



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO. 20 OF 2019

MICHAEL THUO.....CLAIMANT

VERSUS

SAFARICOM PLC.....RESPONDENT

JUDGEMENT

1. The Claimant filed this case vide an amended claim dated 19th December, 2019, through the firm of Gordon Ogola, Kipkoech and company Advocates seeking for the following reliefs; -

- a) **A declaration that his dismissal and or the termination of his employment was wrongful, unfair, unconstitutional and unlawful hence null and void ab initio.**
- b) **An order of reinstatement or re-engagement of the Claimant to employment with back pay and with no loss of seniority, privileges, salaries, allowances and benefits**
- c) **In the alternative to (b) above, back pay from the date of the termination up to the date of judgement and compensation for unlawful and unfair termination equivalent to his 12 months' gross salary calculated as Kshs 318,784.22 x 12= Kshs. 3,825,410.64.**
- d) **In the alternative to 9b) above and in addition to (c) above, one-month salary pay in lieu of Notice.**
- e) **An order directing the Respondent to remit all the statutory deductions on the Claimant's salaries to the respective accounts for the duration he was unfairly terminated.**
- f) **An Order for compensation by way of exemplary damages to the Claimant for unfair termination.**
- g) **Costs of claim**
- h) **Interest at Court rate on all the payments above if awarded, as from the date of filing of this claim until payment in full.**
- i) **Any other or further relief that the Court may deem fit to grant in the interest of justice.**

2. The Claimant's case is that he was employed by the Respondent on the 28th July, 2007 as a retail centre Agent stationed in Nakuru Retail centre, with a starting gross salary of Kshs 35,000. He later rose through the ranks to become the Respondent's Area sales manager at a gross salary of Kshs 318,784.22 and then transferred to Eldoret East.

3. Sometimes in the year 2016, while the Claimant was performing his duties as the Area sales manager based at Eldoret East in the Rift Valley Region, he received 1476 devices which were meant for onward transmission to the Respondent's agents. Out of the 1476 devices, 576 devices did not have order number or pick list, nevertheless that all the device were delivered to the agents having been properly serialized, distributed, activated and monitored. Therefore, that all the device distribution adhered to the Respondent's requirement and were all accounted for.

4. It is stated that sometimes in January, 2018, the Respondent's internal audit department sought for the Claimant to account for 47 devices which the Claimant explained on 12th February, 2018 by presenting a detailed list and account of all the 1476 devices handed over to him. On 8th May, 2018 the Claimant received another communication now from the Respondent's Ethics and compliance department through his email requiring him to account for 410 devices which he responded to as well.

5. About two weeks later on the 23rd May, 2018, the Claimant received summons for disciplinary hearing schedule on 30th May, 2018 on allegation that he had not accounted for 380 devices which allegation did not have sufficient particulars for the Claimant to properly Respondent. Nonetheless the Claimant attended the disciplinary hearing as scheduled on 30th May, 2018 and gave an account of all the devices save for 11 devices which the Claimant sought for more time to give a detailed report on. He then submitted a report on the 11 devices the next day on 31st May, 2018.

6. On 28th June, 2018 while the Claimant was discharging his duties of an area sales manager, he received a letter of termination on account that the Claimant had failed to account for 200 devices. He then appealed the decision but the Respondent maintained its decision and instead treated the appeal as fresh hearing without mention of the evidence that had been table before it in the disciplinary hearing.

7. The Claimant took issue with the way the Respondent varied the number of devices to be accounted for every time. He stated that during disciplinary hearing he was summoned for allegedly failing to account for 380 devices only to be terminated for failing to account for 200 devices.

8. The Claimant contends that the termination was invalid since the reason for termination was not proper and for lack of notice of termination as provided for under section 35(1)(c) of the Employment Act. He also avers that upon termination, he was not paid in lieu of notice as contemplated under section 36 of the Employment Act.

9. It was stated that the Respondent violated the Claimant's right when it demanded the Claimant to account for all the 1476 devices afresh and dismissed the appeal without giving reason for the dismissal thereafter.

10. The Claimant therefore avers that the termination of his employment was tainted with malice and prayed to be compensated exemplary damages for the injustice visited upon him. Further that due to the Respondent's malicious termination the Claimant was subjected to public ridicule where he was accused of colluding with cartels to rob the Respondent's customers, in an article written by Francis Muli, published in Kahawa Tungu.

11. The Respondent entered appearance and filed an Amended response to claim on the 9th March, 2020 admitting to employing the Claimant on the dates indicated in the amended claim and on the salary indicated in the claim.

12. The Respondent however avers that it did not terminate the Claimant unfairly as alleged rather that the reason for termination was provided for and the Claimant was duly subjected to due disciplinary hearing before termination.

13. It is stated that the Claimant was tasked with the following responsibilities; collect and subsequent oversight over the delivery and activation of the devices, monitoring and reporting of the on-ground usage statistics by the agents and to follow up on the lost and faulty devices.

14. It is the Respondent's case that, it had put in place elaborate measures to aid the Claimant in discharging his duties which mechanism include, inventory management, documentation in the form of pick lists and indemnity forms as evidence of delivery and the procedure for replacement of devices and reconciliation.

15. After delivering the said devices to the Claimant for onward transmission, it was noted by the Respondent that there was slow uptake of the electronic subscribers' registration leading to an investigation into the circumstances. It was then discovered that there were several mishaps pointing out to the fact that subscribers' registration process was not properly carried out as planned. The issues that arose include; devices being used on competitor's network for subscriber registration activities, devices being mapped on individual customers instead of the agents and dealers, which issues boiled down to a failure on the part of the Claimant.

16. The Respondent stated that the issues raised above required the Claimant to account for the devices and the personnel who were issued with the said devices which he failed leading to the Respondent's loss of about Kshs. 1.2 Million.

17. The Respondent maintained that it gave the Claimant an opportunity to exonerate himself but he failed. Further that the appeal was considered on merit and declined.

18. Finally, it was stated that the termination was with reason and done procedurally therefore fair in the circumstances.

Hearing.

19. The Claimant testified as CW-1 and adopted his witness statement dated 29.1.2019 and then produced documents of even date as his exhibits. He testified that he was terminated for alleged negligence and failing to account for 380 devices when the record indicates that he accounted for all the 1476 devices entrusted upon him on the 12.2.2018. He stated that the Respondent did not conduct the appeal properly and instead considered it as fresh hearing.

20. Upon cross-examination, the witness testified that he had a clear record of employment throughout his employment until the 2018 when he was terminated. He stated that before 2016 the Respondent could regulate its devices by use of USSD Code, however the code had issues and the communication Authority rolled out a project to regulate all subscribers which was to use an App. To meet the requirements of communication Authority of regulating all subscriber, the Respondent bought devices to be distributed to dealers and agents. He further testified that his role throughout the process was to ensure no loss of devices occurred as he was the one in charge of distributing the devices to the Agents and dealers. He avers that before distribution he was tasked with activating the devices and if there were any fault devices he was to collect them and notify the Respondent. He however contends that the Respondent had not put in adequate measure to ensure he performs his duties adequately especially monitoring of the devices distributed.

21. Upon further cross examination, CW-1 testified that he accounted for all the devices and provided indemnity form, however he maintains that the measures put in place by the Respondent were inadequate to properly monitor the devices. He stated that the Respondent complained on the low uptake of the use and the use of the devices by the Respondent's competitor which was occasioned by the fact that the devices were not lockable as such prone to misuse by agents and customers. He stated that he was summoned to a disciplinary hearing where he participated in and was later dismissed and signed the dismissal letter. He maintained that he accounted for all devices including the 11 devices he sought time during hearing to account for. He then testified that he was terminated for allegedly failing to account for unknown number of devices which were indicated to be worth 1.2 Million.

22. The Respondent on the other hand called two witnesses, **Immanuel Ndibo** as RW-1 and **Odhiambo Ooko** as RW-1.

23. RW-1, the Respondent's compliance officer adopted his witness statement dated 13.6.2019 and upon cross-examination, he testified there is no report made to any police on the alleged fraud or theft by the Claimant. He then stated that at the time of the Claimant's summary dismissal, he had not accounted for 380 devices and upon seeking more time to account he manage to account for a further 180 devices leaving 200 devices unaccounted for.

24. RW-2, is the Respondent, senior manager on labour relations matters. He also adopted his witness statement dated 3.6.2019 and upon cross examination, he testified that he sat in the disciplinary committee that recommended the termination of the Claimant. He stated that it was discovered that the Claimant did not distribute 200 devices to the Respondent's customers as instructed. He stated that the Claimant was empowered to control how the said devices were used and he could even prevent a device from being used by the competitor's network. He then maintained that the termination was as a result of failure to account for 200 devices.

Claimant's Submissions.

25. The Claimant submitted that the termination of his services was not founded on any justifiable reason, it was argued that the Respondent dismissed the Claimant from employment on allegation that there were 200 devices which had not been accounted for but failed to demonstrate by tendering evidence in form of IMIE numbers of the devices not accounted for. It was then argued that their failure to tender evidence on the IMIE numbers of the unaccounted items made their reason for termination untenable.

26. The Claimant further submitted that the alleged failure by the Claimant to Account for the devices was tantamount to be accused of negligence which the Respondent was tasked to proving the failure on the part of the Claimant to do that which he was required to do. In this they defined gross negligence as was held in **Jonah Mwaura Ngugi V Safaricom Plc [2019] eKlr** where the act of *gross negligence* is defined in the case of **Transnet Ltd t/a Portnet versus Owners of the MV Stella Tingas and Another 2003 (2) SA 473 (SCA)**;

“.. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross.... It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care ...”

27. Accordingly, it was argued that the Respondent did not demonstrate any failure by the Claimant in the process that led to purported loss of the devices, therefore the termination on the basis of negligence is not justified.

28. Additionally, it was submitted that as per the Respondent's manual the Area Sales Managers were trained on app deployment and activation of devices and there is no mention or training on monitoring of the devices. Variably, that the Respondent had capacity of monitoring devices and blocking them if used by any other network, and the least they ought to have done is table evidence of their action in monitoring and blocking devices and also to explain how the Claimant failed in the said process. In support of their case, the Claimant cited the case of **Charles Muema Munuve & another v Safaricom PLC [2021] eKLR** where the Court held that :-

“Investigator Ndibo, was candid. He told the Court that the Claimants did not have the capacity to monitor use of the devices. The Respondent had that capacity. It could block the devices. The 2nd Claimant told the Court that the Dealers and Agents are registered with the Respondent. The Respondent could easily enquire about the devices from their recipients. Why would the Respondent insist that Employees it had moved, without requiring them to provide handover reports at the time they were moved, monitor and account for devices no longer under the Employees control? Ndibo did not even have a list of devices, assigned to the Claimants in 2017. The list he had, would be with respect to devices issued in 2016, the piloting phase. Was it reasonable to call on the Claimants to account in 2018? Where is the list for 2017?”

29. On whether the termination was procedurally fair, it was submitted that, the Respondent indeed invited the Claimant to disciplinary hearing however that the devices that the Claimant was tasked with accounting for fluctuated from 47, to 410 to 380 to 11 and upon termination to 200. It was further submitted that the investigation report that informed the disciplinary hearing was not been served upon the Claimant to enable him prepare on accounting for the said device, it was thus argued that the failure by the Respondent made it difficult for the Claimant to prepare adequately for the disciplinary hearing. It was then submitted that the procedure did not meet the threshold provide for under section 41 of the Employment Act. In support of its case the Claimant cited the case of Simon **Muguku Gichigi V Taifa Sacco Society Limited [2012] eKlr**.

30. In conclusion, the Claimant prayed to be reinstated back to employment and relied on the case of **Bamburi Cement Limited V William**

Kilonzi [2016] eklr and in the alternative this Court grant the other prayers as sought in the Amended claim.

Respondent's Submissions.

31. The Respondent on the hand submitted on whether the termination was substantively and procedurally fair and whether the Claimant is entitled to the reliefs sought.

32. With regard to the first issue, the Respondent submitted that that the Claimant was given 1476 device to be distributed to its customers however, while carrying out his duties he failed to properly document the distribution of the devices leading to the loss of the Respondent's 200 devices which costed it Kshs.1,210,120/=. The Respondent then submitted that it blamed the Claimant for the loss since he was in charge of the said devices, him being the Area Sales Manager and had power to track and monitor the said devices and was always in touch with the Respondent when he needed any assistance. It was argued that the Claimant never raised any concerns in the monitoring process therefore he is to blame for the loss. The Respondent thus maintain that it had all reasons to terminate the services of the Claimant and relied on the case of **Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others [2019] eklr** where the Court held that;-

"We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial Court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a Court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test. In the case of **Bamburi Cement Limited vs. William Kilonzo [2016] eKLR this Court expressed itself on the nature of proof required as follows:**

"The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing."

33. Accordingly, it was submitted that the Respondent had all the reasons to subject the Claimant to disciplinary hearing and eventual termination, having failed to account for the 200 devices entrusted upon him for distribution.

34. On whether due procedure was followed, it was submitted that, investigations were conducted into the loss of the devices and on various occasions the Claimant was asked to account for various devices and even wrote a statement with Risk management department as such he was aware of the allegations against him. It was argued that the fact that a show cause letter was not served upon the Claimant did not invalid the disciplinary process as the Claimant was aware of the charges against him.

35. It was submitted also that the letter notifying the Claimant of the disciplinary hearing had extract of the investigation report detailing the devices in question therefore that the Claimant did not have to be served with the entire report to acquaint himself with the issue at hand. In support of its argument the Respondent cited the case of **Charles Muema Munuve & another v Safaricom PLC (Supra)** where the Court held that ;-

"...They were not availed the full Investigation Report by Ndibo, but had extracts, and were advised on the contents. They were aware of the charges against them. They did not go to the disciplinary hearing unaware of the circumstances and the charges. They were not ambushed. They were well-acquainted, with the facts and the issues in dispute. They did not cite any one issue, raised on the floor of the disciplinary hearing, that caught them by surprise, compromising their procedural protections. The Court does not think they were significantly prejudiced, by not having the full Report from Ndibo."

36. It was further submitted that the letter of notification served upon the Claimant indicated the charges facing the Claimant, the reason the Respondent was considering termination and his rights to have an employee of his choice. The notification letter therefore conformed to the intent of section 41 of the Employment Act. In support of this argument the Respondent relied on the case of **Kenya Revenue Authority V Reuwel Waithaka Gitahi and 2 others [2019] eklr**.

37. The Respondent submitted therefore that the disciplinary hearing was conducted in accordance with procedure therefore that the termination conformed to the procedural and substantive fairness test.

38. With regard to the prayers sought, it was submitted on reinstatement sought that save for the 13 years worked for the Respondent, there are not other exceptional circumstances that would warrant this Court to grant the said more, moreover that the Claimant has been out of employment for more than 3 years therefore reinstatement is no longer tenable.

39. In conclusion the Respondent submitted that the Claimant's termination is justified in the circumstances and prayed for the claim to be dismissed with costs.

