



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 65 OF 2019

DOMINIC JOHN MWINGA.....CLAIMANT

- VERSUS -

AUTOEXPRESS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 27.09.2019 through C.O Tolo & Company Advocates. It is the claimant's case that the respondent employed him as a Retail Customer Service Assistant at Nyali Branch initially on 02.12.2013 at Kshs. 30, 000.00 per month and as at termination his monthly salary was Kshs. 138, 000.00. The claimant served on written annual contracts that were renewed one after the other. On 23.03.2019 his contract was extended by the respondent from 01.03.2019 to February 2020. On 01.04.2019 the respondent's Chief Finance Officer Mrs. Vaishali requested the claimant to send her the sales and banking reports for 27.08.2018, 14.09.2018, 16.11.2018, 23.11.2018, 06.12.2018, and 28.12.2018. and the claimant complied. Mrs. Vaishali then asked the claimant to send her reports on how transactions were paid. The claimant states that he replied her that he had checked the branch records but the reconciliations were not available for the reasons that payments may have been posted in another respondent's branch and goods collected at Nyali Branch. Mrs. Vaishali then instructed him to follow up on how the amount was actually paid for and to ensure that the money was collected failing the respondent would be left with no option but to recover the same from his salary. Further the claimant was asked to give a proposal on how the claimant would repay Kshs. 419, 150.00 – and the claimant asked Mrs. Vishali to give him information on the branch where the credit posting was done from

The claimant's further case is that on 16.04.2019 the respondent's head of Audit Mrs. Mary Anyango called him and informed him that he should report to the respondent's Nairobi Office to answer certain audit queries. Further, he attended as summoned and he met Head of Retail Operations, Chief Finance Officer, Head of Audit, Head of Capital and Human Resource Manager who asked him the same issues Mrs. Vishali had asked him about. He wrote a statement but he was asked to change it failing he gets arrested but he refused to change it. He was thereafter arrested and taken to Parklands Police Station. He remained locked up until his friends and relatives intervened and paid the Kshs. 419, 000.00 to the respondent and thereafter, the police released him. He states that he was not notified of the impending termination and the decision to terminate him was unfair, unprocedural, and unlawful because sections 35, 41, 43, 44 and 45 of the Employment Act, 2007 were not adhered to as he was not given a notice, a hearing. He claimed three months' notice pay Kshs. 414, 000.00; 18 days worked in April 2019 Kshs. 95, 538.00; quarter 4 2018 bonus balance Kshs. 30,000.00 plus 2019 quarter 1 bonus Kshs. 45, 000.00; unpaid 12.5 leave days Kshs. 66, 346.25; personal cash used as petty cash in April 2019 Kshs. 13, 600.00; un-expired contract May 2019 to February 2020 138, 000 x 10months Kshs. 1, 380, 000.00; and compensation for unfair termination Kshs. 1, 656, 000.00, unpaid 6 off days Kshs. 31, 846.20. He prayed for judgment against the respondent for:

- 1) Payment of a sum of Kshs. 3, 732, 331.65.
- 2) Costs plus interest at court rates.
- 3) A declaration the dismissal from work was unfair.
- 4) Certificate of service.
- 5) Any other relief the Honourable Court may deem just.

The respondent filed answer to memorandum of claim on 31.10.2019 and through Mucheru Law LLP. The respondent admitted the employment relationship as pleaded for the claimant. The respondent pleaded that anomalies were detected in the books of accounts at the branch headed by the claimant and investigations were carried out. The respondent denied all the claimant's claims and prayers and prayed for the claimant's suit to be dismissed with costs.

The claimant testified to support his case. The respondent's witnesses were Dickson Simon Nyambori (RW1), the Head of Human Capital; and Mary Onyango (RW2), Head of Internal Audit.

The Court has considered all the material on record and the Court returns as follows:

- 1) There is no dispute that parties were in a contract of employment. The claimant confirmed that his last pay was **Kshs. 135, 308.00** per month.
- 2) There is no dispute that the contract of employment was terminated when the respondent required the claimant to account for Kshs. 419, 150.00. The claimant by his testimony confirmed that the amount was with respect to his branch where services had been rendered and money paid but the payment not received as he had no evidence of receipt of that cash – so that the money was actually missing as a loss to the respondent.
- 3) The Court returns that the termination was not unfair. The claimant was notified about the discrepancies in the accounts at his branch. He wrote acknowledging the same and he took responsibility. The claimant wrote to Mrs. Vaishali thus, “**Thank you for your response below. While I would have expected such a shortfall to have been discovered earlier enough by myself and the people checking my transactions, perhaps it would have been easy to recall/ salvage the situation. I trusted our systems & processes too much. I must admit that as BM I am embarrassed that I failed, I should have been more keen and inquisitive especially on funds, I guess the pressure to meet targets must have overwhelmed me. Equally, I have enjoyed great support across departments including finance and yourself in person. Noting the urgency in your previous mail and the follow up from of Rakesh, I take responsibility of the blunder on the basis that it occurred in my branch and I didn't pick it early enough, nor can I recall. Kindly advise recovery options as suggested in your previous mail, though I will endeavour to try and collect the un-receipted funds as I did with the Symbion case.**” After the arrest the claimant refunded or repaid all the amounts involved. He admitted the responsibility and the Court finds that the respondent has established that the reason for termination related to the claimant's conduct, capacity and compatibility as well as the respondent's operational requirements as per section 45(2) of the Employment Act, 2007. Looking at the correspondence, the claimant's admission to take responsibility and then his eventual full payment of the amounts involved, it cannot be said that the respondent failed to invoke a fair procedure – the claimant was fully informed and given an opportunity to respond. It was not an unfair termination. The claimant confirmed that after he repaid the Kshs. 419, 000 in issue he received the letter of summary dismissal on account of negligence in performance of duty. In view that the termination was not unfair, the claim for compensation and notice pay are unjustified.
- 4) The claimant testified that bonus was not contractual. As submitted for the respondent the claims on bonus will fail as discretionary on the part of the respondent.
- 5) The claimant testified that he had no evidence that personal cash was used as petty cash in April 2019. The claims relating to petty cash will therefore fail.
- 6) The claimant prayed for pay for unexpired period. The Court finds that subsequent to summary dismissal the claimant left employment and he has not established anything contractual or otherwise attributable to the respondent that would justify the claim for pay for the 10 unexpired months. The claim and prayer will collapse as unjustified.
- 7) The parties are in agreement that the claimant is entitled to **Kshs. 95, 538.60** being payment for last 18 days worked.
- 8) The rest days as urged for the respondent are with respect to a claimed one-month termination notice which the claimant did not actually serve and could not have earned off days. The Court upholds the respondent's submission that the same is unjustified and further that in any event, summary dismissal disentitled the claimant from due notice as the respondent was entitled to dismiss with no or shorter notice than was contractual per section 44 of the Act.
- 9) Parties are in agreement leave pay is due at **Kshs. 66, 346.25** which is hereby awarded.
- 10) The respondent had already issued a certificate of service per page 24 of the claimant's bundle.
- 11) Considering parties' margins of success, the respondent to pay only 25% of the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant a sum of **Kshs.161, 884.25** (Less PAYE) by 24.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till the date of full payment.
- b) The respondent to pay 25% of the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 26TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE