



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO.68 OF 2015

MOHAMED ALI WAFULA.....CLAIMANT

VERSUS

PHOENIX OF EAST AFRICA ASSURANCE COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Amended Memorandum of Claim dated 26th November, 2018 on the 21st December, 2018 claiming to have been unfairly terminated by the Respondent. He prays for the following remedies: -

a) A declaration that the claimant was unfairly terminated from employment by the Respondent and if not whether the claimant was paid his terminal dues and or compensated for the wrongful dismissal.

b) the claimant be pad his terminal benefits as set out in paragraph 14A of the Amended memorandum of claim.

c) The Honorable Court to issue such orders and give directions as it may deem fir to meet ends of justice.

d) Costs of the suit.

2. The summary of the claimant's case is that the claimant was employed by the Respondent on 1st September, 1990 as Accounts Clerk at a salary of Kshs. 2,200 per month.

3. That the claimant performed exemplary prompting his promotion to clerical officer 1 earning a salary of Kshs. 34,749. Subsequently, he was promoted to the position of Assistant Office Branch Operations and Administration Manager at a salary of Kshs 52,290 and then transferred to Eldoret Branch. His salary was later increased to Kshs 55,427.40 with effect from 1st January, 2012 till his termination.

4. The circumstances leading to his termination, was that the claimant salary for April was not paid on time when all other employees had received their salaries. And on 26th April, 2013, the claimant was summoned to appear at the Respondent's head office situated in Nairobi on the 29th April, 2013 without giving him reasons for the summons.

5. On 29th April, 2013 the claimant reported to the Respondent's headquarters as a directed and waited in the waiting bay till 3pm in the evening when two police officers in company of one of the Respondent staff walked towards him and arrested him. He was then taken to central police station in Nairobi where he was informed that he was arrested for stealing Kshs 100,627 from the Respondent. He was further transferred to Eldoret divisional police and released on bond on 6th May, 2013.

6. On 15th May, 2013 the claimant was served with a show cause letter which doubled up as a suspension letter on the basis that he had misappropriated funds. Subsequently, he was called by Willis Orwe on the 20th May, 2013 informing him of disciplinary meeting scheduled for 24th may, 2013. A letter inviting him to the disciplinary meeting dated 29th April, 2013 was served on him on 21st may, 2013. His services were then terminated after the meeting.

7. The claimant avers that he was not paid his terminal dues which comprises of; April, 2013 salary, unpaid leave, leave allowance, 3 months' pay in lieu of notice, medical allowance for the year 2013 and 12 months' salary compensation for the unfair termination all amounting to Kshs. 1,390,485.16.

8. The Claimant however admitted receiving two payments of Kshs 1,082,595 paid through RTGS on the 9th October, 2013 and a further Kshs 500,021 paid on 5th May, 2015 via cheque no. 457526
9. The Respondent entered appearance and filed a response to claim on the 10th April, 2015 denying the averment of the claim. It was however admitted that the claimant was an employee of the Respondent under the respective posts stated in the claim however that the claimant did not work diligently as alleged.
10. The Respondent avers that one of the claimant's role was to ensure cash is properly managed however that he failed in that role which was discovered in April, 2013 during the internal audit carried out at the Respondent. That the auditors discovered loss of Kshs. 100,627 which were premiums received but not receipted or banked.
11. That when the Respondent learned of the loss of funds it immediately summoned the claimant to its Nairobi office to give an explanation on the lost funds and since no explanation was forthcoming the Respondent escalated the matter to the police and later on suspended the claimant from work effective 29th April, 2013.
12. It is stated that the claimant while on suspension was invited on several occasions for disciplinary hearing however that the claimant failed to heed to the call on all occasions.
13. Having failed to appear before the Respondent's disciplinary Committee, the Respondent was forced to terminate his services and a letter detailing his dues was served on the claimant in August, 2013 and the termination later followed thereafter in September, 2013. It is indicated that the claimant was called to collect his terminal dues and sign the dismissal voucher but he refused.
14. On 9th October, 2013 the Respondent sent the claimant his provident funds amounting to Kshs. 1, 082,595 via RTGS and Kshs 397, 899 being employers 50% contribution remained invested in the funds.
15. The Respondent then maintained that the claimant refused to collect his terminal dues when the same had been calculated ready for collection.
16. It was stated that the termination was fair in the circumstances.
17. In response to the Defence the claimant filed its reply on 4th October, 2017 stating that he was arrested in the Respondent's head office and later charged in Eldoret chief magistrates court which charges he was acquitted of under section 210 of the CPC on the 5th May, 2016.
18. In this response the claimant admitted that he did not attend the subsequent disciplinary hearings for the reason that the respondent had made up his mind that the claimant had stolen money from the company based on the fact that he was compelled by the Respondent director on the 29th April, 2013 to admit the misappropriation of funds and on refusal he was arrested by police. He further stated that the Respondent had preferred criminal charges against it on the same subject of misappropriation of funds which was ongoing therefore that it was not proper for him to be further subjected to disciplinary hearing as the matter was *subjudice*.

Hearing

19. During hearing the claimant appeared as CW-1 and adopted his witness statement dated 2.3.2015. In summary he testified that he now works as a farmer in his home in Trans Nzoia but previously was employed by the Respondent from 1990 to 1st September, 2013. He testified that throughout his employment he was never involved in any disciplinary issue till his termination. He took issue with the way he was terminated and maintained that he was not issued with any summons to appear before any disciplinary committee and that the summons for 29.4.2013 was by the Managing Director who needed him to explain alleged misappropriation of funds and not a disciplinary meeting.
20. Upon cross examination CW-1 testified that when he reported to Eldoret he maintained his position of Assistance Operations Manager under Wilberforce Anzere who was the branch manager. He stated that he was not subjected to any disciplinary hearing and the letters dated 12.6.2013, 1.7.2013 and 29.7.2013 were sent to the branch when he was out of the office and prosecuting the criminal case. Nevertheless, that he collected the letters from the office.
21. Upon further cross examination the claimant testified that while at Eldoret he never handled any money or issued receipts rather that the Branch manager was the one that issued receipts that were done electronically through the branch managers computer.
22. He further explained the loss of the money that the money allegedly received from Dick Maungu was false since, the client had received cancellation notice that he had not paid then appeared in the office with a receipt showing he had paid all cash. Ibrahim Mbugua, the Respondent's agent had not paid the money in full as alleged rather that he had paid in bits while Mbugua had problems with IRA and was the one who had been collecting money from clients and not remitting and on reporting the matter to the top management, bad blood was created between them.
23. He also stated that upon termination he was paid accrued leave and salary arrears, however that he was not paid leave allowance of 19000 for 12 years.
24. Upon re-examination he maintained that he never handled any money and all receipt were issued by the branch manager Mr, Anzere. He stated further that the letter inviting him for disciplinary hearing was issued after the fact when he was already prosecuting the criminal charges.

25. He further testified that he normally received his salary on 26th of every month however in the month of April 2013 he never received his salary as late as 29th April, 2013 when he was summoned to appear before the head office in Nairobi.

26. The Respondent called two witnesses, Ibrahim Mbugua as RW-1 and Stanley Walunda as RW-2.

27. RW-1, the proprietor of Blue sky Insurance and the Respondent's agent testified that he is tasked with selling insurance. He then adopted his statement dated 12.9.2019 and in addition testified that he had paid the Respondent through a cheque which bounced and he personally replaced the same with cash which was given to the claimant.

28. Upon cross examination, RW-1 testified that he was not issued with any receipt for the payment. He also indicated that he paid the exact cash for replacing the bounced cheque and not any penalty amount that might have accrued for the bounced cheque. It further indicated that the claimant had previously received cash from him for payment of premiums however did not have any evidence.

29. Upon further cross examination, RW-1 testified that he knew Dick Maungu and that he was his client whose policy had been canceled though he had paid in full that the reason for cancelled policy is that he had failed to remit money given to him by the said client.

30. RW-2 is the Respondent's Human Resource manager who adopted his witness statement dated 16.7.2019 and produced the list of documents as the Respondent exhibits. He testified that the claimant was summarily terminated from employment after an audit report indicated that the Respondent had lost over 100 Thousand on lost premiums through cash and cheques which the claimant was in charge of. He testified further that the claimant was invited for disciplinary hearing in Nairobi however he failed to appear informing their decision to summarily terminate his services. Further that his terminal dues were calculated and a discharge summary prepared however the claimant failed to collect his money and sign the discharge voucher. The witness maintained that they followed due process before the termination. With regard to allowance he stated that medical allowance was not payable to employee rather that a sick employee could utilize the same and pay for the Bills.

31. Upon cross examination, RW-2 testified that the claimant was promoted regularly on merit and his salary was equally increased. The witness testified that when the claimant was transferred to Eldoret Branch he was tasked with handling cash however that there was nothing in the transfer letter to affirm that the duties included handling cash.

32. Upon further cross examination, RW-2 testified that the claimant was given an opportunity to defend himself however that the letter was served on him when he was pursuing the criminal charges. He stated that the claimant was discharged of the criminal charges for lack of evidence. He further stated that the claimant's calculation were less the misappropriated cash. Finally, that the claimant was not subjected to any disciplinary hearing.

Claimants' Submissions.

33. It was submitted for the claimant that his termination was done without following the due procedure under section 41 and without giving a valid reason as provided for under section 43 of the Employment Act therefore that the termination was unfair in the circumstances. It was argued that the reason advanced by the Respondent was on alleged misappropriation of Money which the Respondent has failed to tender evidence in support of the audit report or otherwise to link the claimant to the loss of the said funds. Therefore, the reason given is not valid.

34. It was then submitted that the Respondent also did not follow due procedure in dismissing the claimant from employment as provided for under section 41 of the Employment Act. In support therefore the claimant relied on the case of **Janet Nyadiko V Kenya Commercial Bank Limited [2017] eKLR**.

35. The Claimant also cited the case of **Walter Ogal Anuro V Smart chip Dynamics Limited [2017] eKLR** where the Court held that;-

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

36. Accordingly, it was submitted that the claimant was not accorded any procedural or substantive fairness therefore that the termination was unfair in the circumstances. The claimant then urged this Court to allow the claim as prayed.

Respondent's Submissions.

37. The Respondent on the other hand submitted that it dismissed the claimant from employment for misappropriating the Respondent funds. It was submitted that mere suspicion was sufficient reason as was stated in the case of **Thomas Sila Nzivo V Bamburi Cement Limited [2014] eKLR** where the Court held that; -

"The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no Oil was available even as the Claimant protested he received such Oil, the Claimant's role in receiving the Oil and releasing the delivering Truck, all gave the Respondent reasonable and sufficient grounds to act against the Claimant. Alternative to Section 44 [4] [g], the Respondent may still have found justification in making the decision against the Claimant, under Section 44 [4] [c]."

38. It was argued further that the claimant was served with Five letters requiring him to attend disciplinary hearing which he failed on the pre-text that he was pursuing the criminal charges. It was then submitted that the claimant waived his right when he failed to appear before the respondent disciplinary committee despite receiving the invitation letters. In support of this argument the Respondent cited the case of **Pandya Memorial Hospital V Geeta Joshi [2020] eKLR** where the Court of appeal held that.

“The right to be heard (audi alteram partem) is not absolute, it can be waived by a party. The waiver may be express or by conduct.”

39. Accordingly, it was submitted that the claimant was given adequate opportunity to defend himself but failed to appear before the disciplinary committee therefore that he waived his right to hearing.

40. The claimant then submitted that the claimant’s termination was justified in the circumstances and the Respondent prayed for the dismissal of this suit with costs.

41. I have examined all evidence and submissions filed by the parties. It is true that the claimant was an employee of the respondent on 29/4/2013, he was issued with a show cause/suspension letter for apparently misappropriating kshs.100,627/= from the respondent.

42. On the same day, the claimant was issued with a letter notifying him to appear before the respondent’s disciplinary committee on Friday 24th May, 2013 at 11.00am.

43. The claimant has indicated that he didn’t appear before the disciplinary committee. The respondents followed up this letter inviting the claimant to the disciplinary committee but he didn’t attend.

44. When cross examined in court, the claimant averred that the invitations to attend a disciplinary hearing came when he had been arraigned in court and was out on bail and he went and picked them up.

45. Indeed the claimant was given an opportunity to defend himself before the respondent’s disciplinary committee and he failed to attend thus squandering his opportunity.

46. The claimant has also indicated that he didn’t handle cash and therefore didn’t misappropriate any funds.

47. Whereas this may be true, the claimant was still expected to appear before the disciplinary committee and indicate so and exonerate himself.

48. In my view, though the respondent may have terminated the claimant, he was the author of his own misfortune for refusing to deliberately attend the disciplinary committee.

49. The respondents in the circumstances had no option but to terminate his services.

50. I therefore find the termination fair and justified in the circumstances.

51. As concern the remedies sought, the claimant submitted that he was not paid his April 2013 salary amongst others. The respondent admitted he was not paid his April salary as submitted.

52. I find that the claimant is entitled to remedies as follows;

1. Payment of his April 2013 salary

= 55,427.40/=

2. The claimant was summarily dismissed after he failed to attend the disciplinary hearing and therefore was not entitled to any notice or notice pay.

3. The claimant was also entitled to payment of his unpaid leave as prayed for kshs.40,646.76

TOTAL AWARDED = 90,074/=

Less statutory deduction

4. Each party will bear its own costs.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kimani holding brief for Mugambi for Respondent – present

Ouma for Claimant – present

Court Assistant - Fred