



REPUBLIC OF KENYA

IN EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 965 OF 2016

SAMUEL MUSYOKA KIILU.....CLAIMANT

-VERSUS-

ALLPACK INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was dismissed from employment by the respondent on 28.8.2015 and brought this suit on 25.5.2016, seeking the following reliefs:-

(a) A declaration that the termination of his services was irregular unfair and an order that the claimant be paid his dues and compensation in the sum of Kshs. 348,416,00/-

(b) Costs of this claim and interest.

2. The respondent filed her defence on 30.7.2018 admitting that she dismissed the claimant but denied that the dismissal was unfair and wrongful. She averred that the claimant was dismissed for defrauding the company of Kshs. 14000 and a fair procedure was followed before dismissing him.

3. Both parties tendered evidence during the hearing and thereafter filed written submissions.

Claimant's case

4. The claimant testified as Cw1 and stated that he was employed by the respondent from July 2008 on seasonal contracts but from 4.11.2010 he was appointed on permanent basis as a General Stores Clerk. His basic salary was Kshs. 18,129/- but the gross was Kshs. 38,449/- per month. His appointment was terminable by either party giving 3 months prior notice.

5. On 15.8.2015, he was served with a suspension letter alleging that he had misappropriated money contributed by the respondent's staff to help a sick colleague called Danson Ndolo. He denied the alleged offence and contended that the money was in the hands of the shopsteward Mr. Ochieng and Beatrice Waweru.

6. When he reported back from the suspension on 18.8.2015, he was served with show cause letter accusing him of defrauding the company Ksh. 14,000/- for alleged unblocking of sewage on 12.8.2015. The letter also invited him to disciplinary hearing on 24.8.2015. He denied the alleged offence and averred that on 12.8.2015 there was a blockage on the sewer line and he reported to his Supervisor Mr. Douglas Mwenda who in turn reported to his boss Mr. Celcius Wekesa.

7. The claimant further testified that he reported the blockage to the Administrator Mr. Mbugua who confirmed the same. Thereafter, the claimant sourced for an external plumber who unblocked the line and the Administration confirmed that the work had been done and certified. The claimant testified further that the plumber served him with an invoice and he took it to the stores and a voucher payment was raised. Thereafter, the voucher was forwarded to the Production Manager who endorsed the same and the invoice and forwarded it to the Accounts for payment. The claimant received the money and passed it to the plumber.

8. He contended that the procedure followed was proper and he had followed it since 2008 when he joined the company. He further, contended that the officer who procures services of an external provider is the one who collects the pay from the company and passes it over to the out-sourced service provider. He contended that the plumber never complained that he did not pass the money to him.

9. The claimant admitted that he was accorded a hearing by a committee in the presence of another employee. He however contended that

the issue of misappropriation of money for Ndolo's medication was never raised at the hearing. He further contended that the only issue discussed was that of the Kshs. 14,000/- and it is the only one cited for his dismissal.

10. On cross-examination, the claimant admitted that he received the Kshs. 14,000/- from the respondent to pay for services rendered by a third party. He contended that he was in charge of the department and he followed the correct procedure. He also contended that he passed the money to the plumber and who acknowledged receipt by signing the register which is in the respondent's custody. He admitted that the plumber never gave him any letter authorizing him to collect the money on his behalf.

11. He denied that the respondent had internal plumbers and averred that every time there was a blockage, he would call an external plumber to unblock the line. He maintained that on the 12.8.2015, he reported the blockage to the Administrator Mr. Michael Mbugua who checked and confirmed there was a blockage and then sent him to call a plumber.

12. The claimant admitted that he was called to record a statement by Mr. Osoro, investigator and later appeared before a committee for a disciplinary hearing. He further admitted that after his dismissal, he was paid his dues and issued with a certificate of service indicating that he left the company on his own violation.

Defence Case

13. The Respondent's HR Officer Mr. Robert Mwachenda testified as Rw1. He confirmed that the claimant was employed by the respondent on 4.11.2010 as a General Clerk. He testified that on 12.8.2015, the claimant received Kshs. 14,000/- from the respondent on the assumption that it was to pay M/s. Alfa Plumbers and Sewerline Services for unblocking of the respondent's sewer line. He further testified that the claimant presented a receipt as evidence of the services rendered to the Finance Department and a goods receipt note (GRN) was generated and claimant was paid the money by signing a petty cash voucher.

14. RW1 contended that the said transaction was irregular because there was no evidence of any sewerage unblocking services rendered to the respondent by M/s. Alfa Plumbers and Sewerline Services. He contended that even if there was blockage, there was no evidence to prove that all the internal resolution mechanisms were attempted before calling the external plumber. He further contended that the claimant had no authority to contract any external services or to receive payment on behalf of the external plumber.

15. He contended that there is an inhouse team with tools for unblocking a sewer and if they fail, the matter is decided by the Administration Manager who does the procurement and co-ordinates the work. He also contended that in this case that procedure was not followed because the claimant did not have any authority to procure services of an external plumber.

16. He contended that after investigations into the matter, it was discovered that there was no sewerline blockage on 12.8.2015 and there was no entity called Alpha Plumbers in Kenya. As a result, the claimant was served with a show cause letter and later heard by a committee in the presence of another employee. Thereafter, he was dismissed and paid his terminal dues and voluntarily signed a settlement agreement discharging the respondent from any further claims.

