



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1511 OF 2018**

**AMOS KITAVI KIVITE.....CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the Memorandum of Claim dated 8<sup>th</sup> November 2018 alleging that his employment was unfairly and unlawfully terminated by the Respondent vide the letter dated 28.6.2018 for various unfounded allegations and without being accorded a fair hearing. He therefore prayed for the following reliefs against the Respondent: -

*a) A declaration that termination of the Claimant by the Respondent, unfair thus unlawful.*

*b) An order that the Respondent immediately reinstates the Claimant to work.*

*c) An order that the Claimant be adequately compensated for time lost out of employment.*

*d) In the alternative and without prejudice to the foregoing, the Claimant prayed for Damages for unlawful termination of employment.*

*(e) Costs of the suit.*

*(f) Any other relevant relief.*

*(g) Interest on the award.*

2. The Respondent filed its Response dated 5<sup>th</sup> December 2018 denying that the Claimant worked diligently during his employment period and averred that he committed gross misconduct of fraud which justified his dismissal. She further averred that before the dismissal the Claimant was heard by a disciplinary committee on 17<sup>th</sup> April 2018 which found him guilty of the said misconduct and recommended for his dismissal in accordance with her Staff Code of Conduct and the Employment Act. She further averred that she is willing to pay the claimant the following dues upon clearance: -

i) Three months' salary in lieu of notice (less any liability to the Respondent)

ii) Pension benefits in line with the Respondent's Pension Trust Deed and Rules

iii) Certificate of service

3. In view of the foregoing matters, the Respondent prayed that the suit be dismissed and/or struck out with costs for being misconceived and lacking merit.

4. The suit was heard on 2.10.2019 and 25.11.2019 when both parties tendered evidence and thereafter filed written submissions.

**Claimant's case**

5. The Claimant testified as CW1 and adopted his witness statement as his evidence and further produced 9 documents as exhibits. In brief he stated that he joined the respondent on 18.10.2007 and on 1.5.2008 he was confirmed as permanent and pensionable staff. Later he rose the

ranks to become a Supervisor.

6. He further testified that in April 2017 he bought eye glasses for his son at the Optica for Kshs.35000 and he was issued with receipts which he used to claim refund. Thereafter he received a letter from the respondent alleging that the receipts he used to claim the refund were fake and proceeded to take him through disciplinary hearing without showing him the alleged fake receipts. He contended that the alleged fake receipts were never availed to him and as such he was not given a fair hearing during his disciplinary case and his subsequent appeal.

7. In view of the foregoing matters, he contended that the reason for the termination was not valid and the procedure followed was not fair. He further contended that the respondent has since suspended Optica from Providing services to the respondent. He therefore prayed for the reliefs sought in his Claim.

8. On cross-examination, CWI admitted that he was given a copy of the Investigation Report but maintained that the alleged fraud was not true. He contended that the alleged fake receipts were issued to him by Optica after paying for his son's glasses around 4.4.2017. He averred that he personally took his son to Optica at the IPS Building along Kaunda Street and he was served by a gentleman. He contended that the glasses were collected a day after the payment but denied that there was a place to sign acknowledgement. He confirmed that he presented the receipts to the employer for refund and the same was processed and paid in May 2017.

9. He further admitted that the letter inviting him for the disciplinary hearing on 17.4.2018 allowed him to be accompanied by a fellow employee of his choice and that during the hearing he was allowed to make his oral defence during the said hearing. He further admitted that before the hearing, he was served with a show cause letter and he responded. However, he contended that the termination was harsh in the circumstances and stated that the employer should have treated him as a first offender.

10. He contended that he was never supplied with minutes of the hearing to enable him prepare his appeal but admitted that he was paid his salary until the date of termination. He further admitted that he has never cleared with the Respondent as had been advised in his termination letter.

### **Respondent's case**

11. RW1, Aggrey Otieno Amadi adopted his written statement dated 14.8.2019 as his evidence in chief and produced as exhibits the Investigation Report and the Medical Refund Claim Forms attaching the Receipt and ETR from Optica. In brief he testified that he works for the respondent as an Investigator and during his investigation herein he discovered that the claimant used fake receipts to claim refund for alleged purchase of spectacles from Optica. He further discovered that the receipts did not originate from Optica and as such the refund claimed by the claimant amounted to fraud and abuse of the medical scheme contrary to the Staff Medical Benefit Policy and theft contrary to the respondent's Staff Code of Conduct.

