



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 727 OF 2014

DAVID GITHINJI KIBUGE.....CLAIMANT

-VERSUS-

NEW KENYA CO-OPERATIVE

CREAMERIES LTD (KCC).....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 6th May, 2014 alleging that he was unfairly and unlawfully dismissed from employment by the Respondent who also failed or refused to pay his benefits. He therefore seeks the following reliefs:-

a) The sum of Kshs. 426,000.00 comprising of the following:-

- i. One Month salary in lieu of notice.....Kshs. 71,000.00
- ii. June 2013 Salary.....Kshs. 71,000.00
- iii. Two years unspent leave.....Kshs. 142,000.00
- iv. Severance Pay..... Kshs. 142,000.00

Total.....Kshs. 426,000.00

b) General damages

c) The costs of this suit

d) Interest on 'a', 'b' and 'c' above until payment in full.

2. The Respondent filed her defence on 9th July, 2014 admitting that she employed the Claimant as an Assistant Accountant in its Finance Department but denied that the Claimant was unfairly and unlawfully terminated from his employment. She averred that she had a lawful reason for terminating the Claimant's employment because he was negligent in performing his duties by which he exposed the Company to financial loss of Kshs. 1,505,715.45. She further averred that she followed due process before terminating the employment as provided under the Employment Act, 2007 by according the claimant a disciplinary hearing. Finally, she contended that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim and prayed for the same to be dismissed with costs.

3. The matter proceeded for hearing on 1/4/2019 and 30/5/2019 with both the Claimant and Respondent calling one witness each. Thereafter they filed written submissions.

Claimant's Case

4. The Claimant gave evidence on 1st April, 2019. CW1 in his evidence reiterated the averments made in his Memorandum of Claim and adopted his written statement dated 7.5.2018 and six documents as his evidence. The summary of his case is that he was employed by the Respondent herein on 8th September, 2011 as an Assistant Accountant based at Sotik and earning a monthly gross salary of Kshs.71,000.00/=. In his view he worked diligently and to the Respondent's satisfaction a result of which he was promoted to the position of Depot Accountant.

5. He further testified that on 24.1.2013, he was served with a Notice to Show Cause by the employer to explain an amount of Kshs.1,505,715 and he responded by his letter dated 1.2.2013 attaching all the reconciliation reports. He contended that the systems at Sotik were down and as such he did not know that there was a problem until he was served with the show cause letter from the Head Office, Nairobi. That after his response, he was served with a suspension letter dated 16th May, 2013 on account of alleged unbalanced Bank reconciliation and underpayments totalling to Kshs. 1,505,715.00.

6. He further testified that on 21st May, 2013 he was asked, via a phone call, to hand over to one Adrian Nyangeno in the presence of Nicholas Mutuku and travel to Nairobi for a hearing before a disciplinary committee in Nairobi. He complied with the summons and appeared before the committee on 23.5.2013 without knowledge of the charges. That the meeting lasted for only ten minutes and he was only asked to explain his reconciliation. That he handed over all the missing documents but he was not allowed to go through his reconciliation statement, nor was he furnished with any information by the Respondent on the said allegation. That after the hearing, he was told to go back to work and he complied. That thereafter the respondent proceeded to terminate his services by the letter dated 30th May, 2013 but delayed service thereof till 8th July, 2013 when he sought to know why his salary for June 2013 had delayed.

7. The Claimant averred that his termination was unfair as no notice was served on him prior to his termination. He further stated that the reason cited by the Respondent for his termination being the loss of Kshs.1,505,715.44 was not valid because there was no audit done and he was not arrested and charged with the loss of the said money. He contended that for the 2 years served, he was never served with any warning letter regarding his performance of his work.

8. Finally, he stated that he was not paid his terminal dues after the separation. He contended that he was entitled to 30 days annual leave but never went for any leave because he was told that there was no one to relieve him. He prayed for the reliefs set out in his Statement of Claim.

9. On cross examination he admitted that he was served with a show cause letter and thereafter invited for a disciplinary hearing. He further admitted that he attended to the hearing and defended himself. Against the allegations levelled against him. That thereafter he reported back to work until 8.7.2013 when he received the dismissal letter dated 30.5.2013.

