



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 952 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MUSYOKA NZOKA MUASYA.....CLAIMANT

VERSUS

TOYOTA KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent as an accountant vide the contract of employment of 10th October 2001. He served the Respondent until 8th October 2012 when his employment was terminated. Aggrieved by this decision to terminate his services, the Claimant filed this suit seeking the following reliefs –

- a. The sum of Kshs.3,438,301.00 as particularized below-
 - i. One months' salary in lieu of notice of Kshs.156,050.00.
 - ii. 8 days' salary arrears for the month of October 2012 of Kshs.41,613.00.
 - iii. Service gratuity for 2 months' salary for the years worked amounting to Kshs.3,121,000.00.
 - iv. Leave allowance for 23 days of Kshs.119,638.00.
- b. A declaration that the termination of the Claimant's employment was unlawful, illegal, unfair and wrongful.
- c. Damages for unlawful, unfair, illegal and wrongful termination of the Claimant's employment.
- d. Costs of this suit.
- e. Interest in (i), (ii) and (iii) above.
- f. Any other relief as the court may deem just.

Claimant's Case

The Claimant avers that he was not issued with a warning letter, a notice to show cause or given the opportunity to be heard.

The Claimant testified as CW1. It was his testimony that he was an accountant for the bodyshop department. His work involved supervising the management reports, cash office, invoicing clerk, debt collection, approval of local purchase order, bodyshop consumable store and bodyshop paint store and release of motor vehicles after repairs. He served in this capacity for 4 years.

It was his testimony that in March 2012 he was verbally instructed by his bosses, Rashid Yusuf and Kitamura, to approve the LPO to Jostony Glass Mart Limited because they had been given permission to close the account. The LPO was to act as a buffer stock while a new supplier was being sought.

It was his testimony that the order was raised by the supply chain supervisor and approved by the conversion manager. He was required to counter sign as it was a stock order. He testified that the instruction that Mr. Yusuf gave to Mr. Okoth to raise the stock in the LPO is the

same instruction he received.

On the charge of fraud against him, it was his testimony that the system in place at the time did not require him to physically verify receipt of goods before payment. His role was to verify the signatures and stamps on the receipt. He testified that in this particular case, the verification had been done. That he only signed the invoice and not the payment voucher.

On the charge of negligence, he contended that he never filed false reports and that there was no evidence to that effect. He admitted that he had been accused of recognizing revenue before a job was complete in the workshop. It was his evidence that the job cards were marked as completed work by Rashid. He contended that he did not need to go to the workshop to ensure that the job was completed and there was no reason to accuse him.

On the accusation of negligence on account of opening a job card, it was his testimony that Rashid Yusuf was to authorize while Morris Okoth opened a job card. He denied participating in opening of the job card and averred that he participated at the invoicing stage. He stated that the only time he was involved he reversed the transaction upon investigation and endeavoured to ensure accountability by putting back the stock which had been erroneously moved.

It was his testimony that he was never issued with the investigation report before his employment was terminated and that this was contrary to the Human Resource Handbook. Further, he was not issued with a notice to show cause.

On the Respondent's counterclaim, it was his testimony that he did not owe the Kshs.538,586.00 as he was not involved since the job card was raised by Morris Okoth. On the claim for overpayment to Jostony Glass Mark, he contended that he was not liable as he approved proper documented payments. Further, that the workshop supervisor had the obligation to ensure the parts acquired were fitted on the correct car.

During cross examination, he testified that the statement he made was under duress and not voluntary as he was told to sign the statement or his employment would be terminated. He admitted to approving document 20 in the Respondent's bundle of documents. As regards documents 28 and 29, it was his evidence that after his approval, they passed through 6 steps. He maintained that the documents he approved were complete. He denied being negligent. As regards documents 64, 65, 67 and 68, he maintained that he followed the procedure.

It was his testimony that pre-invoicing was not allowed before a job was completed. He stated that he did stock taking and was not aware of any stock variance except in document 15 where he found an item that was physically in the store but was not reflected in the system. It was his evidence that he got the necessary approval to make adjustments.

The Claimant stated that he was not aware whether investigations were completed. He testified that he was suspended for 3 months but was dismissed while he was on extended suspension.

Respondent's Case

The Respondent filed its memorandum of reply on 10th July 2013 contending that the termination of the Claimant's employment was fair and just as the Claimant was given the opportunity to be heard. The Respondent asserts that the issuance of warning letters or a termination notice were not legal requirements and contends that it had the legal right to summarily dismiss the Claimant.

It is the Respondent's contention that the Claimant is not entitled to the 1 months' pay in lieu of notice claimed as he was summarily dismissed. It is further contended that the Claimant is not entitled to gratuity as he was a member of a registered pension fund scheme. The Respondent avers that it had the right to deduct any monies owed to it by the Claimant.

The Respondent filed a counterclaim against the Claimant in which it seeks the following prayers-

1. The Claimant's claim be dismissed in its entirety with costs.
2. Judgment be entered for the counterclaim in favour of the Respondent in respect of-
 - a. The amount of Kshs.4,077,894.00 particularized as below-
 - i. Consumable stock variances fraudulently concealed in job card number 5000052935 of Kshs.538,586.00.
 - ii. Overpayment to Jostony Glass Mart between July 2011 and April 2012 of Kshs.2,443,020.00.
 - iii. Parts charged to various job cards as of 27th June 2012 but not physically issued to the jobs, of Kshs.549,135.00.
 - iv. Consumable stocks charged to various job cards as of 27th June 2012 but not physically issued to the jobs, of Kshs.512,353.00.
 - v. Payment to Hawk Eye document examiners of Kshs.34,800.00.
 - b. General damages for gross negligence, misrepresentation and fraud.

- c. The costs of the suit and the counterclaim.
- d. Interest at court rates on a, b and c above.
- e. Any such other or further relief as this Honourable Court may deem fit to grant.

The Respondent avers that the Claimant together with others misrepresented the true performance of the conversions department of the Respondent. This was done by pre-invoicing for work and services not yet provided, to induce the Respondent to believe in a false overstatement of the department's revenue and general performance.

In April and June the department executed duties to Jostony Glass Mart, the Respondent's supplier, by authorizing fraudulent payments using forged documents thereby defrauding the Respondent. Additionally, they defrauded the Respondent by creating fictitious job cards and posting consumable stock and spare parts to the job cards thereby giving the Claimant direct authority and control over the same, valued at Kshs.1,061,488.00.

It is the Respondent's position that the Claimant routinely defrauded them or was negligent in his duties as the accountant and allowed theft to occur under his watch, thereby breaching clause 4.1 (a), (c) and (e) which required him to be diligent and exercise utmost good faith in carrying out his duties and to comply with the lawful regulations laid down by the Respondent.

RW1, JOSHUA NYANGAU, testified that once they got a quotation, the accountant prepared an LPO for goods to be delivered. That authority to supply was given once payment is confirmed. He further testified that an accountant is tasked with ensuring accuracy of the documents and ensuring that the actual delivery is done. Thereafter, he does stock taking where he reconciles the goods delivered and those in the system.

It was his testimony that the Claimant's employment was terminated because he was negligent as he made payments that were not due. That the claimant had the overall responsibility to ensure proper payment.

RW2, FRANCIS MAASAI, testified that a job card has a registration number and chassis number. It was his testimony that delivery note numbers were allowed without approval. That a branch accountant approves the invoices for the process to start. It was also his evidence that an accountant was in charge of internal controls to ensure that the process is above board. He testified that pre-invoicing was done by the bodyshop to show that the branch was doing well while it was not.

During cross examination, RW2 testified that Rashid had confirmed authorizing job card number 6 at page 15. He conceded that no external audit was done and that he did not know whether anyone was charged in connection with the overpayment.

It was his evidence that the auditor had recommended that payments should not be made until supplies were made and that Jostony Glass Mart be blacklisted.

RW3, ANNE NJAMBI KIRUMBA, testified that the Claimant being the accountant in charge, was supposed to exercise due care by verifying the invoices before sending them to finance for payment and ensuring that all reports to him were verified.

She testified that once investigations were completed, the Claimant was found to be culpable for the 3 charges that led to his suspension.

During cross examination, she conceded that there was no copy of the investigation report on the court's record. She conceded that the report that formed the basis of the Claimant's suspension was not forwarded to him. She however contended that she discussed the contents of the report with him.

On the issue of negligence, she conceded that negligence was classified as misconduct for which an employee was liable to a warning. However, she contended that the Claimant was accused of gross negligence.

She admitted that the invoicing was done by Rashid who was the head of that section. She further admitted that the signature of the Claimant was not on the job cards but on the purchase orders. She stated that some invoices were stopped pursuant to the auditor's recommendations, one of them being invoice no. 2 in document 15.

Submissions by the Parties

Mr. Osoro, counsel for the Claimant, submitted that the procedure for terminating the Claimant's employment was unfair. That the claimant was suspended and thereafter a report was made by the risk manager. That the Claimant was not given the reason for his termination, or a chance to defend himself in the presence of a colleague or a union representative.

Counsel submitted that report number 15 of the respondent's bundle was made after the Claimant's employment was terminated. Further, that the report was not signed and neither was it on the Respondent's letter head. Further, that the Respondent's preliminary report, document 14, was prepared by the risk manager instead of the security manager.

On the Respondent's counterclaim, counsel submitted that there was no audit report by a competent auditor to establish the loss of the sum of Kshs.4,077,894.00. He contended that Jordan Kamau, the risk manager, who prepared the report of 31st October 2012 was not an auditor to establish the financial losses in a firm.

He referred the court to chapter 2(ii) of the Report's Summary and submitted that the persons to blame were Morris Okoth and Rashid Yusuf who were opening job cards. He submitted that Rashid Abdul admitted at page 4 of his statement that he had instructed Morris to open the job cards. That Morris Okoth admitted in his statement that his work included opening job cards.

He also submitted that the Claimant should not be called upon to pay the amount paid to Johnson Gross because at the time the report was made, that the amount had not been paid. He also submitted that amount claimed in respect of the payment to Hawk Eye Document Examiners was never proved and was paid after the Claimant was dismissed.

Ms. Mwaisiga for the respondent submitted that the Claimant's termination was according to section 44 of the Employment Act and the Claimant's employment contract. She submitted that the Claimant admitted in his statement at page 20 that he could approve payments for amounts above Kshs.50,000.00. She also admitted that the Claimant admitted to payments being made before delivery of the goods which occasioned loss to the Respondent as the goods were never delivered.

Counsel submitted that the Claimant was invited for a hearing and advised to bring a representative but declined to do so. Further, that he did not make a response when he was required to do so. It was submitted that the Claimant was claiming money already paid.

Analysis and Determination

I have considered the pleadings filed by the parties, the evidence and submissions. The following are the issues for determination –

- a. Whether the Claimant's employment was lawfully terminated.
- b. Whether the Claimant is entitled to the reliefs sought.
- c. Whether the Respondent is entitled to the reliefs sought in the counterclaim.

Termination

The Respondent has submitted that the Claimant's termination was fair and lawful as it was in accordance with section 44 of the Employment Act. The section provides as follows-

(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

Section 41 requires an employer who intends to terminate an employee's services on account of misconduct to explain the reasons for are considering the termination and to give the employee an opportunity to present his case. All this should be done in the presence of the employee's representative of choice. This procedure is mandatory as was held in the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR**.

It was the evidence of RW3 that she called the claimant to explain to him the decision that had been taken to summarily dismiss him. There was no evidence to support her testimony that the Claimant had been given an opportunity to be heard in the presence of a representative of his choice but opted not to. As such, the Claimant's assertions that he was never given the opportunity to be heard remain uncontroverted.

With respect to the grounds for termination the letter of 26th June 2012 informed the Claimant that he was being suspend following investigations into the anomalies on the purchase of the window frames from Jostony Glass Mart in the month of April 2012. His letter of summary dismissal of 8th October 2012 reads as follows-

“Reference is made to the investigations that have been conducted at the Toyota Kenya Limited Body and Paint Department where you worked as the Accountant until your suspension regarding irregular stock orders and payments in April-May 2012.

The investigations reveal that you processed and authorized payments to a supplier of goods that had not been delivered. Your fraudulent actions have caused the company a loss of Kshs.2,616,520.00. Investigations further reveal that you routinely participated in the creation of false reports and opening of job cards for non-existent jobs to misrepresent the performance of the department and to conceal the stock position covering shortfalls. Such actions on your part were negligent in the extreme, in breach of the Company's code of conduct and have caused the company huge financial losses.”

