



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1888 OF 2016

BETWEEN

DAVID KARIUKI NDERITU.....CLAIMANT

VERSUS

SAMCHI TELECOM LIMITED....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Githuku & Githuku Advocates for the Claimant

Anthony Gikaria & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 14th September 2016. He avers, he was employed by the Respondent as a Group Internal Auditor- Cost and Administration, on 30th December 2014. His gross salary was Kshs. 55,000 monthly. The Respondent terminated his contract on 27th May 2016. The Respondent made various allegations against the Claimant in justifying termination, which included: -

- a. Failure to coordinate/control revenue.
- b. Failure to manage treasury and working capital by refusing to audit branches, leading to large working capital being held by the branches.
- c. Failure to investigate, audit and report persistent losses in the branches.
- d. Failure to audit and identify operational risks at the branches and to put effective control systems to minimize loss of assets and other stocks.

2. In brief, the Respondent alleged that the Claimant violated Respondent's procedures and Section 44 [4] [c] of the Employment Act.

3. The Claimant states, he was dismissed for failure to undertake duties which were not within his job description. He was not under his contract, tasked with conversion of stocks into sales; neither was he tasked with production of branch reports. These duties were performed by Branch Managers and Sales Coordinators, not the Internal Auditor.

4. Termination was unfair. The Claimant states that the Respondent had ulterior motive: replacement of the Claimant with another person as Internal Auditor. His responses to all accusations were not considered. He was not given sufficient time to prepare his responses. There was no complaint from the Claimant's immediate Supervisor. There were no letters of warning for the 17 months the Claimant worked.

5. The Respondent refused to pay to the Claimant his terminal benefits which included: 21 days of annual leave at Kshs. 55,000; notice of 1 month at Kshs. 55,000; and severance pay at the rate of 30 days' salary for every complete year of service at Kshs. 82,500. In sum, the

Claimant prays for Judgment against the Respondent for: -

- a. Declaration that termination was unfair and unlawful.
- b. Compensation equivalent to 12 months' salary.
- c. 21 days of annual leave.
- d. 1-month salary in lieu of notice.
- e. Severance pay.
- f. Remittance of all statutory deductions including PAYE, N.H.I.F and N.S.S.F.
- g. Certificate of Service to issue.
- h. Costs and Interest.

6. The Respondent filed its Statement of Response, on 18th October 2016. It is admitted that the Claimant was employed by the Respondent, on terms and conditions of service, stated by the Claimant. On or about 17th September 2015, he was assigned to Respondent's Eldoret Branch. He performed his role negligently and failed to comply with audit standards, resulting in heavy losses to the Respondent. He admitted in his stock losses and debtors report for the year 2015, that the Respondent suffered loss of Kshs. 2,639,456. He again failed and/or negligently performed his duties, occasioning the Respondent loss of Kshs. 206,511 at the Nanyuki Branch and Kshs. 149,520 at Siaya Branch. He was aware that Respondent's Employees at these outlets were stealing.

7. He was issued a letter to show cause, dated 13th May 2016, which he did not adequately respond to. He was invited to disciplinary hearing, which happened on 18th May 2016. He was heard and summarily dismissed on 27th May 2016. He was heard and given valid reason for Respondent's summary dismissal decision. Termination was fair and lawful. The Respondent prays the Court to dismiss the Claim with costs.

8. The Claimant gave evidence and rested his Claim, on 17th December 2020. The Respondent, though served with the hearing notice, did not attend the hearing and gave no evidence. The matter was last mentioned in Court on 4th February 2021 when both Parties confirmed the filing and service of their Final Submissions.

9. The Claimant adopted his Witness Statement and Documents in his evidence. He restated that he worked for the Respondent from January 2015 to May 2016. He worked for a total of 17 months. His salary was Kshs. 55,000 monthly. Statutory deductions were made, but were not remitted. Provisional Member Statement of Account from the N.S.S.F exhibited by the Claimant shows this. There was no payment with respect to N.H.I.F and PAYE.

