



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 349 OF 2016

ELIZER MUSAMBI NYONGESA..... CLAIMANT

VERSUS

SUBARU KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Cause was heard on 19 December 2019 when Elizer Musambi Nyongesa (the Claimant) testified and closed his case and on 15 December 2020 when a Finance Manager with Subaru Kenya Ltd (the Respondent) testified.

2. The Claimant filed his submissions on 29 January 2021 while the Respondent filed its submissions on 11 March 2021.

3. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as identified by the parties in their submissions.

Unfair termination of employment

Procedural fairness

4. Section 35(1) of the Employment Act, 2007 contemplates written notice of termination of employment whilst section 41 of the Act requires an employer to afford the employee an opportunity to make representations before terminating an employment contract.

5. The hearing can be a face to face engagement, through correspondence or a combination of both, depending on the circumstances of each case.

6. The Claimant was engaged by the Respondent as a branch accountant/office administrator on 7 July 2014.

7. On or around July 2018, the Respondent caused an audit of its Kisumu branch operations which revealed an under banking of Kshs 833,441/-.

8. The audit prompted the Respondent to send a memo on 18 July 2016 requesting him to explain the reasons for the under banking before close of the day. The Memo was served through email and a hardcopy.

9. The Memo was followed with a disciplinary hearing on 20 July 2016 and the Committee instructed the Claimant to give a proposal on the repayment of the unbanked monies.

10. The Respondent was not satisfied with the proposal by the Claimant and on 25 July 2016, it notified him of the termination of his employment.

11. Despite the show-cause and the oral hearing, the Claimant contended that the termination of employment was unfair because he was not afforded adequate opportunity to make representations as he was given less than 24 hours, he was not accompanied by a colleague, his immediate boss sat in the disciplinary committee and that investigations were incomplete.

12. Adequate time to prepare for a hearing depends on the circumstances of each case. The Claimant was a senior employee of the Respondent. He did not seek for more time upon the receipt of the show-cause. He equally did not ask the disciplinary committee to adjourn the hearing to enable him bring along a colleague or prepare adequately for the hearing.

13. On the question of conflict of interest, the Claimant merely alleged conflict of interest on the part of his immediate boss being conflicted

because he was a complainant and adjudicator. The record however does not show that it was the immediate boss who caused the audit to be conducted, or conducted the audit. The audit was led by a team from the Respondent's head office.

14. In Court, the Claimant did not demonstrate that he suffered any prejudice.

15. The Court finds that the Respondent was in substantial compliance with the dictates of procedural fairness.

Substantive fairness

16. Pursuant to sections 43 and 45 of the Employment Act, 2007, the employer needs to not only prove but prove as valid and fair the reasons for terminating an employment contract.

17. The Claimant challenged the validity and fairness of the termination of his employment on 3 broad grounds, that the Respondent had given conflicting figures on the under banking; he had been acquitted by a criminal court of theft charges and that his purported proposal to repay the lost monies was under duress.

18. In an attempt to discharge the burden, the Respondent called one witness. A copy of the Claimant's responsibilities and sales summaries/invoices were produced. The summaries show the under banking were in January, February, April and May 2016.

19. The Claimant admitted during the disciplinary hearing that his duties included daily reconciliation and that he would collect and bank monies received from customers and that he had noticed loopholes in June 2016 which he reported.

20. The Respondent produced records to show payments made by individual customers.

21. In the view of the Court, the inconsistent figures referred to do not deflect from the fact that the Claimant received monies from the customers and that he could not sufficiently explain why he did bank all the monies he received.

22. Even the fact that the Claimant was acquitted of criminal charges cannot help him.

23. This Court is aware that a debate has always simmered on the relationship between criminal trial on the same facts and disciplinary hearing.

24. The Court of Appeal in *Kibe v Attorney General* (2003) had this to say on the nexus between criminal trials and disciplinary proceedings:

We do not take this to be the correct way to view the matter because the dismissal was not founded on the criminal culpability of the appellant. It was based on his being liable for neglect of duty. The decision to dismiss the appellant for negligence did not have to await the verdict in the criminal trial and accordingly nothing attaches to the fact that the letter of dismissal preceded the judgment in that case.

25. In *Clement Karuri v Kenya Ports Authority* (2018) eKLR the Court of Appeal held

It is also settled that the institution of criminal proceedings is not a bar to civil proceedings or disciplinary hearings on similar facts. See this Court's decision in *Geoffrey Kiragu Njogu vs. Public Service Commission & 2 Others* (2015) eKLR. With the foregoing in mind, we find that the respondent was not barred from commencing the disciplinary hearing in the manner it did.

26. The Claimant asserted that he agreed to repay the equivalent of unbanked monies under duress. If indeed there was any duress, the particulars were not proved, such as from who and how.

27. The Court therefore finds that the Respondent had and has proved the existence of valid and fair reasons to terminate the Claimants employment.

28. Compensation is thus not available to the Claimant as a remedy.

Breach of contract

Earned wages/salary in lieu of notice/accrued leave

29. The Claimant sought for his 35 days earned salary for July 2016, accrued leave as well 1-month salary in lieu of notice.

30. These dues were computed but were used to offset the monies the Claimant could not account for and therefore nothing turns on these heads of the claim.

Pension funds

31. The Claimant did not produce a copy of the rules governing pension nor disclose whether it was run by the Respondent. Relief is declined since the Respondent informed him in the letter of termination of employment that these would be paid according to the rules of the

pension scheme.

Cooperative savings

32. An evidential foundation to this head of the claim was not laid and relief is declined.

Conclusion and Orders

33. From the foregoing, the Court finds no merit in the Cause and it is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 7TH DAY OF APRIL 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant	Mr Okello instructed by ROW Advocates LLP
For Respondent	Ms Lasololi instructed by Gumbo & Associates
Court Assistant	Chrispo Aura