



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 903 of 2012

TITUS MUSAU NDIVAU.....1ST CLAIMANT

NANCY TRUPHOSA AYODI.....2ND CLAIMANT

VERSUS

WARIDI LIMITED.....RESPONDENT

JUDGMENT

The claimants are Titus Musau Ndivau and Nancy Truphosa Ayodi. The Respondent is Waridi Limited. The claimants' memorandum of claim was filed on 29th May, 2012 through Lilian Amere Machio & Company Advocates. The Respondent's reply was filed on 27th June 2012 through Mulwa & Mulwa Advocates.

The claimants pray for Judgment against the Respondent for:

- (a) a declaration that the dismissal of the claimants was wrongful and unlawful;
- (b) the claimants to be paid their terminal benefits being Ksh.585,000/= for the 1st claimant and Ksh.279,571/= for the 2nd Claimant as particularized in the Memorandum of claim;
- (c) the respondent to be ordered to compensate the claimants for wrongful and unlawful dismissal at the equivalent of twelve (12) months gross salary,
- (d) the court do issue such orders and give such directions as it may deem fit to meet the ends of justice;
- (e) the respondent to pay costs of the claim; and
- (f) Interest at court rates.

The Respondent's memorandum of reply stated as follows:

- (a) That it was admitted that the claimants were employees of the Respondent until 30th August, 2011 when they were summarily dismissed from their employment because there were reasonable and sufficient grounds to suspect that the claimants had committed a criminal offence (theft of fuel by servant) to the substantial detriment of the Respondent.
- (b) That the claimants were asked to defend themselves against the accusations of theft of fuel

belonging to their employer but they failed to do so and were subsequently summarily dismissed from their employment.

(c) That the Respondent acted in accordance with rules of natural justice and equity in dismissing the claimants from employment.

(d) That the Respondent having acted without breaching the terms of the contracts of employment, the claimants' claim be dismissed with costs.

The claimants' case is that the Respondent unfairly terminated their employment on 30th August, 2011 without notification, hearing and provable reasons for the termination.

The case came up for hearing on 4th October 2012 and on 12th October, 2012. The claimants gave evidence to support their respective cases. The Respondent's witnesses were one Joseph Mbogo Mwangi, the Respondent's accountant and one Elijah Mirenyi, a payroll clerk.

The 1st claimant testified as follows:

(a) The Respondent employed him as a driver in 1995 at a gross salary of Ksh.7,700/= and which was increased over time to the last gross monthly salary of Ksh.22,500/=. As a driver he drove any of the Respondent's motor vehicles as assigned and performed messengerial work.

(b) On 30th August, 2011 he reported on duty as usual. He took the cars keys and planned to go and pick the security personnel from a place called Athi River because it was the pay day. He went to the personnel officer and the account to confirm the arrangements associated with the pay day and his duties. At about mid-day he was informed by the Human Resources Manager that he was required to appear before the Human Resource together with other management staff. At the meeting there was the Human Resource Manager one Mr. Kiragu and one Mr. Kadalak, the Farm Manager. Also present was the respondent's director one Mr. Cameroon. Each of the Managers and the director had a ruled writing pad and a calculator. There had been grapevine in circulation that there would be a salary increment and the claimant thought that would be the agenda of the meeting.

(c) The Human Resource Officer asked the 1st Claimant to explain the issue of the alleged fuel theft. He explained that his function entailed only driving the motor vehicle. The fuel tank for the motor vehicle remained locked. He only accessed the ignition key. The vehicles he drove were fitted with a device called Car Track. As he made that explanation, the director Mr. Cameroon jumped up and loudly advised the 1st claimant to keep quiet and to stop the explanations.

(d) That the Human Resource Officer knew that the operational rules were that the 1st claimant only accessed the ignition key. Before the 1st claimant left the meeting, another driver was called in and then the Human Resource Manager pulled out a letter and gave it to the 1st Claimant threatening to summarily sack him. The letter was dated 30th August, 2011 being annex 5 on the memorandum of claim and it stated as follows:

"30.08.2011

Titus Musau – Pr, 439

C/O TRANSPORT SECTION

Dear Sir,

RE: SUMMARY DISMISSAL

This letter serves to inform you that it has been found necessary to summarily dismiss your services from employment with this organization.

Subsequently to conducting a thorough and methodical investigation it is unmistakably evident that the Company has incurred substantial losses arising from the theft of fuel from the companies vehicles KAC 336T and KAS 839Q. Furthermore; the company has documentary corroboration of falsification of entries into the company's record books in an attempt to distort the accounts; and evidence that historical fuel and mileage records for which you are responsible have been removed for their place of storage.

Fortunately parallel records have been in place and have been used to validate this investigation.

Following the meeting held today the 30th of August, 2011 between the management and yourself; you have been given ample opportunity to defend yourself; in which you have failed to do so.

The above gross misconduct amounts to a serious offence contrary to the Employment Act 2007, Section 44 (4) (g) of the new Labour Laws of Kenya and has caused significant loss to the company.

The company therefore has no alternative but to take the above action of discharging you from your duties with immediate effect.

You will be paid your days worked and accrued leave days, if any, as stipulated by law in the Section quoted above under these circumstances.

You are required to carry out final handing over of any company property in your possession to the Personnel Clerk and Security Officer before receiving payment of final dues owed to you.

Yours faithfully,

***SIGNED
C.M. KIRAGU***

Human Resource Manager”

(e) That at the time of termination the 1st Claimant had served the Respondent for over 16 years and it shocked him to be summarily dismissed without any notice. He was evicted from the Respondent's premises under the close eye of the security personnel. It was now over one year. His family had been adversely affected and he had been shunned by friends. His friends refused to pick his telephone calls.

(f) That he had served throughout with a clear record and Exhibit C1 was his certificate of good conduct issued by the Criminal Investigation Department on the 4th February, 2012.

The 2nd claimant testified as follows:

(a) That the Respondent employed her to work in the farm in 2005 and by the letter dated 14th August, 2005. She was appointed as a Store Keeper.

(b) At the time of termination on 30th August, 2011 her gross monthly salary was Ksh.16,000/= as per her July 2011 pay slip at folio 21 on the memorandum of claim.

(c) As a Store Clerk she received goods delivered by suppliers and issued them to users within the respondent's establishment. The computer soft-ware used to upload the relevant records was not functioning as expected and the records were not posted as expected. Some data would go missing. She also needed training and which she undertook on 26th October, 2008 and therefore improving her performance.

(d) On 16th August, 2011 the 2nd Claimant resumed duty from leave. On 18th August, 2011 her daughter of 3 years of age fell sick. She left work to attend to the daughter and reported on duty on 19th August, 2011. On 20th August, 2011, she also worked and 21st August, 2011 was her official off day. On 24th August, 2011 she was given an off to attend to her daughter who had fallen sick again. She was admitted at hospital on 24th to 27th August, 2011. On 29th August, 2011, she was at home monitoring the daughter who was on drugs. She called her supervisor who permitted her to be away from work.

(e) On 30th August, 2011, she was at work. At around 10.00 a.m. the Human Resource Officer called her on her office telephone extension. He told her to go to his office. At the office she was addressed by the Human Resource Officer, that diesel fuel had been stolen. She requested for time to investigate because she had resumed that day from the off. The Human Resource Officer told her that her workmate one Mr. Mutua had signed the records and he asked the 2nd claimant to explain why fuel tanks were full. At that point the director one Andrew Cameroon asked the 2nd claimant not to make any further explanations. He informed her that she would be dismissed summarily. The Human Resource Officer handed her the letter dated 30th August, 2011 being the summary dismissal letter annex 6 on the memorandum of claim and worded as follows:

“30th August 2011

***Nancy Ayodi – Pr. 213
C/O STORES SECTION
Dear Madam,
RE: SUMMARY DISMISSAL***

This letter serves to inform you that it has been found necessary to summarily dismiss your services from employment with this organization.

Subsequently to conducting a thorough and methodical investigation it is unmistakably evident that the Company has incurred substantial losses arising from the theft of fuel from the company’s fuel tanks totaling to 1,191 litres of which you failed to account for.

Furthermore; the company has documentary corroboration of falsification of entries into the company’s record books in an attempt to distort the accounts

Fortunately parallel records have been in place and have been used to validate this investigation.

Following the meeting held today the 30th of August, 2011 between the management and yourself; you have been given ample opportunity to defend yourself; in which you have failed to do so.

The above gross misconduct amounts to a serious offence in accordance with the Employment Act, 2007, Section 44(4) of the new Labour laws of Kenya and has caused significant loss to the company.

The company therefore has no alternative but to take the above action of discharging you from your duties with immediate effect.

You will be paid your days worked and accrued leave days, if any, as stipulated by law in the Section quoted above under these circumstances.

You are required to carry out final handing over of any company property in your possession to the Personnel Clerk and Security Officer before receiving payment of final dues owed to you.

***Yours faithfully,
SIGNED
C.M. KIRAGU***

Human Resource Manager”

(f) The director asked her to read the letter. The Human Resource Officer then asked her to comply. She was allowed to pick her belongings from the stores office. She owed the Co-operative Society (SACCO) money so that the Respondent’s computation did not entitle her to any money.

(g) That she had received long before the dismissal some warning letters. She was not negligent in her service delivery. For the days she had been absent she acted responsibly because she had called to notify her supervisor her predicament. Further the misconducts alleged in the warning letters were not related to the summary dismissal.

The Respondent’s 1st witness was one Elijah Mirenyi, a pay roll clerk. He stated that there had been some allegations of theft of fuel and the claimants were somehow involved leading to their dismissal. That after dismissal they were entitled to days worked and not paid, leave days and overtime unpaid. For the 2nd claimant she was entitled to Ksh.8,942/= as per exhibit R1. For the 1st claimant the document of computation was not available in court. Under summary dismissal they were not entitled to any payment but if they visited the respondent they would be paid whatever was found due.

The Respondent’s 2nd witness was one Joseph Mbogo Mwangi. He was the Respondent’s accountant. He was in charge of accounts and stores. He knew of alleged loss of fuel. He knew the 1st claimant was a driver but did not know the respondent’s motor vehicle assigned to him. Any person in stores including 2nd claimant would receive the fuel and make an entry. Accounts Section received entries as made by stores. Before the claimants’ termination reconciliation had been done on 29th August, 2011 for the period 4th July 2011 to 29th August, 2011. The loss of the fuel was attributable to staff the witness did not know. The Exhibit R2 showed there was a loss but did not show the person who caused it. The witness did not attend the termination meeting. No person was charged in the criminal court for theft of the fuel. It was true that the fuel pump was faulty. The problem was corrected two months after the termination of the claimants. He did not know the point at which the fuel got lost. As a driver, the 1st claimant was not in charge of stock taking. Exhibit R2 showed movement of the stock and could not be relied on to prove the point at which the fuel got stolen.

The main issues for determination in this case are whether the termination of the contracts of employment was fair and whether the claimants are entitled to the prayers made in the memorandum of claim.

On the first issue for determination, Counsel for the claimants has submitted as follows, thus, ***“It is our submission that both the claimants have been able to prove that their dismissal was unfair as the provisions guiding summary dismissal of an employee under the Employment Act were contravened. There was no evidence to link the claimants to the alleged loss of fuel. The Respondent’s witnesses who testified did not help the Court much and were unable to justify the grounds for wrongful dismissal as they were very categorical that they had nothing to do with the dismissal as they were only accountants. One of the Respondent’s witnesses – Joseph Mbogo confirmed during cross examination that he was not aware whether investigations were ever done over the alleged lost fuel and the outcome thereof. He further admitted that he did not know why the 1st claimant was linked to the alleged loss of fuel and also that he was aware that the fuel tank had been calibrated after the claimants left employment thereby leaving a possibility that the fuel tank must have been faulty.*”**

Both claimants explained their duties and there is no way they were responsible for the alleged loss of fuel if at all the Respondent’s allegations were true. There is no evidence that was tendered by the Respondent to prove that such loss of fuel ever occurred in the first place and the cause of such loss. The respondent through its witnesses failed to prove the connection of the claimants to the fuel. The 1st claimant was able to show that from the time he was employed until 4th February, 2012, when he was taking out the certificate of good conduct that his record was clear. He produced the certificate of good conduct confirming that the 1st claimant did not have a criminal record.

For the Respondent it was submitted that the 2nd claimant being the Stores Clerk held a fiduciary position and she was entrusted with the duties to protect and ensure the security of the Respondent's goods but she breached that duty hence occasioning the Respondent to lose a substantial amount of diesel. She had been warned twice about her absence from duty without permission but her argument was that those two occasions were not relevant to the summary dismissal. It was submitted that the 1st claimant having admitted in the pleadings that he was given an opportunity to defend himself during the meeting held on 30th August, 2011, his evidence was misleading. Thus, it was submitted for the respondent that the claimants were properly dismissed.

The court has considered the evidence on record, the pleadings and the parties' submissions. The findings of the court are as follows:-

1. As submitted by counsel for the claimants, under Section 47 (5) of the Employment Act, 2007 it was the burden of the claimants to prove unfair dismissal and it was the burden of the Respondent to prove the grounds justifying the summary dismissal. Under Section 44 of the Act, summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by contract or statute. The court agrees with the account of the claimants' submissions quoted earlier in this judgment.

It is not disputed that the Respondent likely suffered loss of diesel fuel. The issue is whether the Respondent has satisfied the burden to attribute that loss to the claimants. No evidence has been placed before the court to hold the claimants liable for the loss.

It was the duty of the Respondent to prove that first, the fuel was in fact stolen and secondly, that the theft was attributable to the claimants one way or the other. It is the court's opinion that the Respondent has failed to discharge that burden of proof. Under Section 43 of the Act, the Respondent was required to prove the reasons for termination and the Respondent having failed to do so, the court finds that the termination was unfair as envisaged under that section.

2. In making the findings for unfair termination in this case, the court repeats its opinion that employers may invoke summary dismissal in the very obvious cases of gross misconduct on the part of the employee. Gross misconduct, under Section 44 (3) entails conduct by an employee that indicates that the employee has fundamentally breached his obligations arising under the contract of service and examples of such are enumerated in Section 44 (4) of the Act. Employers are advised that it is not enough to merely allege gross misconduct and proceed to remove an employee without evidence of such misconduct. In the circumstances it is the court's opinion that unless the preliminary inquiry into the alleged misconduct do obviously disclose gross misconduct, it were wiser for employers to consistently follow the wider path of notification and hearing as envisaged under Section 41 of the Act. Such wider path of the statutory due process of fair termination of employment would entail the following import steps:

(a) reporting of misconduct, to the appropriate authority of the employer, that may occasion disciplinary action and therefore termination of the contract of employment;

(b) undertaking a preliminary inquiry as to gravity of the alleged misconduct and available material and relevant evidence;

(c) if preliminary inquiry discloses gross misconduct, that is, an obvious employee's conduct that fundamentally breached the obligations arising under the contract of service, the employer may summarily dismiss by communicating the dismissal decision most preferably in writing – but if obvious gross misconduct is not disclosed, the next steps will follow;

(d) informing the affected employee in writing, in a language that the employee understands, the misconduct and full particulars of the allegations leveled against the employee;

(e) the notice in (d), commonly called a show cause letter, must inform the employee the reasonable or agreed time-frame and method for raising his or her defence;

- (f) the notice in (d) must also inform the employee, in making his or her defence, that it is contemplated by the employer that a punishment including termination or dismissal is contemplated against the employee if the employee fails to exculpate himself or herself;
- (g) an objective and factual or scientific investigation should be accorded to the concerned employee including an opportunity to be heard, call and cross-examine witnesses, produce documents and be assisted with a trade union representative or workmate or any other person of the employee's choice;
- (h) during the hearing and even in the show cause letter, the employee ought to be informed of any circumstances that may aggravate or mitigate the consideration of the case as the circumstances are known to the employer including the employee's previous record of service;
- (i) during the hearing the employee should be given an opportunity to make representation on any mitigating factor;
- (j) the concerned employee must be informed, in a language that he or she understands the findings on the particulars of the misconduct alleged and the findings on the aggravating or mitigating factors;
- (k) the concerned employee must be informed the decision made including the punishment imposed or termination of employment or measures the employee must implement in future in view of the findings and the decision that employment shall continue but employee's improvement is desired;
- (l) in view of statutory or contractual provision, informing the employee any right to appeal or apply for review; and
- (m) If external processes shall follow such as conciliation or adjudication, the employer shall provide all the relevant information necessary for fair determination of the dispute arising out of the employer's decision in the disciplinary proceedings.

Accordingly, it is the opinion of the court that the Employment Act, 2007 envisages serious due process of justice on the part of the employer in event of alleged misconduct, poor performance or even physical incapacity of an employee. It is not a casual undertaking that can lead to termination of employment without adequate explanation of the circumstances and the reasons taken into account before making the termination decision. To put emphasis on the seriousness of the decision to terminate, Section 78 of the Act provides that an employer shall notify the termination of every employment and of each lay-off of a person in writing to the nearest employment service office within two weeks of the termination or lay-off.

In the instant case, it is the court's findings that the statutory tests were not complied with and the claimants' termination was unfair.

3. The second issue for determination is whether the claimants are entitled to the prayers made in the memorandum of claim. The court makes the following findings:

(a) The Respondent in the submissions has admitted that the claimants are entitled to salary for days worked and accrued leave days. The claimants are also entitled to the one month pay in lieu of notice. However, as their pay slips show that they were members of the National Social Security Fund, they are not entitled to severance pay as claimed in view of the provisions of Section 35 (6) of the Act. Thus, taking into account the claim as computed under paragraph 20 of the memorandum of claim and the Respondent having failed to provide any evidence to dispute the claims, the court finds the claimants have proved their case on a balance of probabilities.

The 1st claimant is entitled to **Ksh.225,000/=** and the 2nd Claimant is entitled to **Ksh.167,571/=**

(b) The court has found that the claimants were unfairly terminated from the Respondent's employment. To justify the maximum twelve months salaries compensation, it was submitted for the claimants as follows, thus,

“The claimants were able to show how they were threatened and intimidated by the Respondent and any opportunity to defend themselves was shut down. The claimants gave evidence of how their families were affected as a result of the dismissal as they were heavily relying upon them for sustenance. That they were chased away like dogs and ordered to leave the Respondent’s premises without anything and in the presence of other workers which made them to suffer miserably and embarrassed as a result of allegations created by the Respondent which was never substantiated with any evidence. It is our submission that the claimants deserve to be compensated as a result of inhumanity committed against them by the Respondent. That we wish this case to be stepping stone and a warning to employers who are fond of making haphazard decisions regarding their employees without conducting independent investigations. The fact that the claimants have been faithfully working for them for 16 and 6 years respectively, they did not deserve to be dismissed just like that without them following the procedure provided under the Employment Act”.

The court has considered the submissions and finds that the unfair termination in this case was seriously blended with disregard for the claimant’s entitlement to statutory protection, the essential values of human dignity and the rule of law, as well as, the human well-being accorded to the claimants and their families through the right to work.

Accordingly, the court finds that the claimants are entitled to the full compensation of twelve months gross salaries for unfair termination. The 1st claimant is entitled to **Ksh.297,000/=** his last gross salary having been Ksh.24,750/=. The 2nd Respondent is entitled to **Ksh.192,000/=** her last gross salary having been Ksh.16,000/=. In addition, the court finds that to each of the claimant the Respondent shall pay **Ksh.100,000/=** for the high-handed, derogatory, and inhuman unfair termination of the claimants’ contract of employment.

In conclusion, judgment is entered for the claimants against the Respondent for:

- (a) a declaration that the dismissal of the claimants by the Respondent was wrongful and unfair;
- (b) the respondent to pay the 1st claimant Ksh.622,000/= and the 2nd claimant Ksh.459,571/= plus interest at court rates till full payment;
- (c) The Respondent to issue and deliver to the claimants their respective certificates of service; and
- (d) The respondent to pay the costs of the cause.

Signed, dated and delivered in court at Nairobi on the 9th day of November 2012.

**BYRAM ONGAYA
JUDGE**