



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2256 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MWANGI MUIRURI.....CLAIMANT

VERSUS

G4S SECURITY (K) LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed suit seeking payment of a sum of Kshs.330,270 as terminal dues arising out of termination of an employment relationship with the Respondent which according to the claimant was unfair.

He avers that he was engaged by the Respondent on 14th July, 2008 as a driver at a gross salary of Kshs.17,602 per month. He alleges that he served the respondent diligently until 6th March 2015, when he was unfairly terminated.

He states that on 18th February, 2015, he was assigned duties with his colleagues as a crew commander to load cash in the cooperative Bank ATMs and in the process of loading the money they confused the bags carrying the cash and loaded in the wrong ATMs.

He contends that as a result of the said confusion one machine namely Cooperative Bank, Yaya Branch ATM was found to be short of Ksh.404,000.00, which was later found at the Cooperative Bank, Junction Branch ATM. That the Respondent accused the Claimant for failing to explain how the amount missing in the Yaya ATM found its way to Junction ATM.

That the Claimant was not paid service/gratuity, public holidays and one month salary in lieu of notice. He also seeks twelve months wages as compensation for loss of employment. He urges the Court to allow the claim.

The Respondent filed a statement of response wherein it admits the employment relationship. It avers that the Claimant and his colleagues were negligent in the performance of their duties which led to a shortfall of Kshs.404,000 which was not reported to the Respondent. That the Respondent only discovered a shortfall after a reconciliation exercise and realised that there was a mix up of cash at the Yaya and Junction Cooperative Bank ATMs.

That the Claimant's actions amounted to gross misconduct and subsequently he was issued with a notice to show cause for a disciplinary hearing which was held on 3rd March 2015. The claimant was found to have violated a set of ATM operations procedures and thus the decision to separate.

That the Claimant was paid his terminal dues which were offset against his liabilities in the company. That having been summarily dismissed the Claimant is not entitled to gratuity and notice pay.

Determination

Having considered the pleadings and evidence on record as well as the submissions made by and on behalf of the parties. The issues for determination are whether the summary dismissal of the Claimant was fair and whether he is entitled to the prayers sought.

Section 41 of the Employment Act provides for fair procedure while section 43 provides for proof of reason for termination as follows:-

41. Notification and hearing before termination on grounds of misconduct

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.

43. Proof of reason for termination

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.

Section 45(1) and (2) provides prohibits unfair termination. The section provides as follows:-

45. Unfair termination

1) No employer shall terminate the employment of an employee unfairly.

2) A termination of employment by an employer is unfair if the employer fails to prove—

a) that the reason for the termination is valid;

b) that the reason for the termination is a fair reason—

i) related to the employee's conduct, capacity or compatibility; or

ii) based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure.

The grounds for summary dismissal as contained in the summary dismissal letter dated 6th March, 2105, can be summed up as:

-Failing to observe set cash operating procedures

-Failing to escalate the discovery of the Kshs.94,000/=

From the evidence on record, the claimant has not demonstrated either that there was no valid reasons for the termination of his employment on that he was not taken through a fair disciplinary process. I find that the claimant has not proved that the termination of his employment was unfair. The claimant did not prove that he was unfairly dismissed as the respondent complied with both Section 41 and 43.

On payment of terminal dues, the Court notes that the Claimant did not lead evidence on which public holidays he worked and was not paid. This is a special claim which ought to be specifically pleaded and proved and the Claimant has failed to do so. The claim for public holidays thus fails.

The claim is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE