



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2000 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**BONIFACE KASOYA MUSYOKA.....CLAIMANT**

*VERSUS*

**HOGGERS LIMITED.....RESPONDENT**

**JUDGMENT**

The claim herein was filed by Boniface Kasoya Musyoka alleging unfair termination of his employment by Hoggers Limited, a limited liability company incorporated in Kenya carrying on business in the name of Debonairs and Steers.

In his amended memorandum of claim, the claimant prays for the following remedies –

- (a) A declaration that the Respondent's action to decline to reinstate the claimant back to work amounted to constructive dismissal or termination of the Claimant from employment which dismissal/termination was unfair and unlawful.
- (b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- (c) An order for payment of the Claimant's terminal dues and compensatory damages totalling to Kshs.660,000/= as tabulated below

(i) One month's salary in lieu of notice.....	Kshs.30,000
(ii)... Compensation for untaken leave for the entire period of service being Kshs.30,000 x 8 years.....	Kshs.240,000
(iii) Unpaid Salary for September 2010.....	Kshs.30,000
(iv) Compensation at 12 months' gross salary Ksh.30,000 x 12 months.....	<u>Ksh.360,000</u>

**Total claim      Kshs.660,000**

- (d) An order for the Respondent to pay cost of this suit plus interest thereon.

The respondent filed an amended memorandum of defence denying the averments in the memorandum of claim. The respondent avers that the claimant was dismissed following his failure to bank Kshs.1,229,304.50 out of which the claimant misappropriated Kshs.409,082.40 while he was unable to account for Kshs.890,222.15 which was float reserve. The respondent filed a counterclaim for the said Kshs.1,229,304.50/=.

**Uncontested Facts**

It is not contested that the claimant was employed by the respondent on 15<sup>th</sup> January 2002 as a banking clerk. At the time of termination of his employment, he was a banking cashier. His last salary was Kshs.30,000.

The claimant's duties included opening the bank safes during weekly banking, preparing and distributing float cash to all points of sale in Nairobi and collecting and distributing change to all points of sale within Nairobi.

At the end of September 2010, the respondent discovered that there were anomalies in the amount of cash collected and banked. The respondent carried out investigations which disclosed that the claimant failed to bank a sum of Kshs.409,082.40 and was unable to account for a further Kshs.890,222.15 which was supposed to be float reserve, thus making a total of Kshs.1,299,304.55 unaccounted for by the claimant.

The claimant was taken to Gigiri Police Station where he recorded a statement on 1<sup>st</sup> October 2010 in which he admitted that he had been having difficulties reconciling the accounts in September 2010 and over Kshs.1 million was missing.

The claimant was arrested and charged at Kibera Magistrate's Court in Criminal Case No. 4375 of 2010. The claimant was however discharged under Section 87(a) of the Criminal Procedure Code following the failure of the prosecution to produce witnesses on 10<sup>th</sup> May 2012.

Following his arrest, the claimant was dismissed from employment by letter dated 2<sup>nd</sup> October 2010.

The respondent filed a claim with its insurance company for the lost cash and was reimbursed Kshs.1,195,205.00 by its insurers CA Insurance Limited on 17<sup>th</sup> January 2011.

At the hearing the claimant testified on his behalf reiterating the averments in his memorandum of claim. The respondent called STANLEY MBAI who was the respondent's Human Resource Manager at the material time. The parties thereafter filed and exchanged written submissions.

### **Determination**

The issues for determination are whether the termination of the claimant's employment was unfair, whether he is entitled to the remedies sought and whether the respondent is entitled to judgment in terms of the counterclaim.

In his evidence Stanley Mbai testified under cross examination that the claimant was not invited for a disciplinary hearing. I therefore find that although the respondent had valid reason to terminate the employment of the claimant, there was no procedural fairness. The termination was thus unfair in terms of Section 45(2) of the Employment Act that provides –

**(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 courts have underscored the importance of a hearing before termination of employment even in cases where the employee was caught red handed.

In the case of *Donald Odeke –V- Fidelity Security Limited (2012) eKLR*, Ndolo J. underscored this fact when she stated –

*“... it does not matter what offence the employee is accused of.*

*If the employee is not heard the termination is ipso facto unfair.”*

### **Remedies**

The claimant prayed that the court finds that the respondent's refusal to reinstate the claimant back to work amounted to constructive dismissal. I do not agree as the claimant was dismissed from employment on 2<sup>nd</sup> October 2010 following his arrest by police. His request to be reinstated after his acquittal in the criminal case cannot amount to constructive dismissal.

The claimant further prayed for compensatory damages. Although I find the termination of his employment unfair for reason of failure to give him a hearing, I do not think the circumstances of the termination of employment of the claimant would justify compensation. He did admit his failure to account for Kshs.1,299,304.55 which was entrusted to him by his employer. He was solely responsible for the

termination of his employment.

Under Section 49(4) of the Employment Act, this court is supposed to consider, among other factors, the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination, and the conduct of the employee, which to any extent caused or contributed to the termination. Refer to Section 49(4)(b) and (k) of the Act.

Based on the foregoing I decline to award the claimant any compensation.

The claimant further prayed for one month's salary in lieu of notice and salary for September 2010. Mr. Stanley Mbai admitted that the claimant was not paid salary for 29 days worked in September 2010 in the sum of Kshs.29,000. I however award the claimant the sum of Kshs.30,000 being the salary of September 2010 as he stopped working from 1<sup>st</sup> October 2010 when he was arrested.

The claimant is further entitled to one month's salary in lieu of notice, the court having found the termination of his employment unfair. I award him Kshs.30,000.

The claimant is further entitled to Kshs.23,000 on account of 23 days leave as set out in appendix 7 of the respondent's bundle of documents which is "*Terminal Dues Details*" for the claimant. I award him the same.

The claimant is thus entitled to the total sum of Kshs.83,000.

### **Counterclaim**

The claimant having admitted failure to account for Kshs.1,299,304.55 is liable to refund the same to the respondent. However, the respondent was reimbursed the sum of Kshs.1,195,205 by the insurance and awarding it the said sum would constitute double payment.

I therefore award the respondent the difference between what it lost and what was refunded by its insurers being Kshs.104,099.55. **The said sum will be offset from the sum of Kshs.83,000 awarded to the claimant leaving a balance of Kshs.21,099.55 which I award to the respondent against the claimant with interest from date of judgment.**

The claimant will pay respondent's costs for the counterclaim while there will be no orders for costs of the claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**