



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2035 OF 2015**

**HILARY WACHIRA MWANGI.....CLAIMANT**

**- VERSUS -**

**BOLLORE AFRICA LOGISTICS KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

**JUDGMENT**

The claimant filed the statement of claim on 13,11,2015 through Nyabena Nyakundi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's termination or suspension from his employment was unfair, unlawful and un-procedural.
- b) The claimant be paid his terminal benefits in the sum of Kshs.4, 002, 056.37 including:
  - i. 11 days salary for September 2015 Kshs. 77, 000.00.
  - ii. 3 months' salary in lieu of notice Kshs.234, 059 x3 making Kshs.702, 177.00.
  - iii. Service gratuity at 15 days for each of the 4 years served Kshs.420, 000.00.
  - iv. Prorate leave Kshs.40, 384.60.
  - v. 12 months compensation Kshs. 2, 808, 698.00.
  - vi. Total Kshs.4, 048, 259.60.
  - vii. Less amount paid on account Kshs.46, 203.23
  - viii. Total claimed Kshs.4, 002, 056.37.
- c) The respondent to issue the claimant with a certificate of service in terms of section 51 of the Employment Act, 2007.
- d) The Honourable Court do issue such orders and give such directions as it may deem fit to meet ends of justice.
- e) The respondent be condemned to pay costs of the suit.
- f) Interest on the above at Court rates.

The memorandum of response was filed on 10.12.2015 through Mulanya & Maondo Advocates.

The Court has reviewed the parties' respective pleadings, evidence and submissions.

There is no dispute that the claimant was employed by the respondent effective 20.06.2011 as a Deputy Chief Accountant and at Kshs.100, 000.00 per month. The claimant served the probationary term successfully and upon confirmation in appointment his salary increased to Kshs.115, 000.00 per month. Thereafter he was promoted to the Chief Accountant at a gross of Kshs.234, 058.00 monthly pay.

The claimant was dismissed from employment by the letter of summary dismissal dated 15.09.2015 and effective 11.09.2015. The reason for dismissal was that in March 2014 three unauthorised entries were posted from the claimant's user ID in the accounting system which led to a loss of Kshs.2, 123, 563.00 through fraudulent transfer from various supplier accounts to the supplier account of Einabelibel transporters.

The claimant had been given a show-cause notice dated 04.09.2015 and thereafter a disciplinary hearing on 09.09.2015. The dismissal letter set out his terminal dues to include any leave earned, pay for 11 days in September 2015 and less liability to the respondent.

The evidence at the disciplinary hearing was that the claimant was not responsible for posting of the entries in the accounting system. However, the claimant admitted that the user ID assigned for his exclusive use had been used by his workmate one Festus to post the fraudulent transactions in issue. The claimant told the meeting for disciplinary hearing that he admitted that it was totally wrong for him to share his exclusive user ID but he had done so on trust to enable Festus to delete certain supplier ledgers which required deletion on supplier tracking. The claimant further stated that it was unfortunate that after he shared his user ID, he had thereafter failed to check and verify whatever had been done. The claimant further confirmed that he had not been instructed to share his user ID with Festus or any other person.

The claimant's evidence at the hearing of the suit confirmed that he had allowed Festus to use the ID user code that was assigned for the claimant's exclusive use. The Court finds that the claimant's evidence that his concern was that he never approved the vouchers that Festus posted is found not meritorious because it was his duty to check and verify whatever Festus had posted in the system using the claimant's ID user code.

The Court finds that the claimant was accorded due procedure and the reasons for termination were genuine in terms of sections 41, 43 and 45 of the Employment Act, 2007. The declaration that the dismissal was unfair is declined together with the prayer for compensation. The respondent established that the claimant was a member of the NSSF and the pension contributory scheme so that the prayer for severance pay was misconceived, even if, it meant service pay.

RW confirmed that at exit the claimant was paid Kshs.46, 202.23 and the claimant is not entitled to the double pay for 11 days as claimed and pay in lieu of leave. The claimant is entitled to a certificate of service under section 51 of the Act and in view of that partial success, each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the parties with orders:

- a) The declaration that the summary dismissal was not unfair or unlawful.
- b) The respondent to deliver to the claimant a certificate of service by 15.11.2019.
- c) Each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 25th October, 2019.**

**BYRAM ONGAYA**

**JUDGE**