As stated by RW3 in her testimony, the Claimant was the accountant responsible for exercising due care. He was to verify invoices before submitting to Finance for payment. It was also his duty to ensure that all reports to him were verified. RW2 further testified that the Claimant's responsibilities were part of his employment contract thus he was aware about the same. Had the claimant carried out his job according to his job description the Respondent would not have paid out the sum in question and the loss of Kshs.4,077,894 would have been avoided.

I find that there was valid reason for termination of the Claimant's employment.

From the foregoing I return a finding that the summary dismissal of the Claimant was for valid reason but the procedure was flawed. Under section 45(2) of the Employment Act termination is fair only where both limbs of fair procedure and valid reasons are met. The summary dismissal of the Claimant was therefore unfair for failing the test of fair procedure.

The Claimant's Reliefs

Having found that the termination of the Claimant's employment was unlawful, the claim for 1 month's salary in lieu of notice succeeds as the Claimant was entitled to the same under 12.1 of his contract.

The claim for 8 days' salary for the month of October 2012 and leave allowance fail as the Claimant has not disputed nor controverted the Respondent's assertion that he owed the debt to which his terminal dues was applied. His summary dismissal letter stated as follows-

"... You will be paid your final dues as follows-

- a. Salary and allowances up to 8th October 2012*
- b. Leave balance amounting to 23.6 days.*

The above dues will be paid less any amount you owe to the Company. Please arrange to handover all company property in your possession and collect your certificate of service."

[emphasis added]

The claim for service gratuity fails as the Respondent has proved that the Claimant was a member of a pension scheme fund and therefore not entitled to gratuity.

The Prayer for compensation would also fail because of the Claimant's role in facilitating the loss of Kshs.4,077,894 to the Respondent through failure to perform his duties diligently which amounted to recklessness or negligence of duty.

Judgment is thus entered for the claimant against the respondent in the sum of Kshs.156,050 being one month's salary in lieu of notice.

The Respondent's Counterclaim

The claim against the Claimant for recovery of payments to Hawk Eye Document Examiners fails as the Claimant testified that he had no role regarding Hawk Eye Document Examiners as they were hired by the Respondent. Further, RW2 admitted that the payment was made to Hawk Eye on 30th July 2012 while the Claimant was on suspension.

The Respondent's claim in prayer (a), (b), (c) and (d) fail because the Respondent failed to prove on a balance of probabilities that the Claimant was solely responsible for the losses incurred. Although the Claimant was negligent, there were other players in the process who might contributed to the Respondent's loss through their fraudulent transactions or their negligence.

For instance, when asked about the invoice regarding the Kshs.538,000.00 claimed by the Respondent, RW1 stated that he could not tell who raised the invoice as he was not familiar with the signature. It was also the testimony of RW1 that consumable stocks charged to 13 job cards under work in progress, was Kshs.512,353.00. It was also established that Rashid and Morris were the ones responsible for opening job cards as admitted in their witness statements filed in Court.

RW2 testified that the documents at pages 31 to 35 were raised in Finance once they got all the documents. It was his testimony that they were not raised by the Claimant but were raised by Mr. David Klose, who was the responsible accountant. RW2 also testified that all the payments resulting in the overpayment were not approved by the Claimant.

Additionally, during cross examination, RW1 testified that his department prepared a job card upon the request of the workshop supervisor Morris Okoth who also prepared the requisition for materials required. The requisition was then forwarded to the accountant who prepared an LPO to the supplier. He stated that authorization was by the accountant after verifying that the items were necessary for the job. He also confirmed whether there was money to pay for the items and thereafter sent an LPO to the suppliers. It was also his testimony that the manager authorizes and supervises the process under the accountant's advice. The manager also signs the LPO after the accountant. It is clear that an accountant, and to a larger extent the Claimant, was not the only person involved in this process. As such, it is difficult to establish the Claimant's degree of liability in the loss, there being other players in the process, some of whom owed the Respondent a greater duty of care and should have been held to a higher standard of liability.

I therefore find that the Respondent has failed to prove the prayers sought in its counterclaim. As such, the same is dismissed.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE