



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 278 OF 2018

AHMED ALI TWAHIR.....CLAIMANT

VS

M.J CLARKE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. M.J Clarke Limited, the Respondent in this case is a limited liability company engaged in the export business. Its engagement with the Claimant, Ahmed Ali Twahir arose from an employment relationship which ended up in the present dispute now before the Court.
2. The Claimant's claim is that the Respondent terminated his employment unlawfully and unfairly.
3. On its part, the Respondent denies the Claimant's allegations and goes ahead to accuse the Claimant of gross misconduct.

The Claimant's Case

4. In his Statement of Claim dated 26th April 2018 and filed in court on 27th April 2018, the Claimant states that he joined the Respondent's establishment in 1987 at an entry level of Accounts Clerk. He rose through the ranks to the position of Warehouse Manager.
5. The Claimant accuses the Respondent of conceiving a plan to remove him from employment, before attainment of retirement age.
6. The Claimant avers that on 3rd October 2016, the Respondent issued him with a letter notifying him that he was due to retire from the end of the year 2017. In response, the Claimant stated that his retirement age was 60 years.
7. The Claimant further claims that between October 2016 and January 2017 the Respondent sent him several letters whose intent was to harass him.
8. By an undated letter served on the Claimant on 15th December 2016, he was suspended from duty.
9. The Claimant was subsequently issued with a termination letter dated 26th January 2017 on account of misconduct.
10. The Claimant's case is that the termination of his employment was without valid reason and was effected in violation of due process. He accuses the Respondent of orchestrating his summary dismissal by alleging flimsy and trumped up charges.
11. The Claimant further accuses the Respondent of denying him documentation that would have enabled him to respond substantively to the grounds of termination presented to him.
12. The Claimant therefore seeks the following remedies:
 - a) A declaration that the termination of his employment was unjustified, unlawful and unfair;
 - b) General damages for unlawful termination;
 - c) An order directing the Respondent to pay the Claimant his full statutory entitlements and/or terminal benefits together with interest at court rates;

d) An order directing the Respondent to pay the Claimant 12 months' salary on account of unfair dismissal.

The Respondent's Case

13. By its Response dated and filed in court on 18th July 2018, the Respondent states that the Claimant's employment was initially discharged and recommenced pursuant to an employment contract dated 12th July 2006.

14. The Respondent further states that the termination of the Claimant's employment was on the basis of gross misconduct to wit; misappropriation of funds meant for charity and certification of export entries for the year 2014 and 2015 and lack of accountability, among other issues.

15. The Respondent avers that in the year 2016, it discovered that the Claimant had engaged in dubious activities amounting to gross misconduct.

16. The Respondent maintains that the termination of the Claimant's employment had nothing to do with his retirement age. The Respondent also denies the Claimant's allegations of harassment at work.

17. The Respondent further maintains that it is a stranger to the allegations that the Claimant was asked to retire before reaching retirement age and states that any discussion on retirement was mutual.

18. The Respondent pleads that upon discovery of discrepancies in their records, it wrote to the Claimant on 22nd November 2016, seeking an explanation. The Claimant did not respond to the letter and the Respondent proceeded to call for a disciplinary hearing.

19. The Respondent states that the Claimant was suspended as a result of gross misconduct as well as failure to provide an explanation on missing funds. The Claimant had also failed to submit logbooks requested for by the Respondent.

20. The Respondent avers that due process was followed prior to the termination of the Claimant's employment. In addition, the Claimant was paid all his terminal dues.

Findings and Determination

21. There are two (2) issues for determination in this case;

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

22. The termination of the Claimant's employment was communicated by the Respondent's letter dated 26th January 2017 addressed to the Claimant as follows:

"Dear Sir,

Letter of Termination

We refer to the above matter and to the meeting held on 15th December, 2016 between you and the two Directors of the Company being Mr. M.J Clarke and Mathew Clarke, Mr. Habib, in his capacity as Chief Accountant of the Company and Mr. P. Kithaka, in his capacity as Senior Banking Officer of the Company in which the following was discussed: -

- 1. Your misappropriation of funds meant for charity and lack of accountability upon inquiry by the Company; and*
- 2. Your misappropriation of funds meant for certification of export entries for the year 2014 and major part of 2015; among other issues.*

We have considered the matters discussed and the representations you made in the aforementioned meeting and we are convinced to a reasonable degree of your misconduct in respect to No. 1 above. In view of the seriousness of the conduct and its potential to damage the reputation of this Company, we regret to notify you of the termination of your employment with effect from 31st January, 2017 resulting from your failure to account for Company funds and property while in the course of your duties as an employee of the Company.

