



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 79 OF 2015
BETWEEN
PATRICK MUTIE MAKAU.....CLAIMANT
VERSUS
TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kituo Cha Sheria for the Claimant

Kenga & Company Advocates, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 18th February 2015. He avers he was employed by the Respondent Institution, as a Gardener between 1st August 2008 and 18th February 2014. He earned, as of the date he left employment, a salary of Kshs. 23,592 monthly. He was alleged by the Respondent to have stolen 4 Computer Cartridges, the property of his Employer, the Respondent herein. He states the allegation was not established. Fair statutory procedure was not followed in dismissing the Claimant. He prays for the following Orders:-

- a) Declaration that termination was unfair and unlawful.
- b) Reinstatement.
- c) Alternatively, compensation the equivalent of 12 month's salary at Kshs. 233,104.
- d) Certificate of Service to issue.
- e) Costs and any other suitable relief.

2. The Respondent filed a brief Statement of Response on 18th March 2015. The Statement includes a

general denial of Claimant's averment that he was employed by the Respondent. It is generally denied that the Claimant was dismissed by the Respondent for whatever reason. In the alternative and without prejudice to these denials, the Respondent states it hired the Claimant on contractual basis. Termination of his contract was validly and fairly carried out. The Respondent prays for dismissal of the Claim.

3. The Claimant gave evidence, and rested his case, on 6th July 2015. A former Colleague of the Claimant at the Respondent Institution, Albert Juma Omurwa, gave evidence on 6th July 2015. Security Officer Ronce Karue gave evidence for the Respondent on 15th June 2017. Senior Security Supervisor Stephen Kilango Juba, gave evidence on 15th June 2017, and 19th July 2017 when hearing closed. The Claim was last mentioned in Court on 28th September 2017, when Parties confirmed filing of their Closing Submissions.

4. The Claimant told the Court he was employed as a Gardener through the letter of appointment dated 17th July 2007. He was attached to the Electrical Department, as of the year 2013. He delivered mail, and cleaned the Office. He used to open the office at around 6.00 a.m. and leave at around 6.00 p.m.

5. He was alleged to have stolen printer cartridges. He had bought the cartridges. There were 4 cartridges. The Respondent demanded the Claimant produces receipts, to show the cartridges were his, and show the Respondent the shop from where he purchased the cartridges.

6. Security Officer Juba, accompanied the Claimant to the shop where the cartridges were sourced. Juba, the Claimant and the Staff at the shop, confirmed the cartridges were bought by the Claimant from the particular shop.

7. The Claimant received a letter to show cause why disciplinary action should not be taken against him, dated 19th September 2013. He was later on 14th November 2013, summoned to attend disciplinary hearing. He restated his position. He was intimidated by the Panel Chairman, Mbogo.

8. He was issued letter of termination, dated 28th November 2013. This was followed by a letter of summary dismissal, dated 18th February 2014.

9. He did not agree with the position taken by the Respondent that the receipt issued to him to show purchase of the cartridges, was fake. It was not necessary that the Claimant produced an electronic cash register generated receipt.

10. The cartridges were worth Kshs. 4,000. The claimant had worked for 7 years. He did not have warnings or other disciplinary issues.

11. There was no complaint from anyone at the Institution about loss of cartridges. The Claimant did not have the keys to the Vice-Chancellor's Office, where cartridges were normally used.

12. Cross-examined, the Claimant testified he used to buy and sell cartridges. One Ben, from Bombolulu, had made an order with the Claimant for supply of the 4 Cartridges. Ben paid the Claimant on 19th May 2013. The Claimant was to buy the cartridges on 20th May 2013. The Claimant carried the cartridges to the office, expecting to deliver them to his Customer later.

13. Employees were required to declare what they carried in and out of the Institution, at the gate. The Claimant forgot to declare what he was carrying.

14. He placed the cartridges in an envelope belonging to the Respondent. He did not try to conceal

what he was carrying from Juba.

15. The Claimant visited the shop where he bought the cartridges from, in the company of Respondent's Officers. The first time, he visited accompanied by Juba. He went a second time on 27th July 2013, accompanied by other Officers. It is not true that the Shop-Attendant refused to show the receipt book from which the relevant receipt was extracted. It is not true that the date on the receipt, and on the receipt book varied.

16. The Claimant did not call the Shop-Attendant as his Witness during the disciplinary hearing. He was of the view that even if he did so, the Respondent would not lend its ear to such a Witness. Trade Union Representatives John Ongwang' and Kassim Siro, from KUDHEIHA, accompanied the Claimant to the hearing.

