



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRC.C/3/2019**

**CITATION: VS LABAN KIMUTAI AND ELDORET CLUB**

**JUDGMENT**

By a statement of claim filed on 5th February, 2018, the Claimant averred that he was on 1st August, 2008 confirmed to the position of Assistant Club Manger earning a basis salary of Kshs. 35,000/= per month. On 1st January, 2010 he was appointed acting Club Manager and later confirmed to the position on a 3-year fixed term contract.

2. The contract was to run from 1st January, 2018 to 31st December, 2020 at a basis salary of Kshs. 141,725 per month.

3. The contract was however unfortunately cut short by the respondent on false allegations of misconduct tabled against him which left to his unfair dismissal on 17th December, 2018.

4. On the night of 18th and morning of 19th June, 2018 a robbery incident took place at the club's premises as he was informed by Mr. Dennis Koech, the Club's cashier who was at the club. As required of him, he took the necessary action and informed the relevant authorities for further action.

5. As he followed up the issue, he received an administrative letter erroneously dated 4th June, 2018 demanding he proceeds to 30 days leave to pave way for investigations. He responded to the said letter stating the events of the alleged robbery as he was informed by Dennis Koech.

6. The Claimant further averred that on 3rd August, 2018 he received yet another letter extending his leave for 21 days to allow completion of investigations. The Claimant thereafter received another letter on 25th August, 2018 which was a Show Cause letter accusing him of among other things failure to provide oversight over cash handling and banking at the club, issuing of instructions and colluding with club members to override accounting systems, abuse of office in reporting the amount of money lost during the theft and so on.

7. The Claimant responded to the Show Cause letter on 27th August, 2018 stating his position regarding the allegations against him.

8. On 10th September, 2018 the Claimant received a disciplinary hearing notice which he attended but according to him the committee was full of bias, conflict of interest and not properly constituted. The proceedings were later withdrawn through a letter dated 1st October, 2018 indicating that new and compelling evidence had been tabled against him before the committee. A new Show Cause letter with the same allegations as the previous one was issued to the Claimant on 3rd October, 2018 and that he relied on his earlier response contained in his letter dated 9th October, 2018.

9. The Claimant was subsequently invited for a disciplinary hearing which took place on 12th November, 2018. The Claimant however alleged the hearing was marred with bias and ill motive since he was not given opportunity to call a witness. On 17th December, 2018 the Claimant service was terminated.

10. The Claimant disputed the termination on the basis that he did not in any way engage in the allegations against him. He further alleged that he was not accorded a fair and proper hearing hence termination was unlawful and procedurally defective.

11. The Claimant therefore sought declaration that the termination of his employment was unlawful, unprocedural and unfair. The Claimant further sought terminal dues in the sum of Kshs. 8,010,693/= and costs of the suit.

12. The respondent on its part pleaded that it denied the Claimant was on 1st August, 2018 confirmed to the position of Assistant Club Manager at a salary of Kshs35,000/= per month. The Claimant further stated that the Claimant's last contract was to run from 1st January, 2018 to December, 2020 at a basic salary of Kshs. 141,725/= per month subject to 10% increment however the increment was subject to

Claimant's work performance.

13. Regarding termination, the respondent pleaded that the Claimant was terminated due to gross misconduct. The termination could not therefore be termed unfair since the reason for termination was valid as it related to evidence of financial impropriety and general negligence by the Claimant.

14. Regarding the theft incident, the respondent admitted that there was theft at the Club on the night of 18th June, 2018 but the respondent stated it was a stranger to the averment that the Claimant was informed of the theft by one Dennis Koech and that he reported the same to the police.

15. The respondent further admitted putting the Claimant and others on 30 day fully paid administrative leave to pave way for investigations into claims of gross misconduct by some of the respondent's employees.

16. Concerning the disciplinary hearing the respondent averred that on 10th September, 2018 the Claimant attended the disciplinary hearing where it emerged that the Claimant had not received his copy of the forensic audit report dated 29th August, 2018 which was vital to the hearing.

17. Further the forensic auditors presented new evidence against the claimant and in order to accord the Claimant the right to defend himself against the allegations raised, the committee through its main committee, withdrew the disciplinary process. The Claimant was therefore issued with a new show cause letter dated 3rd October, 2018 that contained the charges leveled against him and his right to be accompanied by an advocate and documents to be relied upon during the hearing were forwarded to the Claimant. The Claimant was further informed of his right to call witnesses during the hearing.

