



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 445 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 30<sup>th</sup> September 2019)

DOMINIC ABALA MIDIGO.....CLAIMANT

VERSUS

AA LODGES.....RESPONDENT

JUDGMENT

1. The Claimant, Dominic Abala Midigo, filed a Claim dated 16/03/2016 for unlawful and unfair termination against the Respondent, AA Lodges. He avers that he was at all times employed by the Respondent as a Financial Manager on 01/11/2014 and continuously worked for it with due diligence and to the satisfaction of the Respondent.

2. That his last salary was Kshs. 155,000/= per month net of taxes and advances and that despite working faithfully and diligently for the Respondent, he has never been paid his salary since the month of February 2016. That when he reported on duty as usual on or about 08/02/2016, he was served with a termination of employment letter by the Respondent without any justifiable cause or reasons at all and that the Respondent's action was unfair, wrongful and contrary to the express provisions of the Constitution, the Employment Act, the principles of natural justice and the tenements of good labour practice.

3. He further avers that the termination premised on the allegation contained in the dismissal letter shall ruin his professional career as an accountant causing him immense financial ramifications and that he is thus entitled to payment of his outstanding terminal dues which he claims as follows:-

*a. One month's salary in lieu of notice Kshs. 155,000/=.*

*b. Salary for the month of February for days worked from 01/02/2016 to 08/02/2016 (Kshs.8/26 x 155,000) Kshs. 47,692/=.*

*c. 12 months' salary compensation Kshs. 1,860,000/=.*

*d. Damages for suffering abrupt loss of income, trauma and inability to meet his continuing obligations at 12 months' gross salary (12months x 155,000) Kshs. 1,860,000/=.*

4. That the Respondent has refused and/or ignored to make due his demand and intention to sue and that he prays for judgment against it for:-

*a) A declaration that the Respondent's action of refusing to pay the Claimant his dues and benefits was unlawful, unfair and inhuman.*

*b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages pleaded.*

*c) Costs of this suit plus interests thereon.*

*d) Interest on (c) above from the date of filing suit until payment in full.*

*e) Certificate of Service as provided for in the Employment Act 2007.*

5. The Claimant also filed a Witness Statement dated 16/03/2016 stating that prior to being served with the termination letter by the

Respondent's director, he was never given any warnings, notice or given an opportunity to explain himself and that he was also not paid his lawful terminal dues after termination. That the termination was unlawful and unfair as it was done without prior notice and without following due process.

6. The Respondent filed its Statement of Defence dated 26/04/2016 admitting to have employed the Claimant and averring that the Claimant absconded duty without giving any reasons thereof. That the termination letter dated 06/02/2016 indicating that the Claimant would be expected to be on duty to facilitate a proper handover up to and including the 10/02/2016. That the Claimant wilfully neglected to perform his work or carelessly performed his work in breach of his employment contract which occasioned the Respondent a loss of Kshs. 78,300,000/= as follows:-

*i) Making payment of Kshs. 1,300,000/= meant to be payment for supply of electricity by the Rural Electrification Authority, to a personal account of one Mr. Peter Kimeu.*

*ii) Making an RTGS payment of Kshs. 77,000,000/= meant for Kenya Wildlife Services to Kimberly Western Services, which transfer was being handled by the Directorate of Criminal Investigations at the DCI Headquarters.*

7. That the Claimant was lawfully dismissed under *Paragraph 11 of his employment contract* with the Respondent dated 14/10/2014 and **Section 44 of the Employment Act** and that the suit is accordingly frivolous and vexatious. The Respondent prays that the Statement of Claim be dismissed with costs.

8. The Respondent also filed a Witness Statement dated 06/06/2019 sworn by its Human Resource Manager/Administrator, Gilbert Ounga who states that his duties in the Respondent's company included among others: recruiting, remunerating and terminating workers. That the Claimant was in charge of making payments on behalf of the Respondent and even though he was not a signatory to any of the bank accounts of the Respondent, he used to authorize monies to be paid. That as a result of the loss occasioned to it, the Respondent resolved to terminate the Claimant's employment for gross misconduct and that the said termination letter indicated the reasons for termination and clauses of his contract and the law relied upon.

9. That under *Clause 11(c)* of the said appointment letter/contract, the employer is eligible to summarily dismiss without notice an employee who wilfully neglects to perform any work under the contract. Further, that *Clause 15 of the employment contract* provided for a process of raising grievances and that if the Claimant believed the reasons given in the dismissal letter were not sufficient, he would have followed the said process to seek recourse.

10. That the Claimant was paid all his final dues up to the days he had worked in February 2016 and thus the Respondent does not owe him any money and that this claim is based on total misrepresentation of facts with all the compensation sought being a way for the Claimant to unjustly enrich himself. That the termination was fair and lawful and that the Claimant's cause of action lacks merit and should therefore fail.

#### **Evidence**

11. CW1, the Claimant testified in court that he recorded a Statement which he wished to adopt as his evidence in Court and that his appointment letter was at *page 1 of his documents*. That he worked for the Respondent for 1 year, 3 months and 10 days and that the reason for his dismissal was not valid because he was not a signatory to the bank which was done by the MD and Cashier who was Chinese and further, he never allowed any monies to be paid to anyone.

12. He denied absconding duty as alleged by the Respondent and stated that his work was limited to preparing books of account, filing tax returns and any other instructions given by the MD. That he was never responsible for loss of 78 million as alleged and that payments were sanctioned by MD and Cashier and further, that the Respondent has never filed any documents to show the loss of 78 million.

13. In cross-examination, he confirmed that he was preparing books of account based on vouchers executed by the Cashier and that he never approved vouchers to be paid. That he was never given a job description and there was no complaint about his job from the Respondent and that he was escorted out of the gate after the termination. That the Cashier was making payments to KWS with instruction of the MD and that he is even the one who discovered the fraud being done by a person well known to the MD. He contends that the MD came to know of the fraud because he was the whistle blower. That he was jobless for 2 years before he got a job.

14. RW1, Gilbert Ounga testified that he wished to adopt his filed Written Statement as his evidence and confirmed that the Cashier handles petty cash while the Finance Manager handles company finances. That the Claimant failed to advice the company and it lost money and that no demand letter was sent to them and further, no potential employer came to them asking about him.

15. In cross-examination, he confirmed that he had not filed the RTGS forms but they had filed the bank statements and that they did not also file the bank records showing payment of the Claimant's terminal dues. That the handover notes by the Claimant are at *page 22 of the Claimant's documents* and which are signed by Daniel and Jacob and he confirmed that in the invoice made to KWS at *page 18*, was never signed by the Claimant but by 'KWS'. That there is no document signed by Claimant authorizing payments to anything and in re-examination, he stated that their CEO had been away and which was why other documents were not in Court. That it is Dominic (the Claimant) who reported the loss of money.

#### **Claimant's Submissions**

16. The Claimant submits that the Respondent violated provisions of **Sections 5, 7 and 40 of the Employment Act, Articles 41, 47, 50 and**

**28 of the Constitution of Kenya**, applicable ILO Conventions inter alia, **1982 C111 Discrimination (Employment and Occupation) Convention**; **1958 C112 Employment Policy Convention**; and **1964 ILO Declaration on fundamental principles and rights at work**. Further, that he was never accorded any hearing as required by law in violation of his natural rights to a fair hearing and he thus claims a total of Kshs. 2,241,538/= as unpaid salary and benefits due to him.

17. He submits that as required under **Section 43 of the Employment Act**, the Respondent failed to prove in court the reasons for terminating his employment and that the said termination is unfair because the Respondent failed to establish a valid and fair reason as under **Section 45 of the Employment Act**.

18. Further, that no particulars of the irregularities complained of and his role in preventing them were provided by the Respondent and that the Respondent's managers being faced with malpractices decided to sacrifice his job. That it did not also comply with the procedural fairness requirements set out in **Section 41 of the Act** and he cites the case of **Shankar Saklani –v- DHL Forwarding (K) Limited [2012] eKLR** where Ongaya J held that even in cases of summary dismissal, a hearing and a notification as envisaged under section 41 of the Employment Act is mandatory and necessary. The Claimant prays that this Court finds that his termination was unfair for want of substantive justification and procedural fairness.

19. It is submitted by the Claimant that he is entitled to the reliefs sought in his Claim and that he relies on **Section 49 of the Employment Act** and the case of **C.P.C Industrial Products v Angima, Civil Appeal No. 197 of 1992**. That he is entitled to accrued leave days for the years 2014 to 2016 (*which he did not plead in his Claim and only raised the issue in his submissions*) and that the assertion by the Respondent that he forfeited leave days is not supported by law.

20. That judgment ought to be entered against the Respondent on the basis of the admission on the face of its own document and pleadings filed in court as under **Order 13 Rule 2 of the Civil Procedure Rules**. That the claim for payment of leave days not taken and terminal dues not paid as far as the same has been admitted by the Respondent should be awarded to him.

