



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 81 OF 2012

NATHANIEL MWANYAE.....CLAIMANT

VERSUS

UNITED [EA] WAREHOUSE LTDRESPONDENT

J U D G M E N T

The claimant was employed by the respondent as Warehouse Manager for a monthly salary of ksh.55000. He started on 17/9/2005 and was summarily dismissed without any terminal benefits on 5/1/2012 for “unexplained release of UTDA teas to Newstar Venture”. He has consequently sued the respondent alleging that the said summary dismissal was wrongful and as such he should be paid ksh.385002/- as his terminal benefits in addition to compensation of damages for wrongful dismissal.

The respondent has denied liability to pay any dues and damages and has contended that the dismissal of the claimant was both substantially and procedurally fair. The case was heard on 9/5/2013 and 24/6/2013 when the claimant testified as CW1 while the respondent's General Manager Edward Asema testified as RW1.

The CW1 told the court that on 6/12/2011 the respondent served him with a suspension letter instructing him to stay away from the workplace pending investigations on the release of 80 tea packages to Newstar Agency. That the tea was stored in the warehouse of which was the manager. That the tea was released in August 2011 without his knowledge by one of the Senior Clerk Mr. Otemba to Newstar Agency who was one of the respondents registered customers. He discovered after three months that the tea was released without a contract and reported the matter to the company. Thereafter the chairman called a meeting attended by the CEO, GM all managers and junior staff. During the meeting the blame went to Mr. Otemba who stamped the documents for the release of the tea including the delivery note. Despite the culprit being identified the claimant was suspended and called for another meeting on 14/12/13 which was attended by the chairman, CEO and the GM. In the said meeting he was asked whether he had anything to tell them because the investigations were still going on but he responded that he had already told them everything.

On 5/1/2012 he was served with a letter for summary dismissal. The reason cited was the unexplained release of tea. He was not paid salary for November and December 2011 and also for January 2012. He was also not paid for his 10 leave days outstanding. He contended that he was managing 3 warehouses located in different streets assisted by only one supervisor and unless delivery of goods was requested through his computer he would not know.

RW1 confirmed that CW1 was their warehouse manager and was incharge of 20 permanent workers

and 30 casualties. He added that all cargo stored in the warehouse could only be released by the claimant and whenever any release had to be reported to him upon his return. In the present case tea was lost in unknown circumstances and there were no release documents for the tea and the register book had some pages missing.

He further said that the loss was discovered after the client came to collect his stock. That the claimant could not explain the whereabouts of the stocks 3 months after the request. He added that on 6/12/2011 he held a full management staff meeting for a whole morning but the claimant blamed his junior staff. That before the said meeting of 6/12/2011, the claimant held another meeting with the MD in which he alleged that his junior staff had conspired to steal but his defence was not good enough and was therefore dismissed. He mentioned that the dismissal was justified.

On cross examination he confirmed that the claimant was managing 3 warehouses in 3 different streets. He also confirmed that the claimant was being assisted by only one supervisor. He further confirmed that goods were coming in and going out in all the 3 warehouses and the clerks were taking and keeping record in documents and computers. That the claimant then received the data from the clerks and in case the clerks gave the incorrect information the claimant would not easily detect. He confirmed that the claimant had just a form and not release document for the tea. He confirmed that before meeting the MD the claimant had also another meeting with the Executive Manager. After the close of the hearing both parties filed written submissions.

I have carefully read the pleadings and considered the evidence and the submissions and I am satisfied that the court has jurisdiction to determine the dispute herein by dint of Section 12 of the Industrial Court Act read with Article 162 of the constitution. The issues for determination arising from the said pleadings, evidence and submissions are

1. **whether the summary dismissal of the claimant was wrongful.**
2. **Whether the reliefs sought ought to issue.**

To answer the first issue, the court considered the contract of employment between the parties to see which term or obligation therein was breached. The reason for that consideration is because wrongful termination of employment is purely a matter of breach of the contract which establishes the employment relationships. That concept has to be distinguished from that of unfair termination which basically deals with a breach of a statutory obligation.

In the present case the claimant is in effect saying that his summary dismissal was in breach of his contract which only allowed termination by one month prior notice except where he was caught in circumstances leading to summary dismissal. The letter of appointment did not however specify the circumstances which would lead to summary dismissal and no further document was produced which forms part of the employment contract to explain the said circumstances. The court therefore referred to Section 44 of the Employment Act which outlines the offences or misconduct by an employee which entitles an employer to summarily terminate employment.

The said provisions list down in summary several types of misconducts which attract summary dismissal but it does not include what the claimant was dismissed for. The claimant was dismissed for "unexplained release of UTDA teas to Newstar venture". In my view the alleged misconduct was vague and not amounting to gross misconduct. A reasonable employer intending to summarily dismiss the claimant would have charged him with insubordination if at all he deliberately refused to give explanation after an order from his seniors.

In the alternative he would have charged him with stealing the tea after he failed to give satisfactory defence. A further alternative charge would have been negligent performance of duty if at all there was evidence that the claimant personally released the tea without proper documentation and to the wrong person. Consequently the court finds that the reason cited for the summary dismissal was vague and invalid and did not amount to gross misconduct within the meaning of Section 44 of the Employment Act.

Even if the reason for the dismissal was one of the gross misconduct, the same would still not be upheld by this court. The reason for the foregoing view is derived from the answer to the question whether indeed the release of the UTDA tea was never explained. The respondent has not rebutted the evidence by the claimant that there was a meeting on 6/12/2011 in which the release of the tea was explained. The claimant and all his junior staff explained that the tea was released by Gerald Otemba, a Senior Clerk in the respondent's warehouse. It is therefore dishonesty and mere pretense on the respondent's part to allege that the release of the tea was never unexplained. Consequently the court agrees with the claimants that the reason for dismissal was not justified and the summary dismissal was wrongful.

The second issue for determination is about the reliefs sought. As earlier observed, the dispute before the court is about wrongful dismissal and as such the remedy available to the claimant is limited to the obligation breached. The employment contract was breached when the respondent terminated the claimants services without a justifiable reason and without one month prior notice or paying salary in lieu of notice. The other breach is the respondent's refusal to pay salary and other accrued benefits to the claimant.

In remedying for breach of contract the court's jurisdiction is limited to restoring the innocent party to the financial position he would have been where it not for the breach. Consequently, the court grants the claimants prayer for one month salary in lieu of notice, full salary for November and December 2011 and salary for the 5 days in January 2012 and cash pay in lieu of 10 leave days not utilized.

The prayer for service pay at half months salary per year of service was not contested. The respondent had opportunity but did not prove that the claimant was disentitled to the prayer for service pay for 7 years. The court however finds that the complete years served between 17th September 2005 and 5/1/2012 were 6 and not 7. There cannot be any other compensation for a claim of wrongful termination as prayed in the amended memorandum of claim.

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

a. one month salary in lieu of notice	55,000
b. salary for November & December	110,000
c. salary for 5 days in January 2012	9,167
d. 10 days outstanding leave	18,333
e. service pay (15 days x6x55000)	165,000
	<u>357,500</u>

The claimant will also have interest on the above from the date of dismissal plays costs of the suit.

Signed dated and delivered this 4th October 2013

ONESMUS MAKAU

JUDGE