12. On cross examination, he contended that he was given the receipts used by the claimant to claim refund and visited Optica to verify authenticity but Optica denied that the receipts were issued to the claimant from the facility. He denied being aware of tax evasion by Optica or whether Optica had been suspended from offering services to the respondent. He stated that he could not deny whether or not the claimant visited Optica.

13. Frankline Kiogora Gitonga, an Assistant HR Manager for the respondent testified as Rw2 and also adopted his written statement dated 5.12.2018 as his evidence in chief. In brief, he confirmed that the claimant was employed by the respondent on 18.10.2007 as an Accounts Assistant; that on 12.10.2017, the Medical Unit in the HR department detected that the ETR receipts presented by certain KRA staff in support of reimbursement claims from Optica Limited did not match receipts that had earlier been presented for payment; and that the Medical Unit Manager wrote to Optica Limited forwarding the receipts for authentication and she responded that 12 out of the 122 receipts sent, including the claimant's receipt No.671234 for kshs.35000, did not originate from her.

14. Rw2 further stated that the matter was referred to Internal Affairs for investigation and it was established that 8 employees of the respondent, including the claimant, were involved in fraudulent medical cover claims. As a result the claimant was served with a show cause letter and responded thereto. Thereafter, he was invited to a disciplinary hearing in line with the provisions of section 41 of the Employment Act and he was dismissed upon the employer confirming that indeed he presented the fake receipts and he was paid the kshs. 35,000 in May 2017 as per the payslip for that month.

15. Rw2 contended that the action by the claimant violated section 44(4)(g) of the Employment Act and clause 6.2.2.14 and 6.2.5.6 of the respondent's Staff Code of Conduct which justifies separation. Accordingly, the claimant was served with then termination letter dated 28.6.2018 and he appealed. However, his appeal was dismissed and he brought this suit. Rw2 contended that the suit is without merits and it should be dismissed with costs because the reason for the dismissal is justified and the claimant was accorded a fair hearing as per the letter summoning him for the hearing which allowed him to be accompanied by another employee of his choice.

16. On cross-examination, he stated that the claimant was dismissed for gross misconduct. He further stated that **Paragraph 8 of the Code of Conduct** deals with disciplinary action, **Clause 8.3** provides that a person charged with gross misconduct may be suspended and that **Paragraph 9 of the Code** provides for action or penalties. He testified that the Claimant used to work in the cash office where trust is required and confirmed that no action was taken against the persons who verified the receipts for payment. He contended that in this case the Disciplinary Committee did not recommend for Caution and Recovery but dismissal.

17. He also stated that the Commissioner General is not bound by the decision of the Disciplinary Committee and he is not the one who writes termination letters but only recommends to the HR Department to write. He further stated that appeals are directed to the Commissioner General under **Part 11 of the Staff Code of Conduct** but he has delegated the process to the Commissioner Support Services. Finally, he contended that Clause 9.10 of the Code of Conduct provided that upon termination, an employee can be paid salary in lieu of notice.

### Claimant's submissions

18. The Claimant submits that he served for 11 years without any disciplinary issue and maintained that the termination of his employment based on unfounded allegations was unfair and harsh. He reiterated that he was dismissed without being shown the alleged fake documents and as such the misconduct was never proved. He further contended that due to the denial of the said documents, he was unable to defend himself effectively. He further submitted that the disciplinary committee was not properly constituted under the KRA Act and as such it lacked mandate to hear his case.

19. On the other hand, the claimant submitted that the dismissal was unfair because the disciplinary committee never recommended for the same but rather denial of one annual salary increment and recovery of the allegedly lost money from him. He contended that the Deputy Commissioner Support Services and the Deputy Commissioner – HR unlawfully changed the recommended sentence and unfairly dismissed him from service. In addition, he submitted that only the Commissioner General has the mandate to terminate employee's services under the Code of conduct and not the Deputy Commissioner HR.

20. For emphasis, he relied on **Paul Kipkemoi Kiptoo V Board Of Trustees National Social Security Fund (Nssf) [2019] eKLR** where the court reinstated the employee and held that, where there is an efficacious remedy provided by law, the same ought to be resorted to first. In the claimant's view, the Respondent ought to have considered the available remedies provided by its Code of Conduct including restitution and warning/caution instead of termination.

21. The claimant further relied on **George Kingi Bamba vs National Police Service Commission [2019] eKLR, Civil Appeal 149 of 2017** where the Court of Appeal reinstated the appellant to his employment on the basis of excellent work performance and achievements during his service to the employer against the unproven accusations of impropriety like in the instant case. He contended that he had an excellent work performance which earned him commendations and promotions as is evidenced by the letters produced as **Exhibits 6 and 7**.

