



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 768 OF 2017

BETWEEN

YVONNE ADAMBA SIGANGA.....CLAIMANT

VERSUS

THE AGA KHAN UNIVERSITY.....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Otieno Asewe & Company Advocates for the Claimant

Wandai Matheka & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on 21st October 2020. She states, she was employed by the Respondent Institution, between 15th August 2008 and 4th January 2013, in the position of Human Resource & Administration Manager, in Respondent's Health Service Department. The Department merged with the Aga Khan University. The Claimant became Manager, Administration & Human Resource. She also dealt with Finance in the Department of Community Health, Medical College Division. She earned a monthly salary of Kshs. 120,181. She worked under the Respondent until 10th November 2016.

2. The Respondent issued her a letter to show cause, why she should not be disciplined, on 10th October 2016. She replied on 12th October 2016. A disciplinary hearing was held at Respondent's Offices in Nairobi, on 2nd November 2016. The Claimant was summarily dismissed on 10th November 2016, on grounds of dishonesty. She made an internal appeal. The Appeals Committee upheld summary dismissal decision, but on different grounds from dishonesty- the Appeals Committee held the Claimant liable, for unprofessional conduct and negligence. The Appeals Committee was not satisfied with the findings of the initial Disciplinary Panel, but instead of reinstating the Claimant, introduced new grounds and upheld summary dismissal.

3. She prays the Court to declare that termination was unfair, and grant her Judgment against the Respondent for: -

a. 3 months' salary in lieu of notice at Kshs. 369,543.

b. 12 months' salary in compensation for unfair termination at Kshs. 1,442, 172.

Total...Kshs. 1,802,715.

c. Certificate of Service to issue.

d. Costs.

e. Interest.

f. Any other relief.

4. The Respondent filed its Statement of Response on 18th December 2017. Its position is that the Claimant was first employed by the Respondent as Finance & Administration Manager from 15th August 2008 to 19th March 2013. She worked under the Aga Khan Health Service, Kenya Health Department. From 19th March 2013 to 11th November 2016, she worked for the Aga Khan University Hospital as Manager, Administration & Human Resource and Acting Finance Manager. She earned a gross monthly salary of Kshs. 120,181.
5. Her duties included management and maintenance of Respondent's fleet of vehicles. Respondent's Internal Audit Department, in the month of August 2016, investigated suspect irregularities in fuel usage at the Respondent's Community Health Department Mombasa [CHD]. It was found that Drivers were draining off fuel tanks, approximately 80 litres per vehicle daily, from Petro Oil Buxton Station. They would then submit full fuel receipts to the Finance Manager, who at the end of the month, would together with the Director, CHD, approve for payment. The Audit Report recommended among other things, disciplinary action against all the involved Staff, including the Finance Manager.
6. The Respondent investigated the matter, culminating in the letter to show cause, issued on 6th October 2016. The Claimant replied on 12th October 2016, admitting that she was responsible for vehicle management; she delegated her authority to the Administrative Assistant; and admitted there was irregularity. She was invited to a disciplinary hearing. She was heard and summarily dismissed, through a letter dated 10th November 2016. She was given reasons for the decision: failure to give the Respondent a credible explanation to exonerate herself from gross misconduct allegations; the Respondent had lost faith in her; and her actions were dishonest and facilitated payment of exorbitant fuel costs, contrary to her contract of employment and institutional policies.
7. The Claimant appealed. She explained that she did not think that Drivers would be dishonest; she thought vehicles consumed a lot of fuel because of the heat and terrain in Mombasa; she did not check where the vehicles were driven to, because she was satisfied that the Drivers had obtained work tickets before setting off; the Drivers did not bring motor vehicle logs to her; the letter of dismissal prejudiced her career; and she did not know that Drivers were being dishonest. The Appeals Committee was not satisfied with this position, and upheld summary dismissal. It removed the ground of dishonesty, replacing it with the grounds of negligence and unprofessional conduct. Termination was fair. The Claimant was paid all her terminal benefits and pension. The Respondent urges the Court to dismiss the Claim with costs.
8. The Claimant gave evidence and rested her case, on 15th July 2019. Respondent's Internal Auditor John Njuguna Maina, and Manager Employee Relations Dorothy Anupi Obiayo, gave evidence on 8th October 2020, closing the hearing.
9. The Claimant adopted her Pleadings, Witness Statement and Documents. She restated her employment history with the Respondent, and the terms and conditions of employment.
10. She told the Court that the Finance Manager and Auditor visited the Claimant's station at Mombasa, and found fuel costs to be inconsistent. She received notice to show cause why she should not be disciplined. It was not indicated that she was dishonest or negligent. She replied, and was later heard at Respondent's Offices in Nairobi. She was subsequently dismissed.
11. She was not availed the Audit Report, at the time of showing cause. She was not dishonest. There was no complaint about misuse of fuel cards. Operations money was channelled by the Respondent through Claimant's personal account. She was a bank signatory before transition to The Aga Khan University. The Respondent was in a transition period. Most controls were suspended in all the departments. There were gaps during this period. There were no clear reporting lines. She was not given orientation. She appealed the decision. The Appeals Committee changed the grounds for dismissal. She did not have the opportunity to respond to the new grounds of negligence and unprofessional conduct. The Claimant reiterated that she merits compensation and notice pay.
12. Cross-examined, she told the Court that Audit Report confirmed there were irregularities. She agreed that the Respondent lost about Kshs. 1,682,021. The Report is correct. It was not really her role to monitor vehicles. Her job description included motor vehicle management. She checked fuel claims. The Director would approve expenditure. If the Claimant confirmed a wrong figure, a wrong figure would be paid out. The Claimant states she was not dishonest, but just failed in her job.
13. She received notice to show cause. It did not state that she was dishonest or negligent. There were specific allegations. She replied. She agreed there were irregularities. She was taken through a disciplinary hearing. She had the Audit Report at the time of the hearing. She did not have any document showing she reported to her superiors that there were organizational gaps. Dorothy Obiayo visited Mombasa. The Claimant conceded that the Respondent lost Kshs. 1.6 million. The Auditor recommended disciplinary action is taken against the involved Parties. The Claimant did not raise issues of organizational gaps with the Appeals Committee. The Claimant received pension, terminal dues and certificate of service.
14. Redirected, the Claimant stated that her job description mandated her to deal with all matters related to motor vehicle management. She was not the only one who approved fuel use. Drivers dealt with the suppliers directly. There were irregularities. She was not solely responsible. It was not for her to fill transitional gaps. She was not given the chance to respond to the new accusations at the Appeals Committee.
15. Auditor John Njuguna Maina adopted his Witness Statement. He prepared the Audit Report. He found there were irregularities on fuel usage. Kshs. 1.6 million was lost to the Respondent. Fuel was drawn, while vehicles were on service, or their Drivers on leave.
16. On cross-examination, he told the Court that he did not know if the Report was availed to the Claimant. Finance Manager, Director and Programme Manager were found culpable. The Auditor signed and dated the Report, 15th September 2015. The Report exhibited by the Claimant was not signed. The date was different. When taking action, the Respondent focused on individuals. Some names would be expunged. Drivers retained fuels cards. This was a flaw. The Claimant did not keep the cards. There was no fuel limit. The Claimant was no responsible for setting up the limit. The Auditor found, there was collusion between the Drivers and Fuel Attendants, not the Claimant. Travel requests went through the Claimant. Redirected, the Auditor told the Court that the fuel card could be used to fuel other vehicles. There was divergence in the Audit Reports, for the reasons given by the Auditor.

17. Manager Employee Relations, Dorothy Anupi Obiayo, told the Court that termination process was fair. Due process was followed. She travelled from Nairobi to Mombasa, and discussed the issue with the Claimant and other Staff. There was no satisfactory answer. Obiayo prepared notice to show cause. The Claimant replied. She was heard by a disciplinary committee. Based on evidence, the committee made several conclusions. The Claimant was dishonest, negligent and unprofessional. Summary dismissal letter issued. She appealed, was heard and Appeal dismissed. She was availed her Certificate of Service and paid terminal dues. It is not true that the reasons for the initial decision, differed from the one on Appeal. The Claimant was concerned about the use of the word, dishonest. She felt it would malign her career. The Appeals Committee granted her wish, deleting the word, retaining the other two terms- unprofessional and negligent. The Claimant is a trained Accountant. She did not discharge her role professionally. She sent to the Respondent fuel claims at Nairobi, without authenticating them. She said that she had delegated her role to an Administrative Assistant.

18. Cross-examined, Obiayo stated that she is a qualified Human Resource Practitioner. The Claimant performed multiple roles. Obiayo did not agree that this justified delegation of some duties. It was possible to delegate. The Claimant was interviewed when audit was carried out. Obiayo did not take part in auditing, and was not sure if the Claimant was interviewed. Disciplinary action was recommended against 3 Officers. Some were cautioned. Fuel cards issued at Mombasa. Officers in Nairobi, and the Claimant, would know about the fuel cards issuance. The Claimant would know about their use. The identified issues were supervisory, not solely institutional. There were weaknesses which, Officers took advantage of. The Claimant and the Director approved documents. It was not solely, but largely, Claimant's fault. The Director was taken through a disciplinary process. The letter of termination did not mention unprofessional conduct and negligence. The Drivers' contracts were ended. Obiayo interviewed the Drivers, but did not know, if the Auditor interviewed them. Redirected, Obiayo told the Court that Drivers reported to the Claimant. They gave the documents for her approval, before the documents were taken to the Director, and eventually to Finance Department in Nairobi. The Claimant was herself a delegate, and was imprudent, in delegating.

The Court Finds: -

19. The Claimant was employed by the Aga Khan Health Service, Kenya, through a letter dated 15th August 2008.

20. The letter designates her as Finance and Administration Officer [FAO], assigned to Community Health Department [CHD] of the Aga Khan Health Service, Kenya.

21. Her first gross monthly salary was Kshs. 65,000.

22. The CHD was integrated with the Aga Khan University Hospital. The Claimant was advised in a letter dated 19th March 2013, that she had been appointed Manager, Administration and Human Resource, and Acting Finance Manager effective 1st February 2013. She was based at Mombasa.

23. Her new gross monthly salary was Kshs. 101,384.

24. On 1st January 2016, her salary was raised, to a gross monthly salary of Kshs. 120,181. Increment was based on performance appraisal of 2015, which rated the Claimant's performance, 'commendable.'

25. 9 months later, on 6th October 2016, there was a turn in Claimant's career trajectory. What was to this point an upward trajectory, turned into a downward spiral. On 6th October 2016, she received a letter to show cause, why disciplinary action should not be taken against her. She was accused of failing to manage fuel use, with Respondent's Drivers using their fuel cards uncontrollably, and making false fuel use claims, leading to loss of Kshs. 1.6 million to the Respondent.

26. Uncharacteristically, the letter to show cause, also served as communication from the Respondent to the Claimant, of "*Management's decision to suspend you from duty, awaiting the hearing of this matter.*" The Claimant had not replied to the letter to show cause, at the time she was suspended, and advised to wait for hearing.

27. She replied on 12th October 2016, disclosing that she had delegated her duties to an Administrative Assistant. She had confidence in the Administrative Assistant, and trusted that account summaries on fuel use, were in order. She conceded that significant amounts were lost, requesting for further investigations, before disciplinary hearing.

28. Audit had been carried out in August 2016, before the letter to show cause issued, confirming fuel theft by Drivers, and loss of Kshs. 1.6 million to the Respondent.

29. The Claimant was heard by a Panel chaired by Respondent's Prof. William Macharia, on 2nd November 2016.

30. The Panel found the following facts, *inter alia*, were undisputed: -

- The Claimant had necessary competency of a finance person, with CPA – K, Bachelors and MBA in commerce, and was therefore expected to be conversant with finance protocols.
- She was aware that the Drivers had not submitted logbooks during clearance, but told the Panel that she only realized the logbooks were missing, when the Auditors requested for them during audit exercise. There was an element of dishonesty based on her oral representation during the hearing, and on her meeting with the Human Resource and Finance Manager when they visited Mombasa.
- She had all the documents necessary to help her countercheck and confirm that the fuel consumption claims were accurate. The check was not done leading to loss.

- There were no clear reporting lines for her position.
- There were no systems in place at CHD, as the departments were in transition, but the situation was being worked on.

31. The Panel concluded: -

- The Claimant's conduct was dishonest, unprofessional and negligent, and was contrary to her contract of employment and Respondent's policy.
- Termination was warranted.
- Operations of the departments needed to be streamlined urgently. Transition also needed to be concluded.

32. On 10th November 2016, the Director Human Resource, Agnes Kamau, wrote to the Claimant a letter of summary dismissal. She told the Claimant that: she had failed to give satisfactory answer to the notice to show cause; the Disciplinary Panel had lost faith in the Claimant as a member of staff; her actions were found to be dishonest and facilitated payment of exorbitant fuel costs; and consequently, it had been decided that the Claimant is summarily dismissed with immediate effect.

33. The Claimant was offered salary up to 11th November 2016; 19 days of annual leave; and pension in accordance with the rules of the scheme. She has no claim for further terminal benefits; she claims compensation and notice.

34. She appealed on 16th November 2016. Hearing took place on 5th December 2016. She told the Appeals panel that use of the word 'dishonest' in the letter of dismissal, was 'polarizing' her career. She expressed regret that the Respondent incurred loss. The Appeals Panel concluded that: money was embezzled from the Respondent; the Claimant acknowledged wrongdoing; she was unprofessional and negligent; and it was accepted that the use of the word, 'dishonest,' is expunged from her letter of dismissal.