10. His duties comprised all internal audit. He prepared reports and advised the Respondent on its assets. He was dismissed on 28th May 2016 on the ground that he performed his duties negligently and carelessly. He did not have a warning. He was issued letter to show cause, and invited to a disciplinary hearing. He was heard. His explanation was disregarded. New accusations were introduced. It was alleged that the Claimant failed to coordinate revenues. Sales Coordinator, and not the Claimant had this responsibility. The Claimant appealed the decision to summarily dismiss him, through a letter dated 1st June 2016.

11. The Claimant submits that he was entitled to 21 days of annual leave each year. The Respondent provided for 17 days of annual leave in the contract which was illegal. The Claimant did not go on leave for any period, and was paid nothing in lieu. He claims 21 days of accrued leave under Section 28 of the Employment Act. He submits that he merits: notice pay under Section 36 of the Employment Act; service pay under Section 35[5] of the Employment Act; that statutory dues were deducted, but not remitted to the relevant statutory bodies.; he cannot get tax compliance certificate as the Respondent did not remit PAYE; N.S.S.F was only paid in March, April and May 2016 as was N.H.I.F; and lastly, that he is entitled to compensation for unfair termination, relying on Section 41, 43 and 45 of the Employment Act.

12. He submits at page 14 that: -

“ The Claimant seeks an award of Kshs. 3,980,650.”

He however goes on to make a computation under the various heads, amounting to Kshs. 1,019,744, concluding his Submissions with the following statement: -

“Claimant prays for an award of the total sum of Kshs. 1,019,744. “

13. The Respondent failed to give evidence, but submits that termination was fair and lawful. The Claimant performed his role improperly and negligently. He prepared a report on 3rd February 2016 admitting that the Respondent lost Kshs. 2,639,456. The Respondent's outlets at Nanyuki and Siaya experienced financial loss as pleaded by the Respondent. He was taken through a disciplinary process, leading to the decision to summarily dismiss him. He indicated through his conduct that he was in fundamental breach of his contract, warranting summary dismissal under Section 44[3] of the Employment Act. He was guilty of gross misconduct, warranting summary dismissal under Section

44[4][c] of the Employment Act. Procedure under Section 41 and 45 was fair, as shown from the letter to show cause, the invitation to disciplinary hearing and the actual hearing. He is not entitled to the remedies sought.

14. The issues are: whether termination was based on valid reason or reasons; whether it was fairly carried out; and whether the Claimant merits the remedies sought. The relevant provisions of the law, as identified by the Parties, are Sections 41, 43, 44 and 45 of the Employment Act. These Sections must be read with Section 47[5] which governs proof in wrongful dismissal and unfair termination.

The Court Finds: -

15. It is undisputed that the Claimant was employed by the Respondent as an Internal Auditor through a contract executed by the Parties and their Witnesses, on 30th December 2014 and 31st December 2014. His gross monthly salary was Kshs. 55,000. He was summarily dismissed on 27th May 2016. The reasons for the decision are as stated, at paragraph 1 of this Judgment.

16. Section 47 [5] of the Employment Act places the burden of proving that an unfair termination of employment, or wrongful dismissal has occurred on the Employee. The burden of justifying the grounds, rests with the Employer.

17. In this dispute there is no evidence from the Employer, justifying the grounds of termination.

18. The grounds stated in the letter of termination, without evidence from the Respondent, remain empty Pleadings and Submissions, unsupported through Evidence. From the outset, the Court must conclude that the Respondent has not discharged its burden under Section 47 [5], of justifying the ground for termination.

19. The Claimant's evidence showing that unfair termination occurred is uncontested. Termination was at the instigation of the Respondent. The accusations were in the nature of failure to discharge certain roles, which the Claimant states, did not fall within his job description. This aspect of his evidence was not challenged through evidence adduced by the Respondent, or even tested through cross-examination of the Claimant by the Respondent.

20. From the evidence availed by the Claimant, the Court does not doubt that procedure met the threshold of standards of fairness, prescribed by Section 41 read with Section 45 of the Employment Act.

21. The Claimant told the Court that he was presented with charges through the letter to show cause; he answered to the letter to show cause; he was invited to disciplinary hearing; and he was heard. The Claimant did not show that the Respondent denied him significant procedural right and guarantee under the Employment Act.

22. Termination was unfair under Section 43 and 45 of the Employment Act, but fair on procedure under Section 41 and 45 of the Act.

23. He merits compensation for unfair termination. In determining the amount payable in compensation, the Court has taken into account that the Claimant worked for little under 2 years, a period of 17 months. He does not merit maximum compensation, having served for only 17 months. He did not have warnings. His contract was term-indefinite. He expected to go on working beyond the year 2015. **He is granted compensation for unfair termination equivalent of 2 months' gross monthly salary at Kshs. 110,000.**

24. His contract entitled him 1-month notice or 1-month salary in lieu of notice. He correctly submits that Section 36 of the Employment Act similarly grants him this prayer. **He is granted notice pay of Kshs. 55,000.**

25. The Claimant seeks annual leave pay for 1 year. His contract offered 15 days of annual leave, which is contrary to Section 28 of the Employment Act, affording an Employee a minimum of 21 days of annual leave, after 12 months of continuous employment. Section 28 must override the clause on annual leave contained in the contract. The Claimant however wrongly computes his leave pay at Kshs. 55,000, which would apply to 30 days of annual leave. **His annual leave of 21 days is the equivalent of 21 days' salary, which is granted at Kshs. 44,423.**

26. Severance pay is not available to the Claimant. He did not leave employment under Section 40 of the Employment Act, on redundancy. If he meant service pay under Section 35[5] of the Employment Act, he was subscribed to the N.S.S.F.

27. There was no evidence adduced by, or from the various statutory bodies, confirming the Claimant's position that the Respondent deducted and failed to remit statutory dues. The Claimant just filed extracts alleged to be from N.S.S.F and N.H.I.F with no clear evidence on entries made in these extracts. There was no document from the KRA on PAYE. There is no sufficient ground to order that PAYE, N.S.S.F and N.H.I.F allegedly deducted from the Claimant's salary, are reverted to the Claimant. The best recourse would be for the Claimant to seek enforcement through the statutory mechanisms given under the various Acts of Parliament, governing the various statutory bodies. The Claimant did not, in any event provide specific figures in his Statement of Claim, merely asserting in his Final Submissions, that the Respondent should be ordered to remit all statutory deductions, including PAYE, N.H.I.F and N.S.S.F. In the demand letter issued before action, the Claimant asked to be provided all employment records relating to PAYE, N.S.S.F and N.H.I.F. He did not ask for payment of any statutory deductions. The prayer is declined.

28. He was not consistent in his demand, pleadings and prayers, on the figures. The demand letter states a figure of Kshs. 962, 500; the Statement of Claim states, Total- Kshs. 192,500; while the Submissions inflate the total to Kshs. 3,980,650 and Kshs. 1,019,744. A Party seeking the aid of the Court must be consistent in his/ her letter of demand, pleadings, evidence and submissions.

29. Certificate of Service shall be released to the Claimant as required by Section 51 of the Employment Act.

30. No order on the costs and interest.

IN SUM, IT IS ORDERED: -

- a. Termination was fair on procedure, but unfair for want of valid reason or reasons.
- b. The Respondent shall pay to the Claimant: equivalent of 2 months' salary in compensation for unfair termination at Kshs. 110,000; 1-month salary in lieu of notice at Kshs. 55,000; and 21 days of annual leave at Kshs. 44, 423 – total Kshs. 209,423.
- c. Certificate of Service to issue.
- d. No order on the costs and interest.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

JAMES RIKA

JUDGE