



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 648 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

KENNEDY JILO MUNGATANA.....CLAIMANT

VERSUS

NATIONAL HOSPITAL INSURANCE

FUND BOARD OF MANAGEMENT.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent as an accountant on 3rd April 2000, a position he held until 16th September 2010 when his employment was terminated on grounds of gross misconduct.

The Claimant was interdicted on 9th June 2010 to pave way for investigations. Investigations were carried out and a report submitted revealing that funds had been misappropriated. Consequently, on 15th July 2010 the Claimant was issued with a letter requiring him to show cause why disciplinary action should not be taken against him. He responded vide his letter of 27th July 2010. The Respondent found his explanation unsatisfactory and summarily dismissed him. The Claimant appealed against the termination. His appeal was heard but he was not reinstated.

In the memorandum of claim dated 21st April 2011, the claimant seeks the following prayers-

- a. General and exemplary damages for unlawful termination of employment.
- b. Special damages in the sum of Kshs.620,900.00.
- c. Interest on (a) and (b) above at court rates from the date of filing this suit.
- d. Costs of this suit.
- e. Any other or further relief as the Court may deem fit and just to grant.

It is the Claimant's case that his letter of 27th July 2010 set out his reservations with the way the investigations were carried out. It is also his case that the Respondent did not pay him his half salary withheld during the period of interdiction contrary to the provisions of the CBA.

The Claimant avers that after his appeal was heard, the Respondent undertook to get back to him but never did.

At the time of termination, the claimant was earning a salary of Kshs.88,700.00. It is his position that the termination of his employment was unlawful and he holds the Respondent responsible for his loss of earnings and financial embarrassment.

The Respondent filed a response to the Memorandum of claim on 25th May 2011 contending that the Claimant was transferred from Naivasha to the Head Office to pave way for an internal audit at the Naivasha Office.

It is their position that as an accountant, the Claimant was required to adhere to the procedures laid down in the International Accounting Standards, NHIF terms and conditions of service, the CBA and the Public Officers' Ethics Act. However, he performed his duties negligently

and misappropriated the Respondent's funds which occasioned a loss to the respondent and the public.

The Respondent avers that the reason for the delay in communicating the appeal decision was because it took time to obtain information and deliberate on the issues presented by the Claimant. That the Claimant's appeal was dismissed on 12th May 2011 because he was unable to account for the loss of funds drawn under his signature. The respondent contends that handing over to other accountants did not absolve the Claimant from responsibility of the detected anomalies.

The Respondent contends that the Claimant's salary increment was based on other factors before the Respondent detected the anomalies. The respondent avers that the Claimant is not entitled to loss of earnings or any of the reliefs sought.

At the hearing, both parties called witnesses who testified and were cross examined.

Analysis and Determination

After considering the pleadings and analyzing the evidence and submissions presented before this Court, the issues for determination are-

- a. Whether the Claimant's employment was unfairly terminated.
- b. Whether the Claimant is entitled to the prayers sought.

The Claimant was summarily dismissed for misappropriation of Kshs.7,993,600.00 through cheques drawn in his name between July 2007 and 24th May 2010. This was against the Respondent's standard operation procedure. The audit report on the misappropriation of funds in the Naivasha Branch Office revealed that there were cheques which bore the Claimant's signature that were cashed but never entered in the Operation Cash Book 103222-17002 and Petty Cash Account 100210-17002. The Respondent had no reason to doubt the audit report. The Claimant however alleged that the audit report was malicious and aimed at accusing him for things he did not commit yet has not provided any evidence. In his evidence, the Claimant admitted that cheques were made in his name and he cashed them and that this was not the usual procedure.

The test of reasonability was set out in the case of *Judicial Service Commission vs. Gladys Boss Shollei & Another* [2014] eKLR where the Court was of the view that-

"From my own analysis of the record before us, I would very much doubt that there are many employers who faced with conduct such as displayed by the 1st Respondent would have retained her in her position... As to the action of dismissing the 1st Respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same BRITISH LEYLAND case (ibid)-

'Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair.'

I find that there were valid reasons for dismissal of the claimant

Fair Hearing

Clause 14.22.1(b) of the NHIF Terms and Conditions provides as follows –

"During the period of interdiction, proceedings shall be instituted to establish the facts of the case."

Clause 17.1 of the CBA on the other hand provides as follows –

"17.1 SUMMARY DISMISSAL

Any of the following acts on the part of an employee shall constitute GROSS MISCONDUCT on the part of the employee and if after due investigation by the Fund an employee is found guilty of any one of them, the employee shall be dismissed summarily without prior warning.

- i. If an employee misappropriates and/or embezzles any funds or property belonging to the Fund or any person or institution having business dealings with the employer.
- ii. Any information required by the Union shall be obtained officially and formally. Under breach of secrecy, information disclosed unofficially shall form ground for dismissal.
- iii. If he/she unlawfully pays or authorizes payment by the Fund of any bill to himself or on behalf of any person, group of persons, company or partnership.

- iv. If he/she seeks to or influences any person outside the Fund, with a view to obtaining advancement in the service of the Fund, or intervention on his behalf in a matter adversely affecting his/her services with the Fund.
- v. If he/she engages in corrupt practices, receipt or solicitation of gifts, rewards, fee or commissions by himself or members of his family.
- vi. If the employee is proved to have knowingly made or uttered false statements in a matter in which he/she is required .by the Fund to furnish information.
- vii. If he/she deliberately or wilfully intends to, or causes improper payment out of the Fund.
- viii. If she/he coverts the employer's Funds, vehicles, other assets and resources to unauthorized use.
- ix. If he/she wilfully, makes without authority, official documents or utters false statements as a result of which the employer loses Funds or assets.
- x. If she/he engages in immoral behaviour in tire office such as sexual harassment and other morally unacceptable behaviour.
- xi. If he/she is convicted of a criminal charge of an offence involving on his/her part, moral 'turpitude against a third party. For the purpose of this clause, an offence involving moral turpitude on the part of an employee is an offence involving dishonesty (for example; larceny, burglary, robbery, embezzlement, house breaking, fraud, treason, e.t.c.) whether or not the third party has any business dealings with the Fund.
- xii. If an employee absents himself without lawful cause for a consecutive period exceeding 14 days, he shall be considered *to have absconded duty*.
- xiii. As far as practicable, a "show cause why" letter will be issued to an accused employee where he/she will be given an opportunity' cither to confirm the - accusation(s) or defend himself/herself against the accusations which may lead to summary dismissal. The Fund will give the employee fourteen (14) days within which to reply to the letter. The dismissal letter shall not be copied to the Secretary General of the Union."

The Respondent's interpretation of a fair hearing was to accord the Claimant the opportunity to respond to the letter to show cause. However, Courts have determined what procedure as set out in section 41 of the Employment Act entails. In *Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR* the court stated that the procedure under section 41 was mandatory and should be followed by any employer who sought to terminate an employee's employment services. The Respondent ought to have given the Claimant an opportunity to present his case, adduce evidence and interrogate the evidence relied upon. Though the Claimant's appeal was heard, it did not remedy the unfairness of the original procedure.

I find that the failure to accord the claimant a hearing in terms of

Section 41 of the Employment Act rendered the summary dismissal procedurally unfair.

Reliefs Sought

The Claimant is not entitled to the claim for general and exemplary damages for termination of employment as the same is not grounded in law. The Claim for special damages also fails for lack of particularization and evidence. The prayer for interest suffers the same fate.

In view of the fact that I have found the dismissal of the clamant procedurally unfair, I will award him pay in lieu of notice as provided in Section 49(1)(a).

The claimant is thus awarded only pay in lieu of notice in the sum of Kshs.89,295 based on his gross pay as per payslips annexed to the Memorandum of Claim.

All other prayers are dismissed.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE