



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 269 of 2011

SAMUEL KIRAGO.....CLAIMANT

VS

KUEHNE+NAGEL LTD.....RESPONDENT

JUDGEMENT

By a memorandum of Claim dated 22nd February 2011 and filed in court on 25th February 2011, through Kimani Kahete & Co. Advocates, the Claimant **SAMUEL KIRAGO** prays for the following orders-

- i. One months notice
- ii. Terminal dues
- iii. Benefits
- iv. Leave days and
- v. Damages
- vi. Any other relief that the honourable court may deem fit and proper to grant in the circumstances

The Respondent filed its reply on 14th march 2011 through Kahari & Kiai, Advocates. The parties were heard on 16th November 2011 and 29th June 2012 by Hon. Justice Justice Isaac E.K. Mukunya (Retired). The parties agreed to have the case concluded by me and further agreed on filing written submissions. **Mr. Kimani** of Kimani Kahete & Co. Advocates appeared for the Claimant while the Respondent was represented by **Mr. Kinyua** of Kahari & Kiai, Advocates.

The Claimants case is that he was employed by the Respondent on 28th August 2008 as fuel supervisor and was dismissed summarily on 9th November 2010 on grounds of carelessness and willful negligence of duty. He claims the dismissal was unfair and wrongful.

In the Response to the Memorandum of Claim the Respondent denies that the termination was wrongful and states that the Claimant's dismissal was lawful and justifiable as the Claimant failed to report the loss of or account for 8,921 litres of fuel valued at kshs. 660,154 and was therefore dishonest and irresponsible.

The Claimant gave oral testimony at the hearing while the Respondent called **CATHERINE WANJIKU KIBERA**, the Human Resources Manager.

In his evidence the Claimant avers that he was employed in 2008 by the Respondent as fuel and lubricants supervisor and was dismissed on 9th November 2010. He further stated that the problem started when there was a variance of 6000 litres of fuel which was traced to a bad petrol pump. He further testified that the padlocks he was using had been tampered with when he left the keys to the person manning the pumps, that he involved the transport manager who promised to buy new padlocks. He also testified that he did not report the theft of the fuel, that he was sent on compulsory leave on 8th October up to 4th November 2010 and when he resumed duty on 5th November he was not assigned any duty, that on 2nd November 2010 he was issued a show cause letter which he replied to on 9th November 2010. He testified that on 9th November 2010 he was summoned to the main office where he was issued the letter of dismissal. He testified that he was not informed of the reasons for dismissal.

In cross examination he admitted that he did not inform his supervisor about the loss of fuel, but reported after 2 weeks as he was still investigating the loss. He admitted that he has no training in investigations. He further admitted that he did not submit the investigation report. He also admitted that the transport Manager Diana Kimani asked him about the loss when the figures failed to reconcile in October 2010.

For the Respondents, **CATHERINE WANJIKU KIBERA** testified that the Claimant was employed as a supervisor on 1st August 2008 and was dismissed on 9th November 2010 for disappearance of 6000 litres of diesel which was discovered after reconciliation uncovered that 8900 litres was missing on 13th September 2010. She testified that the Claimant did not report the loss until it was discovered. She further testified that there was a subsequent loss which the Claimant reported to the police on 4th October 2010. After the discovery of the loss the Claimant was asked to explain and called to a meeting with management to discuss the loss and was dismissed for failure to report the loss.

For termination of employment to be lawful and justifiable an employer must comply with Section 45 of the Employment Act. Section 45 [5] requires the Court to look at the following factors:-

**[a] the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;**

**[b] the conduct and capability of the employee up to the date of termination;**

**[c] the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;**

**[d] the previous practice of the employer in dealing with the type of circumstances which led to the termination; and**

**[f] the existence of any previous warning letters issued to the employee.**

In this case the claimant failed to report the loss of fuel worth more than 600,000/=. It is inconceivable that he would arrive from leave of absence and find such a loss but instead of reporting to his superiors, venture into an investigative process outside his job description. I agree with the employer that this was negligent performance of his work for which the employer was entitled to take disciplinary action against the employee.

The next issue for the Court to determine is whether fair proceeding was used. The procedure for termination is provided for under Section 41 of the Employment Act as follows:-

**[1] Subject to Section 42 [1], an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the**

*employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of this choice present during this explanation.*

**[2] Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 [3] or [4] hear a consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection [1] make.**

From the facts of this case the Respondent did not explain to the Claimant the reasons why the Respondent contemplated taking disciplinary action against him. Further, the Claimant was not given an opportunity to have another employee or shop floor union official present during the hearing. Thirdly the Respondent did not give the Claimant or his representative an opportunity to make representations at a hearing. Indeed there was no hearing at all. To this extent the procedure used by the Respondent did not comply with Section 41 and was therefore unfair.

Having reached the conclusions that the Claimant was unfairly dismissed, I have to consider the remedies available to the Claimant under Section 49 [4] of the Employment Act read together with Section 45 and 50.

The Claimant was unfairly dismissed but this was caused by him having been found to have been involved in culpable conduct. I therefore make the following findings on the prayers by the Claimant:-

**1. Salary in lieu of notice**

Having found that the claimant was unfairly dismissed, the dismissal is reduced to normal termination and the claimant is therefore entitled to payment of one month's salary in lieu of notice. I am however not able to specify the amount as none was either pleaded in the memorandum of claim or stated during the Claimant's oral testimony. The only time the Claimant mentions a figure is in the written submissions which cannot be used to adduce new evidence. The salary earned by the Claimant is a fact that is so crucial to the case, it should have been pleaded or stated in the Claimant's oral testimony. The whole of the Claimants case is premised on the salary as this is the basis for determination of his claim. This being the case, I am constrained to find that the Claimant has not proved the amount he would be entitled to as one month's salary in lieu of notice. I therefore make no finding on the amount.

**2. Leave Days**

According to the evidence on record, specifically the application for leave form annexed to the Respondents response to the Memorandum of Claim as "DOC 15", the Claimant had taken all his annual leave and there are no additional leave days.

The claim therefore fails.

**3. Severance benefits**

The Claimant has not explained what is meant by the prayer for severance benefits. According to Section 40 of the Employment Act, Severance Pay is an entitlement for an employee who has been declared redundant and therefore is not entitled to severance Pay. No other evidence was adduced in respect of the severance pay. The same is only mentioned in the written submissions.

For these reasons the prayer for severance pay fails and the same is hereby dismissed.

**4. General damages**

The Claimant has claimed general damages of Kshs.2,000,000/= . No evidence has been given in support of the claim. The written submissions do not give the basis for the figure.

According to Section 12 of the Industrial Court Act 2011, this Court may award the following:-

**12 [3] [c]      *an award of compensation in any circumstances contemplated under this Act or any other law.***

**[d]      *an award of damages in any circumstances contemplated under this Act or any other written law.***

The Courts attention has not been drawn to any Section of the Industrial Court Act or any other written law under which general damages is contemplated.

The Court however notes that Section 49 of the Employment Act provides for compensation up-to a maximum of 12 months salary. Unfortunately there was no prayer for compensation nor was evidence adduced as to the salary earned by the Claimant to enable the court grant compensation.

For these reasons the claim for damages fails.

There will be no orders for costs.

**Orders accordingly**

**DATED AND DELIVERED AT NAIROBI THE 9<sup>TH</sup> DAY OF OCTOBER 2012.**

**HON. LADY JUSTICE M. ONYANGO  
JUDGE**

**In the present of-  
For Claimant:  
For Respondent:**