17. The Claimant did not recall signing terms of service. He was not aware of clause 22 on dismissal. He was not given the opportunity to answer the allegations against him, during the hearing. His Representatives were not heard. He was an office Assistant, with the opportunity to access Vice-Chancellor's Office. He had visited Vice-Chancellor's Secretary Office. If he had registered the cartridges at the gate, the problem would never have arisen. Redirected, the Claimant told the Court he was not present on hearing of the Appeal he had lodged, after the initial termination decision. He did not see any terms of service on being employed, and signed no terms of service.

18. Albert Juma Omurwa told the Court he was manning Respondent's gate on 21st May 2013. The Claimant was carrying an envelope. Omurwa asked to see the envelope. The Claimant refused to have Omurwa inspect the Claimant's parcel. Omurwa pressed the Claimant, who eventually, caved in.

19. The Claimant was found to be carrying cartridges. He alleged they were his, and he had left the sale receipt at his home. He availed the receipt on 22nd May 2013. He was referred to Juba, Senior Security Supervisor.

20. The Claimant did not register the items at the gate. He did not have any item when he reported to work in the morning. Cross-examined, Omurwa told the Court, he did not, in his Witness Statement filed in Court, state that the Claimant carried nothing when he reported to work that morning. No one had complained at work about missing cartridges. The items were ordinarily used in the Vice-Chancellor's Office. The Claimant worked in the Electrical Engineering Department.

21. Ronce Karue testified the Claimant was found carrying an envelope by Respondent's Guards. He did not have the Envelope in the morning. Inside the envelope were 4 cartridges. He claimed to own the cartridges.

22. He brought receipts to the Respondent, the following morning, claiming he bought the cartridges. The Claimant was requested by the Witness to record a Statement. He did so. Karue forwarded Investigations Report to the Registrar. The Claimant was heard. Karue was called as a Witness. The Claimant was heard in the presence of Trade Union Representatives. Karue accompanied the Claimant to the shop from which he alleged to have bought the cartridges from. Karue examined the receipt book and concluded the receipts presented by the Claimant were prepared in afterthought. The Supplies Department confirmed Respondent had procured the cartridges, which were in use, only in Vice Chancellor's Office. Karue compared the consumption of cartridges for the first, past 2 months. The rate was uniform. He looked at consumption over a period of 2 months to the incident. The rate was inconsistent. Karue concluded the cartridges were the property of the Institution. The Claimant's contract was terminated on valid ground – stealing by servant and handling stolen property.

23. Karue confirmed on cross-examination that the Claimant did not work in Vice-Chancellor's Office. He worked in the Electrical Engineering Department. Karue was not there when the incident occurred. No one saw the Claimant steal. The cartridges did not have unique marks. There was no report of missing cartridges. The minutes of the disciplinary hearing were recorded. They were not availed to the Court. Karue recommended the Claimant is charged with a criminal offence. The Claimant was not charged.

24. Juba corroborated the evidence of his colleagues, testifying that the Claimant was found carrying 4 cartridges out of the workplace. The Claimant was instructed to leave the items at the workplace, and provide receipts as proof of ownership, the following day. He brought receipts. Juba concluded the cartridges did not belong to the Claimant; they belonged to the Respondent. The Claimant was subsequently, taken through a fair disciplinary process, and dismissed.

25. Cross-examined, Juba stated the cartridges were from the Vice-Chancellor's Office. The Claimant worked in the Electrical Department. There were 4 cartridges in an envelope. The Claimant availed receipts, indicating he bought the cartridges. There were reports, that cartridges were being misused, not stolen. No one saw the Claimant steal. Juba was able to know the cartridges belonged to the Institution, because he knew the type of cartridges the University used. The Claimant was not charged with the offence of stealing.

26. Was termination of the Claimant's contract of employment validly and fairly carried out as required under Sections 41, 43 and 45 of the Employment Act" Is he entitled to the remedy of reinstatement, or compensation for unfair termination; terminal benefits; costs; and interest"

The Court Finds:-

27. It is not contested that the Claimant was employed by the Respondent University. The significant dates, employment history, and the terms and conditions of service are not disputed. The Claimant was initially dismissed with effect from 1st December 2013, following a Staff Disciplinary Committee (SDC) meeting, held on 22nd November 2013. It is agreed he was allowed to appeal the decision of the SDC, to the Vice Chancellor, within 21 days of the decision being made. The Claimant lodged an Appeal. The Staff Appeals Committee (SAC) met on 6th February 2014. The SAC upheld the decision to dismiss the Claimant from service. The effective date however, was pushed back by SAC, to 1st November 2013.

