



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.544 OF 2019

LAUREEN M NZAU.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGEMENT

The claimant is a female adult and the respondent is a state corporation established under the State Corporations Act.

The claimant was employed by the respondent in the finance revenue section where she worked until 20th June, 2019 when her employment was terminated.

The claim is that termination of employment was on unfounded allegations. Money was allegedly lost between July, 2017 and September, 2018 when the claimant was a cashier but accused of the offence allegedly committed as the person responsible for reconciliation. Such accusation was unfounded and led to unfair termination of employment. During the disciplinary hearing the claimant was not provided with the documents in relation to the allegations made.

The claimant is seeking the following;

- a) *A declaration that termination of the claimant was unfair thus unlawful.*
- b) *An order that the respondent immediately reinstates the claimant to work.*
- c) *An order that the claimant be adequately compensated for time lost out of employment.*
- d) *Costs of the suit.*
- e) *Interests on the reliefs*

The claimant has alternative prayers that;

- a) *Damages for unlawful termination of employment.*
- b) *Costs of the suit.*
- c) *Any other relevant relief.*

The claimant testified that upon employment by the respondent she worked diligently but there were allegations that between July, 2017 to September, 2018 when she worked as cashier money were lost. She had been transferred from the head office at Times Tower to JKIA as a cashier and would collect money on behalf of KCAA and hand over to her supervisor Wycliffe Nyanamba who was found to have misappropriated the money. The claimant was not a reconciliation officer as her role remained the cashier and the two functions could not professionally run together or by the same person. She was overworked and was not able to do cashiering duties together with reconciliations. All monies collected were handed to her supervisor and who acknowledged receipt of the same.

The claimant also testified that reconciliation of monies was done at the head office and all the responsible officers were not questioned and which was discriminatory. The people in the cash office were Rose Otieno, Anthony Mucheru and Anthony Githimo, Githendu and the claimant and only the claimant got victimised. There was no excel sheet to be signed with regard to what was collected in cash each day and when she appeared before the disciplinary committee she was shown an excel sheet which was prepared to implicate her. The respondent

failed to state how much was lost and there was no records produced at the hearing to allow her defend self.

As a cashier, the claimant was accused of failing to reconcile which was not the case. Her profile did not allow access to other stations so as to do reconciliations. She was the only cashier and to do reconciliations she needed the banking slips which were held in a different office. Reconciliations were not her role. The office was understaffed and there was no replacement. The manager was aware that there was nobody to do reconciliations.

The claimant also testified that she was made to bear the burden of blame which was unfair and discriminatory. Nyanamba was found to have committed fraud. The money handed to him was not banked.

Upon cross-examination, the claimant testified that upon being deployed at the JKIA she was to undertake cashiering duties. Previously she had done reconciliations. There was no letter changing her role to cashier. She was collecting cash and handing over to her supervisor and who signed invoices.

Upon investigations the claimant was issued with a notice to show cause why employment should not be terminated to which she filed a reply on 26th May, 2019. She noted that in July, 2017 she had stopped being a reconciliation officer to a cashier.

On 21st May, 2019 the claimant was invited to the disciplinary hearing and informed of her rights but the right to have the documents relied upon during the investigations were not served upon her and which led to unfair termination of employment. Following the disciplinary hearing notice dated 20th June, 2019 was issued terminating employment.

Defence

The defence is that the claimant was employed as an officer, finance vide letter dated 24th January, 2014 and which employment was confirmed by letter dated 2nd July, 2014. Employment was terminated on 20th June, 2019 for gross misconduct arising from the investigation findings by the respondent.

Money was lost between July, 2017 to September, 2018 when the claimant was a cashier was in gross misconduct and justified termination of employment which was fair and within the provisions of the law. At the hearing he claimant was provided with all relevant documents in relation to her case and which she used in making her written and oral representations. Upon notice to show cause the claimant submitted a response and where she confirmed receipt of the investigations report.

The defence is also that at the disciplinary hearing the claimant's rights was secured and she attended before the panel and made oral representations.

The respondent's intelligence and strategic operations department conducted investigations which sought to establish the circumstances under which the finance division staff at the JKIA failed or delayed the banking of revenue amounting to Ksh.22, 672,462 and \$326,093 collected from Air-Navigation Service Charge (ANSC) which the respondent was mandated to collect on behalf of the Kenya Civil Aviation Authority (KCAA). Following investigation and a report dated 16th January, 2019 it was established that the claimant who was a cashier collecting ANSC revenue officer responsible for JKIA between July, 2017 and September, 2018 committed malpractices;

- a) Failed to ensure that her supervisor, Nyanamba acknowledged receipt of the ANSC revenue during handing over of the same monies and
- b) Acted in complete disregard of best practices/accounting practices despite having summary payments schedules which had parts for signing and opted to leave them balance/unsigned.

The claimant's case was reported to commissioner intelligence and the strategic operations via memo dated 16th November, 2018 and which indicated the claimant was under investigations in relation to handing of revenue collected. The claimant was interdicted on 23rd November, 2018 pursuant to the code of conduct clause 7.1 and to allow for investigations. A show cause notice used on 14th May, 2019 and the claimant filed a reply and upon which she was invited to a disciplinary hearing on 29th May, 2019 and based on the investigations report a decision was taken to terminate employment on 20th June, 2019. This was done in accordance with the law and the code of conduct.

Termination of employment was procedural, fair and lawful. The respondent invoked section 44(4) (c) of the Employment Act and Clause 6 of the Code of Conduct of the respondent. Upon investigations it was established that the claimant while working as a cashier failed to adhere to the code of conduct. Being a cashier she failed to undertake reconciliations which was part of her duties and which she knew was part of her cashier duties.

The claims made are without merit and should be dismissed. Reinstatement cannot issue as the termination of employment was on good basis. Upon compliance with terms set out in the letter termination and submission of a final declaration of income and liabilities and upon clearance the respondent shall pay the following dues;

- a) Salary up to 20th June, 2019;
- b) pension benefits in line with the pension trust deed and rules; and

c) Issuance of a certificate of service.

Termination of employment was lawful and no damages are due and the claim should be dismissed with costs.

Patrick Mugambi testified in support of the defence that he investigated the claimant's case following the loss of Ksh.22 million and \$326,093 being revenue collected by the respondent for the KCAA where the claimant had been placed as a cashier, finance officer JKIA. The claimant made her statement and was interviewed and the findings were that she failed to reconcile and thus culpable for failing to report the shortfall to KCAA or the respondent. As a cashier the claimant would hand over cash to the supervisor, Nyanamba without acknowledging receipt. The way the claimant handled and handed the money was not within the best practice in financial and accounting standards. She just handed over money without Nyanamba signing for it whereas the form she used for handing over had a place for acknowledgement.

The claimant had been transferred to the JKIA finance office as a reconciliation officer and there was no evidence that of holding a different role. She was responsible for both reconciliation and cashier duties. The transfer letter did not designate her as cashier only. Mercy Ngige was called in to help at the finance office since KCAA made complaints to the respondent.

Mr Mugambi also testified that Following investigations there were substantial grounds against the claimant and including 7 others found culpable and disciplinary action was recommended. This was not discriminatory as several sections of the code of conduct had been contravened and leading to neglect of duty by the claimant.

Frankline Kiogora the assistant manager in human resource department testified that the claimant was employed as officer, finance (KRA Grade 3) on 3rd February, 2014 and disciplinary case against her was reported by memo dated 16th November, 2018 on alleged fraud in relation to handling revenue collected. The investigation conducted had sought to establish the circumstances under which finance division staff based at JKIA had filed or delayed the banking of revenue amounting to Ksh.22, 672,462 and \$326,093 collected from ANSC which the respondent was mandated to collect on behalf of KCAA.

