



**REPUBLIC OF KENYA**

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

**MOMBASA**

**CAUSE NO. 30 OF 2020**

**STEPHEN NYONGESA MUKAMANI O.....CLAIMANT**

**- VERSUS -**

**CARSLAKE NOMINEES LIMITED T/A DIANI SEA RESORT.....1<sup>ST</sup> RESPONDENT**

**DIANI PROPERTIES LTD.....2<sup>ND</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> April, 2021)**

**JUDGMENT**

The claimant filed the memorandum of claim on 13.07.2020 through P.A. Osino & Company Advocates. The claimant prayed for awards, jointly and severally, against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as follows:

- a) The sum of Kshs.5, 515, 271 as particularised in paragraph 12 of the claim (salary for February 2020 Kshs. 40,670.00; leave days for 3 years and 4 months Kshs. 733, 333.00; salary in lieu of notice 3 months Kshs. 540, 000.00; severance pay for period served; salary from 2<sup>nd</sup> respondent not paid for 2017 Kshs. 1,066, 032.00, 2018 Kshs.1, 494, 048.00, and 2019 Kshs.1, 578, 048.00).
- b) Terminal dues as an accountant for the 2<sup>nd</sup> respondent not paid and pension.
- c) Damages for breach of contract as a result of unlawful dismissal.
- d) Cost and interest of this suit.
- e) Any other relief as the Court may deem just.

The claimant's case is as follows:

- a) The 1<sup>st</sup> respondent employed him as an accountant per the contract dated 24.11.2016 effective 26.11.2016 earning Kshs.102, 000.00 and a house allowance of Kshs.18, 000.00 and was given an accompanying job description.
- b) The claimant was given additional duties of the position of accountant for the 2<sup>nd</sup> respondent until 07.02.2020 when he was unfairly and unjustly dismissed without any reasonable cause.
- c) His salary was reviewed in January 2018 and in January 2019 to the sum of Kshs. 180, 000.00 as gross basic salary inclusive of house allowance.
- d) On 18.12.2019 the 1<sup>st</sup> respondent maliciously issued a warning letter to the claimant. On 27.01.2020 the 1<sup>st</sup> respondent maliciously issued a suspension letter to the claimant and invited the claimant for a disciplinary meeting where the respondent refuted all allegations tabled by the respondents.
- e) On 07.02.2020 the 1<sup>st</sup> respondent maliciously issued a summary dismissal letter to claimant.
- f) The claimant served the respondents from 26.11.2016 with loyalty and diligence until 07.02.2020 when the respondents

wrongfully and unlawfully terminated the services of the claimant and failed to pay him his terminal dues as tabulated in paragraph 11 of the memorandum of claim.

The respondents filed on 17.08.2020 a joint response to the claimant's statement of claim and through M/s Alinaitwe, Osodo Advocates LLP. The respondents prayed that the suit be dismissed with costs to the respondents. The respondents' case is as follows:

- a) The respondents admit that they employed the claimant per the letter of contract of service dated 24.11.2016 effective 26.11.2016 earning Kshs. 102, 000.00 and a house allowance of Kshs. 18, 000.00 and the claimant was given a job description on the same day.
- b) The respondents deny that immediately after appointment he was added duties as accountant for the 2<sup>nd</sup> respondent until 07.02.2020 when he was allegedly unfairly and unjustly dismissed without any reasonable cause.
- c) The claimant's responsibility included the accounts of the 2<sup>nd</sup> respondent because the respondents have a central accounts team and system and the claimant was paid in view of the work assigned, working for both respondents as an accountant; and the claimant knew as much.
- d) The claimant's termination on 07.02.2020 was fair and justified after the claimant was given a notice to show cause and further given a fair hearing and an opportunity to defend himself.
- e) The respondents admit the claimant's salary was reviewed in January 2018 and subsequently in January 2019 to the sum of Kshs.180, 000.00 as gross pay inclusive house allowance. The pay was in recognition that the claimant was in charge of the central accounts of the respondents herein and without which his salary would not have been reviewed so highly in such a short time.
- f) The 1<sup>st</sup> respondent admits that on 18.12.2019 they issued a warning letter to the claimant upon valid grounds and it was valid. Further, on 21.01.2020 the respondents issued another warning letter to the claimant and the same was equally upon valid reasons and therefore not malicious as alleged for the claimant.
- g) The 1<sup>st</sup> respondent admit that on 27.01.2020 they issued the suspension letter inviting him to disciplinary hearing and it was a fair procedure. Subsequently, the 1<sup>st</sup> respondent dismissed the claimant by the dismissal letter as alleged for the claimant but it was a fair decision. It was not a malicious decision.
- h) The respondent calculated the claimant's final dues but the claimant refused to collect the same. The claimant is not entitled to the prayers made.

A reply to the joint statement of response was filed for the claimant on 25.08.2020.

The parties called their respective witnesses. The parties' respective final submissions were filed. The Court has considered the pleadings, the evidence and the final submissions on record. The Court makes findings as follows:

To answer the **1<sup>st</sup> issue** for determination the Court returns that the claimant was employed by the 1<sup>st</sup> respondent to work for both respondents as was assigned. There was no employment agreement between the 2<sup>nd</sup> respondent and the claimant as per the evidence on record. The Court finds that the evidence is that the contract of service was between the claimant and the 1<sup>st</sup> respondent under which the claimant was assigned accounting duties for both respondents. The parties are in agreement that the claimant commenced employment on 26.11.2016 until 07.02.2020 as an accountant.

To answer the **2<sup>nd</sup> issue** for determination, the Court returns that there is no dispute that the claimant was dismissed by the letter dated 07.02.2020 on summary dismissal. The dismissal was upon the ground that the claimant had failed to exculpate himself in view of the allegations in the suspension letter dated 27.01.2020. The suspension letter alleged that a review of the respondent's operations had revealed a number of fraudulent activities related to purchases and cash management and that the claimant had been implicated together with other staff. It was alleged that the claimant had failed to check and verify documents for purposes of payment and resulting into financial losses to the company. In the circumstances, it was further alleged in the suspension letter that the claimant had therefore failed to safeguard the organization's assets. The summary dismissal was said to follow because the management found the claimant had failed to give satisfactory explanation in view of the said allegations.

The **3<sup>rd</sup> issue** for determination is whether the termination was unfair. The evidence is that the summary dismissal came after the suspension letter setting out the allegations and the claimant attending the disciplinary hearing. The Court finds that the procedure was fair because the claimant was accorded notice and a hearing as per section 41 of the Employment Act, 2007.

On the merits of the dismissal, the Court has carefully considered the evidence by the respondent's witness (RW) especially during the cross-examination and returns that the 1<sup>st</sup> respondent has failed to establish a genuine and fair reason for the claimant's summary dismissal as per sections 43, 45 and 47(5) of the Act. First, RW confirmed that there was no respondents' financial audit report for the period of the alleged fraud. Second, while alleging that the Goods In-ward Note (GIN) was to be signed by four people, RW confirmed that the form for 30.11.2019 in issue as exhibited did not provide for signing by four persons as was alleged. Third, RW confirmed that there had been no criminal prosecution with respect to the alleged fraud. Fourth and most crucial, RW confirmed in his testimony that the claimant was not one of the suspects in the case of goods purchased without approval – but the suspects were Ibrahim the purchasing manager and Chisebe who received the delivery and signed GIN as well. Fifth, the claimant was not required to sign for approval of purchases and delivery but he relied on documents from operations sections and submitted to him to process the payments. Sixth, RW testified that it was alleged that the claimant and other staff had been inflating prices but the evidence was not provided at all. Accordingly, the Court finds that the reasons for

termination have not been shown to have existed as at the time of termination and they have not been shown to have related to the claimant's assigned duties and conduct.

