



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1638 OF 2015

AUGUSTUS MULWA MALUKI.....CLAIMANT

-VERSUS-

PG BISON LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The claimant filed a memorandum of claim on 18.09.2015 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration the summary dismissal amounted to unlawful and unfair dismissal.
- b) The respondent to pay the claimant Kshs.432, 000.00 being:
- c) Interest, costs plus interest on costs.

The claimant's case is that he was employed by the respondent as a messenger on 01.12.2010. In October 2014 certain cheques were reported to have been lost from the office of the respondent's cashier. The claimant was suspended on 06.11.2014 pending criminal investigations into the matter. He was on half pay during the suspension. On 17.01.2015 the respondent's Administrator one Felistus Wambui summoned the claimant on telephone to go to the office to pick the letter of summary dismissal. He complied. The letter of summary dismissal was dated 07.01.2015. It stated that the claimant and the cashier Joshua Malombe had access to the company cheques (as was shown by the investigations) and second to the cashier he was a primary custodian of the cheque. The letter further stated that the C.I.D had launched investigations into the claimant's conduct in the matter. The letter referred to the previous suspension where the claimant had converted the respondent's cash to personal use and then was absent from duty to avoid detection. Further, in the present case the claimant had absented himself making it difficult to be contacted. As a result, the suspension had been converted to summary dismissal effective 01.01.2015. The suspension letter was dated 06.11.2014.

The memorandum of response was filed on 11.12.2015 through M/S Macharia-Mwangi & Njeru Advocates. The respondent pleaded that the claimant was employed on 01.12.2011 and not on 01.12.2010 and it was in the capacity of a Driver/ Bank Agent. The investigation officers preferred charges against the claimant and dismissal was on the ground of breaching the contract of service.

The evidence is clear. The claimant was suspended and the suspension graduated to a summary dismissal. It is clear that the respondent invented a disciplinary process alien to section 41 of the Employment Act, 2007 that prescribes a notice then a hearing. Without such notice and a hearing it is difficult to show that the respondent had a valid reason to dismiss the claimant and as per section 43 of the Act. The Court finds that the termination was unfair in procedure and merits. The alleged C.I.D report implicating the claimant was not exhibited and in any event the letter of summary dismissal confirmed that the C.I.D investigations in the matter were ongoing. The Court finds that by the respondent's own evidence the investigations had not concluded, they were on-going and the Court finds that as at termination the respondent had no valid reason to terminate the claimant's employment. It was unfair.

The claimant had served for over 3 years and he desired to continue in employment. However the claimant contributed to his dismissal because he confirmed that he had previous disciplinary cases. In one such case he was arrested and detained at the police station for 5 days. In 2013 he was suspended. In such circumstances the Court will award the claimant 5 months' salaries in compensation for the unfair termination and under section 49 of the Act **Kshs.120, 000.00** at Kshs.24, 000.00 per month.

The claimant is further awarded as follows.

He is awarded **Kshs.24, 000.00** pay in lieu of notice for the abrupt termination. He is also awarded **Kshs.24, 000.00** half salaries withheld for

2 months when he was on suspension – and the Court finds that even if parties agreed to the withholding of half salaries, the respondent is liable to the release in view of the finding that the termination was subsequently unfair.

The parties were in agreement in the submissions that the due leave days were 26 and is awarded **Kshs.36,000.00** as submitted for the respondent.

The claimant testified that his last monthly salary was Kshs.24, 000.00. The respondent says the salary was at Kshs.12, 000.00 per exhibited contract dated 01.12.2011 – but which shows a starting salary of Kshs. 17, 050.00. The contract says the salary would be reviewed annually in June. The Court returns that there is no reason to doubt the claimant's evidence and the respondent's contradictory evidence is discarded. The monthly salary as at termination was Kshs.24, 000.00.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the summary dismissal was unfair.
- b) The respondent to pay the claimant **Kshs.204,000.00** by 15.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 1st November, 2019.

BYRAM ONGAYA

JUDGE