The claimant was interdicted on 23rd November, 2018 in accordance with the code of conduct. Upon investigations, it was established the claimant who worked as cashier collecting ANSC revenue/officer responsible for reconciliation at JKIA between July, 2017 and September, 2018 committed malpractices by failing to ensure her supervisor, Nyanamba acknowledged receipt of monies while handing over and that she acted in complete disregard to best financial accounting practices by failing to ensure the supervisor signed upon receipt of funds.

The claimant was invited to show cause why disciplinary action should not be taken against her on account of gross misconduct by letter dated 14th May, 2019 and who replied and then invited to a disciplinary hearing for an oral hearing. She was provided with all the necessary documents in relation to the case and did not request for anything else. After the hearing, the respondent found good cause to terminate employment on the grounds of neglect of duty and notice issued on 20th June, 2019 which was gross misconduct and warranted summary dismissal but the respondent opted to issue termination of employment. The claimant lodged an appeal but no new grounds had been addressed and this was dismissed.

Mr Kiogora also testified that on the claims made, upon clearance with the respondent, the claimant will be paid her dues for days worked until 20th June, 2019 and as specified in the letter terminating employment. There was due process and the decision to terminate employment was justified and the claim should be dismissed with costs.

At the close of the hearing both parties agreed to file written submissions.

The claimant submitted that it was unfair of the Respondent to single her out among four other cashiers namely, Ms. Rose Otieno, Mr. Anthony Kithimo, Mr. Anthony Mucheru and Ms. Githendu because the mode of collecting and handing over cash to the supervisor was the same for all the said Cashiers. That save for Ms. Rose Otieno who has since retired, the other three cashier's only received warning letters and continue to work for the Respondent as confirmed by the Respondent second witness, Frankline Kiogora. That there was discrimination as held in **Janine Boss v Gems Cambridge International School limited 2016** that the burden of disproving an allegation of discrimination lies with the employer. That in the instant case, the Respondent was under an obligation to prove that the termination notice issued to the Claimant was not discriminatory against her on the basis of the claimant being a female employee.

The claimant also submitted that there exists no provision in the KRA code of conduct that allows an officer to supervise his supervisor as alleged by the Respondent in the termination letter and on alleged negligence of duty, the Claimant performed her duties with all due and integrity and no was cash lost or was traced to her as a cashier. Further that she tried to initiate procedures which would have ensured that fraud was minimized. That she also sent several emails to her supervisor advising him against cash collection of more than Kenya shillings 20,000 but the proposals were never acted on.

On the issue of unlawful procedure, the claimant submitted that the Respondent failed to provide the documents which would assist her during the disciplinary hearing and relied on the cases of **Catherine Muthoni Wairimu v Walter Reif (National chairman of the pubs, Entertainment And Restaurants Association of Kenya) and 2others (2015) eKLR** where the Court held that the Respondents needed to prove the reasons for termination and demonstrate these were valid reasons failure to which the Court was left with the impression that there was an ulterior motive in removing the Claimant from the office.

The Respondent submitted there was a probable reason to terminate the Claimant's Contract based on investigations it conducted on the matter and genuinely believed that there existed valid reasons to terminate the services of the Claimant pursuant to the provisions of section 43 of the Employment Act. Further, that as stated by the Respondent's investigator, the Claimant was moved to JKIA as a person in charge of conciliation and although she was allocated additional duties of a cashier she was still in charge of reconciliation. That no formal correspondence had been made by the Respondent stating that the Claimant should only perform cashier duties. there were proper reasons

why the Respondent instituted proceedings against the Claimant as held in **George Okello Munyallo versus Unilever Kenya Limited (2019) eKLR**. termination was procedural and the Respondent followed the correct procedure. having convened and held disciplinary proceedings in line with the rules of natural justice, the court ought not interfere with the same as held in **Republic versus Egerton University Ex- parte Robert Kipkemoi Koskey (2006) eKLR** where the court held that where an administrative body has complied with the rules of natural justice, the court will be reluctant to intervene with the proceedings.