The **4<sup>th</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1) The claimant prays for damages for breach of contract and unlawful and unfair termination. The court has found that the procedure leading to the dismissal was fair but the reasons for the termination have not been established. The Court has considered the factors to be considered in award of compensation under section 49 of the Employment Act 2007. The Court has particularly considered the claimant's failure to reply and show cause in writing as was offered in the suspension letter. The Court has also considered the 1<sup>st</sup> and 2<sup>nd</sup> warning letters which the claimant received but did not raise a grievance about the validity of the reasons for warning therein. The Court finds that the matters in the warning letters, on a balance of probability, were therefore valid. The 1<sup>st</sup> warning letter dated 18.12.2019 shows that the claimant failed on his oversight role as a team leader when ETR receipts by cashiers serving under him were not generated; when too many errors in billing were identified leading to guests bills not being paid; and, failure to control cash such as where bus fares were loosely authorised to staff resulting into unnecessary expenses in daily bus fare. The claimant never objected to the matters levelled in that 1<sup>st</sup> warning letter after he received the same. The 2<sup>nd</sup> warning letter was dated 21.01.2020. It related belated forwarding of payment vouchers for VAT withholding payments and belated action on suppliers' invoices for payment. Once again the claimant raised no objection or grievances after receiving the 2<sup>nd</sup> warning letter. The Court has considered the two warning letters and the claimant's failure to reply the suspension letter by showing cause as had been expected and returns that in view of that record of service and conduct, the claimant fully contributed to his summary dismissal and is thereby disentitled to compensation under section 49 of the Act.

2) The claimant prays for salary for February 2020 **Kshs40, 670.00**. The termination letter dated 07.02.2020 stated that the claimant would be paid up to 07.02.2020. He is awarded as prayed.

3) He prays for leave days for 3 years and 4 months he served. The contractual leave days were 26 days of paid leave. There was no evidence that the claimant took leave or was paid in lieu of annual leave. In view of the contractual provision on leave and section 28 of the Employment Act, 2007 on leave, the Court returns that the claimant has established his claims for leave and awarded **Kshs. 733, 333.00** as prayed for.

4) The claimant claims and prays for severance pay. As submitted for the respondents the Court returns that the claimant has not established the contractual or statutory basis for the claim and the same is declined.

5) The claimant prays for salary from the 2<sup>nd</sup> respondent for the period worked in 2017, 2018, and 2019. The claimant has stated that he was employed by the 1<sup>st</sup> respondent to work at the 1<sup>st</sup> respondent's central accounts. The Court returns that the claimant has failed to establish a contract of service between himself and the 2<sup>nd</sup> respondent and further failed to establish the terms and conditions of service applicable to any such contract, if at all it existed. The Court finds that the claimant was employed by the 1<sup>st</sup> respondent upon agreed terms and duties. The duties included serving both respondents and absence of a grievance in that regard while employment relationship existed shows parties were in such understanding. In any event, there is no reason to doubt the respondents' case that in view of the dual duties, the claimant's salary was enhanced. Further, he is not entitled to compensation for unfair termination by the 2<sup>nd</sup> respondent because he was never employed and then terminated by the 2<sup>nd</sup> respondent. The claimant's prayers for salary, terminal dues and pension against the 2<sup>nd</sup> respondent will therefore fail.

6) The court finds that the claimant's prayer for 3 months' pay in lieu of notice has not been shown to be based on any contractual provision and the same is declined.

7) The costs follow the outcome in the suit and the claimant is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the 1<sup>st</sup> respondent for:

a) Payment of **Kshs.774, 003.00** (less PAYE) by 01.07.2020 failing interest at court rate to be payable thereon from the date of filing the suit till full payment.

b) The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16<sup>TH</sup> APRIL, 2021.**

**BYRAM ONGAYA**

**JUDGE**