The Respondent's Case

10. The Respondent called one witness **Michael K. Mukopi**, the Industrial Relations Manager of the Respondent Company who testified as RW1 and basically adopted his written statement dated 15.11.2017 as his testimony. In brief he stated that the claimant was employed by the respondent on 5.9.2011 as Assistant Accountant in the finance department. That the claimant's job entailed and called for faithfulness and diligence performance of his duties.

11. Rw1 further stated that the claimant failed to post cheques from salesmen and also to balance his accounts to the tune of Kshs.1,505,715.40 which led to salesmen not being cleared to carry products and thus exposing the company to financial loss. As a result, the claimant was served with a show cause letter dated 24.1.2013 to explain why disciplinary action should not be taken against him. The claimant failed to respond to the said letter and he was served with a suspension letter dated 16.5.2013 after which he was invited to a disciplinary hearing 23.5.2013. That after the hearing a decision was made to dismiss him by the letter dated 30.5.2013 for failing to balance his accounts at Sotik Depot to the tune of Kshs.1,505,715.40.

12. Rw1 maintained that the dismissal was done in accordance with the disciplinary procedure set out in the provisions of the Employment Act. He further contended that after the separation, the claimant failed to undertake clearance and handing over company properties in his possession as required by the company procedure so as to enable the company pay his terminal dues less any liabilities. He therefore prayed for the suit to be dismissed with costs.

13. On cross examination RW1 stated that the claimant was managing the entire accounts for the Depot. He admitted that the termination letter dated 30.5.2013 at paragraph 2 stated that the respondent received a response to the show cause letter from the Claimant. He further admitted that the Claimant was invited to attend a disciplinary hearing on 17/5/2013 at 10 am but the hearing was held on 23/5/2013. He maintained that the reason for dismissing the claimant was negligence that led to loss of Kshs.1,500,000 but admitted that the show cause letter dated 24.1.2013 only accused him of delay in posting cheques and not loss of any money. He, however, contended that the committee discussed the consequence of the late posting of the cheques. Finally, he maintained that the claimant never cleared with the company using clearance forms after the dismissal.

Submissions by the parties

14. The Claimant submitted that his termination was contrary to the provisions of Sections 43 and 45 of the Employment Act, 2007 because the Respondent failed to produce any evidence to prove loss of any money which was the basis his dismissal. To fortify his argument the Claimant relied on **Walter Ogal Anuro Vs Teacher's Service Commission (2013) eKLR** as cited in the case of **Daniel Kiplagat Kipkebut Vs Smeep Deposit Taking Micro Finance Limited (2016) eKLR** .

15. The Claimant urged this Honourable Court to find that his termination was unfair and unlawful by dint of Section 41 of the Employment Act, 2007 and prayed for the reliefs set out in his Memorandum of Claim.

Respondent's Submissions

16. On the other hand, the respondent submitted that she legally dismissed the Claimant as provided under Section 44 of the Employment Act, 2007. She maintained that based on the evidence presented in this matter the Claimant's dismissal was based on reasonable grounds and in her view she has discharged the burden of proving the reason for the termination as required by section 43 of the Employment Act. For emphasis the Respondent relied on **Nicholas Muasya Kyula Vs Farmchem Ltd (2012) e KLR** and **Evans Kamadi Misango Vs Barclays Bank Kenya Limited (2015) eKLR** where the Court held:

“To my mind, the burden placed on the employer by Section 43 is to demonstrate a valid reason which would cause a reasonable employer to terminate the employment of an employee.”

17. In conclusion the Respondent urged this Honourable Court to find that as supported by evidence the Claimant’s termination was within the law and that the same was procedurally fair. She further urged this Honourable in the circumstances to dismiss the instant Claim with costs to the Respondent.

Analysis and Determination

18. There is no dispute that the Claimant was employed by the Respondent on the 8th September, 2011 as an Assistant Accountant and was later promoted to the position of Depot Accountant, Sotik in November, 2011 earning a monthly salary of Kshs.71,000/=. There is further no dispute that the Claimant’s services were terminated by the Respondent vide the summary dismissal letter on 30th May, 2013. The issues for determination are:

- a) Whether the Claimant’s dismissal was unfair and unlawful.
- b) Whether the Claimant is entitled to the reliefs sought in this suit.

(a) Whether the dismissal of the claimant was unfair and unlawful

19. Under Section 45(2) of the Employment Act provides that termination of an employee’s contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or based on the employer’s operational requirements; and that a fair procedure was followed. The legal burden of proving unfair termination however remains with the employee who must demonstrate a prima facie case by evidence that the reason cited for the termination was not valid and fair and/or a fair procedure was not followed before the termination. It is only then that the burden of proof shifts to the employer to prove and justify the reason for the dismissal, and that a fair procedure was followed as required by section 43,45, 47 (5) and section 41 of the Act.

