



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Before: Charles P. Chemmutut, J.,

J.M. Kilonzo & A.O. Wafula, Members.)

CAUSE NO. 53 OF 2006.

KENYA GUARDS & ALLIED WORKERS' UNION.....Claimants.

v.

FACTORY GUARDS CO. LTD.....Respondents.

Issue in Dispute:-

“Wrongful termination of Mr. Joseph M. Mega, No. 5921.” (hereinafter called the grievant).

Parties' version:

“Summary dismissal of Mr. Joseph M. Mega, No.5921.”

Mr. Cosmas O.Orowe, Industrial Relations Officer, for the Claimants (hereinafter called the Union).

Mr. T.K. Kariba Mbabu, Advocate, of M/S. T.K. Kariba Mbabu & Co., Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

This dispute was referred to the Court for consideration and determination by the Minister for Labour on 9th May, 2006, under powers conferred upon, or vested in, him by Section 8 of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act); and his reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14(9)(e) and (f) of the Act, were received by the Court on 23rd May, 2006, and the dispute was listed for mention on 19th June, 2006. On this occasion, Messrs. Orowe and Mbabu, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 6th and 21st July, 2006, and the dispute was fixed for hearing on 3rd August, 2006. Mr. Orowe for the Union submitted his memorandum on 4th July, 2006, and the learned counsel for the Company, Mr. Mbabu, belatedly filed his reply statement thereto on 25th July, 2006, and the dispute was heard as aforesaid, i.e. on 3rd August, 2006.

Admittedly, the grievant was employed by the Company on or about 2nd September, 1997 as a driver at a salary of Kshs.5,036/= and house allowance equivalent to 15% of his basic salary per month. He was summarily dismissed on 28th October, 2003, under Section 17(c) and (g) of the Employment Act, Cap. 226, Laws of Kenya, on the ground that he was involved in a road traffic accident while driving a motor vehicle, Reg. No. KAK 064T, and failed to report the same to the management of the Company or to the police and/or both, contrary to Section 73(3) of the Traffic Act, Cap. 403, Laws of Kenya, which states as follows:-

“73(3) .. The driver shall report the accident at a Police Station or to a Police Officer as soon as reasonably possible and in any case within twenty four (24) hours of the occurrence thereof.”

Section 75 of the said Act proceeds to prescribe the penalties for failure to comply with the foregoing.

At the time of his summary dismissal, the grievant was earning a monthly salary of Kshs.5,908/= and a house allowance of Kshs.1,035/= per month, making a total of Kshs.6,943/= per month.

The Union approached the management of the Company for an amicable settlement of the matter, but no compromise was reached. Consequently, the Union reported a formal trade dispute to the Minister for Labour in accordance with Section 4 of the Act. The Minister accepted the dispute and appointed Ms. Janet Imunya of Industrial Area Labour officer to act as the Investigator; and on the basis of the investigation, the Minister released his findings and recommendation to the parties on 21st February, 2005, wherein he found and recommended as follows:-

FINDINGS.

..... the parties are in agreement on the dates of engagement and the nature of work that Mr. Joseph Mega performed.

..... the facts that let to Mr. Mega’s dismissal were that on 27th October, 2003, he was involved in an accident where driving a company vehicle but failed to report the incident to his supervisors. The incident only came to light when the owner of the damaged vehicle went to claim a refund for repairs he undertook. Mr. Mega had two (2) valid warnings in his file.

..... Mr. Mega has served the Company for six years and had admitted liability to pay for the damage he caused. Though he erred in failing to report the incident, the action taken by the management was rather harsh as a warning and surcharge would have sufficed.

RECOMMENDATION.

..... I recommend that Mr. Mega’s dismissal be reduced to normal termination to enable him collect his final dues.”

The Minister finally appealed to the parties to accept the recommendation as a basis of resolving the dispute. It would appear that the Union accepted the recommendation, but the Company rejected it on the ground that the Minister had no regard for the law governing the reporting of the accident and the risk involved to the Company and its property whereof it was vicariously liable for the actions of its employees, especially the drivers (see App. 2). Hence this dispute for adjudication and determination.

In his written submission, on behalf of the Union, Mr. Orowe conceded that the grievant committed the offence for which he was summarily dismissed from service; but he contended in a nutshell that before any action was taken against him, the grievant ought to have been informed of the alleged misconduct and given an opportunity to defend himself, or to explain the circumstances alleged against him. Therefore, in the absence of such an opportunity, the principles of natural justice were violated and the punishment of summary dismissal of the grievant was unfair and extremely harsh in the circumstances. In any case, the grievant had agreed to and actually paid for the damages which the owner or driver of the other vehicle, Reg. No. KAC 100Q, had incurred (see App. I). Mr. Orowe also pointed out that the Company did not adhere to the warning procedure because the grievant was entitled to a third warning letter before his summary dismissal.

Therefore, the action taken by the Company against him was legally unjustified and untenable; and the Union gave a statement of claim or demand of the terminal dues of the grievant for the consideration and determination by the Court as follows:-

- (i) one month’s pay in lieu of notice Kshs. 6,943/=
- (ii) Unavailed leave. ” 6,943/=
- (iii) Leave traveling allowance ” 850/=

- (iv) 7 years gratuity at Kshs.6943/=x7x18days ” 33,647/=

(v) 12 months' compensation for loss of

employment: Kshs.6943/=x12 " 83,316/=

Grand total Kshs.131,699/=

Accordingly, Mr. Orowe prayed that an award be made in favour of the grievant for Kshs.131,699/=.

The learned counsel for the Company, Mr. Mbabu, resisted the demand on the ground that on 27th October, 2003, the grievant was involved in a road traffic accident while driving motor vehicle, Reg. No. KAK 064T, but failed to report the accident to either the Company or the police as required under the aforementioned Section 73(3) of the Traffic Act, Cap. 403, Laws of Kenya. He pointed out that the details of the accident only came to light when the owner or driver of the other motor vehicle, Reg. No. KAC 100Q, went to demand payment of the repairs from the Company at its premises. On being questioned, the grievant did not initially admit liability; but on further serious interrogation, he owned up and offered to settle the matter with the third party. Consequently, the grievant, who had at the material time two (2) valid warnings, was summarily dismissed from service pursuant to Section 17(c) and (g) of the Employment Act, Cap. 226, Laws of Kenya, or exposing or putting the Company to a grave risk of prosecution and damages.

The learned counsel submitted further that the Company was a security concern which dealt largely with the enforcement of law and order while offering security services, and it would not at any one time condone a commission of an offence by either its employees or officers and would also be failing in its duty and service to the public if it was seen to aid the commission of an offence. He averred that the grievant must have done some repairs to the motor vehicles without authority and whose quality the Company could not ascertain as it did not know what damages the cars had, the repairs undertaken and the amount involved. The learned counsel pointed out that App. I of the Union's submission was obtained to further its case and it did not add value to the events of October and November, 2003. Thus, the question of surcharge and/or acceptance of the same did not arise.

On the demand for payment of terminal dues, the learned counsel contended that the grievant was not entitled to them because they were not provided for in the contract of service and for lack of proof of the same. He urged the Court not to make it difficult for the Company to discipline its own employees and enforce the law of the land, which protects both the Company and the employees equally.

Furthermore, the Company should not be compelled to retain the grievant because he denied it (Company) the opportunity to report the matter to its insurers because he concealed the offence or accident and endangered its properties.

For the foregoing reasons, the learned counsel prayed that the demand be rejected as unsustainable and futile.

There is no dispute that the grievant was summarily dismissed from service under Section 17(c) and (g) of the Employment Act, Cap. 226, Laws of Kenya, for being involved in a road accident and failing to report it either to the Company or the police, pursuant to Section 73 (3) of the Traffic Act, Cap. 403, Laws of Kenya. Section 17(c) and (g) hereinabove state as follows:-

“17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal-

(a)

(b)

(c) if, an employee willfully neglects to perform any work which it was his duty to have performed or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d)

(e)

(f)

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."

Misconduct has not been defined under Section 17 of the Employment Act, Cap. 226, Laws of Kenya. In our view, misconduct means improper conduct (see *Province of East Parkistan v. Muhammad Sajjad Ali Mazumdar, 1962 PLC 528*). What is misconduct will depend upon the circumstances of each case, and Section 17 hereinabove is not exhaustive of the cases of misconduct but enumerative.

In our opinion, the conduct of an employee, which may lead to criminal prosecution of his employer, would amount to misconduct. The admitted position in this case is that the grievant was involved in a road accident but he failed to report it to either the Company or the police as required by Section 73 (3) of the Traffic Act, Cap. 403, Laws of Kenya. The concealment of the offence was, therefore, punishable under Section 75 of the said Act. The concealment of the offence by the grievant, which would have occasioned criminal prosecution of

the management of the Company, amounted to misconduct. We are fortified in this view by the observation of **Lopes, L.J.** in *Pearce v. Foster (1886) 17, Q.B.D. 563*, which runs as under:-

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

Without going into any other considerations, we hold that the concealment of the offence by the grievant, which would have entailed criminal prosecution of the management of the Company, amounted to misconduct. In the circumstances, there was no denial of the principles of natural justice as the grievant had admitted his guilt. The case, therefore, fails and the demand is rejected.

DATED and delivered at Nairobi this 21st day of March, 2007.

Charles P. Chemmutut, MBS.,

JUDGE.

O.A Wafula,

J.M. Kilonzo,

MEMBER.

MEMBER.