40. I have examined all evidence and submissions of the parties herein. The issues for this Court's determination are as follows;

1. Whether the Respondent had valid reasons to warrant dismissal of the Claimant.

2. Whether the Respondent followed due process before dismissing the Claimant.

3. Whether the Claimant is entitled in remedies sought.

REASONS

41. The Claimant was summarily dismissed vide a letter dated 28/6/2018. The letter indicated that it had been alleged that he failed to adhere to the requirements of ensuring proper distribution, activation and monitoring of the devices as expected and that as a result devices totaling 380 worth 2,299,228/= were not accounted for.
42. Another allegation was that he failed to show due care to ensure that company assets were used for their intended purpose. That this resulted in devices being used by two TDRS in his sales as personal phones and others in a competitive network.
43. The letter further indicated that during the disciplinary hearing held on 30/8/2018, he had not accounted for 380 devices but following the hearing he requested for time to fully account for the devices and subsequently accounted for an additional 180 devices and so 200 devices were not accounted for worth 1,210,120/=.
44. Before the dismissal, the Claimant had been invited to a disciplinary hearing on 30th May, 2018 vide a letter dated 23/5/2018 and was informed that the investigation carried out by the Ethics and Compliance team into alleged irregular distribution of sub-reg devices had revealed that he had failed to account for a total of 380 devices valued at 2,299,228/=.
45. Earlier on, the Claimant had been asked to account for some electronic devices totaling 1,471 and vide an Email of 12/2/2018 the Claimant had been asked to account for some 47 devices and he indicated he had accounted for 33 while 14 were not in their possession.
46. The Claimant attended the disciplinary hearing on 30/5/2018 and it appears that the Claimant further made an account of the remaining 11 devices that he had not accounted for by the time of the disciplinary hearing.
47. On 28/6/2018 the Claimant was summarily dismissed and the letter indicated that he had not accounted for 200 devices worth 1.2million.
48. The Claimant averred that from the time of the inquiry, the Respondent unilaterally raised the number of devices to be accounted for by the Claimant.
49. This is indeed true because the number of devices to be accounted for were initially 47, then 380, and the dismissal was in respect of 200 devices.
50. In this Amended defence, the Respondent avers that the Claimant failed to account for all devices that were issued to him and exposed it to a loss of about 1.2million.
51. Indeed the initial loss the Claimant was to explain at the hearing was 380 devices worth 2,299,228/=.
52. What is not clear about the validity of reasons leading to the Claimant's dismissal is the case put up against the Claimant and how he defended himself on his failure thereto.
53. No disciplinary proceedings were exhibited before this Court by both the Claimant and the Respondent.
54. There is no indication that the Claimant at the hearing actually explained about 138 devices and failed to account for 200.
55. Without the proceedings being placed before Court, doubt is created as to whether the reasons for the dismissal were validly established or not.
56. In the circumstances I find that the Respondent have not justly established that they had valid reasons to terminate the Claimant.

DUE PROCESS

57. The Claimant was indeed invited for a disciplinary hearing on 30/5/2018. He was expected to explain the whereabouts of 380 devices. He avers he explained himself. The Respondent dismissed him for not explaining 200 of the 380 devices.
58. Whether this is what transpired at the hearing or not is also not established. No proceeding of the disciplinary hearing were presented to Court.
59. Section 41 of the Employment Act 2007 states as follows;-

“41.

Notification and hearing before termination on grounds of misconduct

(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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 a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make”.

60. It is expected that the disciplinary hearing be conducted in a transparent manner and it is only expected that the proceedings be presented before Court for the Court to establish the fairness of the process.

61. I am unable to establish in the circumstances whether the Claimant was subjected to a fair disciplinary process or not.

REMEDIES

62. Having established that the Claimant was dismissed without valid reasons and without following due process, I find the dismissal unfair and unjustified as provided for under Section 45 (2) of the Employment Act 2007 which states as follows;-

“45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

1. In the circumstances the Claimant is entitled to compensation equivalent to 6 months pay in view of the lack of valid reasons and due process

= 6 x 318,784.22 = 1,912,705.32/=

Less statutory deductions

2. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

IN THE PRESENCE OF:

MWANGI FOR RESPONDENT – PRESENT

KIPKOECH FOR CLAIMANT – PRESENT

COURT ASSISTANT - FRED