



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1728 OF 2014

LUCY NYAMBURA MBUGUA.....CLAIMANT

VS

THE AVENUE GROUP.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 30th September 2014 and filed in court on 3rd October 2014, the Claimant sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Reply on 30th April 2015.

2. The matter came up for hearing before me on 18th October 2018, during the Nairobi Station Service Week. The Claimant testified on her own behalf and the Respondent called its Group Human Resource Manager, Fridah Kanana Muriungi.

The Claimant's Case

3. The Claimant was employed by the Respondent on 3rd December 2012 in the position of Accountant-Accounts Payable. Her initial monthly salary was Kshs. 50,000 which was later increased to Kshs. 60,000.

4. Following payments made to Nakumatt Holdings Ltd between December 2013 and July 2014 on account of cigarettes and wines and consequent investigations thereon, the Claimant was dismissed from employment effective 4th August 2014. The reason given for the dismissal was gross negligence.

5. The Claimant states that her dismissal was unlawful and unfair. She therefore claims the following:

- a) 12 months' salary in compensation.....Kshs. 720,000
- b) 1 month's salary in lieu of notice.....60,000
- c) Costs plus interest

The Respondent's Case

6. In its Statement of Reply dated 29th April 2015 and filed in court on 30th April 2015, the Respondent admits having employed the Claimant as an Accounts Payable Officer within the Finance Department.

7. The Respondent states that it was the Claimant's primary duty to verify invoices, delivery notes and appropriately signed Local Purchase Orders (LPOs) before passing them on for payment.

8. The Respondent further states that the Claimant was dismissed from employment on 4th August 2014, on account of negligent performance of her duties that allowed irregular procurement of cigarettes and wines allegedly for the Respondent's kitchen. As a result, the Respondent incurred heavy losses.

9. The Respondent accuses the Claimant of failure to report the anomalies to the Accounts Payable Manager who was her immediate

supervisor. The Respondent adds that the Claimant only inquired from the Catering Department Supervisor when the first invoice was presented. She then proceeded to forward the said invoice and subsequent ones for payment despite the LPOs relating to the invoices not being properly authorized. Additionally, the goods purchased being alcohol and cigarettes were not ordinarily used in the Respondent's kitchen.

10. The Respondent submits that the matter that led to the Claimant's dismissal was fully investigated by the internal audit team and a report presented to management on 29th July 2014. The Respondent further submits that the Claimant was afforded a fair hearing where she was informed of the reasons for her dismissal. The Claimant was also notified of her right of appeal.

11. The Respondent states that the Claimant was only entitled to the sum of Kshs. 41,209 as computed in her August 2014 pay slip which amount was duly paid to the Claimant through her bank account.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

13. The Claimant's dismissal was effected by letter dated 4th August 2014 stating as follows:

"Dear Ms. Nyambura:

RE: Summary Dismissal

It has come to the Management's attention that you have processed Nakumatt invoices for payment which included items that were evidently not used by the Catering Department. You only raised the issue with the Catering Department supervisor when the first invoice was presented, but did not consult your direct line manager on how to resolve the issue within the Finance Department.

Our records indicate that the Nakumatt invoices processed for payment from January 2014 to July 2014 have cost the Company hundreds of thousands of shillings as a result of your gross negligence.

Your negligence and failure to perform the tasks assigned to you appropriately is a cause for summary dismissal under the Employment Act, 2010, (sic) Section 44, 4c ".....the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee...an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature was his duty, under his contract, to have performed carefully and properly."

You are therefore summarily dismissed with immediate effect. You will be entitled to dues for the days worked up to and including 4th August 2014 and accrued leave, if any. Kindly collect your Certificate of Service on return of all Avenue property that may be in your possession by close of business on 4th August, 2014.

Yours Sincerely

(Signed)

Ms. Nthenya Mule

Chief Financial Officer

cc: Personnel File

.....
I Lucy Nyambura Mbugua, confirm that the above has been discussed with me and I acknowledge receipt of this letter.

Employee's Signature (Signed) Date 4/8/2014"

14. This letter accuses the Claimant of gross negligence in the performance of her duties, particulars being that she processed invoices for purchase of unauthorized items being, cigarettes and wines.

15. Section 47(5) of the Employment Act, 2007 states as follows:

(5) 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 shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

16. With this in mind, the question is whether the Respondent had a valid reason to dismiss the Claimant. The Claimant herself told the Court that cigarettes and wines were unusual purchases for the Respondent which operated a hospital. She added that when she saw the first invoice carrying the two items, she raised a query with the Head Chef who told her that the wines were for preparing special meals while the cigarettes were for the top management who were smokers.

17. The Claimant appears to have bought the explanation by the Head Chef and did not raise the issue with her own supervisor, the Accounts Payable Manager. She passed for payment the first invoice carrying the offensive items and several similar others. As it turned out, the purchases had not been authorized.

18. In her testimony before the Court, the Claimant strenuously tried to absolve herself from blame by stating that she acted upon duly authorized LPOs and invoices and that the payments were subsequently approved by her superiors. The question in the mind of the Court however is this; why did the Claimant not bother to escalate the issue to her direct line supervisor? This is more so because in some of the LPOs the Claimant relied on, the items in issue were written by hand and the Claimant herself had doubts on the authenticity of the purchases.

19. Section 43 of the Employment Act, 2007 places a burden on an employer to establish a valid reason for bringing the employment of an employee to an end. As held by the Court of Appeal in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** the burden placed on an employer under Section 43 is to demonstrate a valid reason that would cause a reasonable employer to terminate employment.

20. The Court does not therefore ask what it would have done had it been in the shoes of the employer. All the Court asks is whether the employer acted reasonably in the circumstances and if the answer to that question is in the affirmative, then the Court will not interfere with the decision taken by the employer.

21. By her own admission, the Claimant failed to escalate an important matter to her supervisor thus causing her employer loss. On this ground alone, the Court finds and holds that the Respondent had a valid reason to terminate her employment as required under Section 43 of the Employment Act.

22. The next question is whether in dismissing the Claimant, the Respondent observed due procedure. The Respondent's Group Human Resource Manager, Fridah Kanana Muriungi told the Court that a disciplinary meeting was held on the same day the Claimant was dismissed. Muriungi was not at the meeting and no minutes of the said meeting were produced before the Court.

23. The procedural fairness requirements as set out under Section 41 of the Employment Act require that an employee receives prior notice of charges against them and an opportunity to respond. In the instant case, this mandatory procedure was clearly not followed thus rendering the dismissal procedurally unfair. The Claimant is therefore entitled to compensation on this account.

Remedies

24. In light of the foregoing findings, I award the Claimant two (2) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the fact that the Respondent had a valid reason for terminating her employment. I further award the Claimant one (1) month's salary in lieu of notice.

25. I therefore enter judgment in favour of the Claimant as follows:

a) 2 months' salary in compensation.....	Kshs. 120,000
b) 1 month's salary in lieu of notice.....	<u>60,000</u>
Total.....	180,000

26. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

27. The Claimant will have the costs of the case.

28. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 15TH DAY OF JANUARY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Mureithi for the Claimant

Mr. Wanjohi for the Respondent