



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2199 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2019)

CLEMENT MUIA KHIO.....CLAIMANT

VERSUS

THE COPY CAT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide the Memorandum of Claim filed on 11th December 2014, challenging his termination and the Respondent's failure to pay his terminal dues. The Claimant seeks the following reliefs:-

- a. 1 months' salary arrears of KShs. 55,608.00.*
- b. Salary in lieu of notice of KShs. 55,608.00.*
- c. 39 unpaid leave days in the sum of KShs. 72,290.40.*
- d. 3 years' service pay of KShs. 333,648.00.*
- e. 12 months salary compensation for a ruined career in the sum of KShs. 667,296.00.*
- f. Damages as compensation for unfair and unlawful termination of 12 months' salary.*
- g. Costs of this suit.*

2. The Claimant was employed on 1st June 2011 as a Sales Executive earning a monthly salary of KShs. 30,723.00. At the time of the termination, he was earning a salary of KShs. 55,608.00. The Claimant avers that on 14th March 2014, he was sent on suspension which was later lifted on 6th May 2014. However, his employment was terminated on 30th June 2014 without a justifiable cause or the issuance of a notice. He had not been given previous warnings or committed any act to warrant termination of his employment.

3. It is the Claimant's case that the Respondent has refused to pay his terminal dues being salary in lieu of notice, payment for 39 days untaken leave, severance allowance at the rate of 3 months' salary for every year worked.

4. The Claimant adopted his witness statement dated 1st October 2018. In cross-examination, it was his testimony that he was not given time to respond to the allegations that led to his suspension. He maintained that he never shared his password with anybody and that he did not consent to have his dues remitted to pay his loan.

5. On 27th March 2015, the Respondent filed a Reply and Counterclaim contending that the Claimant's termination was lawful while seeking the following reliefs:-

- a. The sum of KShs. 160,459.68 together with interest thereupon at the prevailing commercial rates of interest.*
- b. Costs of the counterclaim and interest thereupon at such rate and for such period of time as this Honourable Court may deem fit to grant; and*

c. Such further or other reliefs as may be appropriate in the circumstances.

6. They contend that the Claimant's basic salary at the time of termination was KShs. 50,000.00. They aver that investigations were conducted and it was reported that the Claimant had lost monies in the sum of KShs. 160,459.68 on account of the Respondent resulting in his suspension on full pay.

7. They further aver that lifting the Claimant's suspension did not mean that he had been cleared as investigations were still ongoing. It is the Respondent's case that the investigations conclusively revealed that the Claimant was responsible for the said losses. Sale of goods had been made and money received on account of the Respondent but never accounted for.

8. The Respondent avers that the Claimant was given an opportunity to be heard before his summary dismissal. He had several meetings with the Human Resource Officers and eventually submitted a memo acknowledging that sharing his password with his colleague led to the loss since his colleague used the password to embezzle money. It is their case that the passwords are not supposed to be shared.

9. The Respondent contends that the Claimant is not entitled to payment of salary arrears as he agreed to have the same used to offset his loan at Standard Chartered Bank. Further, that the Claimant was only entitled to payment of accrued leave days in the sum of Kshs. 26,370.00.

10. RW1, Mary Nyaga, testified that a report was made to the management on 10th March 2014 which revealed that the Claimant's account was used to create sales and cancel them leading to a loss of Kshs. 156,399.00. The Claimant was subjected to a disciplinary process and thereafter suspended and issued with a notice to show cause. It was also her testimony that the Claimant was a member of NSSF and therefore not entitled to service pay.

11. On cross-examination, she conceded that the letter lifting the suspension had not indicated that investigations were still ongoing. She maintained that there were numerous hearings but could not produce minutes of the meetings or documents to show that the Claimant had been invited for the same. It was her testimony that Kshs. 156,399.00 was claimed in the counterclaim but conceded that the incident was never reported to the police.

12. RW2, Patricia Wamboi, adopted her witness statement as her evidence in chief. On cross-examination, she testified that upon dismissing one Veronica they broke into her cabinet and found sales receipts prompting them to carry out an investigation where they discovered that the cash sales were updated by the Claimant's password and that he was able to cancel sales. However, she conceded that Entry No. 8 of the table annexed to her witness statement indicated that the Claimant was not involved in the transaction.

Submissions by the Parties

13. In his written submissions filed on 23rd May 2019, the Claimant submits that the Respondent has failed to demonstrate that he was accorded a fair hearing or prove its counterclaim. It is the Claimant's submissions that the termination of his employment was unlawful and that he is entitled to the reliefs sought. He relies on the cases of **Nicholus Muasya Kyula vs. Farmchem Limited [2012] eKLR** and **Bernard Ngugi vs. G4S Security Services Kenya Limited [2013] eKLR**.

14. On their part, the Respondents filed their written submissions on 12th June 2019. In their submissions, the Respondent urges the Court to take cognizance of the Respondent's effort to give the Claimant a fair hearing even though the procedure was not strictly followed as evidenced by the lack of minutes for the disciplinary hearings.

15. The Respondent submits that the termination was lawful because there were valid reasons to terminate the Claimant's employment, and relies on the case of **Elijah Aggrey Atsali vs. Nairobi City Water and Sewerage Company [2015] eKLR**.

16. It is their further submissions that they followed due process envisioned in section 41 of the Employment Act as the Claimant was afforded an opportunity to respond to the charges against him and rely on the case of **Sophia Wambui Muthoni vs. Muramati Sacco Society Limited [2014] eKLR**.

17. The Respondent submits that pursuant to Section 35 (6) of the Employment Act, the Claimant is not entitled to service pay as he was a member of NSSF whose contributions were remitted as evidenced in his pay slips. They rely on the case of **Elijah Kipkoros Tonui vs. Ngara Opticians T/A Bright Eyes Limited [2014] eKLR**.

18. The Respondent further submits that the Claimant is not entitled to compensation for a ruined career and posits that a party is only entitled to payment of damages equivalent to a maximum of 12 months gross wages. In their view, payment of both damages would amount to unjustly enriching the Claimant. They also submit that the Claimant is not entitled to costs of the suit as they have proved that his termination was lawful and justifiable.

19. I have examined all the evidence and submissions of the Parties. The fact of Claimant's suspension on 14/3/2014 is evidenced by Appendix C in Claimant's documents.

20. On 6/5/2014, the suspension was lifted unconditionally (Appendix D). There was no indication that there were any investigations pending nor that the lifting of the suspension was conditional.

21. On 30.6.2014, the Claimant was however terminated and the Respondent's letter of termination alludes that the suspension had been lifted temporary to allow investigations but investigations continued which now found Claimant culpable hence the termination.

22. This was indeed a new issue as there had been no previous indication after the lifting of the suspension that the investigations were still ongoing.

23. Even assuming that indeed investigations were still on, the Claimant was never called to any disciplinary hearing to answer to the charges. No investigations report had been placed before this Court to show that indeed the investigations done revealed that the Claimant was culpable.

24. In the circumstances, it is my finding that the Respondent did not establish that they had a valid reason to warrant termination of the Claimant nor did they follow due process as envisaged under the law.

25. Section 45 (2) of Employment Act states 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".

26. It is my finding therefore that the termination of the Claimant was unfair and unjustified and therefore the Claimant is entitled to the following reliefs:-

1. 1 months' salary in lieu of notice = 50,000/=

2. Unpaid leave of 39 days = 72,290.40/=

3. 10 months' salary as compensation for unlawful and unfair termination = 50,000 x 10 = 500,000/=

TOTAL = 622,290.40/= less statutory deductions

4. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 17th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Bundotich holding brief Anyoka for Respondent – Present

Claimant- Absent