



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 221 OF 2018**

**NYAMAWI SANGA RANDU.....CLAIMANT**

**VS**

**AQIQ TRADING COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 11<sup>th</sup> April 2018 and amended on 8<sup>th</sup> January 2019, the Claimant claims compensation for unfair termination of employment plus payment of terminal dues. The Respondent filed a Response dated 31<sup>st</sup> May 2018 and amended on 10<sup>th</sup> June 2019.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Director, Mukarram Kurban Hussein; Chief Executive Officer, Mukarram Kurban Hussein A. Dalal and Chief Accountant, Shabbir Abidhusein Bhaijee. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as an Office Assistant, at a monthly salary of Kshs. 23,000 effective 1<sup>st</sup> October 2007. He worked until 26<sup>th</sup> November 2017 when he was summarily dismissed.

4. The Claimant claims that his dismissal was wrongful and unfair for want of valid reason and violation of due procedure. He therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 23,000
- b) Leave pay for 1 year.....16,107
- c) Years of service.....115,050
- d) 12 months' salary in compensation.....276,000
- e) Certificate of service
- f) Costs plus interest

**The Respondent's Case**

5. In its Response dated 31<sup>st</sup> May 2018 and amended on 10<sup>th</sup> June 2019, the Respondent denies having employed the Claimant on 1<sup>st</sup> October 2007 and states that it was incorporated on 4<sup>th</sup> September 2014.

6. The Respondent avers that it entered into an employment contract with the Claimant from 1<sup>st</sup> July 2016, by which the Claimant was employed as an Office Assistant, earning a monthly salary of Kshs. 17,000, inclusive of allowances.

7. The Respondent further avers that upon expiry of the first contract, the Claimant was employed as an Office Messenger for a further period of one year at a monthly salary of Kshs. 22,300, inclusive of allowances.
8. The Respondent states that the Claimant was dismissed for valid reasons and in compliance with due procedure.
9. The Respondent claims that the Claimant was involved in a criminal act of stealing contrary to the provisions of the Penal Code, which amounted to gross misconduct, as provided under Section 44(4)(g) of the Employment Act.
10. The Respondent gives the following particulars of unlawful and criminal acts by the Claimant:
- a) That on 21<sup>st</sup> October 2017, the Claimant was sent to Eco Bank Kenya Limited, Moi Avenue Branch to bank cash on behalf of the Respondent;
  - b) That instead of banking the cash at Eco Bank Kenya Limited, the Claimant committed an act of gross misconduct, by stealing a mobile phone belonging to another bank customer at Eco Bank Kenya Limited, Moi Avenue Branch;
  - c) That the Claimant then went back to the Respondent's office with the money, which he later deposited at Eco Bank of Kenya Limited, Nyali Branch;
  - d) That Ms. Amina Adam, the Operations Manager, Eco Bank Kenya Limited, Moi Avenue Branch called the Respondent's Chief Executive Officer, Mukarram Kurban Hussein A. Dalal and informed him of the Claimant's act of theft at the Bank;
  - e) That the Chief Executive Officer, Mukarram Kurban Hussein A. Dalal instructed the Chief Accountant, Shabbir Abidhussein Bhajjee to go to the Bank and investigate the matter;
  - f) That the Chief Accountant went to the Bank on 21<sup>st</sup> October 2017, at around 12.30 pm, where he viewed a CCTV footage, in the presence of Ms. Ruth Thairu and Ms. Amina Adam of Eco Bank Kenya Limited, which clearly showed the Claimant walking to the Bank's customers' counter and stealing a mobile phone belonging to another customer, putting it in his pocket and leaving the Bank at around 10.30 am;
  - g) That the Claimant was contacted by Ms. Amina Adam, the Operations Manager, Eco Bank Kenya Limited, Moi Avenue Branch; the Claimant went to the Branch at around 12.30 pm on the same day;
  - h) That the Claimant was asked about stealing the mobile phone and he confessed in the presence of Shabbir Abidhussein Bhajjee, Ms. Ruth Thairu and Ms. Amina Adam that he had the mobile phone in his pocket;
  - i) That the Claimant handed the mobile phone to the bank officials, confessed having stolen the phone and further confessed having formatted it ready for resale to a third party;
  - j) That Shabbir Abidhussein Bhajjee reported back to Mukarram Kurban Hussein A. Dalal who instructed him to take keys of a company motorcycle from the Claimant. The Claimant was instructed to attend a disciplinary meeting on 23<sup>rd</sup> October 2017;
  - k) That on 23<sup>rd</sup> October 2017, Mukarram Kurban Hussein A. Dalal and Mukarram Kurban Hussein held a meeting with the Claimant and duly accorded him an opportunity to be heard, whereby he explained his actions with respect to the aforementioned incident.
11. The Claimant was issued with a summary dismissal letter dated 23<sup>rd</sup> October 2017 and a Certificate of Service of the same date.
12. The Respondent's case is that it acted lawfully and fairly in dismissing the Claimant as the reason for dismissal was valid and related to the Claimant's conduct as required by the Employment Act.
13. The Respondent therefore denies the Claimant's entire claim and puts him to strict proof.
14. Regarding the claim for leave pay, the Respondent states that as at 31<sup>st</sup> August 2017, the Claimant had a leave balance of 15 days remaining for the year. The Respondent adds that the Claimant had only one unpaid pro-rata leave day which was discounted in his final dues computation, on account of a loan owed by the Claimant.
15. In response to the claim for years of service, the Respondent states that the Claimant was a contributing member of the National Social Security Fund (NSSF).
16. The Respondent avers that the Claimant's dues as at the time of dismissal were calculated against the amount owed to the Respondent, leaving a balance owed in the sum of Kshs. 428, which the Claimant was fully aware of. The Respondent states that the Claimant's Certificate of Service was available for collection.

### **Findings and Determination**

17. Three issues fall for determination in this case:

- a) Whether the Respondent had a valid reason for dismissing the Claimant;
- b) Whether in executing the dismissal, the Respondent observed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

#### **Valid Reason?**

18. The Respondent produced a letter dated 23<sup>rd</sup> October 2017, addressed to the Claimant as follows:

**“RE: DISMISSAL LETTER-NYAMAWI SANGA RANDU-OFFICE MESSENGER**

*We refer to the above subject matter.*

*That based on the meeting held on 23<sup>rd</sup> October at Aqiq trading Plaza office between Mr. Mukarram and yourself, we sadly wish to inform you that the company has decided to dismiss you from your employment effective from (sic) the 21<sup>st</sup> October 2017 due to the following reasons:*

- 1. That on 21<sup>st</sup> October at around 11.10 am while under the company’s employment, you were involved in an act of stealing at Ecobank Kenya Limited, Moi avenue branch whereby you stole a mobile phone of a bank’s client from the slip filling counter.*
- 2. That you immediately left the banking hall with the mobile phone and proceeded to format/flash the phone and you admitted that you intended to sell it.*
- 3. That after follow up by Mr. Shabbir and the bank’s management you returned to the bank in the afternoon at around 1.30pm with the formatted/flushed phone.*
- 4. That CCTV footage from the bank’s security cameras clearly showed you stealing the said mobile phone and leaving with it immediately thereafter.*
- 5. That at the hearing in our offices, you explained and confirmed the incident but gave no valid reasons for you (sic) actions.*

*Take note that you (sic) employment was founded on efficiency, honest, faithfulness and integrity and you have clearly demonstrated to the company that you cannot be trusted hence company can no longer trust you to carry on its operations honestly and faithfully.*

*Take note that your actions are a direct violation to the terms of the Employment Contract between yourself, company and employment laws.*

*Attached is the computation of your dues.*

*We however take this opportunity to wish you the best in your future endeavors.*

*(signed)*

*Hussein Mukarram”*

19. According to this letter which was backed by the Respondent’s three (3) witnesses, the Claimant was dismissed on allegations of stealing a mobile phone from a customer at Eco Bank Kenya Limited, Moi Avenue Branch, Mombasa where he had gone to bank cash on behalf of the Respondent on 21<sup>st</sup> October 2017.

20. In his testimony before the Court, the Claimant admitted having taken the mobile phone from the customer’s counter but denied any *mens rea* to steal. Obviously, this is not a criminal trial and the applicable standard of proof is therefore on a balance of probability.

21. In this regard, Section 43 of the Employment Act 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 45.***

***(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.***

22. The Court was referred to the United Kingdom Employment Appeal Tribunal decision in ***British Home Stores Ltd v Burchell [1980]***

ICR 303 where the ingredients of a valid reason for termination of employment were condensed in the following terms:

*(a) A belief by the employer that the employee is guilty of the allegations made against them;*

*(b) Reasonable grounds for sustaining that belief;*

*(c) Prior investigations into the matter reasonable in the circumstances of the case.*

23. This is what is commonly known as the 'reasonable responses test' by which all the employer is required to demonstrate is that it acted reasonably in the circumstances of the particular case.

24. If the Court was to believe the Claimant's account that he was a 'good Samaritan' who found a misplaced mobile phone at the banking hall, the question remains why he chose to take it away with him rather than handing it over to the bank security or officials.

25. The Claimant made no attempt to answer this crucial question and applying the 'reasonable responses test' I find and hold that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.

#### **Dismissal Procedure**

26. The Claimant states that his dismissal was devoid of the procedural fairness requirements of Section 41 of the Employment Act.

27. The Respondent's Chief Accountant, Shabbir Abdihussein Bhaijee told the Court that on 21<sup>st</sup> October 2017, the Claimant was, in his presence, questioned about the mobile phone he had taken from the banking hall. Bhaijee further testified that the Claimant handed over the phone to the bank officials. This account concurs with the Claimant's own testimony.

28. The Respondent's Chief Executive Officer, Mukarram Kurban Hussein A. Dalal testified that he met the Claimant on 23<sup>rd</sup> October 2017, in the presence of Mukarram Kurban Hussein, when the Claimant was given an opportunity to explain his actions. Mukarram Kurban Hussein corroborated the testimony of the Chief Executive Officer and the Court had no reason to disbelieve the two witnesses.

29. Additionally, the Claimant signed a document dated 23<sup>rd</sup> October 2017 detailing the events of 21<sup>st</sup> October 2017. At any rate, there was no evidence of the Claimant having complained that he had not been given adequate time to prepare his evidence

30. All the foregoing events put together, persuades the Court to find and hold that the procedural fairness dictates of Section 41 of the Employment Act were complied with.

31. The claims for compensation for unlawful dismissal and notice pay are therefore without basis and are dismissed.

#### **Other Claims**

32. Having been a contributing member of NSSF, the Claimant is not entitled to service pay.

33. The claim for leave pay was abandoned at the trial.

34. Finally, the only order I will make is that the Claimant is entitled to a Certificate of Service for the period given in his contracts of employment.

35. Each party will bear their own costs.

36. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY DECEMBER 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Chebukaka for the Claimant

Ms. Wamithi for the Respondent