17. On cross examination, Rw1 reiterated that the Administration Manager is the one who coordinates the unblocking of the sewerline. However, he admitted that he did not know whether the Administration Manager, Mr. Mbugua authorized the unblockage of the sewerline. He contended that the claimant attended the disciplinary hearing accompanied by the Chief Shop Steward and thereafter he was dismissed in relation to the sewerline unblockage.

18. He admitted that the payment of Kshs. 14,000/- was authorized by the Operations Manager Mr. Celcius Wekesa after a GRN was generated by the Stores Clerk Ms. Beatrice Waweru. He contended that Mr. Wekesa and Ms. Beatrice were both dismissed with the claimant.

Issues for determination

19. I have carefully considered the pleadings, evidence and submissions. There is no dispute that the claimant was employed by the respondent as a General Clerk until 28.8.2015 when he was summarily dismissed. Under section 45 of the Employment Act, an employer is barred from unfairly terminating the services of his employee and that the termination is unfair if the employer fails to prove that it was grounded on valid and fair reason and that a fair procedure was followed. The issues for determination herein are:

- (a) Whether the dismissal was grounded on valid and fair reason.
- (b) Whether a fair procedure was followed
- (c) Whether the claimant is entitled to the reliefs sought.

Reason for the termination

20. The termination letter cited the reason for dismissing the claimant as making a fake claim of Ksh. 14,000 in favour of Alfa Plumbers purporting that he had procured their services to unblock the respondent's sewer system. Under section 43 and 45 (2) of the Employment Act, the burden of proving that the cited reason was valid lies with the respondent.

21. In this case, the claimant contended that there was indeed a blockage in the respondent sewer system and he reported it to his supervisor and the Administration Manager, Mr. Mbugua. He further contended that Mr. Mbugua inspected the system and confirmed that it was blocked and instructed him to call a plumber. That he called Alfa Plumbers who unblocked the system and he called the Administration

Manager to confirm. Thereafter, the plumber gave him an invoice and he pursued the payment on his behalf through the company procedure. That all the documentation was done by the relevant departments and approval given by the Production Manager. Finally, the cashier paid him the Kshs. 14,000/- which he handed over to the plumber who acknowledged receipt by signing the register.

22. RW1 is the only defence witness called but with due respect, except for the issue of the procedure followed before dismissing the claimant, the rest of his evidence was hearsay. He testified on information he heard from other persons who were not called to give evidence including the investigator, alleged internal plumber and security at the gate.

23. The Administration Manager, Mr. Mbugua was not called to deny that the claimant reported a blockage on the sewer line and that he checked and confirmed the same and authorized him to call an external plumber to unblock the line. I therefore, return that the respondent has not proved on a balance of probability that there was no blockage on her sewer system on 12.8.2015 and that the Kshs. 14,000/- claimed by the claimant on behalf of Alfa Plumbers was a fake claim. It follows that the reasons cited for dismissing the claimant were not valid and as such the dismissal was unfair within the meaning of section 45 of the Employment Act.

Procedure followed

24. There is no dispute that the claimant was suspended on 15.8.2015 for alleged misappropriation of funds contributed by fellow staff to assist another employee Mr. Ndolo. There is further no dispute that on 18.8.2015 he was served with a show cause letter accusing him of defrauding the respondent of Kshs. 14,000/- purporting the same to be payment to Alfa Plumbers for unlocking the respondent's sewer system. It is also common ground that the claimant made a written defence and later appeared before a disciplinary committee accompanied by the Chief Shop Steward to defend himself. Finally, it is clear from the evidence that the claimant was dismissed on 28.8.2015 on the allegation that he made a fake claim of Ksh. 14,000/- in favour of Alfa Plumbers for unblocking the sewerline.

25. The above procedure in my view was on all fours within the procedure provided under section 41 of the Employment Act which requires that, before dismissing an employee for misconduct the employer must explain the reason to the employee in the presence of a fellow employee or shopfloor union official of his choice, and then accord the two a chance to air their representations in defence. Consequently, I return that the respondent proved that she followed a fair procedure before dismissing the claimant.

Relief

26. In view of the finding that the respondent has failed to prove that the dismissal of the claimant was grounded on a valid and fair reason, I make declaration that the dismissal was unfair and unlawful.

27. The claimant prayed for compensatory damages totaling to Kshs. 348,416.00/- However, because he signed a settlement agreement declaring that he had been paid all his rightful dues and discharged the respondent from further claims, I decline to grant the damages sought herein. It is now trite that a settlement agreement executed by an employee in favour of his employer constitutes a binding contract unless it is vitiated by mistake, undue influence, duress or fraudulent misrepresentation.

28. In this case the claimant contended that he was intimidated to sign the agreement in order to receive his pay. RW1 denied the alleged intimidation and averred that the claimant executed the agreement voluntarily. He who alleges must prove. In this case, the claimant had the choice to sign or decline to sign the deal offered if it was not good. But once signed he committed himself to the terms set out in the agreement.

Conclusion and disposition

29. I have found that the dismissal of the claimant was unfair because it was not grounded on a valid and fair reason. However, I have also found that no compensatory damages are payable to the claimant because he executed a settlement agreement after the separation acknowledging the dues paid as full and final settlement and discharged the respondent from any further claims. Consequently, the suit partially succeeds and as such each party should bear his/her own costs.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE