



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 47 OF 2017

MONICA MUENI MUTHAMA.....CLAIMANT

VERSUS

TAMARIND VILLAGE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This employment claim is brought by Monica Mueni Muthama against her former employer, Tamarind Village Limited. The claim is condensed in a Memorandum of Claim dated 21st December 2016 and filed in court on 9th January 2017. The Respondent filed a Memorandum of Response on 27th June 2017 to which the Claimant responded on 16th November 2017.
2. At the hearing, the Claimant testified on her own behalf and the Respondent called its Manager, Esther Nabwanda. The parties further filed written submissions.

The Claimant’s Case

3. The Claimant pleads that she was employed by the Respondent on 11th October 2011, as a Receptionist earning a monthly salary of Kshs. 20,500. She worked as such until August 2016 when her employment was terminated, on allegations that she was captured on Closed Circuit Television (CCTV) Cameras putting money in her handbag.
4. The Claimant avers that the reason given for the termination of her employment was unfounded and without basis. She adds that the Respondent did not follow the laid down procedures provided under Section 41 of the Employment Act.
5. The Claimant’s claim is as follows:

- a) Notice pay.....Kshs. 23,000
- b) 12 months’ salary in compensation.....276,000
- c) Leave pay for 5 years.....215,550
- d) Terminal benefits for 5 years.....71,850
- e) Collection charges.....50,000
- f) Certificate of service
- g) Costs

The Respondent’s Case

6. In its Response dated 23rd June 2017 and filed in court on 27th June 2017, the Respondent states that the Claimant is its ex-employee, who was working in the position of Secretary.
7. The Respondent states that the Claimant's employment was terminated following an incident on 19th and 20th July 2016 where she was observed through the CCTV Cameras putting company money into her bag, in breach of her contractual fiduciary duty.
8. The Claimant was summoned for a meeting with officials from the Respondent Company where the issue was explained to her and she was thereafter placed on suspension by letter dated 26th July 2016.
9. The Respondent claims to have investigated the matter, resulting in a recommendation that the Claimant's employment be terminated.
10. The Respondent adds that the Claimant was informed of the recommendation, upon which she recorded a statement dated 15th August 2016, in response to the allegations that had been raised.
11. The Respondent avers that the Claimant's response to the whole issue was considered and the Respondent, having lost confidence in the Claimant due to her suspicious conduct, dismissed her summarily. The Respondent further avers that the Claimant accepted the summary dismissal by executing the corrective action form on 23rd August 2016.
12. The Respondent states that the Claimant was paid all her terminal dues.
13. The Respondent submits that the Claimant conducted herself carelessly and improperly vis-a- vis her duties, as regards the handling of cash and further that the Respondent had reasonable grounds to suspect the Claimant of having acted to the Company's detriment.
14. The Respondent further submits that in the circumstances, it was justified in losing confidence in the Claimant. The Respondent adds that the Claimant was given a chance to explain and give her side of the story, before the decision to terminate her services was effected.

Findings and Determination

15. There are two (2) issues for determination in this case
 - a) Whether the Claimant has made out a case of unlawful termination of employment;
 - b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

16. The Respondent filed a Corrective Action Form dated 15th August 2016 citing the following problem and facts:

Problem:

IRREGULARITIES WITH SHIFT CLOSING ON JULY 19TH, 20TH 2016

Facts:

1. *ON JULY 19TH JULY 2016 MONICA WAS OBSERVED THROUGH THE CCTV PUTTING MONEY IN HER BAG.*
2. *ON JULY 20TH 2016 ON TWO OCCASIONS SHE WAS OBSERVED THROUGH THE CCTV PUTTING MONEY IN HER BAG.*

17. In her letter dated 15th August 2016, the Claimant concedes having put money in her bag on 19th and 20th July 2016, which she described as her tips from guests. However, when put under cross examination, the Claimant stated that the money she was seen putting in her bag, was replacement of her money she had used to give change to a customer.
18. The Claimant did not mention any of the foregoing details either in her Memorandum of Claim or in her witness statement. In fact, she terms the allegation that she was caught on CCTV Cameras putting money in her hand bag, as unfounded and without basis.
19. Section 43 of the Employment Act, 2007 provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

20. In the final submissions filed on behalf of the Respondent on 9th March 2020, reference was made to the decision in **Kenya Revenue Authority v Reuwel Waitthaka Gitahi & 2 others [2019] eKLR** where the Court of Appeal, while dealing with the issue of the burden of proof under Section 43 of the Employment Act, stated the following:

“the standard of proof is on a balance of probability not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist” causing it to terminate the employee’s services. That is a partly subjective test.”

21. In the **Reuwel Waitthaka Gitahi Case** (supra) the Court of Appeal cited with approval the decision in **Mckinley v BC. Tel (2001) 2 S.C.R. 161** where the Canadian Supreme Court rendered itself as follows:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer. “

22. The Court of Appeal also relied on the following excerpt from the **Halsbury’s Laws of England, 4th Edition, Vol. 16(1B) para 642:**

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

23. According to her Job Description, the Claimant was employed as a Receptionist in the Front Office Department and her duties included receiving cash on behalf of her employer. Without a doubt, this position called for a high degree of honesty and trust.

24. From the evidence on record, the Claimant indeed put money in her bag while on duty, not once but twice. This, coupled with the Claimant’s inconsistency as to the circumstances surrounding her action, would raise suspicion with any reasonable employer. The question is not whether the Respondent lost money; it is whether there was sufficient reason for the Respondent to lose confidence in the Claimant.

25. I think there was. An employee whose job entails receiving money on behalf of their employer, should not in my view, mix their own funds with those of the employer. The Respondent’s Manager, Esther Nabwanda told the Court that there was nothing wrong with the Claimant receiving tips from guests but she needed to make disclosure of the tips to the Duty Manager. In her position, this control measure would have served the Claimant well, by ruling out any suspicion of pilferage.

26. Overall, the Claimant’s action of putting money in her hand bag while on duty as a cashier, coupled with inconsistencies in her narration of the events of 19th and 20th July 2016, provided reason enough for the Respondent to lose confidence in her.

27. I therefore find and hold that the Respondent had a valid reason to terminate the Claimant’s employment.

28. The next question is whether in effecting the termination, the Respondent was faithful to the procedural fairness requirements of Section 41 of the Employment Act.

29. The Respondent’s Manager, Esther Nabwanda told the Court that following the incidents of 19th and 20th July 2016, she, together with the Security Manager, summoned the Claimant on 21st July 2016, played the CCTV footage and told the Claimant to give an explanation.

30. The Claimant was thereafter suspended on 26th July 2016 and on 3rd August 2016, Nabwanda prepared a report recommending termination of the Claimant’s employment. Oddly, the Claimant was invited to make a written statement on 15th August 2016, after the recommendation for termination of her employment had been made.

31. It seems to me therefore that the Claimant was not afforded an opportunity to defend herself prior to the termination of her employment as contemplated under Section 41 of the Employment Act. The termination was therefore procedurally unfair and the Claimant is entitled to some compensation.

Remedies

32. I therefore award the Claimant three (3) months’ salary in compensation. In making this award, I am guided by the Claimant’s length of service, her contribution to the termination and the Respondent’s failure to follow procedural fairness law.

33. I further award the Claimant one (1) month's salary in lieu of notice.
34. According to the evidence on record, the Claimant was paid leave pay alongside other terminal benefits. This claim is therefore without basis and is disallowed.
35. No basis was established for the claims for terminal benefits and collection charges which also fail and are dismissed.
36. In the ultimate, I enter judgment in favour of the Claimant as follows:
- a) 3 months' salary in compensation.....Kshs. 61,500
 - b) 1 month's salary in lieu of notice.....20,500
- Total.....82,000**
37. This amount will attract interest at court rates from the date of judgment until payment in full.
38. The Claimant is also entitled to a certificate of service and costs of the case.
39. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF MAY 2020

LINNET NDOLO JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE Appearance:

Mr. Anangwe h/b for Mr. Ngonze for the Claimant

Mr. Weru for the Respondent