



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. 004 OF 2014

ABRAHAMAN BARASA.....CLAIMANT

VERSUS

LAIKIPIA UNIVERSITY (FORMERLY EGERTON UNIVERSITY).....RESPONDENT

JUDGMENT

1. The Claimant through Messer Ngaywa, Ngigi and Kibet Advocates filed this claim vide a Memorandum of Claim dated 27th December, 2013, and later with leave of court given on 15th July, 2016 amended the Memorandum of Claim and filed in Court on 19th August, 2016, though the firm of Ndeda and associates Advocates, alleging wrongful dismissal and unlawful termination from employment and non-payment of terminal dues against the Respondent and seeks the following orders;-

- a) A declaration that the Respondent's letter dated 22nd August, 2013 summarily dismissing the claimant from employment was unlawful and hence null and void.**
- b) That the respondent reinstates the claimant in employment with immediate effect with no loss of benefits at his previous post or in another post with terms not less favorable than his previous post.**
- c) The respondent to pay the claimant loss of remuneration calculated at the rate of the claimant's remuneration of Kshs. 68,678/- per month to be paid for the period between 18th October, 2012 until date of reinstatement in employment.**

IN THE ALTERNATIVE

- d) Outstanding salary Kshs. 755,458/-**
- e) Three months salary in lieu of Notice Kshs. 206, 034/-**
- f) Maximum compensation of 12 months salary for wrongful/ unfair summary dismissal (Kshs. 68, 678 x12) of Kshs. 824,136**

Total= Kshs. 1,785,628/-

g) Interests at Court rates on (d), (e) and (f) above from the date of filing this claim.

h) Cost of this suit.

2. The summary of the claimant's case was that he was employed by the respondent on temporary appointment on 20th November, 1991 and given formal employment as an Account's Clerk on 17th July 1992. The claimant avers that he rose through the ranks and was promoted first to the position of Account Assistant Grade A/B on 29th August, 2006, then secondly to Senior Accounts Assistant 1 Grade VIII on 17th June, 2010 and finally on 7th June 2012 the claimant was promoted to the position of Assistant Accountant 1 Grade 10 which position he held until his dismissal.

3. The claimant states that, between 9th December, 2011 to 12th January, 2012 he was verbally instructed by respondent's finance officer to

temporarily perform the duties of the accountant in charge of income generating unit (IGU) as the said accountant was proceeding on leave. That no handing over or accounts reconciliation was carried out when he took over the said duties and when he handed over the said work back to the IGU accountant.

4. The claimant avers that by a letter of 17th February, 2012 he was informed by the finance officer that there was Kshs. 22, 143/- for farm department that was not banked during the time that the IGU accountant was on leave which claimant explained himself to the respondent's finance officer that he was not aware of any such anomaly and the matter was not followed further.
5. That on 26th September, 2012 the finance officer wrote a letter to the Respondent's registrar reporting the loss of money indicated in the letter of 17th February, 2012. Consequently, the registrar by a letter dated 28th September, 2012 demanded for explanation for the loss of the said money which claimant responded by the letter dated 1st October, 2012 denying any loss or misappropriation while he was acting in the accountant's office.
6. On 18th October, 2012 the claimant was suspended from employment on alleged loss/ misappropriation of funds amounting to Kshs. 22, 143/- and a disciplinary hearing scheduled for 28th November, 2012 which he alleged that the respondent did not give him a fair hearing. Consequently, the committee delivered its finding and summarily dismissed him.
7. The claimant avers that he appealed the decision of the disciplinary committee by his letter dated 19th December, 2012 which Appeal committee overturned the decision of the disciplinary committee on 26th April, 2013 and recommended the reinstatement of the claimant with immediate effect.
8. The claimant avers that he was surprised to receive a letter on 4th September, 2013 dated 22nd August, 2013 from the registrar that his appeal was dismissed by the Appeal Committee on 2nd August, 2013 when the previous Appeal Committee's had held a contrary opinion.
9. The claimant therefore avers that he was unfairly dismissed from employment and urged this Court to find as such.
10. The respondent filed a memorandum of response through the firm of E. M. Juma & Ombui advocates on 27th January, 2014 and affirmed that the claimant was employed by the respondent albeit on temporary basis.
11. The respondent avers that the claimant accepted to take over the duties of the IGU accountant without raising question on official handing over and accounts reconciliation.
12. That the delay in reporting the matter to the registrar was occasioned by the fact that the claimant had requested the finance officer to give him time to regularize the anomaly and even apologized for the anomaly as seen in the letter of 1st October, 2012.
13. The respondent avers that the initial appeal which recommended the reinstatement of the claimant was inconclusive as the decision to uphold the dismissal by the disciplinary committee was arrived at after a subsequent meeting was held by the appeal board after they realized that they did not have all information in relations to the claimant's file.
14. The respondent avers that dismissal of employees is a prerogative of a full council and not on recommendation of the committee and therefore the termination of the claimants on gross misconduct of misappropriating funds was lawful and in accordance with section 44(4) (g) of the Employment Act and Clause 5(b) (iii) of the CBA.

Hearing.

15. This matter proceeded for hearing on 16th March, 2021 and the claimant **CW-1** adopted his witness statement dated 10th March, 2016 and filed in court on 18th March 2016 as his testimony in chief and adopted the documents equally filed on 8th January, 2014 and further list of documents filed on 19th August, 2016.
16. On cross examination, the claimant testified that he was dismissed from employment on allegation of misappropriation of funds. That he was not in charge of the accounts office when the said money was lost as he temporarily handled the duties of the accounts officer who was on leave. That there was no formal handing over of the office documents to him therefore he cannot tell when the said money went missing. Further that the cashier was in charge of banking the money not him. He confirmed intimating to the finance officer that he will make good the lost finds but avers that he only agreed to it to avoid being in trouble. He testified that the sub- committee upheld his appeal but the full council declined it and upheld the disciplinary committee's decision.
17. The respondent on the other hand called one witness, **Sophia Muchiri (RW-1)**, the Director of Resource Mobilization and the former Finance officer at the respondent's employment who adopted her witness statement filed on 15th July, 2016.
18. On cross examination, she testified that the claimant was not the clerk but the Acting Assistant Income Generation Unit (IGU) Accountant therefore was the proper person to take over the duties of the IGU while the said accountant was on leave. That when the IGU reported back to work and perused through accounts counter-checking the receipts *vis a vis* what was banked she noted a problem and reported to her as the in charge of the department by then.

Claimant's submissions

19. The claimant through his advocate on record submitted that the claimant has worked diligently for the respondent from the year 1991 till his dismissal on 17th February, 2012 without any reprimand or being issued with any warning letter therefore his work has been impeccable as seen in how he was promoted three times while at the employment of the respondent which he has worked for about 21 years.

20. It was argued that it is suspicious that the claimant was requested by the finance office to take over the duties of the IGU accountant temporarily without the said accounting officer undertaking accounts reconciliation or officially handing over the said accounts as in practice only for the said officers to allege missing funds and lay blame on the claimant. Further that, the Respondent failed to explain to this court how the said money was lost or who and when the same was received from the farm therefore raising questions as to whether the money was indeed lost while the claimant was acting in the office of the IGU. Counsel, submitted that no evidence had been produced in this Court to affirm the allegation that there was a receipt issued by Claimant for the Kshs. 22, 143/- but which was not reflected in the bank. He therefore urged this Court to decline the respondent claim of alleged lost money when they have failed to prove that indeed there was money received, receipted but not banked by the claimant.

21. It was submitted that the 2nd appeal sitting conducted on 11th May, 2013 noted that the procedure of handing over of the duties from the IGU accountant to the claimant was not proper and that internal auditor discovered the loss of cash which was not indicated anywhere in the said findings that the loss of funds was in any way attributable to the claimant herein. Similarly, the 1st Appeal meeting held by Audit Governance and Risk management committee on 26th April, 2013 absolved the claimant from any liability and ordered the immediate reinstatement of the claimant to employment.

22. Counsel thus argues that since the respondent failed to adduce any evidence in form of receipts or call witnesses to show that indeed there was money that was received from the firm, then this courts is left to guess the state of facts and therefore urged this court to dismiss the respondents defence and allow the claimant claim as prayed.

Respondent's submissions

23. The respondent's advocate submitted that the claimant was terminated legally as the respondent followed due procedure and invited him for disciplinary hearing which he attended on the grounds of misappropriation of funds under his custody when the IGU accountant was on leave. He argues that the claimant admitted to the loss of the said cash and apologized by his letter 1st October, 2012 and promised to correct the normally but failed to act on his promise culminating to the disciplinary proceeding which found him guilty of gross misconduct and on an appeal by the full council he was equally found culpable and summarily dismissed.

24. Accordingly, he submitted that the termination was justified and in accordance with section 45 of the Employment Act. Additionally, counsel argued that the onus of proof of unfair terminations rests with the employee while the duty to prove that there existed valid reason for termination rest with the employer. He buttressed his argument by citing the case of **Jane Mukui Mwini –vs- Africa Apparels EPZ Limited [2018] eklr.**

25. Counsel also cited the case of **Miriam Siwa –v- Postbank Ltd [2011] eklr** where the claimant had failed to exercise his supervisory role properly leading to loss of funds by the respondent which culminated to the claimant dismissal and the court affirmed the respondent's decision stating that misappropriation of funds is a serious offence with dire consequences.

26. He argues that when the issue of misappropriation of funds came to the attention of the administrative department, the claimant was suspended in accordance with Clause 5(b)(ii) of the CBA and later summoned to disciplinary hearing on 28th November, 2012 which he attended together with two union officials and that there is no requirement to have the IGU officer and the finance officer appear before the disciplinary committee, one because they are not implicated secondly because the internal dispute mechanism do not follow strict rules of court as was held in the case of **George Musamali –versus- G4S security services Kenya limited[2016] eklr.**

27. On the 1st appeal committee recommendation, counsel submitted that the internal audit department made recommendation to have the claimant reinstated but argues that such recommendation are not binding on the Council's Appeal committee therefore argues that the Claimant was procedurally dismissed from employment and urged Court to disallow the prayers sought in the memorandum of claim as the dismissal was neither wrongful or unfair in the circumstances.

28. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

1. Whether there were valid reasons to warrant the claimant's dismissal.

2. Whether due process was followed before the claimant was dismissed.

3. Whether the claimant is entitled to the remedies sought.

ISSUE NO. 1 & 2.

29. The claimant was dismissed vide a letter dated 29th November, 2012 Ref No. LUC/60369/Vol.11/20 which indicated that the claimant had been found guilty of misappropriating university funds for the tune of kshs.22,143.00 between 9th December 2011 and 12th January, 2012.

30. Prior to this dismissal, the claimant averred that between 9th December 2011 to 12th January 2012, he had been instructed verbally by the respondent's Finance Officer to temporary perform the duties of the Accountant in charge of Income Generating Unit (IGU) who had proceeded on leave.

31. He avers that he performed his duties well but there was no handing over procedure conducted before he started the new duties.
32. He indicated that the incharge IGU resumed her duties on 12th January, 2012 and still no handing over procedure was conducted.
33. However on 17th February, 2012 when he was informed by the Respondent's Finance Officer that there was kshs.22,143/= from the Farm Department which was missing.
34. From the evidence presented, the claimant claimed he was unaware of the said anomaly as no account reconciliation was done between him and accountant in charge. It is also evident that there is no evidence submitted before court to indicate how this shortfall arose and at which period in time.
35. The claimant was also promoted on 7th June 2012 despite the alleged breach.
36. Nothing happened in the interviewing period until 26th September, 2012 when Finance Officer wrote to the Registrar on the matter. On 25th September 2012, the claimant was issued with a show cause letter and later was issued with a show cause letter and later a disciplinary hearing was held on 28th November 2012 to discuss his case in his absence.
37. The minutes of the committee held on 25th November, 2012 were presented to court as App 7 and there is no indication that the claimant attended the meeting.
38. It is indicated that the claimant had denied the case of misappropriating funds of the respondent but it is not clear the forum when he denied this nor when he asked to be pardoned so he could make arrangements to pay the money.
39. The committee recommended he be dismissed from duty summarily. He appealed the summary dismissal and the appeal was upheld as per minutes of Council Committee held on 26th April 2013.
40. He however recalled another letter dated 22nd August 2013 indicating that the Council Appeals Committee had upheld the disciplinary Committee decision to dismiss him summarily.
41. From the evidence submitted it has not been established how and when the claimant misappropriated the 22,000/= belonging to the respondent. There are no documents produced to show circumstances under which this offence occurred.
42. As indicated in this Judgment, there is evidence that the claimant was asked to act as accountant IGU when the boss went on leave. The instructions were verbal and no handing over and taking over notes were done.
43. It is therefore not very clear when the misappropriation of funds occurred i.e whether it was before he took over or after he took over and this makes the evidence of respondent against claimant not water tight.
44. There are many glaring unexplained gaps which make me reach the verdict that there was no valid reason to dismiss the claimant.
45. As concerns due process, the process is also waiting as the respondent failed to follow fair procedure.
46. The respondent's witnesses didn't show how the claimant received the alleged cash and failed to bank it.
47. The loophole in the accounting procedures of the respondent was brought out by the council's audit committee which allowed the claimant's appeal and ordered he be reinstated to work.
48. It is not clear how this committee's decision was later reversed because the claimant made an appeal to the council appeals committee on 19/12/2012 and the Council Audit Committee recommended his reinstatement.
49. The claimant was also not given an opportunity to be heard. It is therefore my finding that due process was not given to the claimant before he was dismissed.

ISSUE NO. 3

50. On issue No. 3 on remedies available, Section 45 (2) of the Employment Act 2007 states as follows;

45. (1).....

(2) A termination of employment 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.

51. In view of the fact that the claimant was dismissed without valid reason and without being accorded a fair hearing, I award him;

1. Compensation equivalent to 10 month's salary

= 10 x 68,678 = 686,780

I also award claimant as follows

2. 3 month's salary in lieu of notice as per the respondent's CBA clause 4.5 = 68,678 x 3 = 206,034/=

3. The claimant be paid all withheld salary not paid during the period of suspension as per clause S.2 of the CBA with effect from 18th October 2012 to 28th November, 2012.

= 1 month & 13 days = 43 days

43/30 x 68,678 = 98,438/=

4. 20 days salary not paid at the time of dismissal

= 20/30 X 68,678 = 45, 785/=

TOTAL = 1,037,037/=

Less statutory deductions

5. The claimant be issued with a Certificate of Service

6. The respondents will pay the above amount with costs and interest with effect the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Fred