



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 47 OF 2013

HASSAN EGESA NYONGESACLAIMANT

VERSUS

PWANI OIL PRODUCTS LIMITEDRESPONDENT

J U D G M E N T

The claimant brings this suit against the respondent claiming ksh.644001 as his terminal dues following his wrongful dismissal on 2/2/2013. The respondent has denied liability and has contended that the dismissal was lawful with respect to the reason for and the procedure followed.

The case was heard on 3/6/2013 and 29/7/2013 when the claimant testified as CW1 and the respondent called Machael Onyango Obiaya, Caleb Ouma and Japheth Ongweno as RW1,2 and 3 respectively. CW1 stated that he was employed by the respondent on 5th October 2010 as executive maintenance mechanical. His salary was ksh.35000 which was later increased to ksh.46000/-. He was also entitled to a 21 days annual leave that he worked continuously until 4/2/2013 when he received a letter for summary dismissal dated 2/2/2013 (exhibit 3).

The reason for dismissal was lost company property. That before the said dismissal RW1 called him and other employees from different departments on 28/1/2013 and told them that an electric cable had disappeared on 27/1/2013 at night. That each employee called in was asked to explain what happened and that if it was not recovered all were to be sacked. That on 29/1/2013, RW2 called all the workers on duty in the shift that was associated with the alleged theft but the claimant was never called for interrogation. That on 2/2/2013 he decided voluntarily and without any request to record a statement with the security office at the gate. That he was never given any disciplinary hearing before the dismissal. That the theft was never reported to the police for investigations. He denied being involved with electrical work or stealing the cable. That the cable was huge and heavy and could not pass through the security check at the gate without being noticed.

That he was not paid any dues after the dismissal and prayed for judgments as follows:

- a. **4 days salary6,134**
- b. **26 leave days39,867**
- c. **damages552,000**
- d. **one month notice pay 46,000**

On cross examination he confirmed that the equipment for both mechanical and electrical departments were kept in one place. He also confirmed that anybody could have taken the cable. He also confirmed that he was called together with employees by RW2 to explain the loss of the cable but according to him that was not a disciplinary hearing since no one was identified as the suspect in the whole group.

He contended that he worked until 4/2/2013 when he was served with a termination. He also confirmed that he was initially on a 2 years contract but later it became permanent vide letter dated 1/5/2012 (exhibit H.E.1). He maintained that he has leave days outstanding.

RW1 is the Senior Executive Maintenance for the respondent. He told the court that on 20/1/2013 he was with the claimant Fredrick Shioya and other workers on duty and he left them going with the work at 8.00pm when he went home. That at 10.00pm he was called by night shift staff to notify him of the missing cable. That on 21/1/2013 he called the six employees including the claimant to inquire into the lost cable. That all the employees told him that the claimant sent them to various sections and when they returned they did not find the claimant and the cable. That he did explain to them the inquiry but never recorded the proceedings. That when he left at 8.00 pm the mechanical work was complete but the electrical work was going on.

He confirmed that the cable was 4 ½ metres and that it was not heavy. He confirmed however that people are checked as they leave the gate. He added that there is also a biometric machine for clocking in and out. That the clock in machine on the material day did not show when the claimant left the premises. He admitted that he never investigated the watchmen who were guarding the premises.

RW2 stated that he is the person in charge of the plant and its security. That on 20/1/2013 there was maintenance work done to install a compressor which extended into the night. That in the process, a heavy duty cable of 4 meters and valued kshs.64000/ was lost. That on 21/1/2013 RW1 reported the matter to him and requested for replacement cable. That on 22/1/2013 he convened a meeting of the employees on duty when the cable disappeared and interrogated them. The other workers on duty blamed the claimant for the lost cable because he was left alone while the other workers went to change to join the next shift. That the claimant was seen at the workshop enquiring about the whereabouts of his assistant. That the biometric clock in did not also reflect his clock out time. That he then recommended for his dismissal. He maintained that he heard the claimant before dismissal.

On cross examination he contended that the dismissal was based on facts not mere suspicions. He admitted that the claimant was never told that he was a suspect but he ought to have considered himself as such. He maintained that the cable could be carried by one person because it weighed about 5 kilograms. He also admitted like RW1 that he did not interview the watchman because there was no report or any one walking out with any property. He also admitted that he did not find out whether by the time the claimant was left behind by the other workers he had already changed his clothes. He also admitted that none of his colleagues saw him carrying the cable.

RW3 is the Senior Executive HR Administration manager in charge of Jomvu since 1.2.2013. He told the court that he reviewed the reports by the RW1 and RW2 and wrote the dismissal letter. That the claimants contract of 2 years ended in October 2012 and was never renewed but he continued to work and receive pay. That as at the time of dismissal he had 28 leave days outstanding and had worked for 4 days in February 2013.

On cross examination he denied that the cable disappeared on 27/1/2013 and maintained that it was on 20/1/2013. He admitted that after the lapse of the 2 years contract, the claimant worked for 5 months earning a monthly pay of Ksh.46,000/. After the close of the hearing the parties filed written submissions.

I have carefully perused the pleadings and considered the evidence and the submission filed. I am satisfied that I have the jurisdiction to entertain the dispute before court. The issues arising from the

pleadings, evidence and submissions are:

- a. **whether the claimant was a permanent employee.**
- b. **Whether his summary dismissal was wrongful.**
- c. **Whether the relief sought ought to issue.**

The answer to the first issue is not difficult for the court. The two parties have agreed in their evidence that the claimant was initially engaged under a term contract which lapsed in October 2012. That his services continued un-interrupted until 4/2/2013 when he received the dismissal letter dated 2/2/2013. That period after October 2012 was described by the defence as a contract of employment from months to month. According to me that is a myth in employment contracts. The worse description one can give to such an employee is temporary or seasonal employee.

Section 37 of the Employment Act however provides for conversion of such employees into permanent staff if they have served for a period exceeding 2 months. In this case the claimants served for more than 3 months from October 2012 to 4th February 2013 and the court finds that he qualified for conversion to permanent employee status under Section 37 of the Employment Act.

As regards the second issue the court has considered the evidence by the respondent and agrees with her that the reason for the termination was proved under Section 43 of the Employment Act. The evidence of RW2 and RW3 have fitted well within the provisions of Section 43(2) which provides for a subjective test of a reasonable employer believing in the guilty of an employee at the time he decides to terminate. RW3 clearly indicated that he reviewed the investigations reports placed before him and formed the opinion that the claimant was guilty of theft of the electrical cable.

The court however takes issue with the procedure followed by the RW3 in arriving at the decision to dismiss the claimant. Section 41 of the Employment Act requires that before summary dismissal under Section 44 is done, a disciplinary hearing is warranted in which the employee is entitled to be accompanied by another employee or a shop floor representative of his choice. In this case I am persuaded by the claimant's explanation that he was never formally charged by the employer in a disciplinary hearing except the global threat of dismissal given by the RW1 to all the employees he summoned for enquiries. According to him when the enquiry was done by the RW2, he was never called to listen to his accusers and he was never allowed to explain himself forcing him to offer a statement to the security officers at the gate. That conduct by the claimant showed a desperate reaction of a person trying to explain himself out of a situation.

I have perused the statements recorded by the RW2 and 3 before they were heard in the open court. None of them stated that they heard the claimant in defence of what all the other employees accused him. That was an unfair process of condemning a person without listening to his side of the story. The termination was therefore unfair within the meaning of Section 45 of the Employment Act. Section 41 of the Act does not leave any room to the employer to exercise discretion of whether or not to give the employee a hearing before dismissing him under Section 44 of the Act.

Consequently I disagree with the submission by the defence counsel that an employee is only entitled to a hearing before dismissal on any other reason except for the reason warranting summary dismissal outlined under Section 44. In my view the vice versa is the correct position. It follows therefore that the validity of the reason for dismissal became questionable after the foregoing analysis of the procedural fairness. It is possible that if the claimant was accorded a chance to be heard and call witness there is probability that he would have explained himself out. To that extent the court finds and holds that the summary dismissal was unfair and wrongful.

The last issue to consider is the reliefs sought. I award salary arrears Ksh.6134 for 4 days worked in February 2013 plus ksh.39867 for 26 leave days outstanding as at the time of dismissal. The court will also award ksh.46000 being one month salary in lieu of notice in view of my findings that the dismissal was wrongful. I have dismissed the prayer for 12 months salary for wrongful dismissal for lack of any basis. It is trite that wrongful dismissal connotes breach of contract as opposed to unfair dismissal which

relates to breach of a statutory provisions. There was no prayer for unfair dismissal made and the court is unable to move itself to amend the claim at this stage. The claimant was ably represented by learned counsel who is presumed to know the law.

In summary therefore the court enters judgment for the claimant against the respondent as follows:

- a. **4 days salary****6,134**
 - b. **26 leave days****39,867**
 - c. **salary in lieu of notice** **46,000**
- 92,001**

d. **costs and interest.**

Orders accordingly.

Signed, dated and delivered this 20th September 2013.

ONESMUS MAKAU

JUDGE