18. The respondent further stated that the decision to terminate the Claimant's employment was based on the charges contained in the show cause notice dated 3rd October, 2018 and not on any other show cause notice as the earlier show cause notice had since been withdrawn and ceased to exist.

19. Concerning investigations, the respondent stated that the Claimant was interviewed by the forensic auditors and recorded a statement with them. The respondent further stated that it had no reason to witch hunt the Claimant herein and that the audit was done in order to shed light on the issues of financial impropriety that befell the respondent.

20. At the oral hearing the Claimant stated that he filed a witness statement dated 4th February, 2019 which he sought to adopt as his evidence in chief. The Claimant further relied on his documents filed with the claim.

21. According to the Claimant, he was employed in August, 2008 as an Assistant Manager. His monthly salary was Kshs. 35,000/=. In 2010 he was appointed as the Acting Club Secretary/Manager and was drawing acting allowance of Kshs. 5,000/=.

22. In 2012 the respondent asked that his position be put on 3 year fixed term contract renewable. As Club secretary he was in charge of overall club activities. He used to attend club committee meetings and take minutes. He was also a signatory to the club's financial documents. At the time of termination his monthly salary was Kshs. 142,000 and that his contract was scheduled to end on 31st December, 2020 however he was terminated on 17th December, 2018.

23. According to him the termination was as a result of the theft incident at the club on 15th June, 2018. The Claimant further stated that he was issued with a show cause letter on 5th August, 2018 and invited for a disciplinary hearing on 13th September, 2018.

24. On 13th September, 2018 he was to be at the venue by 9.00 am however there were many people. He was called in at 8.00 p.m. and the Committee sought adjournment to 15th September, 2018.

25. On 15th September, 2018 the hearing proceeded. He was questioned on the forensic audit report but he had not seen the same prior to the hearing so he objected. The Committee therefore proceeded with issues not contained in the report. It was suggested that the audit report be discussed on another date to be notified to him.

26. On 19th September, 2018 he was invited for the presentation of the audit report. He however considered the notice inadequate for him. He however attended and the auditors came and made a presentation on the accounts. After the presentation, he was to be invited for the continuation of the disciplinary hearing but was never invited for further hearing.

27. On 5th October, 2018 the Claimant received two letters, one withdrawing and cancelling the previous disciplinary hearing and another a fresh Show Cause letter. He responded to both letters on 9th October, 2018.

28. According to him, the proceedings were withdrawn because he raised issues of conflict of interest by some committee members. One of the allegations against him was collusion with some members who were sitting in the committee. The Claimant further stated that there were no new allegations in the new Show Cause letter and further that there was no new evidence attached despite allegations of new compelling evidence.

29. It was the Claimant's evidence that the new disciplinary hearing took place on 12th November, 2018 and after the hearing he received a letter of summary dismissal on 24th November, 2018. The Claimant observed that the second disciplinary committee consisted of some ordinary members and not committee members.

30. According to him an ad hoc committee ought to come from the main Committee of the club not handpicked members of the club.

31. Regarding his contract, he stated that the same was renewed by the club and that statutory deductions such as taxes etc. were done by the employer at source.
32. Concerning the robbery, when he received the report, he told the staff not to touch anything and he further he informed the Chairman and the police. It was his evidence that he had never been charged with any offence connected with the robbery.
33. Mr. Kimutai further informed the Court that he was a mandatory signatory to the respondent's accounts and that he was called by the auditors and asked about some items. He was asked about cheques, unbanked cash, Mpesa transactions etc.
34. Regarding accounts, he stated that all accounts prepared were adopted by the members. As the club Secretary he could allow credit to members under bylaw 17. The people mentioned in the audit report were club officials hence his bosses. He further stated that the credits he gave have since been cleared.
35. Regarding banking he stated that G4S was to oversee the banking and that this was done once a week on Tuesday. He denied that cash collected and cheques were not documented.
36. In cross examination he stated that he was in charge of all employees at the club however it was his evidence that he was not aware of the misdeeds in the accounts department. According to him there were none until 2nd July, 2015 when there was presentation to the management of the audit report.
37. Concerning the disciplinary proceeding he stated that he participated in the proceedings and that the reason for withdrawal of the previous proceedings was explained to him.
38. Regarding composition of the disciplinary panel, the Claimant stated that he was aware of rule 5(4) of the club rules which allow for co-optation of committee members. He further stated that he did not produce any document showing he objected to the composition of the 2nd Committee.
39. Regarding the robbery incident, he stated that the staff who called him about the incident was mentioned in the audit report and further that he was not the only one dismissed over the incident.
40. Regarding rules of credit to members it was his evidence that rule 17 provides for a limit of Kshs. 50,000/= for a period of sixty days. There were members who got credit more than the limit and had surpassed the 60 days' period.
41. Concerning return of the lost cash he stated he had not filed any document to show that the lost cash has since been paid. He further stated that one Mugo issued a cheque of Kshs. 368,000/= and he authorized the issuance of a receipt but asked the accountant not to bank the same.
42. Mr. Kimutai further stated that upon termination he was paid one months' salary in lieu of notice and that he never went on leave in 2018 and he was compensated. He further stated that he was a member of NSSF.
43. The respondents' first witness Dr. Florence Ayaibei Murgor informed the court that she was the chair of the Club and a member and that she recorded a statement on 20th February, 2019 which she sought to adopt as her evidence in Chief. She also adopted the document filed a 1st March 2019 and Supplementary documents filed on 16th October, 2019 and 7th August, 2019. It was her evidence that she knew the Claimant. He was the Clubs' employee as Secretary to the Committee and Manager and that by the time of termination he had worked for fifteen years.
44. Dr. Murgor confirmed that on 18th June, 2018 there was a robbery incident at the club and some money got stolen. About Kshs. 700,000/= was stolen. The police were called and conducted investigation. The police formed the opinion that it was an inside job since nothing was broken. The keys were intact. The Committee met and deliberated on the matter. The Claimant was present at the meeting and explained what happened. According to the Claimant, the cashier was the main suspect. He further told the Committee not to worry because the money was insured. Subsequent meetings were called and the Committee wondered why such large sums of money were kept at the club and not banked.
45. According her, banking should have been done as soon as possible. It was her evidence that only the Claimant and the accountant had the keys to the safe. The accountant said he locked the safe and kept the key in his drawer which he also locked and kept the drawer keys on his desk. The cashier was called to explain what was seen on the CCTV footage. The committee was surprised that the cashier's office had no CCTV. The cashier accounted for the money he had in his smaller safe. He further informed the Committee that staff from other departments lent themselves money from Mpesa float and raised IOU slips.
46. It was her evidence that the Committee therefore resolved to have a forensic audit done. This was done and report tabled before the Committee.
47. A special AGM was called and the report presented. The Claimant was among other employees adversely mentioned in the audit report. Some members and Committee members were also adversely mentioned as owing the club money.
48. The committee deliberated the report and decided to constitute a disciplinary panel. The Claimant and the other staff implicated were sent on compulsory leave for 30 days with full pay.
49. It was her evidence that she was not involved in the disciplinary committee but that the Committee upon conclusion recommended

summary dismissal for the Claimant and his colleagues involved. The Claimant was paid his terminal dues upon termination and was issued with a certificate of service. She denied that the Committee members who were adversely mentioned were involved in the decision to dismiss the Claimant.

50. In cross-examination Dr. Murgor stated that the Claimant was found guilty of negligence and allowing unauthorized credit. It was further her evidence that the Claimant was not at the club on the day of the theft. She stated that the second show cause letter was issued after it was established that some disciplinary committee members were adversely mentioned. She further stated that the Claimant had been cashing his cheque and not remitting statutory deductions.

51. She also stated that the Claimant receipted a cheque but did not bank the same and further that he was given a copy of the audit report and that he was at the special AGM when the report was presented.

52. The respondents' second witness Mr. Nelson Korir informed the Court that he was a practicing accountant in Eldoret, Nairobi and Mombasa and that he does forensic audit. He had been practicing since 2008.

53. In January-June 2018 he was assigned by the respondent to perform financial investigations. He was issued with terms of reference which required him to focus on a specific area of interest. That is to say he was to focus on trigger areas and conduct risk analysis.

54. It was his testimony that he looked at procedures and financial processes. The information was for observation. They interviewed the Claimant and others. They found a lot of shortcomings and noted that the respondent lost about 5,589,560/=. The money was lost in about six areas. 1st area was daily collection. The money was purportedly banked but when they checked there was no daily banking. Some were banked while others were not. The 2nd area was where cheques were receipted but not banked. 3rd area was petty cash which remained largely unaccounted for.

55. The 4th area was the Mpesa system where the amounts remained unreconciled. The 5th area was IOUs where they were unable to get supporting documents for the IOUs. The accountant and the Manager (Claimant) had the custody of the IOUs.

56. Mr. Korir informed the Court that his conclusion attributed the loss to the accountant and the Manager. The Claimant was the Manager and the accountant was called Ngugi. He prepared a forensic report and presented the same to the Committee as per the terms of reference. He further stated that their recommendations included how to improve the operations of the club.

57. They concluded that the accountant failed to prepare daily petty cash and bank reconciliation and further that there was lack of supervising role by the Manager. He misled the Board by misreporting and was negligent leading to improper accounting for funds.

58. In cross-examination he stated that appointment of auditors ran for 3 years and that for the period he was external auditor he never found any malpractice but back then they were statutory auditors and not forensic auditors. As statutory auditors they discussed weaknesses with the management.

59. Mr. Korir further stated that he was commissioned to perform review following a trigger. He denied recommending termination of the Claimant's service and prosecution. Their focus was on a specific area as instructed by the client. He further stated that the Club did not have a written financial and human resource policy. There was further no written credit policy. His recommendation was based on best practices and not any written policy.

60. Mr. Korir further stated that Mugo's cheque did not have the Claimant's name or signature but there were written instructions that it be receipted but not banked. He further stated that the break-in on 18th June, 2018 is what prompted the forensic audit.

61. The respondent's 3rd witness Mr. James Chirchir stated that he was a member of the respondent and had been a member for 27 years. He was the chair of the disciplinary sub-committee. They were seven appointed by the main committee. They set guidelines for conducting their business.

62. It was his evidence that they went through the audit report and the show cause letter and then invited those affected including the Claimant to hear their views concerning the allegations against them.

63. It was Mr. Chirchir's evidence that the Claimant attended alone. He had been informed of his right to be accompanied with a person of his choice including a lawyer. The Claimant was taken through the allegations one by one. The Claimant was asked about Laban Mugo's cheque for Kshs. 368,000/= and said he gave instructions to the accountant for it be receipted but not banked. According to him, a cheque should be banked when due. He further stated that Mr. Mugo admitted receiving Kshs. 200,000/= against the cheque.

64. The Claimant was asked how the Kshs. 200,000/= would be accounted for after issuing a receipt for the cheque. According to Mr. Chirchir they also found that the Mpesa system was not reconciled and that staff advanced themselves money without proper documentation.

65. It was further his evidence that the Claimant's role was supervisory. After hearing the Claimant, they gave their recommendations to the main committee.

66. In cross-examination he stated he had been in the finance committee but never raised any financial concerns against the Claimant.

67. Regarding the disciplinary hearing he stated that he was not aware if the Claimant had been previously tried. They adopted the initial show cause letter which contained issues raised by the main committee. He further stated that Mugo was not invited to the meeting because the Claimant admitted receiving the cheque and issuing instructions to the accountants that it should not be banked. It was further his

evidence that he had worked with the Claimant and was familiar with his handwriting and signatures. The instructions over the cheque were issued to the accountant.

68. Regarding the break in, it was his evidence that it was what triggered the forensic audit. Before that the Committee assumed the reports submitted by the Claimant were okay.

69. Having carefully considered the pleadings, evidence and submissions by the parties, there seem to be one common issue which is, the reasons for which the Claimants service was terminated by the respondent.

70. There seem not to be so much dispute about the fact that on 18th /19th June, 2018 there was a break in or robbery at the club in which some money was lost. The matter as the Court understands is still pending under investigations by the police.

71. It was common ground that following this incident, the Claimant and others not before this Court were suspended and later taken through disciplinary proceedings and thereafter summarily dismissed from employment.

72. The Claimant has disputed the dismissal on grounds among others that he did not in any way engage in the allegations against him. He further alleged that he was never accorded a fair and proper hearing and that his termination was therefore unlawful and procedurally defective on the grounds among others that the audit report was scrupulous since he was never called or interviewed by the auditors and that he was never given an opportunity to call any witnesses or union representative during the hearing.

73. The respondent on the other hand justified the termination of service on grounds among others that the Claimant was guilty of gross misconduct in that it related to evidence of financial impropriety and general negligence by the Claimant which was a reason related to the Claimant's conduct and was based on the operational requirements of the Claimant as employee of the respondent.

74. The respondent further justified the dismissal by stating that there was compelling evidence of financial impropriety against the Claimant in the form of a cheque issued to the club by a client and accompanied by instructions by the Claimant to the accountant to issue a receipt but not bank the same so as to allow the client pay the Claimant in cash which was illegal and against the club bylaws.

75. Regarding procedure followed prior to the termination of the Claimants' service, the respondent as summarized above in the evidence stated that the Claimant and others implicated were sent on compulsory leave for 30 days and subsequently issued with show cause letters which they responded to and were later taken through a disciplinary hearing which they also attended and gave their defence. The Committee upon the conclusion of the hearing recommended the dismissal of the Claimant and those involved. The recommendation was adopted by the respondent and the Claimant at his colleagues dismissed from the service of the respondent.

76. Section 47(5) of the Employment Act provides: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

77. That is to say this section assigns the burden of proof on each party in a dispute where there is allegation of unfair termination or wrongful dismissal.

78. Under Section 45 of the Act, an employer is prohibited from unfairly terminating the service of an employee and states that a termination will be considered unfair if an employer fails to prove that the reason for termination is valid and a fair reason related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employee and further that the employment was terminated through a fair procedure.

79. The Claimant has complained that the termination of his service was unfair for the reason that he did not engage in the allegation placed against him. He further complained that he was not accorded a fair and proper hearing before he was dismissed.

80. There was no serious contest over the fact that the Claimant was the respondent's Manager/Secretary. He was the overall supervisor over day-to-day activities of the club staff and its affairs and that he used to report to the club's main committee.

81. As summarized in the evidence, the audit report identified several malpractices in the financial affairs of the respondents which in the Court's view would constitute valid grounds for termination of service. Of significance is the issue of the cheque for Kshs. 368,000/= issued by a member by the name Laban Mugo. The Claimant although attempted to deny it, but the Court seemed persuaded based on the evidence of Mr. Chirchir (RW3) that the Claimant issued instructions to the accountant to receipt the cheque but not bank the same. Mr. Chirchir was positive that having worked with the Claimant for several years he was familiar with the Claimant's handwriting and signatures. He was therefore positive that it was the Claimant who wrote the instructions over the cheque to the accountant.

82. Pausing here for a moment, the proceedings before this Court are governed by rules of Civil litigation where the standard of proof is on a balance of probability. This is obviously lower than in criminal cases where the proof should be beyond reasonable doubt. This court is not concerned about proof that would lead to a conviction in a criminal trial but a proof which leads to reasonable conclusion that the person accused of an act or omission, more probably than not acted or omitted to act as alleged.

83. The Court at the risk of delving into the accounting field, obviously notes the abnormality in receipting a cheque but not banking the same. This creates imbalance between the book revenues and what is actually received. This is an obvious financial malpractice and alone a reasonable ground for termination of service.

84. As observed earlier, there were several accusations against the Claimant including his role as the overall supervisor which he failed to discharge diligently, these taken into account together with the cheque incident, constitute reasonable grounds for dismissal.

85. This Court has severally observed that it is not its jurisdiction to second guess the reason for which an employer dismisses an employee unless the reasons are on their face so flawed that no reasonable employer would consider dismissal as the most appropriate disciplinary measure to take.

86. As observed earlier the several allegations against the claimant including the cheque incident, constituted reasonable grounds for the termination of his service. To this extent the Court finds and holds that the Claimant's assertion that he was not guilty of the allegations against his fails.

87. Regarding the procedure followed prior to the dismissal, the Court from the review of the evidence above, is persuaded that the respondent followed fair procedure before terminating the service of the Claimant.

88. In conclusion the Court finds and holds that the claim is without merit and hereby dismisses the same with costs.

89. It is so ordered.

Dated at Eldoret this 25th day of March, 2021 Delivered at Eldoret this 25th day of March, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-03-25 11:03:49+