We will pay you your salary up to the date of termination in full and final settlement of all obligations owed to you, which are subject to tax and statutory deductions.

Your termination dues are K.Shs. 120,000 which is your salary for the month of January 2017. The same can be collected from the Company conditional upon returning all Company equipment and documents. Your pension dues shall be computed by the pension

fund administrators and released or otherwise dealt with in accordance with the applicable scheme rules.

Also please sign the acknowledgement below and return to us a copy of this letter with your signed acknowledgement.

We wish you all the best in your future endeavours.

Yours faithfully

(signed)

M.J. Clarke

Director, M.J. Clarke Limited”

3. This letter cites the reasons for termination of the Claimant’s employment as:

“Misappropriation of funds meant for charity and lack of accountability upon inquiry by the Company and misappropriation of funds meant for certification of export entries for the year 2014 and major part of 2015; among other issues.”

4. However, a reading of the minutes of a disciplinary meeting held on 15th December 2016, produced by the Respondent and which instructively, the Claimant did not sign, reveals that the issues taken by the Respondent against the Claimant had to with undelivered monthly foodstuff donations and lapse in export certification for 2014 and a major part of 2015. This latter line runs through all antecedent communication between the Claimant and the Respondent.

5. From the record, the Court did not find any evidence of charges of misappropriation of funds having been made against the Claimant.

6. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee. In order to discharge this burden, the employer is required to notify the employee of the specific charges and allow them an opportunity to respond at the shop floor. These are the procedural fairness requirements of Section 41 of the Act.

7. In its decision in **Jared Aimba v Fina Bank Limited [2016] eKLR** the Court of Appeal stated the following:

“....under sections 45 and 41 of the Employment Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to the termination.”

8. In its decision in **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** this Court held that for an employee to respond to allegations made against them, the charges must be clear and the employee ought to be given sufficient time to prepare their defence.

9. Neither the disciplinary meeting of 15th December 2016 nor previous communication leading to the disciplinary meeting addressed the offence of misappropriation of funds, which the Respondent cites as the reason for terminating the Claimant’s employment.

10. What is more, from the exchange of correspondence between the Claimant and the Respondent, it is evident that the employment relationship was coloured by extraneous issues relating to the Claimant’s retirement and an outsourcing arrangement between the parties.

11. Overall, this case reveals an employer on a fishing expedition to find an excuse to get rid of an employee for collateral reasons. I therefore find that the Respondent has failed to establish a valid reason for terminating the Claimant’s employment. I further find that the disciplinary process initiated by the Respondent against the Claimant was choreographed to reach a predetermined outcome of termination of employment.

12. For these reasons, I return that the termination of the Claimant’s employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

13. In light of the foregoing, I award the Claimant twelve (12) months’ salary in compensation for unlawful termination of employment. In arriving at this award, I have taken into account the Claimant’s long service with the Respondent and the Respondent’s unlawful conduct in terminating the employment relationship.

14. I further award the Claimant one (1) month’s salary in lieu of notice.

15. The claims for general damages and terminal benefits were not proved and are dismissed.

16. Finally, I enter judgment in favour of the Claimant as follows:

| | |
|--|------------------|
| a) 12 months' salary in compensation..... | Kshs. 1,440,000 |
| b) 1 month's salary in lieu of notice..... | <u>120,000</u> |
| Total..... | 1,560,000 |

17. This amount will attract interest at court rates from the date of judgment until payment in full.

18. The Respondent will bear the costs of this case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Saeed for the Claimant

Mr. Mwangi Gitau for the Respondent