



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 1343 OF 2014

CAROLY KIPKENY ARKACH.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was employed by the respondent on 9th December, 1992 as a sales clerk. On 18th December, 2003 he received a suspension letter alleging that he had illegally provided telephone accounts 564113 and 562969 and strapped the numbers in the ANI- translator so as to have ISD bills appear to be originating from telephone number 567318 which resulted to a disputed bill of Kshs 596,023/50. The claimant was further accused of destroying documents so as to conceal the fraud.

2. According to the claimant, as a result of having worked for the respondent for a long period of time, he was acquainted with numerous customers who preferred working with him and as such it was no surprise that one customer he had served before came to Ngong Road Telecare to work with him on the provision of telephone services. He further pleaded that even after the customer requested for his assistance he made sure he went through required procedure. According to him, he had no prior knowledge that the telephone service provided to the customer would be fraudulently used. He further stated that the allegations against him were false and unfounded since he did not work in the exchange department and that he never colluded with his colleagues to defraud the company.

3. The respondent on its part pleaded that the claimant was dismissed on 29th April, 2004 for illegal provision of telephone numbers 564113 and 562969 and strapping of numbers to have ISD call bills appear as operating from telephone No. 567318 resulting to a disputed bill of Kshs 596,023/50.

4. According to the respondent, on diverse dates between May/June 2003 it noted that telephone numbers 567318 was making abnormal calls. It was also noted that two numbers 564113 and 562969 were ceased under suspicious circumstances and allocated irregularly to a company known as Eastern Cp. Ltd. Investigations conducted at Jamhuri exchange on 27th July 2003 revealed that telephone No. 564114 was strapped in the ANI-Translator to have calls originating from the number translated for billing as if they originated from 567318.

5. Further investigation revealed that the claimant had colluded with other members of staff and public to defraud the respondent through illegal provision of telephone numbers 564113 and 562969 to Eastern Co. Ltd when no connection fees had been paid. The claimant was the main link between the fraudster and other members of staff since he constantly communicates with him through his mobile phone.

6. The respondent further pleaded that the claimant was informed that the respondent was contemplating severe disciplinary action against him including dismissal and was requested to submit his defence. The claimant responded denying his involvement. He however admitted that he knew the customer and that he had given him his mobile phone number. The claimant further stated that the reallocation of numbers was due to an error of omission after the initial allocation was reflected on records. The respondent's disciplinary committee considered the claimant's response and found it unacceptable. The claimant was therefore on 29th April, 2004 dismissed from service. He appealed against the dismissal but the appeal was rejected.

7. In his oral testimony in court eh claimant stated that there was no disciplinary hearing and that he was just issued with a letter of dismissal. He denied knowledge of what strapping is and stated he was not an engineer. It was his evidence that he was not in survey and sales office and that he would only allocate a number once the survey is complete.

8. In cross-examination he stated that he was given an opportunity to defend himself through the show cause letter and that he responded to the accusations. He further stated that the dismissal letter stated that his explanations were considered and found inadmissible. He appealed against the dismissal but the appeal was rejected.

9. The respondent's witness Mr Kennedy Mokuia stated he was the respondent's Human Resource Officer and that he had worked for the respondent for twenty three years. He recorded a witness statement which he asked the court to adopt as his evidence. The statement repeated most of the averments in the memorandum of response. He denied the claimant was discriminated against since four other employees were dismissed for the same reason.

10. In cross-examination he stated that there was nothing wrong with a sales person being in constant communication with a customer. He further stated that the process of strapping is long and involves more than one person which was why the respondent talked of collusion.

11. Under section 43(2) of the Employment Act, the reasons for termination of employment are matters that the employer at the time of termination of employment genuinely believed to exist and which caused the employer to terminate an employee's service. It was common ground that telephone numbers 564113 and 562969 were ceased and allocated to a company called Eastern Company Ltd. It was also not disputed that there was a case of strapping of these numbers in ANI-translator to have the ISD bills appear to be originating from telephone number 567318. This caused the respondent loss of some Kshs 596,023/50 on account of a disputed bill.

12. The matter in dispute was whether the claimant was involved. The claimant denied involvement. He however admitted that he knew the fraudster prior to the incident and that they had been in communication. He however denied knowledge that the numbers allocated to Eastern Company Ltd were to be used to defraud the respondent. The claimant further stated that the numbers that were ceased and allocated to the fraudster were not previously documented hence the second allocation. As observed earlier the reasons for termination are those reasons which an employer genuinely believed to exist and which caused the termination. It is difficult to know if there was any collusion between the claimant and the fraudster but the admission by him that he knew the fraudster and that he assisted him to have the two numbers allocated to him create a reasonable possibility that the claimant could have been aware of the fraud.

13. The standard of proof of reasons for dismissal are lower than in criminal cases. The evidence may not amount to guilt but if enough to upset the trust between an employer and employee then a dismissal can be justified. The claimant's issue was deliberated between the union and the respondent and it was agreed that the dismissal be reduced to normal termination and his dues paid. This was done. According to the union once the claimant was paid his dues the matter would be closed.

14. The claimant was represented by the union which settled the matter as above. He collected his dues as per the recommendation of the conciliator and with the concurrence of the union and the respondent. The union was his authorized agent and compromised the dispute as referred to above. The claimant therefore cannot turn around and sue the respondent after accepting the recommendation of the conciliator and taking the payment.

15. The court therefore finds the claim without merit and hereby dismiss the same with costs.

16. It is so ordered.

Dated at Nairobi this 31st day of May, 2019

Abuodha J. N.

Judge

Delivered this 31st day of May, 2019

Maureen Onyango

Principal Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.