



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 9 OF 2020

ABUBAKAR MOHAMED ALI SHEIKH.....CLAIMANT

VERSUS

GRAIN INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. What is before the Court is an employment dispute between Abubakar Mohamed Ali Sheikh and Grain Industries Limited. The Claimant documented his claim in a Memorandum of Claim dated 7th February 2020 and filed in court on 10th February 2020. The Respondent filed a Response on 8th July 2020.
2. The matter proceeded to full trial with the Claimant testifying on his own behalf. The Respondent called Bakari Bwetta.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on a five year fixed term contract with effect from November 2017. He was initially employed as a Logistics Clerk but was later designated as Distribution Coordinator.
4. The Claimant worked for the Respondent until 24th September 2019, when he was dismissed. At the time of dismissal, he earned a monthly salary of Kshs. 80,000.
5. The Claimant states that he was dismissed on the basis that he had received the sum of Kshs. 44,3000 on 4th April 2019, which he allegedly converted to his personal use, an allegation the Respondent knew to be false.
6. The Claimant's case is that his dismissal was wrongful and unfair. He cites the following particulars in this regard:
 - a) The Respondent had, since 5th April 2019, known that the Claimant had disclosed the fact that he had received the sum of Kshs. 44,300 in the course of his employment;
 - b) The Respondent was aware that the Claimant was to apply the said funds towards the repair of the Respondent's Motor Vehicle Registration Number KCL 919Y;
 - c) The Respondent did not, for 5 months, issue the Claimant with any notice of warning for having received and/or being in possession of the aforesaid sum of Kshs. 44,300;
 - d) In the circumstances, charging the Claimant 5 months after the alleged offence of misconduct was an afterthought, malicious, unfair and unprocedural;
 - e) The Claimant utilised the aforesaid funds for the intended purpose and hence his dismissal was unjustifiable and/or unfair;
 - f) The Respondent was out-rightly malicious because it was aware that the Claimant, by his position, held even larger sums of money in the course of his duty and such accusations had never been levelled against him;

g) The Respondent, through its Chief Executive Officer (CEO), manipulated, intimidated and unfairly influenced the Claimant's response to the show cause letter dated 16th September 2019;

h) The Respondent's CEO read the Claimant's response submitted on 17th September 2019 and he resolutely told the Claimant unless he "admitted" the charges levelled against him, such a response would only earn him a dismissal;

i) By virtue of the CEO's conduct, the Claimant was impelled to issue another response (submitted on 18th September 2019) which he contends was not rendered freely but was obtained through threats, blackmail and intimidation;

j) As a consequence, the Claimant was not accorded a fair and just disciplinary procedure;

k) The Claimant was also not given sufficient time to think through, process or deliver a proper response to the notice to show cause.

7. The Claimant therefore contends that his dismissal from employment lacked in fairness in terms of substance and procedure. He now claims the following from the Respondent:

a) One month's salary in lieu of notice.....Kshs. 80,000

b) Compensation for unlawful termination

(Salary for the unexpired term of contract)

(September 2019 to September 2022).....2,880,000

c) In the alternative to prayer b) above, 12 months' salary in compensation

d) Certificate of service

e) Costs plus interest

The Respondent's Case

8. In its Response dated 7th July 2020 and filed in court on 8th July 2020, the Respondent states that the Claimant was summarily dismissed on the grounds of gross misconduct and loss of trust/confidence.

9. The Respondent further states that the Claimant was accorded a fair hearing and adds that due process was followed in effecting the dismissal.

Findings and Determination

10. Two issues fall for determination in this case:

a) Whether the Claimant's dismissal was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

11. The Claimant was dismissed by letter dated 24th September 2019, stating thus:

"Dear Abubakar,

RE: SUMMARY DISMISSAL LETTER

*Reference is made to our letter Ref No. **HRD/DISC/160912/002** dated 16th September, 2019, our disciplinary hearing invitation Letter Ref. No: **DISCIPLINARY/200919/002** dated 20th September, 2019.*

In accordance with the Company's Human Resource Regulations, you were given a chance to appear before the Disciplinary Committee on Monday, 23rd September, 2019 and Tuesday 24th September, 2019. The committee having heard and carefully evaluated your written and oral explanations noted the following: -

1. That you received money in cash amounting to Kshs. 44,300 from a third party meant for purchase of spare parts for motor vehicle KLC (sic) 919Y and converted the said moneys for personal use without authority.

By virtue of your conduct, the Company has concluded that you have fundamentally breached your obligations as an employee. Consequently, the Management has adopted the Disciplinary Committee's recommendation to summarily dismiss you from service for gross misconduct and loss of trust/confidence effective 25th September, 2019.

Your terminal benefits will be computed as per below:

Ø Days worked up to 25/09/2019.

Ø Leave days accrued as at 25/09/2019.

Ø Any off days worked as at 25/09/2019.

Ø Less statutory deduction applicable.

Any payments due shall be subject to deductions in line with Section 19 of the Employment Act, 2007.

Please return any Company Property in possession and thereafter arrange to collect your final dues from the Human Resource Department.

Note that you have a right to appeal against this decision to the undersigned within seven (7) days from the date of this communication.

Yours sincerely,

For and on behalf of

GRAIN INDUSTRIES LIMITED

(signed)

BAKARI BWETTA

HUMAN RESOURCES MANAGER."

12. This letter accuses the Claimant of converting the Respondent's funds to his personal use. The facts as to how the subject funds ended up in the Claimant's possession are fairly simple and not contested; the Claimant received the sum of Kshs. 44,300 from a third party, Richard Okwaro, for purchase of spare parts for repair of the Respondent's Motor Vehicle Registration Number KCL 919Y, which had been involved in an accident, for which the third party was blamed.

13. The Claimant purchased spare parts worth Kshs. 8,887 on 11th April 2019. He told the Court that the rest of the spare parts were out of stock and he therefore kept the balance of the money paid to him by the third party, awaiting availability of the spare parts.

14. The dispute herein revolves around the question whether the Claimant's action of keeping the money amounted to gross misconduct in the nature of conversion.

15. In response to a show cause letter issued to him on 16th September 2019, the Claimant wrote two letters on 17th September 2019. In the first letter, he denied the allegations of conversion stating that the Logistics Officer was aware that he had the money, awaiting availability of the spare parts. In the second letter however, the Claimant admits having spent the money with the intention of refunding it once the spare parts were available.

16. In his pleadings and testimony before the Court, the Claimant stated that he was coerced to write the second letter, by the Respondent's Chief Executive Officer, on the promise that he would get a lenient sanction in the form of a warning.

17. Apart from the alleged promise of a lenient sanction, the Claimant did not provide any evidence of coercion. To my mind, an employee alleging coercion, especially in a non-custodial environment, must prove the exact ingredients of such coercion.

18. What manifests in this case is not coercion but a shifty employee who is prepared to lie to save his job. In the premises, the Claimant's tale of coercion is rejected and his admission that he converted the Respondent's funds to his personal use is adopted.

19. With the foregoing in view, the only conclusion to make is that the Respondent had a valid reason for dismissing the Claimant, as required under Section 43 of the Employment Act.

20. Regarding the procedure adopted in the executing the dismissal I have this to say; the Claimant was issued with a show cause letter to which he responded. He was then invited to a disciplinary hearing which he duly attended. The Court did not see any formal complaint by the Claimant regarding any aspect of the disciplinary process leading to his dismissal.

21. On the whole, the Court is satisfied that in dismissing the Claimant, the Respondent adhered to the procedural fairness requirements set by Section 41 of the Employment Act.
22. The claims for compensation and notice pay are therefore without basis and are dismissed.
23. The only order I will make therefore is that the Claimant be issued with a Certificate of Service.
24. Each party will bear their own costs.
25. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OCTOBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

APPEARANCE:

MISS NGIGI FOR THE CLAIMANT

MR. SAEED FOR THE RESPONDENT