



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/207/2017

CITATION: LUKA KORIR VS MOI TEACHING AND REFERRAL HOSPITAL

JUDGMENT

ON 2021-10-22 BEFORE HON. JUSTICE J. N. ABUODHA

1. By a statement of claim filed on 9th September, 2016, the Claimant averred that he was on 26th April, 2010 employed by the respondent as an Accounts Assistant at a monthly salary of Kshs. 51,910. According to him, he served the respondent dutifully and diligently until 12th June, 2013 when the respondent placed him on suspension and later on 16th October, 2013 summarily terminated his service.
2. The Claimant averred that the suspension was irregular and improper as it did not accord with terms of service and contract of employment and further that he was not heard prior to the suspension.
3. The Claimant further averred that the termination was unfair spurious and unlawful because no fair and impartial hearing was accorded, no notice to attend a disciplinary hearing with a fellow member of staff was given and that no opportunity to cross examine witnesses was given among others.
4. The Claimant therefore sought a declaration that his suspension and dismissal was unlawful and unfair. He further sought payment of salary during suspension and reinstatement to employment. In the alternative the Claimant sought compensation for unfair termination of service as set out in paragraph 12 of his statement of claim.
5. The respondent filed a statement of response in which it averred among others that the Claimant was neither dutiful nor diligent and that he willfully neglected to perform his work and the respondent was entitled to suspend him without pay.
6. The respondent further averred that the suspension was necessary to protect the respondents legitimate business interest and further that the internal disciplinary action was necessary to prevent further injury due to the Claimant's fraudulent activities and that the respondent's terms and conditions of service provided for acting directors positions, their powers, internal disciplinary procedures and punishment that can be administered which were adhered to in compliance with article 47 and 50 of the Constitution and Section 41 of the Employment Act while handling Claimant's case.
7. At the hearing the Claimant testified that he used to work for the respondent as an accountant and that on 11th June, 2013, he was called by Internal Audit and met three auditors namely Maiyo, Rotich and Arine. They wanted him to explain the difference between his receipts and the auditors' books i.e. the main cashbook. He told them that he could only explain the system report and his receipt copies and that the cashbook the auditors had was strange to him and that after some argument he was told to go and wait for further communication.
8. On 12th June, 2021 he received a suspension letter requiring him to respond to the allegations against him. He responded on 13th June, 2013 and explained what caused the difference. He indicated that there was an error in the system and the receipts in the main office were being written with different figures.
9. On 16th October, 2013 he was invited for disciplinary hearing. Before the hearing he reminded the panel of what he had written in response to his suspension letter. It was his evidence that he was given a day to reconcile his report with that of internal auditors. Upon reconciliation it was confirmed that there were errors in the system. It was confirmed that the receipts in the strong room/cash office were being written in different accounts and the cashier receiving the revenue as indicated in the original receipts but banking money as indicated in copies of the receipt which was a lesser amount.
10. The report was to be signed by him and the Chief Internal Auditor and to be submitted to the staff disciplinary committee who requested for it. The internal auditor refused to sign the same so he appeared before the disciplinary Committee with an unsigned copy. On 3rd December, 2013 he received a termination letter informing him he had been terminated on 16th October, 2013.

11. According to the Claimant, he was not issued with a notice before termination and that he was never informed to attend the disciplinary hearing with a fellow employee or union official. The Claimant further stated that he felt discriminated over the issue since some of his colleagues who were also affected were reinstated. He further alleged that he was never given a chance to cross-examine witnesses.

12. In cross-examination he stated that he was aware of the investigations and that he was not suspended after the special audit on revenue collection. He denied knowledge of the special audit. The Claimant further stated that he responded to the suspension letter. He denied admitting the allegations against him. He confirmed attending the disciplinary hearing but stated he was not given a chance to ask questions. The Claimant further stated that he signed the audit report and that the errors were approximately Kshs. 1.6 million.

13. The respondent's witness Mr. Felix Kosgei testified in the main that he was a Senior Human Resource Manager at the respondent and that he dealt with employee issues. In this particular case it was found that there were officers who defrauded the respondent. The Claimant was one of them.

He was given a chance to reconcile his receipts but he could not.

14. It was Mr. Kosgei's evidence that the respondent lost Kshs. 1.7 million. The Claimant was issued with a Show Cause letter on 12th June, 2013 and he responded to the same indicating his concurrence that there were shortages. The Claimant was subsequently invited for a disciplinary hearing at which he was cross-examined. At the conclusion of the hearing the panel found the Claimant guilty of fraud and negligence to the detriment of the respondent and dismissed and that he was informed of his right to appeal. On appeal he admitted that he was liable for Kshs. 470,625/=.

15. In cross-examination he stated that the Claimant was suspended in two days. It was further his evidence that the Claimant admitted the shortfall in his response to the Show Cause letter.

16. Mr. Kosgei further stated that the disciplinary Committee had 10 members and that Cheres was a member of the Committee. He produced the system report and that the report was before the Court and further that there was no confirmation of errors in the system.

17. It was his evidence that the termination letter contained grounds for dismissal and the same grounds were referred to in the suspension letter. The Claimant appealed against the termination but the appeal was disallowed.

18. The Claimant herein was accused of among others being involved in suspected corrupt practices and willfully neglecting to perform work which was his duty to perform and failed to do so properly. He was further accused of committing fraudulent acts against or to the substantial detriment of the respondent.

19. He was by a letter dated 12th June, 2013 suspended from work without pay and required to respond to the accusations against him within two days which he did through a letter dated 13th June, 2013 the next day. There is no evidence on record that the Claimant complained about the period of response or asked for more time. Upon response to the suspension letter, the Claimant was invited for a disciplinary hearing on 14th October, 2013 through a letter dated 7th October, 2013. The letter did not advise the Claimant to attend the hearing with a colleague of his choice or shop floor union representative. Upon the conclusion of the hearing a recommendation was made to terminate the Claimant's service which was done through a letter dated 3rd December, 2013. The termination letter stated that considering the mitigating circumstances at the disciplinary hearing on 16th October, 2013 on the offences communicated to the Claimant through the earlier suspension letter, he was found guilty of the charges and a decision made to terminate his service.

20. Counsel for the Claimant, Mr. Kisuya took issue with the fact the Claimant was never accorded an opportunity to be heard prior to his suspension.

21. Section 41 of the Employment Act provides that before terminating the employment of an employee an employer is required to 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 shop floor union representative of his choice present during explanation.

22. This section does not seem to apply to the case of suspension. A suspension from employment is not a termination. It is in essence a temporary separation from day-to-day duties of an employee suspected of committing a disciplinary offence. It is usually handed out to allow for investigations into the allegations against the employee concerned. It is as it were, quite a preliminary stage in the disciplinary process where the evidence in support of the allegations is subject to further investigations and the employee subject to suspension cannot conveniently continue to work when they are going on.

23. To require an employer to hear an employee in such a preliminary stage before handing the suspension does not sound practical. Whereas in some organizations or employment contracts, hearing before suspension may be provided for but is not a mandatory requirement under the Employment Act. An employee proceeding on suspension is usually called upon to react to the preliminary charges which is usually considered vis-a-vis the final investigations report before escalating the issue to a disciplinary hearing.

24. It was common ground that the Claimant was taken through disciplinary hearing which he attended and stated his case. At the conclusion of the hearing the Committee reached a decision that the Claimant's service be terminated. This was done and communicated to him by a letter dated 3rd December, 2013.

25. The termination letter advised the Claimant if dissatisfied, to appeal the decision which he did but the dismissal was up held on appeal.

26. This far the Court is satisfied that the procedural fairness contemplated by section 45 of the Act was adhered to.

27. Counsel for the Claimant however complained that the letter inviting the Claimant to the disciplinary hearing did not inform him of his right to be accompanied to the hearing by a colleague of his choice or union representative.
28. Section 41 of the Employment provides for the entitlement on the part of the employee to be present with a colleague or shop floor union representative when the employer is explaining to the employee in a language that employee understands the reason for which the employer is considering the termination.
29. A plain and holistic reading of section 41 yields a meaning that the employee contemplated in the section must be a lower cadre employee who may not understand the reason for which his or her service is being considered for termination . It does not make it mandatory in every case where a termination is contemplated. It follows therefore that omission to advise an employee how is at senior level or able to understand and or effectively participate in the disciplinary process would vitiate the whole process.
30. Having observed as above, the issue is whether the allegations against the Claimant were proved to the required threshold to justify the termination of his service.
31. The Claimant was accused embezzling and or failing to account for respondents' funds that came into his possession by virtue of his work. It was his evidence that when the issue came up, he was called upon to Show Cause and or explain the discrepancies, which he did. He further informed the Court that he was referred to sit down with the auditors and reconcile his figures. According to the Claimant, there were system errors which was responsible for the discrepancies. According to the respondent there were no system errors.
32. The Claimant in the undated letter of appeal admitted that he could not trace from his previous cash point, receipts amounting to Kshs. 470,625/= yet they were indicated in the daily revenue report as accounted for by the revenue in-charge. The Claimant did not elaborate why he could not trace the receipts in issue or in whose custody they could have been.
33. It is important to note at this point that the standard of proof in employment disciplinary cases is a lot lower than the standard of proof in civil cases. That is to say an employee facing disciplinary hearing is not the same as a person undertaking litigations before a civil court or undergoing criminal prosecution. The rigours of a trial process therefore do not have any place in a disciplinary hearing which is purely a management function.
34. Further one of the foundational principles of employment relationship is trust and once the same is tainted the relationship cannot continue smoothly.
35. The respondent herein had before it reasonable evidence which showed that it was more probable than not that the Claimant was involved in the loss of funds under investigations. It undertook forensic audit which confirmed the same. The Claimant was involved throughout the process. He conceded that some of the funds that came to his possession could not be accounted for by him but not the entire amount he was accused of not accounting for. The respondent felt he was either not truthful or was negligent and reached the decision to terminate his service.
36. The test usually in termination cases is whether a reasonable employer faced with the evidence and circumstances would consider dismissal as the most appropriate disciplinary measure to mete out. If the answer be in the affirmative this Court will not second guess the discretion of an employer to dismiss by reevaluating the evidence before the employer to see if it could have reached a different conclusion.
37. The court will only reconsider and re-evaluate the evidence and the material considered by the employer in dismissing an employee where it is ably demonstrated that such evidence or material was so insufficient that no reasonable employer could dismiss for it.
38. In this particular case the court is satisfied that the material and the accusations against the Claimant justified his dismissal.
39. The claim is therefore found without merit and is hereby dismissed with costs.
40. It is so ordered.

DATED AT ELDORET THIS 7TH DAY OF JANUARY, 2022

GIVEN under my hand and Seal of this Court on 2022-01-07 21:00:52

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)