28. The Respondent justified its decision on the ground that the Claimant was found in possession of 4 HP Cartridges, the property of the Respondent. The cartridges were packed in an envelope which belonged to the Respondent. The Claimant was found to have these items by Respondent's Guard, Albert Juma, at the main gate, in the evening hours, while leaving the workplace. It was alleged the Claimant did not have the items when he reported for work in the morning. He did not disclose at the gate, that he had brought in the cartridges, which he claimed were his own.

29. Section 44(4) (g), of the Employment Act allows an Employer to summarily dismiss an Employee, 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 Employer's property.

30. Did the Respondent have reasonable and sufficient grounds, in acting against the Claimant"

31. The Claimant carried 4 cartridges to work. He told the Court he was in the business of buying and selling cartridges. On this occasion, he bought the cartridges on order, for one Ben, a resident of Bombolulu. The Claimant told the Court he could not leave the cartridges at home. When asked to avail

receipts, he took Respondent's Security Officers to the shop he allegedly bought the cartridges from. The Officers were not persuaded that the Claimant bought the cartridges, and noticed discrepancies between the receipts and the receipt-book.

32. When asked why he did not declare what he was carrying to work, at the gate, in the morning, the Claimant's evidence was that he forgot to declare the cartridges.

33. This in the view of the Court was the Claimant's undoing. Why would he forget to declare what he was carrying"

34. The Security Officers were categorical that the Claimant carried nothing in the morning. He had nothing to declare. He had the cartridges in the evening. The inference would be he obtained the cartridges from his Employer.

35. Failure to declare by the Claimant, clearly amounted to reasonable and sufficient grounds on the part of the Respondent, to suspect the Claimant of having committed a criminal offence against, or to the substantial detriment of his Employer, or Employer's property.

36. It was not necessary that the Claimant is charged in Court with a criminal offence. What action was taken was at the discretion of the Respondent. The Respondent correctly found the Claimant to have been involved in an employment offence.

37. The Claimant had the opportunity on being heard at the SDC, to call Ben from Bombolulu, and the Shop Attendants alleged to have sold him the cartridges. He did not call these persons as his Witnesses.

38. The Claimant confirmed he was an Office Assistant, with the opportunity of accessing the Vice-Chancellor's Office. He visited the Vice-Chancellor's Secretary.

39. The Court is convinced the decision against the Claimant to dismiss him from employment, was based on valid ground. Cross-examined, he was forthright, conceding that the problem would not have occurred, had he declared he was carrying cartridges at the gate, when he arrived at the workplace in the morning. The decision against him was based on valid ground under Section 43 and 45 of the Employment Act 2007.

40. The Claimant was asked to show cause why disciplinary action should not be taken against him, through a letter from the Respondent, dated 19th September 2013. He gave his explanation.

41. The letter to show cause contained detailed charges. He was specifically told the allegations against him offended the Terms of Service for Support Staff (Grade 1N) Clause 21.4.4. (b)(c) and (d) and the Employment Act 2007, Section 44(4) (g).

42. He was summoned to attend SDC hearing on 22nd November 2013. Invitation was in a letter dated 14th November 2013. The specific charges were restated in the letter of 14th November 2013. The Claimant was advised to go along with his Witnesses if any.

43. He was heard by the SDC on 22nd November 2013. Representatives from his Trade Union were present. He was dismissed after hearing, on 1st December 2013. He was advised on his right to appeal against SDC's decision.

44. He appealed to the SAC through a letter dated 10th December 2013. The Claimant was heard on Appeal, on 6th February 2014. Representatives from Claimant's Trade Union KUDHEIHA also gave submissions on Appeal. Curiously, the Representatives submitted that the Respondent should be aware, that the Respondent's supply chain had loopholes, which needed to be sealed. The Union asked the Respondent to give the Claimant the benefit of doubt, and reinstate him.

45. After the Claimant's Appeal was thrown out, he applied for review on 22nd July 2014, through his then Advocates, D.N. Oruko & Company Advocates. He made extensive submissions on review. The Respondent replied on 18th August 2014, affirming the decision made by SDC and SAC.

46. Procedure met the standards of fairness under the Claimant's Terms of Service, and Sections 41 and 45 of the Employment Act 2007.

47. The Claimant is entitled to the Certificate of Service under Section 51 of the Employment Act.

IT IS ORDERED:-

a) The Respondent shall release to the Claimant his Certificate of Service forthwith.

b) Other prayers are declined.

Dated and delivered at Mombasa this 15th day of December 2017.

James Rika

Judge



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