On the allegations that the Respondent discriminated against the Claimant, the respondent submitted that Claimant has failed to prove how the Respondent discriminated against her and that the onus was on her to prove the same. Further, that seven other individuals appeared before the disciplinary panel and their cases addressed accordingly and the reliefs sought should be dismissed.

Determination

Whether there was unfair termination of employment;

Whether there was discrimination against the claimant;

Whether the order of reinstatement should issue;

Whether the remedies sought should issue.

The main issue for determination in this case is whether the Claimant's dismissal was justifiable and lawful and a determination of the same will effectively address the issue whether the remedies sought should issue.

Section 43 of the Employment Act, 2007 (the Act) provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

And Section 45 (2) of the Act requires that:

(2) A termination of employment by an employer 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

For the court, the question then is whether the Respondent had a genuine reason to warrant the finding that the claimant was of gross misconduct to justify termination of employment and whether in reaching its decision the Respondent employed fair procedure as held in **Walter Ogal Anuro v Teachers Service Commission [2013]eKLR; Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR; and Patrick Kibui Nyingi v Nairobi City Water And Sewerage Company Limited & another [2020] eKLR** and the findings that;

The investigations report dated 27th May 2013 is sufficient evidence to consider whether a reason to dismiss the claim and it was would be unnecessary for this Court to further investigate the allegations against the Claimant. Further, the argument that the Respondent did not prove the loss it incurred does not hold water as it is evident that the Respondent would have incurred loss as a result of the adjustment. Based on the investigations report, I find that there was a valid reason for dismissing the Claimant for gross misconduct under section 8.23.2 of the Human Resource Policy and Procedures Manual and Section 44(4) (g) of the Employment Act which provides:

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

In this case, by letter dated 24th January, 2014 the claimant was employed by the respondent as an Officer, Finance (Grade KRA 3) which position was based in the Corporate Support Services Department (Finance Division) and directed that;

... you will be deployed at the Nairobi station but in further you will be eligible for transfer to other offices where the Authority business operations are carried out. ...

The claimant testified that she was transferred/redeployed to the JKIA finance office from 28th July, 2017 where she was a cashier and that the transfer was verbal. It was meant to be temporary as she was replacing another officer. There was no replacement.

Effectively, the claimant remained under her terms of service, the officer, and Finance (Grade KRA 3) at all material times.

By letter dated 20th June, 2019 the respondent terminated the claimant's employment on the grounds that;

Management has considered your representations and found it unacceptable since your culpability is confirmed on the fact that on various dates between July 2017 and September 2018, being the officer responsible for ANSC reconciliations duties before Ms Mercy Ngige took over, you failed to perform your reconciliation duties diligently thereby facilitating fraud and theft that could otherwise have been unearthed at an early stage and remedial action taken.

Further, it is evidenced that while you worked as cashier collecting ANSC revenue at JKIA, you failed to ensure that your supervisor (Mr. Nyanamba) acknowledged receipt of the ANSC revenue during handover of the said monies in complete disregard of best financial/accounting practices despite having the summary payment schedules which had parts for signing and you instead opted to leave them blank/unsigned.

Your above stated actions led to KCAA revenue loss of Air Navigation Service Charge (ANSC) amounting to Kenya Shillings (Kshs.22, 672,462) and USD 8,408 which KRA collects on agency basis.

Consequently, a decision has been reached that your services with the Authority be terminated for gross misconduct with immediate effect in line with the provisions of the Employment Act, 2007 section 44.4(c) as well as clauses; 6.1.2.2 Of the KRA Code of Conduct.

The claimant was alleged to have failed to undertake her reconciliation duties and thereby facilitated fraud and theft of funds; she failed to ensure her supervisor Nyanamba acknowledged receipt of monies collected during handover in accordance with best financial/accounting practice; there was loss of funds as a result; and this resulted in gross misconduct.

In her evidence, the claimant maintained that while she was at the JKIA station collecting revenue for ANSC she was a cashier and not a reconciliation officer. Indeed she collected monies and handed to her supervisor, Nyanamba who was to undertake banking. The handed over funds/monies were without an acknowledgement. These funds/monies got lost and Nyanamba was found to have stolen. The claimant testified that;

... I was a cashier when the alleged loss of funds at JKIA occurred between July, 2017 to September, 2018. The cashier was to collect cash and remit to the supervisor to bank. I was collecting cash and handing over to Wycliffe Nyanamba ... as cashier I was accused of failing to reconcile which was not the case. My profile did not allow me access to other stations so as to reconcile. I was only cashier and to reconcile I needed banking slips. Reconciliation was not my role. The banking slips were in a different office at Forodha House and I was at KCAA. The reason the respondent may have considered me to have been in reconciliation was because we were understaffed. ...

On this evidence, the claimant was cross-examined by the defence and she testified that;

... before my transfer to JKIA I was at Times Towers doing reconciliations. I was moved to JKIA and I was deployed to general duties. Previously I was doing reconciliations. In July, 2017 I stopped reconciliations and there was nobody to handover to such duties. I had no document stopping my role to the next ... I had no letter deploying me to cashier duties. I was collecting cash and handing over to my supervisor. I signed invoices. There was a schedule and the receiving officer did not sign the excel sheets. ...

The investigations on the shop floor vide the investigations report of Mr Mugambi outlined the conduct of the claimant and the failure to undertake her duties of reconciliation of revenue collection at her station, the failure to ensure the handing over of monies collected was acknowledged and which led to loss of funds facilitated by her conduct. The defence that the claimant was only a cashier and not the reconciling officer does not remove her from her allocated duties as an officer in the finance department and upon transfer to JKIA she was a reconciliation officer and which function/duty was not changed and which required due diligence and attendance at all times. An officer in the department of finance such as the claimant held was bound by best practices and accounting practices in handling monies collected whether as cashier or reconciliation officer. she was required in handing over to the supervisor or any other officer of the respondent to ensure such was acknowledged and a record was kept as evidence. even a cashier, which was not the case here as the claimant was functionally a reconciliation officer at a high role to that of cashier, due diligence in such finance duties required keenness to handling of cash.

The claimant failed in her duties as deployed by the respondent. she was found to be in neglect of duty and amounting to gross misconduct contrary to section 44 of the Act. such warrant summary dismissal. The decision to terminate employment was an option taken by the employer at own discretion.

There is no dispute that there was fair procedure in addressing the claimant's case of gross misconduct. Upon interdiction, there was notice to show cause and the claimant replied in writing and was invited for an oral representation and upon which termination of employment issued on 20th June, 2019. This was in adherence to the provisions of section 41 and 45 of the Act. There was due process.

There was a claim that the claimant was discriminated against by the respondent where other officers in her department were left out and she was made the sacrificial lamb. These are serious allegations.

Discrimination against a person has been defined by the Supreme Court in the case of **Law Society of Kenya v the Attorney General and Central Organisation of Trade Unions Petition No.4 of 2019** held that;

[discrimination is] a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society.

Affording different treatment to different persons similarly situated without any justification. However, in the claimant's case, her duties were distinct, separate and though similar to her colleagues in the same department, she was found to have failed to ensure reconciliations were done over revenue collection in her station, she failed to handover monies with an acknowledgement as required in best practice in finance and which facilitated fraud and theft of such funds. Upon investigations she was found culpable.

The claimant cannot be found to claim there was discrimination against her in the midst of the investigations which found her culpable. She cannot hide under the guise of other colleagues without demonstrating that they held similar duties to her and they failed to do them diligently. Her employment was specific and personal.

The court finds no case of discrimination against the claimant. No damages are due.

On the claims made, reinstatement cannot issue where employment is terminated fairly and upon the due process.

Accordingly, the claim is hereby dismissed. The claimant shall attend at the shop floor for clearance and upon which the dues outlined in the letter dated 20th June, 2019 shall be addressed. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and