REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.276 OF 2018

JONAH MWAURA NGUGI.....CLAIMANT

VERSUS

SAFARICOM PLC ..... RESPONDENT

JUDGEMENT

The claimant filed his memorandum of Claim on 7th December, 2018 and served the respondent with summons on 18th December, 2018. There was no attendance or defence filed. The claimant took a mention date for hearing directions and served notice upon the respondent on 7th March, 2019 but there was no attendance or any action taken to defend the suit.

On 10th July, 2019 the claimant attended court and hearing directions issued n noting there was no attendance or defence filed by the respondent a hearing date was allocated for the 24th July, 2019 under the provisions of Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The claimant was heard on his case upon the court being satisfied with the filed returns on service upon the respondent.

Claim

The claimant was employed by the respondent as an area manager from 2nd February, 2015 with a salary of ksh.199, 000.00 as gross pay per month the claimant worked until 29th June, 2018 when he was issued with letter of summary dismissal on grounds of negligence and improper performance of duty while distributing, activating and monitoring the sub-reg devices issued to him. prior to the termination of employment, no complaints had been made against the claimant with regard to his work performance. Until such time the claimant had been of excellent performance and was awarded with two *Hongera Awards* in the year 2017 and 2018.

Following hard work and excellent work performance, the claimant's gross salary rose to ksh.274, 173.66 per month.

By letter dated 23rd May, 2018 the claimant was notified of a disciplinary hearing following alleged investigations by the ethics and compliance team into alleged irregular distribution of sub-reg devices assigned to him. the claimant was accused of not accounting for 466 devices and when he was given time to account he did so but when he requested the disciplinary committee for time for manual accounting for the devices, this was not allowed. A decision was taken to issue summary dismissal notice on alleged not accounting for 151 devices.

The claimant made an appeal against the decision on summary dismissal on 31st July, 2018 and gave a detailed explanation on the challenges he faced in accounting for all the devices but by letter dated 13th August, 2018 the appeal was dismissed. Such was unfair and without justification as there was no reasonable cause to support the summary dismissal. The respondent failed to adhere to the statutory provisions of section 41 and 43 of the Employment Act, 2007 and termination of employment was unfair under section 45 of the Act.

The claimant is seeking for a declaration that his employment was terminated unfairly, the payment of damages for unlawful and unfair dismissal from employment, costs and infests.

The claimant testified in support of his claim. He is an expert in the telecommunication sector and before working with the respondent he was with Celtel company. upon employment by the respondent he was allocated the large area of Aberdare covering Samburu, Nyandrua and Laikipia and based at Nyahururu market. He performed very well and was issued with the best performing area manager award for the years 2017adn 2018. However immediately after his last award, in May 2018 he was issued with disciplinary notice over alleged failure to account for 466 phone devices.

The claimant explained that of the 2000 devices he had been allocated to issue to customers and agents to allow for telephone migrations and

digitalisation of customer details he had trade development representatives (TDR) who had been outsourced by the respondent to facilitate the issuance of these devices. The agents who received the devices were required to sign an indemnity form and to it attached a copy of identity card. The agents ha to be registered Mpesa agents as the sim card for the device use was necessary. The trade development agents were also required to train the agents in the use of the issued devices.

The claimant also testified that he kept a record of the indemnity forms with the details of the agents who received the devices. Any loss, misplacement or damage was tracked by the trade development representatives and the agent was required to report to the police and keep an abstract.

Upon the allegation that 466 devices had been lost or could not be traced, the claimant extracted from his records and made an account for all the devices in his region. He had developed a system of tracking the agent number, name and area code. He also noted that the devices issued were open and an agent could remove the sim card and use it for other purposes. He had noted with the respondent that the devices issued should have been locked but this was not addressed.

In his efforts to reconcile the records he realised that some devices may have been misused as against the purpose of their issuance, others had since closed shop for various reasons and did not inform the respondent and the devices could not be traced while other refused to cooperate. The claimant made his report accounting and giving an explanation on all the devices.

The claimant also testified that despite his detailed examination in writing and at the disci0linary hearing, he was dismissed form his employment on the grounds that 151 devices could not be accounted for despite his efforts to account for the 466 devices and without details of which 151 divides were under reference.

The claimant testified that he had been of excellent work performance until the notice to attend before the disciplinary committee and the wards issued testified to his good work. Since his dismissal he has been unable to secure new employment due to the summary dismissal and the position held by other actors in the sector with regard to the respondent standing, this has affected his future prospects for a job and just two weeks before the hearing he secured a new job in kakamega with Wananchi Group albeit at a less salary as he had been without any job or income since leaving the respondent. that the unfair termination of his employment by the respondent has exposed him to great difficulty and when called for interviews he is not able to explain why he was dismissed yet he was performing very well and thus he should be awarded as claimed. The declarations should will help remove the record and compensation will address the unfair termination of employment.

Determination

Without a defence or appearance by the respondent, the court is left with the claimant's case only.

Such claim shall be addressed on the pleadings, evidence and the applicable law.

The issues which emerge for determination noting the above are;

Whether the claimant was unlawfully and unfairly terminated in his employment; and

Whether the remedies sought should issue.

By letter dated 28th June, 2018 the respondent summarily dismissed the claimant on the grounds that there was a disciplinary hearing held on 30th May, 2018 following investigations by the ethics and compliance team into alleged irregular distribution of 2,780 sub-reg devices. The allegations were that;

> While carrying out your duties, you failed to adhere to the requirements of ensuring proper distribution, activation and monitoring of the devices as expected. This resulted in devices totalling to 466 worth of ksh.2,819,580 not being accounted for.
>
> Further you failed to show due care to ensure that company assets were used for their intended purpose. This resulted in devices being used by the TDR in your sales are as a personal phone and others in competitor network.

The letter of summary dismissal also noted that;

During the hearing you confirmed that;

> 1. You are an Area Sales Manager.
>
> 2. You were assigned 2,780 devices.
>
> 3. You were responsible for the distribution of the devices to the sub agents though your Trade Development Representatives and activating the devices with the sub-agents for the purpose of subscriber registration.
>
> 4. The devices were distributed and issued using indemnity forms and that it was also part of your responsibility to ensure that the sub-reg devices were activated and monitored for use in subscriber registration.

The respondent also noted that the claimant had been issued with notification to account for the devices vide notice of 2nd January, 2018 from the internal audit and that he had unsatisfactory response; on 18th January, 2018 the ethics and compliance team got no response; on 19th April, 2018 and 8th May, 2018 the ethics and compliance got unsatisfactory responses.

It was also noted that by the time of the disciplinary hearing on 30th May, 2018 the claimant had not accounted for 466 devices. The claimant was given more time to fully account for the devices and he accounted for 315 and despite additional time being allocated he was unable to account for 151 devices worth ksh.913, 641.00.

The actions of the claimant were reviewed and found to have *amounted to negligence and improper performance of duty which was your duty to have performed properly and carefully.* Such was found to be in breach of the terms and conditions of employment and the employer code of conduct and thus the summary dismissal.

The claimant made an appeal vide letter dated 9th July, 2018. The appeal was rejected.

As noted above, the failure by the respondent to enter appearance, file defence or attend at the hearing denied this court crucial defence material on the claims made. The background to the dispute and claims made are only deduced from the claimant. His was a case of summary dismissal for allegedly failing to undertake a proper distribution, activation and monitoring of the devices totalling to 466 worth of ksh.2, 819,580 and Further failing to ensure that company assets were used for their intended purpose. This is alleged have resulted in devices being used by the Trade Development Representatives in his area as personal phones and others in competitor network.

From the allegations made, the claimant was not dismissed for the alleged failing to distribute, activate and monitor 466 devices but for 151 devices meaning he accounted for all others save for these alleged 151 devices.

Summary dismissal of an employee is regulated under section 44(3) and (4) read together with section 41(2) of the Employment Act, 2007. In the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Ltd, Industrial Court Cause No. 66 of 2012** where the court observed as follows;

> i. That the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
>
> ii. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible.
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> iii. Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

It is therefore imperative that before summary dismissal can issue the employee should be notified and allowed a defence. Such defence should be considered on its merits before the sanction can issue.

