



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 217 OF 2015

(Before Hon. Justice Mathews N. Nduma)

NOBERT MUHORO IKUNDO MWANYALO.....CLAIMANT

VERSUS

NZOIA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed suit on 1st July 2015, praying for orders:

- (a) A declaration be issued that the termination of the employment of the claimant by the respondent on 24th November 2014 was unlawful, wrongful and unfair.
- (b) An order be made compelling the respondent to pay the claimant claims amounting to Kshs. 7,722,500.07 and a letter of service.
- (c) The respondent to pay costs of the claim and interest.

Facts of the claim

2. The claimant was employed by the respondent on 30th August 2012 as head of Information and Communication Technology (ICT) at a gross monthly salary of Kshs. 312,000 after application, interview and recruitment.
3. Claimant reported on 3rd August 2012, and underwent two (2) weeks induction. The respondent procured a stable email exchange server upon recommendation by the claimant together with a team of consultants. This was done at a cost of Kshs. 1,059,660 and included a software on Compact Disk and the User Licence (300). The software came after four (4) months of requisition. The system was received but could not immediately be put to use since the respondent had not yet fully implemented and installed the support infrastructure due to lack of funds.
4. The new system was kept in the store on 31st January 2013 and was not installed as planned. In March 2014, it was then discovered that the Compact Disk was missing from the store although the user Licence was available.
5. At the end of 2013, the claimant recommended staff audit be conducted to establish if there were ghost workers in the system. A forensic audit was conducted by Deloitte and Touche Consulting Limited and it was established there were indeed ghost workers.
6. Four (4) managers of the company were suspended to pave way for investigations.
7. On 9th June 2014, an audit report was issued by the internal Auditor Mr. Lucas Otene on the ICT department. The report concluded that the ICT department did not install new infrastructure and technology in place was inadequate. That some of the software installed was not genuine and some was not placed in use though funds were expended on the same.
8. On 13th June 2014, the claimant responded to the said audit report and refuted the allegations levelled against him as head of ICT.
9. On 26th May 2014 and 25th June 2014, the claimant was issued with a show cause letter and suspension without pay and four charges were raised against him including that:
 - (a) He paid 400 casuals despite instructions to withhold their payment pending a vetting exercise.

(b) That claimant had allowed a stranger to access ICT functions.

(c) That he had spent Kshs. 1,059,660 on ICT system that could not be used.

(d) That he had failed to make weekly briefings and quarterly reports on the implementation progress of the company's ICT strategy to the Board of Directors.

10. The claimant was to respond within 72 hours. On 29th May 2014 and 28th June 2014, the claimant responded to the notices to show cause and denied the allegations against him.

11. On 18th November 2014, the claimant was called to appear before the Finance and Administration Committee of the board and was only interrogated on the issue of the exchange server to which he responded.

12. On 18th December 2014, the claimant received a letter of termination dated 24th November 2014, signed by the Managing Director Mr. S. Wasilwa. The claimant was not paid terminal benefits set out under paragraph 16 of the statement of claim.

13. The claimant appealed to the Board on 13th February 2015. The Appeal was not responded to by the respondent hence the suit. The claimant prays for the following reliefs:

(a) Arrear salary as set out under items 16(i) to (iv).

(b) Payment in lieu of leave days not taken.

(c) Salary underpayments.

(d) Unlawful deductions

(e) Maximum compensation for unlawful termination.

(f) Letter of service.

14. The claimant prays that the suit be granted as prayed.

Defence

15. The respondent filed a memorandum of response on 22nd January 2016. The respondent admits the particulars of employment of the claimant as head of ICT.

16. RW1 testified for the respondent that his name was Lucas Alwalo Otene and was head of internal Audit of the Respondent.

17. That RW1 carried out an internal audit and found out that a stranger worked in the ICT department with rights to all company information. That the claimant procured a server and software which was delivered but was not there. That the loss was not reported for over a year. RW1 made a report and wrote two memos on the issue. The stranger was one Jonathan Shihundu who had no job description and was said to be a student intern but was not an employee. Claimant regularized the situation when RW1 raised the issue by a letter dated 26th April 2014 requesting the Managing Director to take the student as an intern. That Human Resource department was not aware of the presence of Jonathan in ICT department. Masinde Muliro University wrote on 25th June 2014 requesting for the attachment of the student. That this is confirmation that the student was not attached. RW1 stated that the procurement of the server was fraudulent. RW1 stated that the student did not compromise data but was in the ICT department illegally.

18. RW1 stated that exchange server was procured on 10th August 2012 but had no components. RW1 stated that the server and software were never placed in the store as alleged by the claimant but were simply not delivered. That money was spent on the user licence and not the Compact Disk as such.

19. That the claimant had signed documents confirming receipt of the server and software but he did not report failure of delivery. That four (4) people signed the inspection report and were not charged for the loss of the system. That the supplier had agreed to replace the system free of charge sometimes in 2014 although supply was in 2013.

20. RW2 was Shadrack Nyongesa Masinde. He testified that he was employed by the respondent in 2002. That the claimant was employed head of ICT on 29th June 2012. That the claimant did not attend strategic plan meetings. That the claimant owned up and apologized.

21. That the claimant paid casuals without authority. That these were ghost workers. That the claimant owned up to this allegation and apologized also. That the claimant was suspended on 25th June 2014. The claimant also allowed a non-employee to access company data. RW2 also stated that the server procured by the claimant was never installed.

22. That the claimant responded to the show cause letters and attended a hearing on 18th November 2014. That the claimant participated in

the Finance and Administration Committee. That the issue had earlier been ventilated before the Audit Committee of the Board.

23. That the employment of the claimant was terminated on 21st November 2014. That the claimant appealed on 13th February 2015. That the appeal was dismissed on 14th April 2015. That the Appeal had no merits since no new issues were raised. That the claimant owed the company and his terminal benefits were used to offset the debt. That the claimant was paid in lieu of notice, salary for days worked and leave travelling allowance. That the claimant was charged in criminal case no. 1178 of 2017 at Milimani law court, where 32 counts of forgery of certificates are pending against him. That the claimant had a forged identify card at the work place. RW2 prayed that the suit be dismissed with costs.

Determination

24. The issues for determination are:

- (a) Whether the termination of employment of the claimant was for a valid reason and followed a fair procedure?
- (b) Whether the claimant is entitled to the reliefs sought?

Issue (a)

25. In terms of Section 47(5) of the Employment Act, an employee bears the burden of proving that the termination was wrongful whereas the employer bears the burden of justifying the grounds of termination.

26. Indeed *Section 43(1) and (2)* specifically mandates the employer to show that he/she had a valid reason to terminate the employment of the employee. Furthermore, *Section 45* deems any termination of employment or dismissal done without a valid reason and/or without following a fair procedure unlawful and unfair.

27. In the present case the respondent charged the claimant with misconduct set out in this judgment. The claimant was given opportunity to show cause why his employment should not be terminated for the alleged misconduct. The claimant responded twice to the notice to show cause and was called to a disciplinary hearing where he defended himself. The respondent was not satisfied with the explanation provided by the claimant and terminated the claimant's employment. The claimant appealed the decision to terminate his employment and the respondent considered the Appeal in the absence of the claimant and dismissed the same.

28. The court is satisfied that the respondent had justified grounds to terminate the employment of the claimant. Conversely, the claimant failed to discharge the onus placed on him under *Section 47(5)*, in that he did not demonstrate on a balance of probabilities that the termination of his employment was wrongful.

29. The court is satisfied that the respondent provided the claimant with a fair opportunity to defend himself prior to the termination. The respondent satisfied the requirements under *Section 41 and 45(1) and (2) of the Employment Act*.

30. The respondent paid the claimant in lieu of one month notice in terms of his contract of service and Section 36 of the Act.

31. The claim for unlawful and unfair termination therefore lacks merit and is dismissed.

Issue (b)

32. RW1 and RW2 did not adequately challenge reliefs sought by the claimant under paragraphs 16(1), (ii), (iv), (viii) and (ix).

33. The claimant by *viva voce* evidence ably proved that he was owed arrear salary for 9 days in November 2014 and 18 days in December 2014; Salary during six (6) months of suspension; salary underpayments by Kshs. 30,000 for 24 months and unlawful deductions in the sum of Kshs. 157,000. The respondent did not offer any tangible defence to these specific claims. The court finds the same to be merited and awards the claimant accordingly.

34. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- (a) Arrears salaries in terms of paragraphs 16(i) (ii) (iv), (v), (vi), (viii) and (ix) of the statement of claim in the sum of Kshs. 3,655,573.48.
- (b) Interest at court rates from date of filing suit till payment in full.
- (c) Costs of the suit.

Judgment Dated, Signed and delivered this 4th day of November, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Rakoro for Claimant

Mr. Malebe for Respondent.

Chrispo – Court Clerk