



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1317 OF 2015

BETWEEN

DENNIS MUMINA KAKUNDI.....CLAIMANT

VERSUS

KENGEN [K] LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

M/S Kamende D.C & Company Advocates for the Claimant

Modi & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 31st July 2015.
2. He states, he was employed by the Respondent as an Analytical Chemistry Technician, in the year 2011.
3. The Respondent unfairly and unlawfully terminated his contract, on 1st August 2014.
4. The Respondent issued him a letter to show cause why he should not face disciplinary action, which is dated 27th March 2014. It was alleged that the Claimant had submitted to the Respondent 5 different travel claims.
5. On 16th March 2014, the Claimant was invited to attend disciplinary hearing. He attended hearing but was not heard, or given a chance to explain himself before the Disciplinary Committee.
6. He was dismissed with effect from 1st August 2014. He appealed on 6th August 2014. He was invited for appeal hearing on 5th September 2014, but up to the date of coming to Court, had not been advised on the outcome of the Appeal.
7. The Claimant prays for Judgment against the Respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Reinstatement.
 - c. Accrued salary from 1st August 2014 until the date of reinstatement.

Alternatively

- d. 12 months' salary in compensation for unfair termination at Kshs. 1,504,339.

- e. 1-month salary in lieu of notice at Kshs. 125,361.
- f. Accrued leave days [?]
- g. Service pay at Kshs. 125,361.
- h. N.H.I.F deducted but not remitted at Kshs. 3,840.
- i. Pension contributions at Kshs. 142,464.
- j. House allowance at Kshs. 360,000.
- k. Transport allowance at Kshs. 312,000.

Total...Kshs. 2,573,366.

- l. Interest.
- m. Costs.
- n. Certificate of Service to issue.
- o. Any other suitable relief.

8. The Respondent filed its Statement of Response on 8th September 2015. It is conceded that the Claimant was employed by the Respondent. The Claimant unlawfully obtained from the Respondent travel claims, in the sum of Kshs. 55,000, on diverse dates between 26th June 2015 and 15th August 2015. He was given a chance to explain himself. He did not do so satisfactorily. His contract was terminated fairly and lawfully. He was paid salary for July 2014, 1-month salary in lieu of notice, and 34 accrued annual leave days, subject to clearance. He was offered his dues under the Staff Retirement Benefits Scheme. His Certificate of Service was prepared but the Claimant did not collect it. The Respondent prays the Court to dismiss the Claim with costs.

9. The Claimant gave evidence and rested his case on 19th March 2021. The Respondent's Chief Human Resource Officer, Martin Makallah, gave evidence for the Respondent on 16th July 2021 when the hearing closed.

10. The Claimant adopted his Statements of Claim and Witness, in his evidence-in-chief. He also exhibited 6 documents on record. He restated his employment history with the Respondent, the terms and conditions of employment, and the circumstances surrounding termination of his contract.

11. He received the letter to show cause, and was required to respond the same day. He did so. He admitted he received the travel claims. He followed the laid down procedure in making claims.

12. He was given a short notice to appear for disciplinary hearing. The notice is dated 16th May 2014. He was to be heard on 22nd May 2014. He appeared and gave his explanation. It was recommended that the Claimant is dismissed.

13. Paragraph 18 of Statement of Response alleges the irregular claims amounted to Kshs. 25,000. It was alleged the Claimant lodged claims twice. He used to carry out field work. The number of trips were determined by his Supervisor. The claims were made on diverse occasions. The Supervisor verified claims. They were then forwarded to the Claims Officer and Finance Manager. The latter would verify and forward to Accounts Section for payment.

14. At pages 2 and 4 of the Respondent's documents, there was a claim for Kshs. 8,000. They relate to different dates and projects within the same locality. It was normal for the computer to show what had been done earlier. Verification Officers would have noticed, if there was double payment.

15. There was a claim for Kshs. 9,000 raised on 15th July 2013. There was another for a similar amount, dated 3rd July 2013. These are not the same claims.

16. It is alleged at page 11 of the Respondent's documents that the Claimant collected money. He did not. The signature and service numbers shown there are not his. The Claimant did not at any time, intend to defraud the Respondent. There was a verification process in place.

17. He received the letter of dismissal on 31st July 2014. He was not paid terminal dues as promised in the letter. He appealed the decision. There was no response from the Respondent. He did not receive the letter exhibited by the Respondent, stating that the Appeal was rejected.

18. Human Resource Manual has offences warranting summary dismissal. The Claimant was not charged with a criminal offence. He did not intend to defraud the Respondent. He made genuine, not double claims.

19. Cross-examined, the Claimant told the Court that he received the letter to show cause, with respect to 5 claims. All claims were genuine. Apart from the claim for Kshs. 15,000, the Claimant raised the other claims.

20. He raised the claims on 15th July 2013 and 3rd July 2013. He received money on both occasions. The money was lunch allowance. It was paid for lunch, during field days. It was paid for each day. It could not be paid twice.

21. The request for 15th July 2013, totalled Kshs. 9,000. It was for lunch, with regard to 21st June 2013, 24th June 2013, 25th June 2013, 27th June 2013, 27th June 2013, 29th June 2013 and 30th June 2013.

22. The request for 3rd July 2013, was for Kshs. 9,000. It related to lunch for 21st June 2013, 24th June 2013, 26th June 2013, 27th June 2013, 29th June 2013, and 30th June 2013.

23. The dates are replicated.

24. The Claimant raised another claim for Kshs. 8,000 on 19th June 2013. It related to lunch for 17th May 2013, 22nd May 2013, 23rd May 2013, 24th May 2013, 28th May 2013, 29th May 2013 and 30th May 2013.

25. On 12th June 2013, he made another claim. The claim was for lunch, with regard to 17th May 2013, 20th May 2013, 22nd May 2013, 29th May 2013 and 30th May 2013.

26. The Claimant confirmed certain dates were replicated.

27. These claims were in issue in the letter to show cause.

28. The Claimant raised claim for Kshs. 15,000, at page 11 of Respondent's documents. It was possible for an Employee to raise a claim for another, through ICT personnel. The dates could be double entries, but did not show there were double payments.

29. In his reply to the letter to show cause, the Claimant states that he collected the money without second thought. He states it was his first offence. He states he remorseful and asked for forgiveness. He repeated these statements on Appeal, pleading that he was a first-time Offender.

30. Redirected, the Claimant told the Court that he was remorseful because he had not been supplied all documents by the Respondent, at the time he was called to the disciplinary hearing.

31. Makallah confirmed that the Claimant lodged double claims for lunch allowances as particularized in his cross-examination. The Claimant was taken through a disciplinary process. He appealed against dismissal. His Appeal was dismissed. He was informed about the outcome. He did not clear with the Respondent, to access terminal benefits. He was entitled to notice pay, annual leave pay, and pension. It is not the fault of the Respondent that the Claimant has not cleared, to receive his benefits.

32. Cross-examined, Makallah told the Court it was possible for an Employee to work outfield on successive days. One could claim differently using the same centre. Audit disclosed abuse. The Respondent only picked 5 instances initially, when the Claimant made double claims. Others were uncovered later. The total double claims amounted to Kshs. 55,000. The Committee recommended recovery of Kshs. 32,000.

33. The Claimant was given 72 hours to respond to the letter to show cause. He was in the field. Time was sufficient to respond. He did not seek more time. The consequences of his admission were grave. The letter of dismissal did not expressly mention a right of appeal. The Respondent did not instigate criminal charges. Termination was fair and lawful. On redirection, Makallah restated that there were double claims, made by the Claimant.

34. The issues are: whether termination was in accordance with fair procedure under Section 41 and 45 of the Employment Act; whether it was substantively fair under Section 43 and 45 of the Employment Act; and, whether the Claimant merits the reliefs sought.

The Court Finds: -

35. The employment history of the Claimant by the Respondent, the terms and conditions of his service, and the fact that he was dismissed by the Respondent on 1st August 2014, are not contested facts.

36. He was suspected of making 5 false travel claims. He was issued a letter to show cause dated 27th March 2014 with details of the false claims. He was required to respond within 3 days.

37. The Court does not find fault, with the period of 72 days given to the Claimant. He did not protest in his response that notice was short. He did not ask for more time.

38. He instead replied on 4th April 2014, within the specified period, admitting to everything. He states: ‘ I wish to acknowledge that I made claims mentioned and I collected the money from the finance office, without having a second thought. I hereby write to express my remorsefulness and humbly request the Management not to take stern measures against my actions, being a first offence...’

39. He was invited to attend disciplinary hearing. The notice is dated 23rd May 2014. Hearing was on 28th May 2014. The notice was for 5 days. This again cannot be viewed as a short notice, particularly for an Employee who had already admitted the offences over which he was going to be heard.

40. He was heard. There is nothing on record to suggest that his right to be heard fairly, by the Disciplinary Committee was compromised. He again conceded the offences before the Disciplinary Committee.

41. He appealed against the decision to dismiss him, through a letter dated 6th August 2014. He was heard on Appeal, on the 5th September 2014. There is a delivery book showing he received the letter communicating dismissal of the Appeal, on 3rd October 2014 at 3.30 p.m.

42. The Court is satisfied that procedure was fair, in accordance with Section 41 and 45 of the Employment Act.

43. Termination was fair under Section 43 and 45 of the Employment Act as a well. The offences were admitted by the Claimant at every turn, from the letter to show cause. It beggars belief that the Claimant would turn around and attempt justification of the double claims. There was serial concession of wrongdoing. The Claimant made unequivocal concession. Even if he did not, the evidence from the Respondent on the double payments was conclusive. The Respondent established valid reason, justifying termination, under Section 43 and 45 of the Employment Act.

44. The Claim has no merit. The Claimant ought to have cleared with the Respondent and received his terminal benefits way back in 2015.

IT IS ORDERED: -

a. The Claim is declined.

b. Costs to the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10TH DAY OF FEBRUARY 2022.

JAMES RIKA

JUDGE