



Waweru v Majid Al Futtaim Hypermarkets Limited t/a Carrefour (Employment and Labour Relations Petition E158 of 2022) [2024] KEELRC 837 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 837 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E158 OF 2022**

**MN NDUMA, J
APRIL 18, 2024**

BETWEEN

PETER NYINGI WAWERU PETITIONER

AND

**MAJID AL FUTTAIM HYPERMARKETS LIMITED T/A
CARREFOUR RESPONDENT**

JUDGMENT

1. The petitioner adopted the facts set out in the petition and supporting affidavit as his evidence in chief. The petitioner testified that he was employed by the respondent on 8/1/2016 earning a salary of Kshs. 152,170.00 as a section manager and was promoted to position of store manager in charge of Carrefour Westgate Branch earning Kshs. 265,424.00. He worked well until the 18/2/2022 when he was suspended with full pay for 14 days to allow investigations into an alleged breach of respondent's code of ethics. On 22/2/2022 the petitioner was summoned to an investigation meeting when he was made aware of the allegations against him.
2. The petitioner was served with a notice to show cause dated 25/2/2022 on allegations that on 9th October 2021 through M-Pesa number 0720853748, he received Kshs. 50,000.00 from mobile number 0798986064 registered under Mr. Yashi Yahya Mohammed as supplier of goods under Yestesh Company.
3. The petitioner responded to the show cause letter by a letter dated 28/2/2022 in which he reiterated his innocence and stated that the response period given to him was insufficient to allow him prepare a sufficient response and that he was yet to receive the requisite documents including investigations report and HR policy manual and signed copy of the code of ethics.



4. The petitioner attended a disciplinary meeting on 5/3/2022 and at the meeting he was confronted with new evidence in the form of an affidavit sworn to by Corporal Kamwaro on 26/1/2022 citing unfair awarding of tenders to suppliers by staff in an attempt to defraud the respondent.
5. The petitioner received a letter dated 7/3/2022 extending his suspension and was summarily dismissed by a letter dated 10/3/2022. The petitioner wrote a demand letter to the respondent through his advocates which was responded to by the respondent. The petitioner filed suit upon being dissatisfied by the response by the respondent.
6. The petitioner was cross-examined by counsel for the respondent and he said he was told to submit his laptop to one Roseline. The petitioner admitted having received Kshs. 50,000.00 on 9/10/2021. That he had requested for a certified M-Pesa statement but same was issued to him on the date he was terminated on 2/3/2022. The petitioner said that the payment details were gotten from the M-Pesa details of the supplier Yahya Mohamed but not from his phone.
7. The petitioner admitted that Yahya Mohammed was one of the suppliers of the respondent. The petitioner said he did not know if his colleagues had also received money from Yahya.
8. The petitioner admitted he was found guilty by the employer of having received money from Mr. Yahya Mohamed after a disciplinary hearing. The petitioner complained that the respondent accessed his private phone information unlawfully although he agreed that the information was supplied by Mr. Yahya Mohamed.
9. The respondent called RW1, Daniel Okoth Ponde to testify in favour of the respondent. He adopted a witness statement dated 9/10/2022 as his evidence in chief.
10. RW1 said he was a Human Capital Manager of the respondent and knew the petitioner well. RW1 produced exhibits '1' to '27' in support of his evidence in chief.
11. RW1 said the petitioner was on 10/3/2022 summarily dismissed from employment for breach of respondent's code of ethics.
12. RW1 said sometime in December 2021, the respondent had received a hotline report regarding employees who were receiving money from suppliers contrary to policy. The report was confidential by a whistleblower.
13. The respondent conducted investigations on the matter and on 18/1/2022, the Head of Risk and Compliance Mr. David Masinde reported the matter to Parklands Police Station. The aim of the report was to be assisted by police to get information on the transactions between the employees and suppliers, RW1 produced a copy of the OB report dated 14/9/2022.
14. That the police made an application to court in Miscellaneous Application E307 OF 2022, Republic versus Safaricom Kenya Limited with a request to have warrants of search issued to investigate M-Pesa accounts of three suppliers who were suspected of sending money to employees of the respondent. That Corporal Gerald Kamwaro was the investigating officer.
15. That the police later confirmed that the petitioner was one of the employees who had obtained funds from Mr. Yasir Yahya Mohamed a supplier owning Yestesh Company Limited. The information was obtained from M-Pesa account statements of Mr. Yasir Yahya Mohamed being mobile number 0798986064 in which was reflected a payment of Kshs. 50,000.00 to the petitioner by Mr. Mohamed. On 9/10/2021 at 10:16 p.m. with M-Pesa transaction reference PJ991M8UFD.



16. That the respondent did not at any point submit the petitioner's phone number or details to the police to access his M-Pesa statements. The respondent did not breach any privacy of the petitioner as alleged or at all.
17. The petitioner was suspended from duty on 18/2/2022 to pave way for further investigation. RW1 said further that the petitioner was summoned to the head office for an interview with Mr. David Masinde who was handling the investigation. The petitioner when confronted with the payment of Kshs. 50,000.00 details by Mr. Mohamed declined to respond to the allegation and requested to be furnished with the allegations in writing. RW1 produced a copy of the investigation report.
18. On 25/2/2022 the petitioner was issued with a notice to show cause to which he responded by a letter dated 28/2/2022 requesting for further information and documents to help him respond to the notice.
19. On 1/3/2022, the respondent shared M-Pesa details; employment contract; excerpt from *Employment Act*; excerpt from HR policy on discipline, risk and compliance; investigation report dated 23/2/2022 and signed copy of the code of ethics.
20. The petitioner then responded to the notice to show cause by letters dated 28/2/2022; 2/3/2022 and 3/3/2022. The petitioner denied that he had received funding from the supplier.
21. On 3/3/2022, the petitioner was called to a disciplinary hearing which he attended on 5/3/2022. The petitioner chose not to bring an employee representative. At the hearing, the petitioner confirmed mobile number 0720853748 is registered in his name. The petitioner was also shown confidential police investigation report which implicated him of having received Kshs. 50,000.00 from a supplier.
22. On 7/3/2022 the suspension of the petition was extended to allow decision to be taken by the disciplinary panel which exercise was concluded on 10/3/2022. That the respondent was satisfied that the petitioner was guilty of receiving funds from a supplier in order to favour him in allocation of stock supply to the respondent.
23. The petitioner was issued with a letter of summary dismissal in which letter the reason for dismissal was stated and he was informed that he would receive salary for days worked up to 10/3/2022; payment in lieu of leave days not taken up to March 2022; public holidays worked up to March 2022 less any monies owed by the petitioner to the company.
24. That the petitioner's final dues were computed and a cheque was prepared for a sum of Kshs. 153,470.—being payment of final dues to the petitioner through his advocates. The cheque is dated 27/11/2023. The advocates received the cheque on 30/11/2023.
25. Under cross-examination by counsel for the respondent, RW1 explained the nature of request made to the police in order to obtain confidential information from suspected suppliers and not from employees of the respondent.
26. That the information gotten upon issuance of warrants of search by the court led to the M-Pesa statements of Mr. Mohamed in which the payment of Kshs. 50,000.00 to the petitioner was detected. RW1 insisted that no breach of confidentiality or privacy occurred on the part of the respondent in respect of the petitioner. That the adverse evidence was obtained through lawful means by the police on behalf of the respondent.
25. RW1 stated that though the petitioner was not directly involved in tendering and procurements of stock to the shops, the petitioner was in contact with suppliers and had opportunity to influence the supply to the respondent since the petitioner was a manager of a store.



26. The respondent had also filed a replying affidavit to the petitioner sworn to by Roselyn Kyeyu a continuing Human Capital Manager in which the testimony adduced by RW1 is reiterated.

Determination

27. The parties filed written submissions which the court has carefully considered together with the testimony by the petitioner and RW1. The issues for determination are:
- a. Whether the summary dismissal of the petitioner was for a valid reason following a fair procedure..
 - b. Whether the petitioner is entitled to the reliefs sought.
28. In the petition dated 19/8/2022, the petitioner sought the following reliefs:
- a. That an order of certiorari do issue against the respondent that the wrongful dismissal be quashed;
 - b. That declaration do issue against the respondent to rescind the said summary dismissal.
 - c. That an award of damages do issue as against the respondent for wrongful dismissal;
 - d. That all disciplinary proceedings by the respondent as against the petitioner be called and quashed by issuance of Judicial Review orders;
 - e. That a declaration do issue that the petitioner's constitutional rights have been violated.
 - f. That general damages do issue for the constitutional and statutory violation.
 - g. That such other or further orders as the court may deem necessary to enforce the constitution do issue
29. The court in the first instance deems this matter a mundane dispute between an employee and employer for alleged summary dismissal of the employee by the employer for misconduct. Evidence adduced by the respondent in this matter overwhelmingly established that the petitioner being a manager of the Westgate store of the respondent obtained payment of Kshs. 50,000/= from a supply of stock to the respondent stores in breach of the code of ethics of employees of the respondent.
30. A plain analysis of the evidence by the petitioner vis a vis that by the respondent points to the fact that the petitioner admitted to having received the Kshs. 50,000.00 from a supplier. The petitioner did not offer any evidence to explain the clear receipt of money from a supplier an act prohibited in the human resource manual and ethics code of the respondent.
31. The petitioner attempted to hid in legal niceties that the evidence of the impugned transaction between himself and supplier Yahya Mohamed was obtained illegally by the respondent.
32. The court finds that the respondent followed due process by getting police assistance to obtain the M-Pesa statements of the supplier suspected of paying employees to induce favours to them.
33. The police correctly got warrants of search from the court pursuant to which they obtained the M-Pesa statements of the suppliers.
34. The respondent proved on a balance of probability it had a valid reason to summarily dismiss the petitioner from employment in terms of section 43(1) and (2) read with sections 45(1) and (2) of the Employment Act 2007.



35. The respondent also demonstrated that it had followed a fair and lawful procedure before summarily dismissing the petitioner. The respondent therefore complied with the requirements of section 41 of the Employment Act, 2007.
36. The allegations of breach of the Employment Act, Fair Administrative Actions Act No. 4 of 2015; Computer misuse and cybercrime Act No. 5 of 2018; Data protection Act. No. 24 of 2019; Criminal Code Cap 75 Laws of Kenya; National Police Service Act Cap 84 and constitutional rights of the petitioner under Articles 41, 47 and 50 of the Constitution of Kenya 2010 are bare and no iota of evidence has been adduced by the petitioner to prove the alleged breaches and violations.
37. The respondent has to the contrary proved that it had adhered to sections 41, 43, 44 and 45 of the Employment Act in conducting a disciplinary process that culminated in a summary dismissal of the petitioner for gross misconduct.
38. The court in the final analysis finds that the petition lacks merit in its entirety and is dismissed. The reliefs sought by the petitioner are not merited and are denied.
39. This is a normal dispute between an employee and an employer and the court finds that though it was not necessary to file a constitutional petition. That this was indeed abuse of the constitutional process by unduly elevating the dispute in that manner.
40. The court finds that the claimant should pay the costs of the suit to the respondent.

DATED AT NAIROBI THIS 18TH DAY OF APRIL, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Donald Kipkorir for the petitioner

Mr. Makori for the respondent.

Mr. Kemboi, Court Assistant

