summoned to court.

Upon termination he stated, he was only paid for days worked and pending leave.

On cross-examination he stated that he was not aware George was fueling his car using respondent's fuel. According to him he only authorized George to wash his car. He stated that there was no designated area for washing any vehicles including guest's vehicles. On his attention being drawn to the code of practice for employees he admitted signing the same and admitted awareness to its contents.

Mr. Joseph Lemisu for the respondent testified that he was a security officer for the respondent. According to him, they received a report on theft of fuel and conducted investigation after which they decided to lay a trap. He stated that they as security officers noted that every week the claimant's car would be driven to the Golf House by George.

On the material day George brought the car around 5.30 a.m. and while in the process of stealing fuel he was arrested. He was shown the pictures of the gadgets allegedly used for stealing fuel and confirmed they were the ones George was found with.

On cross-examination by counsel for the claimant he stated that he did not see the claimant steal fuel and that it was George who was found doing so. The second respondent's witness repeated what his colleague stated and added that George used to steal the fuel by putting it in the bucket and later transferring it to a five litre container and later fuel the car using an adapted mineral water bottle. According to him it was George who told him that the claimant asked him (George) to fuel his car.

In any action for wrongful termination of employment, the onus is on the employer to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair. Further under section 47(5) provides that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.

The question the court has to resolve at this point is: Has the respondent discharged the burden of proof placed on it by section 43 of the Employment Act to justify the termination of the claimant's services? On the other hand has the claimant shown that the termination of his employment was unfair and or wrongful?

The claimant in his evidence has testified that he did not authorise George to fuel his car but admitted that he used to give George his car to wash for him. It was further his evidence that there was no designated area for car washing even for guests. The respondent's witnesses DW1 and DW2 both testified that it was

George whom they found fueling the claimant's car. This testimony is confirmed by George's statement found at page 84 of the respondent's supplementary memorandum of defence when he states:

“I was at the golf course washing Mr. Mutahi's car. I had a problem starting it, and I felt it had no fuel. I thought to fuel it with 1 litre and inform him as a manager to let the petrol attendant know...”

The essence of George's statement is that it was his decision to fuel the claimant's car on the belief that its refusal to start was because it had no fuel. This statement taken together with the testimony of DW1 and DW2 leads to a reasonable conclusion that the claimant was not aware that his car was being fueled hence could not have been a party to the fuel theft if any on the material date which gave rise to his dismissal. To this extent the claimant has discharged the burden of proof that his dismissal on this ground was unfair and unlawful. But there is the other issue of washing his car using the respondent's water and employee. The respondent sought reliance on clause 4 of its code of practice for employees in relation to competitors, customers, suppliers and other matters. Clause 4 provides:

“...Employees shall not use the service of any Company employee on private basis even if this is outside the working hours of the employee concerned, and even if such services are free of charge or are paid for.”

The respondent further relied on its Colleague Handbook presumably at clause 6.20(9) which prohibits misappropriation, misuse, or abuse of the property of the respondent. Whereas the Colleague Handbook appears more relevant to the case before the Court, the code of practice appears to have been more specific in regulating the behaviour and or relationship between the respondent's employees and its competitors, customers and suppliers etc. It appears more of a conflict of interest and anti-competition document. Hence clause 4 thereof ought to be construed in that context. It does not in the opinion of the court include using the services of a fellow of employee to for instance wash a car as was the case here. Clause 6.20(9) of the Colleague Handbook therefore appears more relevant here.

The claimant does not deny giving his car keys to George to wash. It was his evidence that there was no designated car wash area even for guests. Further, from the testimony of the respondent's witnesses it would appear that the claimant had had his car washed in this area on more than one occasion. The question that arises then is: was the act of washing the claimant's car so grave as to warrant his summary dismissal without any previous warning?

Clause 6.20 provides in the relevant portion as follows:-

“...The following actions will not be tolerated in our workplace and any employee who commits any of these actions will be subject to disciplinary action **up to and including dismissal.** ((underlining mine).

Further, clause 9.5 of the Colleague Handbook provides:

“Unless an offence requires more severe action, you will receive verbal counseling from your

direct Supervisor...”

It would therefore appear that dismissal was the most severe action which the respondent and indeed any other employer could take against an employee. From the evidence of DW1 and DW2 the claimant had on more than one occasion washed his car at the site where it was found being fueled by George on the material date. No report was made nor any warning issued to the claimant over this. It would seem therefore that the act of car wash was not such a serious offence as to warrant summary dismissal. A warning to the claimant could therefore have been the first step in expressing the respondent's disapproval of this activity.

Section 45 of the Employment Act provides inter alia that a termination of employment is unfair if the employer fails to prove that the reason for the termination is a fair reason and that the employment was terminated in accordance with a fair procedure. It may well be that the termination of the claimant's employment on grounds of using the company's water to wash his car was a fair reason, however the respondent did not adhere to the provisions of its colleague Handbook especially clauses 6.20 and 9.5. In the circumstances the court reaches the conclusion that the claimant was unfairly terminated from employment with the respondent.

Under section 49(1)(c) of the Employment Act read together with section 50 an employee who has been found unfairly terminated is entitled to up to 12 months gross monthly wages at the time of dismissal.

The claimant was suspended and eventually arrested on the allegations that he was stealing petrol from the respondent. He was bonded to attend court at Nanyuki to face a charge of stealing by servant which he did yet no charges were preferred until to date. He must have been tormented in the process. In the circumstances the court awards him 10 month's salary as reasonable compensation for his unfair dismissal as provided under section 49(1)(c) of the Employment Act. This compensation will be in addition to the claimant's terminal benefits set out in his dismissal letter of 1st October, 2008 if not paid already. The award shall be subject to statutory deductions. Parties to this suit may if necessary liaise with the Deputy Registrar of this Court for the computation of the actual figures in the event of any difficulty. It is so ordered.

*Dated at Nyeri this 23rd day of July 2013.*

**Abuodha J. N.**

**Judge**

**Delivered in open Court in the presence of Muthoni Advocate for the Claimant and Githinji Advocate for the Respondent.**

**Abuodha J. N.**

**Judge**