



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 954 OF 2012

BETWEEN

UGASS ABDI MOHAMMED

..... **CLAIMANT**

VERSUS

GRAND BUS SERVICES LIMITED

..... **RESPONDENT**

Rika J

CC. Elizabeth Anyango

Mr. Odawa instructed by Moses Odawa & Company Advocates for the Claimant

Ms. Ng'etich instructed by Ng'etich & Associates, Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

DATE OF FILING OF THE CLAIM: 5TH OF JUNE 2012

DATE DECISION DELIVERED:

AWARD

1. Ugass Abdi Mohammed lodged the Statement of Claim at the docket of the Court, on 5th June 2012. His Claim is against Grand Bus Services Limited, a Road Transport Company doing business in Kenya, with its Head Office at Nairobi. He claims he was employed by the Respondent as a Security Guard, in October 2010, at a monthly salary of Kshs. 8,000. There was a security breach at the premises where the Claimant was tasked to guard, on or around Saturday the 22nd October 2011. The Claimant was consequently suspended on 22nd November 2011, and dismissed on 28th November 2011. He was not satisfied with the decision made by his employer, and filed this Claim alleging he was not fairly dismissed. He seeks the following prayers:-

- a. 1 month salary in lieu of notice at Kshs. 8,000;

- b. Annual leave entitlement for 1 year worked at Kshs. 5,600;
- c. Gratuity/ Service of Kshs. 4,000;
- d. House rent allowance at Kshs. 14,400;
- e. 48 days Off duty at Kshs. 3,413;
- f. P/H at Kshs. 8,533; and
- g. 12 months' salary in compensation for unfair termination at Kshs. 96,000

Total..... Kshs. 139,946

Ugass also seeks costs, interest and in his own words, 'any *other relief the Tribunal may deem fit.*' He states, again in his own words, that "the cause of action arose within the jurisdiction of this Tribunal"

2. The Respondent filed its Statement of Reply on 7th August 2012. It conceded to employing Ugass for 1 year, from October 2010 to November 2011 as its Security Guard. He was dismissed on 28th November 2012, after the Respondent confirmed he was an accomplice in a crime against the Respondent's property, whereof the Respondent's office was broken into and an amount of Kshs. 80,000 stolen, on the night of 22nd October 2011. Investigations carried out by the Police confirmed the Claimant's participation in the crime. He was offered and rejected terminal dues, which were computed by his own Trade Union Representative at Kshs. 35,824. This amount is still available to the Claimant. The Respondent urges the Court to dismiss the Claim.

3. Ugass testified and wound up his case on 27th November 2012. Ali Mohammed, a Guard who worked with Ugass for the Respondent, and Abdikadir Osman who serves as the Respondent's Operations Manager, testified on the same day as the Claimant. Roselyn Chepng'eno, the Respondent's Human Resource Officer gave evidence for the Respondent on 25th January 2013 when the hearing closed. The matter was last mentioned on 22nd April 2013, when Parties were advised by the Court its decision would be delivered on notice.

4. The Claimant told the Court that the Operations Manager Abdikadir Osman was malicious, in terminating the Claimant's contract of employment. At the time Ugass left his place of work, there was no breaking into the premises. He was called later by Management and informed that money had been stolen. He had left passengers buying travel tickets. The Senior Guard had the keys. The money was stolen from the Accountant's Office. Ugass was not arrested and taken to the Police. The Trade Union computed for him the prayers contained in his Claim.

5. Answering questions from Ms. Ng'etich, the Claimant testified that he served for 1 year. He had a key to the office. His colleague in the guard duties was Ali Mohammed. Ali too was called by the Management when the incident occurred. The Claimant was interrogated by the Management and asked to go home. He was not told how much money was stolen. He testified he did not know a gentleman named Martin Oduor. He was assisted by his Trade Union Representative in computing terminal dues. When he went to the employer to collect his terminal dues, he was told that the Police were withholding his terminal dues. The amount had been agreed at Kshs. 35,000. It is not true that he refused to collect his dues. He testified on redirection that he held the key for the ticketing area. P/H in the Statement of Claim stands for Public Holidays. Ugass asks the Court to grant the Claim.

6. Ali Mohammed testified that both Guards had their own set of Keys. The premises were secured by a metallic door. The bus departed the station at 8.00 p.m. Ali reported around 5.30 p.m. Ugass locked the inside door, while Ali was responsible for the main outer door. After Ali arrived, he left briefly for the prayers at the adjacent Mosque. Ugass remained behind locked in the premises. Ali saw Martin Oduor, an ex-employee of the Respondent, loafing around the Respondent's premises. Ugass put on the lights in the premises. Ali went and asked Oduor what he was doing around his former employer's premises. He had no answer. Ali then confronted Ugass, who became sweaty and choked-up. Words refused to roll off Ugass's tongue. Ali discovered that Ugass had facilitated Oduor to get entry into the premises by removing a window pane, off the window to the room where the cash lay. The door was not broken. Oduor was arrested.

7. On cross-examination, Ali testified that he and the Claimant reported for duty at 6.00 p.m. The bus left the station at 8.30 p.m. Travellers were not allowed access to the area guarded by Ugass. Ali did not see Oduor get in. Both guards attended the prayers at the Mosque. Before Ugass joined Ali for the prayers, Ugass switched on the lights inside the premises. On return, Ali found Oduor at the place guarded by Ugass. Ali did not hear any commotion during the night. On redirection, Ali confirmed that all the doors remained locked at the time of the incident.

8. Osman corroborated the evidence of Ali, testifying that Ali reported to Osman he had found Oduor in the premises, while doors remained locked. Oduor used to work as a Turn Boy for the Grand Bus. Osman had retained Oduor's cell phone number. He called Oduor, who came to his former employer's premises, a day after the incident. Two Administration Police Officers were on hand to receive Oduor. On interrogation, he confessed he had stolen the money and a camera. He revealed Ugass had left the key in an accessible place, to allow Oduor easily reach the money and the camera. Oduor led the Officers to his residence where Kshs. 48,000 was recovered. Oduor then vanished before further action could be taken against him. Ugass was suspended and never went back to work. Osman told the Court the Respondent did not wish to take Ugass to the Police as this would result in clan disharmony. The parties come from the Somali Community, where clan identity is strong. The Respondent however, did not have any doubt on the involvement of Ugass in the crime. Osman testified further on cross-examination that Oduor confirmed Ugass availed the key to him. The door to the cashier's office was locked. Osman clarified on redirection that Oduor was left the key for the main inside door by Ugass, and entered the cashier's office through the window.

9. Chepng'eno agreed with the evidence given by Osman. Osman told her investigations had confirmed Ugass aided in the commission of the offence. The Claimant was suspended, and given a notice of termination of employment on 28th October 2011. He came during suspension with Mr. Rogers from his trade union. Parties computed by consent, the terminal dues at Kshs. 35,824. There was no dispute on the computation. Computation was done on 6th December 2011. Ugass has never gone to collect the dues, and was not told that the Police were with-holding his terminal dues. He was treated fairly, being offered terminal dues, even while guilty of gross misconduct. Chepng'eno stated that the Respondent's Business is founded on irreproachable Islamic morals and ethics, and would not deny Ugass fair treatment. She testified on cross-examination that the letter of termination is dated 28th October 2011. The incident took place on 22nd October 2011. Ugass went to his employer with Rogers before 8th December 2011. The letter dated 8th December 2011 from the Respondent, told Ugass his terminal benefits would be paid after the investigations were carried out by the Police. The Claimant was informed by the Respondent that it was considering termination. In re-examination, the witness testified that investigations carried out by Osman were sufficient, and the Claimant was given adequate opportunity to defend himself. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

10. The Claimant was employed by the Respondent transport Company as its Security Guard, in October 2010. He earned a monthly salary of Kshs. 8,000. He left after one year, on 22nd October 2011. There was a theft on this day at the Respondent's premises, whereof cash of Kshs. 80,000 and a camera, were stolen. Evidence given by the Respondent's witnesses Ali, Osman and Chepng'eno was emphatic that an ex-employee Martin Oduor, accessed the Cashier's Office with the assistance of Ugass. Oduor himself confessed he stole from the premises, and was assisted by Ugass in doing this. He led the Police to his residence where part of the stolen money was recovered.

11. This was very strong evidence, showing that Ugass was involved in the commission of two employment offences under section 44 [4] of the Employment Act 2007, for which the employer would have been justified in summarily dismissing him. Under section 44 [4] [c], he would be deemed to have neglected to perform his guard duties; or to have carelessly and improperly performed his guard duties. Under section 44 [4] [g] he would be found to have committed, or on reasonable grounds suspected of having committed a criminal offence against or to the substantial detriment of his employer, or his employer's property. In either case, the Respondent would have been justified to summarily dismiss him

for gross misconduct.

12. The Court agrees with the Respondent that it is a business operated on Islamic morals, and offered the Claimant a soft landing. He approached the Respondent with his trade union representative named Rogers, and was offered terminal benefits tabulated with the agreement of all the involved parties, at Kshs. 35,824. He did not collect this amount, but chose to instead file this Claim seeking for unlikely prayers.

13. He was suspended and by taking the trade union representative to the Respondent to compute terminal dues, appears to have agreed to leave employment in an amicable separation. There does not seem to this Court to have been any infringement of the employment protections due to the Claimant under the Employment Act 2007, termination having been consensual. The Respondent for reasons related to the clan ties which are very sensitive in the Somali Community, opted not to escalate the matter into an employment disciplinary process or criminal trial. The Claimant seems to have had a change of heart after he left the Respondent's Offices with Rogers. He should have reciprocated the goodwill shown to him by his employer. Ugass had facilitated theft at Grand Bus, and should not have exacerbated the injury to his employer, by presentation of this Claim.

14. In the end, the Court is satisfied that the Respondent acted fairly. The claim is rejected. Mr. Ugass Abdi Mohammed shall collect the sum of Kshs. 35,824 from the Respondent within 30 days of the delivery of this Award. No order on the costs.

Dated and delivered at Nairobi this 1st day of July 2013

James Rika

Judge