Again, and as noted above, without the respondent's attendance or defence, the court is denied the responses by the respondent.

The claimant, out of due diligence filed the defences he submitted with the respondent for consideration by the court. of the total devices issued under his responsibility save for the mandatory indemnity forms, he kept a record of all the 2780 devices issued. He made a schedule of the same noting the following;

- Agent's name;
- Agent number;
- Location;
- Assistant name;

- Contract;
- TDR name; and
- His comments

On this schedule, all the devices are accounted for. some are noted as recovery on-going, repossessed, outlet closed, unreachable, lost and report made to the police with an OB number or the agent was not cooperating. Other agents are noted to have relocated to other towns/locations, devices stolen, device faulty and with fundi. Fundamentally all the devices are accounted for.

It was also acknowledged that the claimant was being assisted by TDR. The TDR were allocated with devices to supply to the agents and to train them in the use. The TDR were outsourced for this purpose. The level of control was with a third party and not the claimant.

In his defence to the respondent, the claimant noted that he reported 87% of the devices fully activated on the network despite the systems challenges and availability of subscriber registration via USSD which affected adoption. He kept on monitoring the devices across two sales areas of Aberdare and Central Rift which are expansive and that are how he achieved 87% usage monitoring despite the challenge of not having a tool from the respondent and thus devices dipstick checks to capture the devices that had gone to personal use by the sub-agents

after assignment. The other major challenge the claimant note din his defence was that the devices were open and could be used by the sub-agents with other networks or competitors and only the respondent had the capacity to lock them and this was not within his mandate.

Following notice for disciplinary action, of the 2780 devices the claimant accounted for all devices save for 151 and then asked for more time to follow up on those not recovered, not traced, the agents who had moved. From the 2780 devices the claimant was alleged to have lost 466 and with time he accounted for 315 and was left with 151 to account for.

As noted above, termination of employment through summary dismissal should be based on both substantive and procedural fairness. The defence given by the employee should be given a consideration. when terminating the claimant's employment the attendant legal provisions for consideration are set out in **sections 41, 43** and **45** of the Act. In **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR,** the Court summarized those procedures as follows;

> Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.
>
> The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.
>
> Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer. [underline added].

The defence of the claimant put into account and the principles laid out by the Court of Appeal in the above cited case, had the respondent put into account defence given and the applicable challenges the claimant faced while in the field, noting the comments made with regard to each and every device issued out in his responsibility, it would have become obvious that he was not culpable.

Of the 2780 total devices issued, there is no audit setting out which devices were not used for their intended purpose, and which TDR(s) used the issued devices for their personal use and those in competitor networks. For the respondent to sustain a charge of *negligence* against the claimant proof of absence of any explanation for not doing what was required to be done was imperative. The allegation of being *negligent* at work is a serious omission and where proved amounts to gross misconduct under the provisions of section 44(4) of the Employment Act.

The act of *gross negligence* is defined in the case of **Transnet Ltd t/a Portnet versus Owners of the MV Stella Tingas and Another 2003 (2) SA 473 (SCA);**

> .. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. …. even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence …. It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross …. It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care …

It is therefore not sufficient for an am employer to site an employee for negligence. There must be evidence and proof that the employee was reasonably able to foresee risk and recklessly failed to avoid the same or by his conduct acted in a manner that was so reckless and unreasonable that exposed the employer to risk and or acted so radically from the standard of a reasonable person or the practice of the employer and thus deviated from what a reasonable employee placed in a similar situation would act.

In my view and noting the defence by the claimant to the respondent, he took reasonable steps to safeguard the devices issued and when called upon to account for the same as note din his returns that he had distributed and was monitoring 87% of the devices issued, such ought to have been put into account before the sanction of summary dismissal. Without any defence challenging the claims made, the action taken by the respondent against the claimant failed in substantive justice. It was unfair.

The claimant was also alleged to be of *improper performance of duty which was your duty to have performed properly and carefully.* terminating the claimant's employment on the grounds of improper or poor performance and issuing a sanction of summary dismissal is addressed under section 41(1) of the Employment Act, 2007. In **Jane Samba Mukala versus Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010** the court held as follows;

> a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in

section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.

Before termination of employment on the grounds of poor performance an appraisal ought to have been conducted on the claimant's work performance in 2018 or 2017 to confirm whether the he had improved on his previous performance rating before termination of his employment and that in the absence of such proof, termination of the claimant's employment with the respondent was unfair. See the Court of Appeal decision in **National Bank of Kenya versus Samuel Nguru Mutonya Civil Appeal No.118 of 2017 (Nairobi);**

...an appraisal ought to have been conducted on the respondent's work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before termination of his employment and that in the absence of such proof, termination of the respondent's employment with the Bank was unfair.

Inherently, the claimant having raised concern with regard to the outsourced TRDs, the issued devices being open and subject to and for use in other networks and competitors, without any support over any alleged poor performance or improper work performance to enable him address the same, the respondent as the employer failed and cannot rely on such grounds to dismiss him from his employment. Had such matter occurred and brought to the claimant's attention in a manner that he knew would result into summary dismissal if not addressed resulted in unfair labour practice against him and in this regard the sanction of summary dismissal in the circumstances is not justified.

The court thus finds the summary dismissal of the claimant of the claimant by the respondent was not lawful and unfair contrary to the provisions of section 45 of the Employment Act, 2007. The same was not justified and lacked substantive justice.

The claimant is seeking compensation for the unlawful and unfair dismissal from employment and for the maximum at 12 months' salary on the grounds that he was diligently in his duties and earned accolades being the best Areas Sales Manager for the year 2018 and 2017. That being an employee of the respondent and the reputation it carries and noting the reason(s) applied in terminating his employment, it has become practically impossible for him to secure new employment and until two weeks to the hearing of his case he secured employment but at a lower pay as no employer is willing to take him on similar terms and he last had with the respondent. he therefore urged the court to make a finding that he is entitled to damages for the unlawful and unfair action of the respondent.

As sect out above, upon the court finding the claimant was substantively unfairly terminated in his employment by the respondent, the remedies under section 49 of the Employment Act, 2007 can issue in single or multiple terms/awards. The claimant is however only keen on compensation.

In addressing unfair termination of employment the court is bound to look at Section 45 (5) provisions. To look at the following;

a. procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

b. the conduct and capability of the employee up to the date of termination;

c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any pervious warning letters issued to the employee.

Though the respondent followed due process, with the finding that there was no substantive justification for the summary dismissal, such procedure is rendered irrelevant. Due process cannot justify an unlawful and unfair action. Had the respondent interrogated the record and defence at hand it would have been apparent that the claimant had been a diligent employee, earned accolades and his work performance record earned him the *Hongera Awards for the years 2018 and 2018* and that he had distributed all 2780 devices issued to him and rendered an account for them all.

The Court of Appeal in the case of **George Kingi Bamba versus National Police Service Commission [2019] eKLR Civil Appeal 149 of 2017** in allowing an appeal from the court, reinstated the appellant back to his employment after 3 years on the basis that while serving the employer he was of excellent work performance and *achievements against the unproven accusations of impropriety.* The claimant's case stands out as similar and though there is no claim for reinstatement, such accolades and Awards while serving the respondent put into account, these are good reasons to award compensation as claimed and at 12 months maximum pay.

The claimant was last earning a gross salary of Ksh.274,173.66 in accordance with the payment statement issued for the month of November, 2015. There is no evidence of a contrary pay. The claimant is thus awarded Ksh.3, 290,083.92 in compensation.

Accordingly, judgement is hereby entered for the claimant against the respondent with compensation at ksh.3, 290,083.92 and costs of the suit. The dues payable shall be subject to section 49(2) of the Employment Act, 2007.

Delivered at Nakuru this 23rd day of September, 2019

M. MBARU JUDGE

In the presence of: .....

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