



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 934 OF 2015

SAMUEL GAKUNA.....CLAIMANT

VERSUS

GITHUNGURI DAIRY AND COMMUNITY SACCHO LIMITED.....RESPONDENT

JUDGMENT

1. Samuel Gakuna (Claimant) was employed by Githunguri Dairy and Community Saccho Ltd (Respondent) as an Accountant on 3 September 2008. He rose to the position of Finance Manager by time of separation.
2. On 15 April 2013, the Respondent issued a *show-cause* notice to the Claimant to explain why disciplinary action should not be taken against him on account of some suspicious transactions in his bank account.
3. The Claimant tendered a written explanation on 16 April 2013 and on 21 May 2013, he was notified of the termination of his employment.
4. The Claimant was dissatisfied and on 29 May 2015 instituted these proceedings alleging unfair termination of employment and breach of contract.
5. The Respondent filed a *Memorandum of Reply and Defence* on 31 July 2015, and the Cause was heard on 31 October 2019.
6. The Claimant and the Respondent's Chief Executive Officer testified.
7. The Claimant filed his submissions on 15 November 2019 while the Respondent filed its submissions on 29 November 2019.
8. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as set out and examined hereunder.

Unfair termination of employment

Procedural fairness

9. The Claimant was issued with a *show-cause* notice and he made a written response. Still he contended that he was not afforded an opportunity to be heard because there was no oral hearing. He cited *Moses Daniel Nyongesa v Mumias Sugar Co. Ltd* (2019) eKLR.
10. Under section 41(2) of the Employment Act, 2007, an oral hearing is mandatory in cases of summary dismissal. The instant case was not one of summary dismissal as it was preceded with a *show-cause* and offer of pay in lieu of notice.
11. The decision relied on by the Claimant is therefore inapplicable.
12. Since the Claimant was informed of the charges to confront and he responded in writing, the Court is satisfied that the Respondent was in substantial compliance with the statutory procedural fairness requirements.

Substantive fairness

13. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was expected to prove the validity and fairness of the reasons leading to the termination of the Claimant's employment.

14. The reason leading to the termination of the Claimant's employment were suspicious transactions in his account.

15. The Claimant disclosed that he operated a joint business with his wife and that the wife made certain deposits into his account. The wife in her own written investigative statement to the Respondent acknowledged making the deposits from sales from a joint business venture.

16. If indeed there was a joint business and the deposits were proceeds from the business, the Claimant ought to have produced records of such a business venture (such records were solely within his knowledge and not the Respondent). The records could have demonstrated *bona fides* for the deposits.

17. It is not in dispute that the Respondent's main business concerned handling of members finances and hence high levels of integrity and honesty were paramount on the part of its employees.

18. The Court therefore agrees with the Respondent that the deposits made into the Claimant's account were suspicious. They were even above the Claimant's known or declared sources of income.

19. The Court finds that there were valid and fair reasons to terminate the Claimant's contract.

Breach of contract

Leave days

20. The Claimant testified that he had 23 accrued leave days and sought Kshs 70,490/-.

21. The Respondent countered that the Claimant took 1 week leave in May 2013 and, therefore, had balance of 15 leave days and offered Kshs 44,055/-.

22. The Court will agree with the Respondent.

Salary for May 2013

23. The Claimant was entitled as of right to earned wages up to date of separation, (not full month salary as sought) and unless the same is used to offset any pending loans in terms of contract, the Respondent should pay it to the Claimant.

Conclusion and Orders

24. From the foregoing, the Court finds and declares that the termination of the Claimant's employment was fair, but still finds that the Claimant is entitled to and is awarded

(a) Accrued leave Kshs 44,055/-

(b) Earned wages Kshs 44,057/-

25. However since the amounts were utilised to offset loans taken by the Claimant, the Court finds that the same were already settled.

26. Respondent to issue a certificate of service within 21 days.

27. No order on costs.

Delivered, dated and signed in Nairobi on this 24th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ongeru instructed by Gicheha Kamau & Co. Advocates

For Respondent Mr. Njuguna instructed by Mbigi Njuguna & Co. Advocates

Court Assistant Judy Maina