



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 2247 OF 2014

DURAN LIGAGA AMUYUNZUAPPLICANT

VERSUS

THE MATER HOSPITALRESPONDENT

JUDGMENT

1. The Claimant suit is contained in the Amended Memorandum filed on 11.7.2016 seeking the following reliefs:-

(a) That the court do find that the Respondent's action of summarily dismissing the claimant from employment was unlawful and unfair.

(b) That as a result the court do order that the Respondent pay the Claimant.

(i) Damages for wrongful and unlawful termination of employment.

(ii) Any other award or benefit which this Honourable Court may deem fit to grant.

2. The Respondent filed defence on 1.8.2016 admitting that she employed the claimant as her Chief Cashier and that on 4.6.2014 she summarily dismissed him for gross misconduct. She averred that the dismissal was fair and lawful because the claimant performed his work negligently and dishonestly by concealing his deceitful misappropriation of money which he admitted upon inquiry by his seniors. She averred further that she paid the claimant all the dues after the dismissal and prayed for the suit to be dismissed with costs.

Claimants evidence

3. The Claimant testified as CW1 and stated that he joined the respondent on 14.1.2002 as a cashier and later rose to become the Chief Cashier. He contended that during his service, he received letter of commendations and certificates from the respondent the excellent performance of his duty the last one being given in December 2012.

4. He further testified that on 4.5.2014, he was dismissed for alleged shortfalls during the period between 2009 to 2011. He denied any wrong doing and contended that through out that period, internal and external audits were done on the respondents books of accounts and nothing wrong was highlighted. He therefore prayed for judgment as prayed in the amended claim.

5. On cross-examination CW1 admitted that the termination letter cited the reason for the termination as gross negligence leading to loss of Kshs. 12 million. He admitted that he wrote the statement (report) dated 3.6.2014 to the Financial Controller but he denied that he admitted failure to check banking slips to verify the banking. He admitted that he is facing criminal charge of theft by servant and a further civil case for restitution of Kshs. 16 million before the High Court.

6. In re-examination he stated that his role was to hand over money to the Wells Fargo courier under a cash in transit agency (CIT) and thereafter receive the banking slips which he handed over to Accounts Department for reconciliation.

Defence case

7. Mr. Willis Odhiambo Oyoo, respondent's former Senior Financial Accountant and Financial Controller for the respondent testified as RW1. He joined the respondent on 5.12.2011. As part of his duty, he did bank reconciliation with Mr. Moses Macharia, the General Ledger Accountant but they were unable to reconcile the receipts and bank balances. Upon a keen examination, he realized that there was a consistent under banking of Kshs. 400000/- every month.

8. He contended that the claimant slept on his duty of verifying that the money he gave to the CIT Agent was banked. He contended that the claimant signed receipts for all the amounts receipts passed to the CIT agent for banking and also signed on all the banking slips returned by the CIT agent before passing them over to the Finance Department.

9. To demonstrate the fraud committed, he produced two (2) banking slips no. 1311957 for Kshs. 70000/- and Kshs. 470000/- and No. 1246986 for Kshs. 50000/- and Kshs. 350000/-. He contended that the two slips had been altered from Kshs. 70000/- to Kshs. 470000/- and from Kshs. 50000/- to Kshs. 350000/- to fraudulently conceal the under banking. He further contended that the CIT agent confirmed that all the money given to them by the claimant was banked vide the banking slips which were altered after being handed over to the claimant.

10. He testified that the claimant was asked to defend himself in writing and thereafter he was heard orally by the Financial Controller before being dismissed.

11. In cross-examination Rw1 stated that he used banking slips and bank statements to do conciliation for 2009 to 2011. He contended that conciliation was supposed to be done monthly but it was being done after three (3) months. He contended that when he asked the Ledger Accountant Mr. Macharia to do reconciliation, he did a report with false figures and when he asked him to repeat the exercise, he ran away.

12. He admitted that the claimant was given commendation letters and salary increments for good performance but contended that the mess he committed had not been fully uncovered. He contended that the claimant wrote a statement dated 3.6.2014 and that he is one of the former staff members facing criminal charges in relation to the money lost. He contended that the original banking slips for cash banked from 2009 to 2014, were taken away by the police.

Claimants submissions

13. The Claimant submitted that his dismissal was unfair because it was done through a flawed process. He contended that he was not served with prior notice or accorded any hearing as required under section 41 of the Employment Act. For emphasis, he relied on **Shankar Saklaniks DHL Global Forwarding (k) Ltd. [2012] eKLR, Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers SACCO Ltd. [2014] eKLR** where the courts were unanimous that termination of employment without according the employee a fair hearing as required by section 41 of the Act is unfair.

14. The Claimant further submitted that the reasons for the termination was not valid because he was a diligent employee as evidenced by the commendation letter produced as exhibits and salary increment that shot up from Kshs. 15000 in 2002 to Kshs. 86120 per month in 2014. He therefore urged to find that his dismissal was unfair and unjustified and award him the reliefs sought in the suit.

Respondents submissions

15. The Respondent submitted that the dismissal of the claimant was justified under section 44(4) (c) and (g) of the Employment Act because he performed his duty negligently and was also suspected to have committed criminal offence, namely fraud against his employer. He contended that the claimant admitted vide his report dated 3.6.2014 that he performed his work negligently and failed to rectify whether the CIT agent had banked all the money he had handed over for banking.

16. The Respondent further submitted that the claimant was accorded an opportunity to defend himself in writing before the dismissal. She further contended that having admitted, in his report dated 3.6.2014, that he did not take keen interest to check on the banking slips to confirm that accurate banking was done , there was no need for further explanation as to his shortcoming.

17. She relied on **Mutua Musau v Barclays Bank of Kenya Ltd[2016] eKLR** where the court held that negligent performance of duty and failure to exercise supervisory role leading to loss is a valid ground for dismissal. She therefore prayed for the suit to be dismissed with costs.

Issues for determination

18. There is no dispute that the claimant was employed by the respondent as a cashier in 2002 and was dismissed on 4.6.2014 while in the rank of the Chief Cashier. The issues for determination are:

- (a) Whether there was a valid and fair reason justifying the dismissal.
- (b) Whether the procedure followed was fair.
- (c) Whether reliefs sought should be granted.

Valid and fair reason

19. It is now well settled that in any legal proceedings challenging termination of employment contract, the employer has the burden of proving that there existed a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements, at the time when the termination was done. That obligation is set out under section 43 of the Employment and the failure to prove the reason renders the termination unfair within the meaning of section 45 of the Act.

20. In this case the reasons for the termination was captured in the termination letter dated 4.6.2014 as follows:-

“Due to your failure to perform your duties as required, the hospital has incurred a loss of over Kshs. 12 million over an audited period of between 2009 and 2011.

On the basis of this gross negligence in the performance of your duties; management has no option but to terminate your employment at the Mater Hospital effective 04th June 2014.”

21. The Claimant admitted in evidence that he was asked to explain the underbanking in writing and he did so vide his written report dated 3.6.2014. The respondent contended that the report contained an admission by the claimant that he performed his duty negligently by failing to take keen check on the banking slips returned by the CIT agent to confirm whether all the money given out was all banked. The report stated as follows:

“(a) During posting of the deposit slips what was not keenly done was the tallying of the slips and actually authenticating the validity of the slips since at the back of my mind, was that what I gave them was actually banked. In the highlighted cases in the receipts under banked, I could say that this alteration was not picked during posting process . . .

Whereas I take responsibility of not having checked keenly on the documents, I cannot be able to explain and comprehend what motive one had by changing amount and forging ahead to change initials on the deposit slips.”

22. I agree with the respondent that the explanation by the claimant above contained an admission that he had either performed his duties negligently or he failed to perform the duty as required. Such conduct under section 44(4)(c) of the Employment Act entitles the employer to dismiss the employee summarily. I therefore find and hold that the respondent has proved on a balance of probability that there was a valid and fair reason for dismissing the claimant from employment as required under section 43 and 45 (2) of the Employment Act.

Fair procedure

23. The Respondent submitted that after she gave the claimant an opportunity to explain the shortfalls in the banking and he did so in writing vide his report dated 3.6.2014. She further contended that the claimant admitted negligence in the said report and as such there was no need of further hearing required over the matter. The claimant contended that he was not accorded any hearing as required under section 41 of the Act.

24. I have considered the evidence and submissions and I agree with the respondent that after the claimant admitted that he performed his duty negligently, there was no need of further investigation into that negligence. The said admission was voluntary and in such circumstances the employer had no obligation to investigate the matter further. I have held previously and dare repeat here that where an employee voluntarily admits an offence in respect of which the employer intends to terminate the employment relationship, the provision of section 41 need not be complied with because there is nothing more that remains for inquiry.

25. In view of the foregoing observations, I find and hold that the employer followed a fair procedure before dismissing the claimant herein and as such the precedents cited on the provisions of section 41 of the Act are not relevant herein and are therefore distinguishable from the instant suit.

Reliefs

26. Considering the finding hereinabove that there was a valid reason for dismissing the claimant and that a fair procedure was followed. I decline to order that the dismissal of the claimant was unlawful and unfair. I further decline to award damages for wrongful and unlawful termination of employment as prayed.

27. However in consideration of the offer made in the termination letter, I award the claimant salary for four (4) days worked in June 2014, one month salary in lieu of notice, and the leave days based on the basic salary of Kshs. 86120 totalling to Kshs. 152,366.15. I therefore enter judgment for the claimant against the respondent in the said sum plus interest at court rate from the date hereof. Because the award herein was offered to the claimant by the respondent before filing the suit, I award him no costs. The award herein is subject to statutory deductions.

Dated, signed and delivered in open court at Nairobi this 6th day of March, 2020.

ONESMUS N. MAKAU

JUDGE