



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 8 OF 2020

ABDIAZIZ MOHAMED ALI.....CLAIMANT

- VERSUS -

GRAIN INDUSTRIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 10.02.2020 through Waithera Ngigi & Company Advocates. The respondent employed the claimant on a five-year contract from 02.01.2018 to end about 02.01.2023. He was to hold position of General Logistics Supervisor and the designation changed to Administration and Compliance Officer. He was summarily dismissed by the letter dated 24.09.2019 at a time he was paid a gross salary of Kshs. 80,000.00. he alleges he was dismissed on the basis that he had wrongly and knowingly obtained Kshs. 5, 000.00 through extortion from a customer namely Phyllis and the allegation was false. The claimant's case is that the dismissal was unfair, premature, malicious, unprocedural, wrongful, unlawful and unjustified upon the grounds that he did not solicit, extort and receive Kshs. 5, 000.00 from a customer as was alleged; there was no evidence that he solicited, received or extorted the alleged money from a customer; there was no misconduct proved against the claimant and there was no valid reason or justification for the dismissal; the claimant was victimized on account of alleged misconduct committed by his brother Abubakar Mohamed Ali and who had been dismissed around the same time; and sufficient time was not allowed for the claimant to respond to the letter to show cause.

The claimant claimed notice pay Kshs. 80, 000.00 and compensation for unlawful termination measured as pay for unexpired tenure October 2019 to January 2023 Kshs. 3, 120, 000.00 making a sum of Kshs. 3, 200, 000.00.

The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was wrongful, unfair, unlawful, unprocedural and irregular.
- b. Payment of Kshs. 3, 200, 000.00.
- c. In alternative to (b) above, 12 months' salaries compensation for the wrongful, unfair, unlawful, unprocedural and irregular termination
- d. A certificate of service to issue.
- e. Costs of the suit.
- f. Any other remedy that the Honourable Court may deem fit to grant.
- g. Costs and interest at Court rates.

The respondent filed the on 08.07.2020 the response to the memorandum of claim through Balala & Abed Advocates. The respondent admitted employing the claimant as pleaded for the claimant. The respondent averred that the claimant was summarily dismissed on account of abuse of office and loss of trust, and, the procedure was fair because claimant was given a hearing per the Employment Act, 2007. The respondent prayed that the suit be dismissed with costs.

The claimant testified to support his case and the respondent's witness (RW) was Bakari Bwetta, the Human Resource Manager. Final submissions were filed for the parties. The Court has considered the material on record and makes findings as follows.

To answer the **1st issue**, the Court returns that as pleaded for the claimant and admitted for the respondent, parties were in a contract of service.

To answer the **2nd issue**, the contract of service was terminated by the letter of summary dismissal dated 24.09.2019.

To answer the **3rd issue**, the evidence is that the claimant was accorded due process of a notice and hearing as per section 41 of the Employment Act, 2007. The letter to show cause was dated 16.09.2019. It was alleged that by virtue of his position, the claimant had received Kshs. 5, 000.00 as a reward from Madam Phillis who was one of the respondent's clients and but the claimant had failed to declare it to the office and converted it into his personal use, contrary to company policy which was within the claimant's knowledge. The claimant was to respond by 17.09.2019 at 0500 hours. The claimant responded by his letter dated 17.09.2019. The claimant recalled the meeting of 16.09.2019 where the issue of receiving a reward of Kshs. 5,000.00 was discussed at which he explained that Phillis had not yet honoured her promise to give the reward and the claimant was still demanding from her to honour it. He further explained as follows. Phillis had been one of the bidders for yellow maize the respondent put up for sale. She was not successful because the highest bidder gave 17/= per unit. Later the claimant met the highest bidder one Kalume outside the respondent's premises begging for assistance to return the yellow maize to respondent's premises because his client had declined to receive the consignment and further said that he was willing to go low to recover his cost price because he was already in losses. At that point the claimant recalled that Phillis had been unsuccessful bidder but who had begged for an opportunity for yellow maize if it came up. Thus, the claimant linked up the highest bidder to the said Phillis. In that process the respondent did not suffer loss and Phillis in view of the connection and joy and happiness told the claimant that she would sort him out but so far he had not received the reward. He had apologised to the team at the previous meeting that if linking up two brokers and accepting the verbal reward which had not even been received was wrong, the same would not happen again.

By the letter dated 20.09.2019 he was invited to a disciplinary hearing on 20.09.2019 fixed for 23.09.2019 at 3.30pm and he was advised he could be accompanied by a colleague or any other person he trusted and who will actively participate in the proceedings. The disciplinary hearing took place and minutes are exhibited by the respondent. The allegation was that the claimant had received Kshs.5, 000.00 in bribery. The minutes show that the claimant retracted his response to the letter to show cause, said he had authority to use money in the manner he wished, he did not show remorse whatsoever, and he became hostile and aggressive. The committee unanimously recommended dismissal for gross misconduct and irreconcilable differences. The letter of summary dismissal referred to the reason as, **"...summarily dismiss you from service for abuse of office and loss of trust/confidence effective 1st November 2019."**

The **3rd issue** is whether the reason for termination was valid, genuine, fair and justifiable.

As submitted for the claimant, under section 45(2) of the Employment Act, 2007, an employer must prove that the reason for termination is valid and a reason for termination is fair if it related to the employee's conduct, capacity or compatibility; or is based on the operational requirements of the employer.

The Court has considered the contract of service between the parties. Clause 11 on confidentiality provides as follows, **"Confidentiality: During your employment other than in the proper performance of your duties for the Company and upon termination of your employment, you shall not directly or indirectly use or disclose to third parties, any of the secrets and confidential information of the Company or any of its associated or affiliated company or companies. Confidential information shall extend to all information of confidential nature concerning the organisation, business, finances, databases, research projects, products, processes, customers or clients and/or affairs of the Company or any associated of affiliated company or companies whether in hard copy or electronic"**

The evidence is clear. While the claimant may not have received the gift of Kshs. 5,000.00, he looked forward to it and in his response he stated that he was still making demands to Phillis in that regard. The Court finds that more important, the claimant used the confidential information he had acquired in his official capacity to linkup the two brokers. The Court finds that the action amounted to a direct use and disclosure to third parties which was clearly prohibited under clause 11 of the contract of service. The Court finds that the reason for termination thus, abuse of office and loss of trust or confidence, was precisely what the claimant had done. The Court finds that as submitted for the respondent, the reason was fair because, it related to the claimant's conduct and compatibility and, it related to the respondent's operational requirements per clause 11 of the contract of service. The Court returns that the termination was not unfair in substance or merits because the reason was fair per section 45 of the Act and it was valid as existing as at the time of termination. It was submitted for the claimant in a lengthy manner that the claimant was acting after working hours and while physically outside the respondent's office. However, the Court finds that clause 11 on confidentiality is designed like an omnipresent provision flying beyond physical employer's premises, working hours and tenure of contract. It is not a hardware confined in spaces and time but it is in the nature of free-moving and freely portable software or spirit that is ever present – even long after the termination of the contract of service. Thus it was immaterial that the claimant divulged the formal and secret information to Phillis and the troubled highest bidder outside the respondent's premises and after the agreed working hours.

Under section 44(1) of the Act, the respondent was entitled to dismiss with no or lesser notice than the contractual notice where summary dismissal is involved. The claimant is entitled to a certificate of service under section 51 of the Act and in that consideration, each party to bear own costs of the suit.

In conclusion, the suit is hereby determined with orders:

1. The respondent to deliver the certificate of service by 15.03.2022.
2. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022

BYRAM ONGAYA

JUDGE