Reason for termination

20. The reason cited by the Respondent in her letter of Summary Dismissal dated 30th May, 2013 is negligence contrary Clause 27.2 (4) of the Company code of Regulations that occasioned the Respondent loss of a total of Kshs.1,505,715.44. Paragraph 2 of the letter stated:

“This is to inform you that after careful consideration of your responses to our letter and the disciplinary committee proceedings, it was concluded that your negligence caused the company to lose a total of kshs. 1,505,715.44 and your response during the your appearance at the staff disciplinary committee was found to be unsatisfactory and unacceptable as your actions contravened clause 27.2(4) of the company code of Regulations.”

21. The claimant admitted the said misconduct vide his letter to the Finance Manager dated 1.2.2013 which stated as follows:

“With reference to to your internal memo ref: NKCC/S.19/CMF/55/MK dated Jan 24, 2013 I would like to reply.

Some omissions were done while posting banking slips and cheques. Some of the omission was failing to change the SAP option for the “Document Date” and the procedure of posting Cheques and bank slips.

I have corrected to prevent such omission and errors not to occur in future.

Attached please find summary of the correction done on the postings

Regards”

22. In view of the foregoing express admission by the claimant, I return that the claimant has failed to demonstrate that the reason for the separation was invalid and unfair. The corollary to the foregoing finding is the view that the Respondent had a valid reason for termination and her burden of proof under section 43, 45 and 47(5) of the Employment Act has been discharged on a preponderance of evidence.

Procedure followed.

23. Section 41 of the Employment Act, 2007 provides in mandatory terms the procedure to be followed while terminating the services of an employee for a cause, thus:

“41(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 ...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, make.”

24. The claimant admitted that he was served with a show cause letter inviting him to tender a written explanation regarding his negligent performance of duty and he did so. That thereafter he was invited to oral hearing before a staff disciplinary committee where he attended and defended himself but thereafter he was dismissed. In this courts view the procedure followed resonated well with the object of the provisions of section 41 above, which is to give the employee a hearing before dismissing him for misconduct or poor performance. It has not been shown that the claimant protested to the procedure followed to the disciplinary committee or at all.

25. In the end it is the opinion of the court that the evidence adduced support the conclusion that the dismissal of the claimant by the respondent was fair and lawful. The said inference is fortified by **Daniel Kiplagat Kipkeibut Vs Smep Deposit Taking Micro Finance Limited (2016) eKLR** where Marete J held that:

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

(b) Whether the Claimant is entitled to the reliefs sought

26. Having found that the Claimant’s dismissal was fair and lawful I dismiss the claim for salary in lieu of notice and compensation for unfair termination under section 49 of the Employment Act.

27. However, he is entitled to salary for June 2013 being Kshs.71,000 because his uncontroverted evidence before this Court is that after the hearing he reported back to work until 8.7.2013 when he was served with the termination letter dated 30.5.2013 after enquiring why the salary had delayed. The respondent never adduced any evidence to prove that the claimant was served with the termination letter on 30.5.2013.

28. In addition, the Claimant pleaded and contended in his testimony that he is entitled to 30 days’ annual leave but he was denied the same on ground that there was no one to relieve him during his two years’ service. The said evidence was not rebutted by the respondent using leave records. Consequently, I award him leave for one year and ten months being 55 days. Hence $Kshs.71,000 \times 55/26 = Kshs.150,192.30$ but because he prayed for only Kshs.142,000 that is what I award him.

29. Finally, the Claim for severance pay dismissed since separation herein was not on account of redundancy as provided under Section 40 of the Employment Act, 2007.

Conclusion and disposition

30. I have found that the dismissal of the claimant by the respondent herein was fair and lawful. I have however found that the claimant is entitled to some accrued terminal dues. Consequently, I enter judgement for him against the respondent in the following terms:

Salary for June 2013.....	Kshs. 71,000
55 leave days.....	<u>Kshs. 142,000</u>
Total	<u>Kshs. 213,000</u>

The award is subject to statutory deductions but in addition to costs of this suit plus interest at Court rates from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 11th day of October, 2019

ONESMUS N. MAKAU

JUDGE