21. The Claimant further submits that it is the responsibility of the employer to keep records of the employee and where such are not availed an inference will be drawn that these records would have revealed that the employee was not granted leave nor was he allocated off days as required. That this position was affirmed by the court in the case of **Joseph Kutela Ingati & another –v- Charles Kahende Kinuthia [2015] eKLR**. (*He also submits on public holidays and Sundays worked which he did not plead on in the Claim*). That he has proved the claims sought as against the Respondent and the claim should thus be allowed as prayed.

#### **Respondent's Submissions**

22. The Respondent submits that the Claimant was in a position of responsibility, demanding he always upholds the values of trust and confidence in the finance department which are the cornerstone of an employer-employee relationship. That the payment of over Kshs. 78 Million to fictitious accounts/persons shows there was justification in dismissing the Claimant. It cites the case of **Francis Nyongesa Kweyu –v- Eldoret Water and Sanitation Company Limited [2017] eKLR** where the Court held that the open and clear display of dishonesty and deficiency in the integrity of the Claimant in the course of duty eroded all elements of trust inter parties and also destroyed the core of the service contracts until it was no longer sustainable and that this embedded the Respondent's action of termination of employment.

23. It submits that **Section 44(3) and (4) of the Employment Act** allows an employer to dismiss an employee who has fundamentally breached the employment contract or has grossly misconducted themselves and that it has demonstrated the same and further testified that there was indeed loss of huge sums of money.

24. That the Claimant is not entitled to payment in lieu of notice as he was summarily dismissed and which has been justified as was held in the case of **Kenya Shoe and Leather Workers Union –v- Fast Track Management Consultants Limited [2015] eKLR**. That it is in the interest of justice and the economic interests of the Respondent that having lost huge sums of money, no damages, compensation and interest should be awarded to the Claimant. It urges this Court to find that the illegal actions of the Claimant cost it the abovementioned loss and that he is therefore not entitled to any remedies for the said dismissal.

25. That the Claimant never pleaded in his Claim on his untaken leave days or working on public holidays and Sundays and neither was it an issue during the hearing and that this court should not be invited through submissions to determine an issue not pleaded. That this Court has a wide discretion to award and fix the rate of interest and since no damages are deserved in this suit, it follows that no interest should be awarded.

26. That this Court should be guided by the principle that 'costs follow the event' and since the Claimant has not adduced evidence to show that there was service of demand and Notice of Intention to sue, each party should bear its own costs. He concludes that the Claimant is a dishonest person seeking the protection of this court for his transgressions and it urges this Honourable Court to see beyond the veil the Claimant is putting on his conduct.

27. I have examined all evidence from both Parties plus submissions filed. From the dismissal letter issued to the Claimant dated 6/2/2016, the Claimant was terminated under Section 44(4) (e) of Employment Act for neglecting his work which led to loss of cash being 1.3 million and 77 million paid to Peter Kimeu and to KWS respectively without a reason.

28. The Respondents initially indicated to Court that the Claimant had absconded duty but this is contrary to the termination letter.

29. Based on the termination letter, the RW1 testified that the Claimant's appointment letter Clause 11(c) entitled an employee to summary dismissal without notice and that the Claimant was dismissed for authorising payments which led the Respondent to loose a lot of cash.

30. In cross-examination, he told the Court that the invoice paid out to KWS at page 8 of their documents confirmed that the same was not

signed by the Claimant. He also confirmed that there was no documents authorising payment which was signed by the Claimant presented before Court.

31. RW1 also admitted that it is the Claimant who reported the loss of money.

32. In essence, what this Court concludes is that the Respondent had no valid reason to warrant dismissal of the Claimant who was even the whistle blower concerning this loss.

33. Other than lack of valid reasons warranting dismissal, the Respondent proceeded to terminate the Claimant's services without any notice and without giving him any opportunity to explain himself. This was in breach of Section 41 of the Employment Act 2007 which provides as follows:-

**“(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”.**

34. Section 45(2) of Employment Act 2007 provides as follows:-

**(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”.**

35. Given that the Respondent had no valid reason to terminate the Claimant and also denied him an opportunity to defend himself, I return the verdict that the Claimant was dismissed unfairly and unjustly.

36. In terms of remedies sought, I find for Claimant as prayed and I proceed to award him as follows:-

**1. Months' salary in lieu of notice = 155,000/=**

**2. Salary for 8 days worked in February 2016 =  $8/30 \times 155,000 = 41,333/=$**

**3. 12 months' salary as compensation for the unlawful and unfair termination =  $12 \times 155,000 = 1,860,000/=$**

**Total awarded = 2,056,333/=**

**4. The Respondent will issue the Claimant with a certificate of service.**

**5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.**

**Dated and delivered in open Court this 30<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Njoroge for Respondent – Present

Claimants – Absent