### Respondent's Submissions

22. The Respondent submitted that the law on fair termination from employment is set out under **Sections 43 and 45 of the Employment Act** which was further espoused in the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** where the court held that there are two elements of fair termination of employment that must be satisfied by the employer, fair procedure and valid reason.

23. As regards fair procedure, the respondent submitted the relevant law is **Section 41 of the Employment Act** as was discussed by this court in the case of **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR** in the following terms and which was cited with approval by the Court of Appeal in the case of **National Bank of Kenya v Anthony Njue John [2019] eKLR**.

24. The respondent submitted that she terminated the claimant's employment in accordance with **Section 44 (4) (g) of the Employment Act** which provides that the employer is entitled to summarily dismiss his employee who commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

25. The Respondent further submitted that the Claimant was required under **paragraph 9 of his Letter of Appointment** to comply with **paragraph 5.6.5 of the Code of Conduct and Ethics** which provided that Staff shall not be involved in theft, forgery, fraud, embezzlement or misappropriation of Authority's funds.

26. In addition, she submitted that the Claimant was well aware of the respondent's rules and regulations as set out in the Staff Code of Conduct including **Clause 6.2.2.1 of the Code of Conduct**, which provides that engaging in fraud, bribery, embezzlement or misappropriation of public funds amounts to gross misconduct, while clause 6.2.2.14 provides that theft and forgery also amount to gross misconduct whose sanction under **Clause 9.10** of the Code is termination of employment.

She clarified that issuing a warning letter is a sanction for a misdemeanour and not gross misconduct.

27. She relied on **Thomas Sila Nzivo vs Bamburi Cement Limited [2014] eKLR** where Rika J, while discussing the import of section 44 (4) (g) observed that the employer was not required to have conclusive proof of the claimant's involvement and was only expected to have reasonable and sufficient grounds.

28. The Respondent further submitted that termination of employees' service is not a preserve of the Commissioner General as alleged by the Claimant and contended that the functions of the Respondent are delegated to the Commissioners who head the various departments of the respondent. That the disciplinary committee was also properly constituted and that the Deputy Commissioner Human Resources Department having been delegated with the function of Staff welfare, properly and lawfully executed his functions with the help of staff deployed to the department.

29. She contended that the Claimant was in Grade 4 at the time of termination from employment and that **Part 13 of the Staff Code of Conduct** provides that a disciplinary Committee composed of members appointed by the Commissioner General and chaired by a person appointed by the Commissioner General will examine and deliberate on disciplinary cases for employees of KRA grade 4-16 and make appropriate recommendations to the Commissioner General.

30. It is submitted by the Respondent that since it followed due procedure and was justified in terminating the Claimant's employment, reinstatement to employment or compensation sought by the Claimant are not tenable. She relied on the case of **Dalmas B. Ogoye vs K.N.T. C Limited [1996] eKLR** where the Court of Appeal held that the courts do not ordinarily order reinstatement because such order would be difficult to enforce, besides it not right to impose an employee who has fallen out of favour with the reluctant employer.

31. In conclusion, the Respondent submitted that she informed the claimant of his rightful terminal dues plus pension benefits vide the termination letter and undertook to pay the Claimant all the dues upon completing clearance.

#### **Issues for determination and analysis.**

32. After careful consideration of the pleadings, evidence and submissions, it is a fact that the claimant was employed by the respondent from 18.10.2007 to 28.6.2018 when his services were terminated for gross misconduct. The issues for determination are:

- (a) Whether the Respondent terminated the Claimant's employment unfairly and unlawfully.
- (b) Whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim.

#### **Whether the termination was unfair and unlawful.**

33. Section 45(2) of the Employment Act provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed. In **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

*“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”*

34. Again in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** Onyango J held that: -

*“What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.*

35. Further, in **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR** this court expressed itself as follows, and which was cited with approval by the Court of Appeal in the case of **National Bank of Kenya v Anthony Njue John [2019] eKLR**, thus: -

*“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.*

*The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”*

#### **Fair procedure**

36. Section 41 of the Employment Act provides

*“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”*

37. In the instant case, it is not disputed that the Claimant was informed of the allegations against him vide a show cause letter and given opportunity to respond in writing. Thereafter he was invited to an disciplinary hearing where he was allowed to make his oral representations. It is also common ground that the claimant was further informed of his right to be accompanied to the said hearing by a fellow employee of his choice, but opted not to be accompanied. The Claimant was also given the investigation report by the Respondent before the hearing upon request. To that extent the court is of the opinion that the procedure followed before dismissing the claimant was in accordance with the mandatory provisions of section 41 aforesaid.

38. I gather support from **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR** where this court expressed itself as follows, and which was cited with approval by the Court of Appeal in the case of **National Bank of Kenya v Anthony Njue John [2019] eKLR**, thus: -

**“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.”**

**Reason(s) for the termination.**

39. The reason for the termination of the claimant’s services was captured in the termination letter dated 28.6.2018 as follows: -

**“... a decision has been reached to terminate your services with effect from 28<sup>th</sup> June, 2018 on account of making fraudulent medical claims for thirty five thousand shillings (Kshs. 35,000) using receipts (quoted in the show cause letter) purported to have originated from Optica Limited which is a medical service provider to the Authority. It has been confirmed that you defrauded your employer since the claim was paid to you as supported by the fraudulent receipts through payroll in the month of May, 2017.**

**Your actions were in violation of the Employment Act, 2007 section 44(4)(g) as well as KRA Code of Conduct Clauses 6.2.2.14 and 6.2.5.6 which provide lawful grounds for this separation...”**

40. The claimant admitted that he presented a refund claim form attaching a receipt for kshs.35000 plus an ETR receipt for same amount and transaction of purchase of spectacles for his son, Nelson. The claimant further admitted that he was indeed paid the said sum of Kshs. 35,000 through the payroll in May 2017. The Rw1 produced the said receipts and the claim form together with the letter from Optica Limited dated 27.10.2017 which stated that the said receipt did not originate from the medical service provider. The claimant did not object to production of the said documents nor did he deny that the said receipts were the ones he used to obtain the said Kshs. 35,000 from the employer.

41. In view of the said admission by the claimant and the evidence by Rw1 that the payment of the Kshs. 35,000 to the claimant was founded on fake receipts, I find that the respondent has proved on a balance of probability that the reason for terminating the claimant’s services was valid. **Section 44 (4) (g) of the Employment Act** provides that: -

**“44 (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause...:**

**(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”**

**(f) paragraph 5.6.5 of the respondent’s Staff Code of Conduct and Ethics** provides: -

**“Staff shall not be involved in theft, forgery, fraud, embezzlement or misappropriation of Authority’s funds.”**

42. Having carefully considered the evidence and the submissions presented by the parties, I am satisfied that the respondent had reasonable grounds for suspecting or concluding that the claimant had committed a criminal offence against her and to her financial detriment. The said offence amounted to gross misconduct within the meaning of section 44(4)(g) of the Employment Act and Clause 5.6.5 of The Staff Code of Conduct and Ethics. Such misconduct amounted to valid reason that justified summary dismissal but she instead opted for a lesser action of termination with the benefit of salary in lieu of notice.

43. For the reason that the respondent has proved by evidence that the reason for terminating the claimant’s contract was valid and that a fair procedure was followed, I find that the claimant has failed to discharge his burden of proof under section 47 (5) of the Employment Act which provides as follow: -

**“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination or wrongful dismissal rests on the employer.”**

44. In view of the foregoing finding, I hold that the termination of the claimant’s employment by the respondent on 28.6.2018 was not unfair and unlawful within the meaning of section 45 of the Employment Act as alleged by the claimant.

**Whether the claimant is entitled to the reliefs sought.**

45. In view of the foregoing holding, I decline to make declaration that the termination of the claimant’s employment by the respondent was unfair and unlawful as prayed. For the same reason, I find that the claimant is neither entitled to reinstatement to his former job nor the alternative prayer of damages for unlawful termination of employment.

46. The claimant further prayed for any other relief that the court deems fit. Considering respondent’s pleadings, evidence and submissions, I grant the terminal dues and pension as set out in the termination letter dated 28.6.2018 and admitted in paragraph 9 of the defence where the respondent pleaded as follows: -

***“9. The Respondent is bound, ready and willing to pay the claimant’s dues in full up to and including the date of termination, three months’ salary in lieu of notice (less any liability to the respondent), and pension benefits in line with the respondent’s Pension Trust Deed and Rules upon Clearance. The Respondent also undertakes to issue the Claimant with a Certificate of Service as per Section 51 (1) of the Employment Act.”***

47. The said dues shall be paid after the claimant completes clearance as directed by the respondent vide the termination letter. Save for the said award made on admission, the suit is dismissed with no costs.

**Dated and delivered at Nairobi this 24th day of September, 2020.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**