35. Was termination based on valid ground, under Section 43 read with Section 45 of the Employment Act?

36. As concluded by the Appeals Panel, the Claimant conceded wrongdoing. Right from the date she replied to the letter to show cause, she conceded there were irregularities. It was never disputed that the Respondent lost Kshs. 1.6 million, in fuel theft. The Claimant was responsible for Finance, and approved fuel claims, before they were submitted to the Head Office for payment. She was a trained Accountant. She bore the ultimate responsibility for protecting Respondent's financial resources at Mombasa.

37. She failed. She gave reasons for her failure, which perhaps were mitigating factors, but certainly not sufficient to absolve her of negligence and unprofessional conduct. She lamented that she was not given orientation; she blamed her Director; she delegated to an Administrative Assistant; she trusted the Drivers would not make false claims; she thought consumption was high because of the coastal heat and terrain; and she told the Court that the Respondent was in a state of transition, with no clear policy guidelines. The Audit Report and Conclusion of the Disciplinary Panel both agreed with the Claimant on policy deficit. They recommended streamlining of the Operations Department and conclusion of transition.

38. The Respondent concedes there were institutional weaknesses. This is not to say however, that the Claimant's failure was owing entirely, to these institutional weaknesses. She took the added responsibilities voluntarily, but failed to discharge them, in accordance with her professional acumen. In the end she was exposed to charges of wilfully neglecting to perform work, which was her duty to perform, which under Section 44 [4] [c] of the Employment Act, is an act of gross misconduct, warranting summary dismissal.

39. The Court is persuaded, based in particular on Claimant's own admission that there were irregularities leading to loss of Kshs. 1.6 million to the Respondent, that there was valid reason to justify termination. The loss happened under her watch. But, it is inescapable too, that there were mitigating factors. The Audit Report and Conclusion of the Disciplinary Panel, pointed to flaws in Operations Department and need for closure of transition of the Respondent. Reporting lines were unclear. These mitigating factors ought to have persuaded the Respondent, to commute summary dismissal to regular termination under her contract [what other labour law sources call 'normal termination.']

40. Was procedure fair? The allegations facing the Claimant followed an audit, the findings of which the Claimant does not contest. She was issued letter to show cause, which the Court has faulted, in that it was combination of a disciplinary hearing notice, a suspension letter and a notice to show cause. Suspension and notice that there is going to be a disciplinary hearing, ought to follow the Employee's reply to the show cause letter. At the time of showing cause, the presumption would be, that any fair-minded Employer would not have made a decision to subject the Employee to suspension or disciplinary hearing. It is after the Employee has replied, and the reply carefully considered, that the Employer makes a decision, that based on the Employee's reply, there is cause to escalate the process to suspension and disciplinary hearing. Notice to show cause, is a preliminary enquiry. It cannot be presumed by an Employer that what the Employee says in reply, has no exculpatory effect. The Respondent did not wait for the Claimant to state her position. Disciplinary hearing was predetermined.

41. The Claimant was heard on Appeal. The decision to summarily dismiss her was upheld. The only thing that changed was that the word 'dishonest,' was expunged from the letter of summary dismissal. This was after the Claimant complained that it would affect her employability. The words used in the end were 'unprofessional' and 'negligence.' The Court does not think this was a material violation of fair procedure. The substantive findings, whether conclusion was that the Claimant was 'dishonest,' 'unprofessional' or 'negligent,' did not change. It did not change the fact that the Respondent suffered financial loss, due to the mismanagement of the financial docket, under the Claimant. There was no reason to call on the Claimant on Appeal, to respond to new allegations. There were really no new allegations or new findings. It is not clear how the use of the word 'dishonest' would affect her employability, less than the use of the other words. An Accountant with the tag 'unprofessional' is no better than one wearing a jersey marked 'dishonest.' This was an insignificant play of semantics.

42. Procedure was fair, except on letter to show cause.

43. The Court proposes to resolve the dispute herein by commuting summary dismissal to regular termination under the Parties' contract; and to redress the defect in the procedure, grant minimal compensation equivalent of the Claimant's 1- month gross salary.

44. The Claimant worked for 8 years, August 2008 to November 2016. Her record, prior to the events of, or around August 2016, was perfect. She had been given pay rise, based on commendable performance. She was paid terminal dues and pension.

45. She exhibits Certificate of Service in her bundle of documents. She did not tell the Court why she wishes to have a second Certificate of Service.

IT IS ORDERED: -

a. It is declared that termination was unfair.

b. Summary dismissal is commuted to regular termination under the contract.

c. The Respondent shall pay to the Claimant: equivalent of 1-month gross salary at Kshs 120,181, in compensation for unfair termination; and, 3 months' gross salary in lieu of notice under the contract, at Kshs. 360,543 – total Kshs. 480,724.

d. No order on the costs and interest.

Dated, signed and released electronically to the Parties at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 15th day of December 2020.

James Rika

Judge