



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 858 OF 2015

PAUL KIMEMIA NJIHIA.....CLAIMANT

VERSUS

KENYA CREDIT TRADERS LIMITED.....RESPONDENT

JUDGMENT

1. This Cause was heard on 6 November 2019. Paul Kimemia Njihia (Claimant) and Alphonse Oluoch Nyamrer, General Manager with Kenya Credit Traders Ltd (Respondent) testified.
2. The Claimant thereafter filed his submissions on 10 January 2020 (should have been filed on or before 20 December 2019) while the Respondent filed its submissions on 28 January 2020.
3. The Court has considered the pleadings, evidence and submissions and will examine each parties case in terms of the Agreed Issues filed in Court.

Unfair termination of employment

Procedural fairness

4. The Claimant contended that the process leading to his dismissal on 22 May 2012 was not fair because he was not notified in advance when summoned to the Respondent's head office on 18 May 2012 that he would be attending a disciplinary hearing or that the termination of his employment was in contemplation.
5. According to the Claimant, the action of the Respondent offended the mandatory requirements of section 41 of the Employment Act, 2007. The Claimant referred the Court to the case of *Alphonse Machanga Mwachaya v Operation 680 Ltd* (2013) eKLR.
6. The Respondent on its part asserted that prior to the termination of contract, the Claimant was afforded an opportunity to be heard after being summoned on 18 May 2012 to report to the Head Office for a review of his performance. The meeting(s), it was stated took place on that day and on 21 May 2012.
7. To buttress the assertion that the Claimant was afforded an opportunity to be heard, the Respondent's witness drew the attention of the Court to previous warning letters, Visit Reports and Performance and Sales Administration Reports discussed with the Claimant.
8. Section 35(1)(c) of the Employment Act, 2007 envisages an employer issuing a *written notice of termination of employment* to the employee.
9. On the other hand, section 41 of the Act obliges the employer to notify the employee prior to termination of employment that such termination is on the cards, and afford the employee an opportunity to make representations.
10. The Respondent did not issue the Claimant with the notice contemplated by section 35(1)(c) of the Act (such a notice is not required if it is a case of summary dismissal).
11. However, in cases of summary dismissal, an oral hearing is a prerequisite by dint of section 41(2) of the Employment Act, 2007. Before the hearing, the employee should be afforded sufficient time to prepare a defence, if any.

12. The Respondent did not controvert the Claimant's testimony that he was not notified while being summoned to Nairobi that the termination of his employment was under consideration or would be discussed.
13. The Court would therefore agree with the Claimant that he was ambushed, and find that he was not given sufficient time to prepare for (any) disciplinary hearing or to get a colleague of his choice to accompany him to the hearing.
14. If any disciplinary hearing was held, it is the view of the Court that it was a sham or mechanical process not meeting the statutory threshold.

Substantive fairness

15. The letter advising the Claimant of his dismissal informed him that the reason(s) were

..... received 14 instalment payments through mpesa via your personal mobile phone which is against Company rules. Out of these 14 transactions, 11 of them were found to be irregular in that you did not receipt the whole amount. You could not account for Kshs 10,585/=. These activities cannot be allowed since they are hurting the company financially.

As you are aware, you are not supposed to receive instalment payments through mpesa via your personal mobile phone since the company has a paybill number....

16. It is the above allegation(s) which the Respondent was expected to prove in terms of sections 43 and 45 of the Employment Act, 2007.
17. To discharge the burden placed on it, the Respondent produced a copy of the Claimant's mpesa statements.
18. The mpesa statement indicate several instances where the Claimant received mpesa payments from the Respondent's customers through his personal mpesa account.
19. The Respondent also produced a copy of Internal Memo issued by the Managing Director on 1 August 2011 and directing all staff to stop receiving payments through their personal mpesa accounts.
20. The Claimant admitted during cross-examination that he used to receive mpesa payments due to the Respondent through his personal mpesa account despite the Respondent having an mpesa paybill number/account for use by customers.
21. The Claimant attempted to explain away the payments by contending that it was the decision of the customers to pay through his personal mpesa account.
22. The Claimant was a Store Manager in charge of one the Respondent's shops. He was aware of the policy on payment through the mpesa paybill number. He received payments due to the Respondent through his personal mpesa account through an extended period of time. He did not explain how the customers got his mpesa details or why he did not advice the customers to pay through the paybill account.
23. In the view of the Court, the action of the Claimant to receive the payments through his mpesa account was not only suspect, but deliberate and showed dishonesty as he was aware of instructions not to receive such payments.
24. The Respondent, the Court finds, had and has proved valid and fair reasons to dismiss the Claimant.

Compensation and pay in lieu of notice

25. *Compensation* is a discretionary remedy. Considering the Claimant's dishonest conduct, the Court is of the view that compensation would not be an appropriate remedy.
26. The Claimant was not given notice of termination of employment or afforded an opportunity to make representations, the Court would have awarded the equivalent of 1-month salary in lieu of notice.
27. The Respondent offered the Claimant the notice pay and nothing turns on the head of relief.

Security deposit refund

28. The Claimant sought Kshs 25,540/- being balances from the security account with the Respondent.
29. The Respondent operated a scheme where it deducted some monies from the salaries of employees to be held as security for any financial losses occasioned by the employees.
30. The Respondent asserted that it deducted Kshs 10,585/- from the Claimant's dues and admitted in the submissions that the balance would be released to the Claimant upon clearing.
31. If the balance was not used to offset loans advanced to the Claimant (statement filed in Court), the Court finds that the Respondent

should release the same to the Claimant.

National Hospital Insurance Fund and National Social Security Fund deductions not remitted

32. The Claimant sought Kshs 1,120/- and Kshs 2,400/- respectively purportedly deducted from his salary but not remitted to the Funds.

33. To show failure to remit deductions to the National Hospital Insurance Fund, the Claimant produced an extract of a copy of statement from the Fund from January 2008 to April 2012

34. The Claimant also produced a copy of statement from the National Social Security Fund to show that deductions from his salary were not remitted to the Fund.

35. Since the statutes governing the operations of the two Funds have provisions for dealing with failure to remit deductions from employees, the Court is of the view that the Claimant should make formal complaints to the Funds for appropriate action.

Service pay

36. The Claimant was a contributing member towards the National Social Security Fund and is therefore ineligible for service pay by operation of section 35(5) & (6) of the Employment Act, 2007.

Certificate of Service

37. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant.

Conclusion and Orders

38. The Court finds and declares that the termination of the Claimant's employment though substantively fair was procedurally unfair.

39. For reasons already given in the body of the judgment, the Court declines to award compensation or award any other relief save for a Certificate of Service and balances, if any of the security deposit.

40. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 14th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Wachira instructed by Njui Kariuki & Co. Advocates

For Respondent Mr. Kahiga instructed by Muturi Kamande & Co. Advocates

Court Assistant Judy Maina