

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 10 of 2017

(Formerly Nyeri ELRC Cause No. 396 of 2017)

NEWTON MURIITHI MURANGIRI.....CLAIMANT

VERSUS

PJ DAVE FLOWERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent his erstwhile employer seeking to recover for the alleged unlawful dismissal from employment. He averred that he was employed in 2013 by the Respondent in the construction department where he rose through the ranks to the position of a clerk. The Claimant averred that his services were terminated on 12th January 2017 without any warning or notice. He averred the termination was contrary to all employment norms and without regard to his employment rights, due process and without according him audience to hear and be informed of the reason behind the drastic action. He averred that in all his service he had no disciplinary issues and that his dismissal without any warning being issued was enough proof that he had no pending work related dispute with the Respondent. He thus sought general damages for unlawful dismissal, payment of gratuity and terminal dues as well as costs of the suit and interest.

2. The Respondent in the defence filed averred that the Claimant was confirmed as a permanent employee in 2014 and was summarily dismissed on 12th January 2017 after committing gross misconduct in December 2016. The Respondent averred that the Claimant was issued with a show cause letter and a hearing conducted pursuant to which there was separation. The Respondent averred that there was no irregularity in the separation as the law allows for summary dismissal where the employee commits gross misconduct. The Respondent averred that the Claimant worked as a Human Resource clerk and had access to the Respondent's payroll and his role was to check and confirm the payroll. The Respondent averred that in addition to basic salaries, the Respondent pays its general workers a daily travel allowance while the clerks, supervisors, mechanics and security guards are paid a fixed travel allowance. The Respondent averred that an audit of the December payroll was done and it revealed that the Claimant had manipulated the payroll and paid himself both the daily travel allowance and the fixed travel allowance when he was only entitled to the fixed travel allowance. The Respondent averred that it wrote an email to the Claimant seeking to ascertain whether the Claimant knew he was not entitled to both travel allowances and in his reply clearly indicated that he knew the difference. The Respondent averred that the Claimant was thus aware he was only entitled to the fixed travel allowance. The Respondent averred that it also established that the Claimant had usurped the role of the company's financial controller by communicating with Equity Bank Isiolo Branch and sending introduction letters to the bank which allowed some employees to access loans. The Respondent averred that some of the details in the introduction letters were falsified to the detriment of the Respondent. The Respondent averred that the Claimant was called upon to explain the irregularities through a notice to show cause and a hearing conducted where the Claimant admitted to communicating with Equity Bank and deleting the emails which was an attempt to cover up the dealings. The Respondent averred that the Claimant was unable to prove that the overpayment recorded in the December 2016 payroll was erroneous as he did not report any irregularity to management despite counterchecking the payroll and signing it. The Respondent averred that it resolved to summarily dismiss the Claimant on that account and paid him his terminal dues comprising of his gross pay up to 12th January 2017 less taxes, NHIF and NSSF dues as well as deduction of salary advance. The Respondent averred that the Claimant is not entitled to gratuity as he was summarily dismissed from employment in terms of Section 44(4)(g) of the Employment Act. The Respondent thus urged the dismissal of the suit with costs.

3. The Claimant and the Respondent's witness Judy Sambay testified. The Claimant reiterated his plea to court and stated the dismissal was without basis and without a hearing. The Respondent's witness testified that the Claimant's services were terminated after he was found culpable of gross misconduct. She stated the Claimant was heard and subsequently dismissed. She conceded the minutes were undated but stated that the Claimant did not deny the email advising of the misconduct and his invitation to attend the hearing.

4. The parties thereafter filed submissions. The Claimant submitted that the letter issued on 11th January 2017 was of a general nature and that the dismissal on 12th January 2017 was abrupt. He submitted that giving him a letter on 11th January 2017 and requiring a response by 12th January 2017 was unfair and unreasonable. The Claimant submitted that the Respondent in the further list of documents produced attached a letter the Claimant authored on 14th January 2017 apologising for his actions. The Claimant submitted that the letter was written after the termination and that it was written out of frustration seeking reinstatement. The Claimant submitted that if he had acted in contravention of Section 44(4)(g) of the Employment Act the Respondent had not explained why it had not taken any criminal action against the Claimant. The Claimant submitted that the allegations of criminal misconduct were just a ploy to end his services and deny him his terminal benefits. The Claimant submitted that the termination was unlawful and illegal and that he was entitled to the remedies sought in the claim.

5. The Respondent submitted that the Claimant was dismissed for just cause as he was guilty of gross misconduct in the double payment and the improper communication with Equity Bank. It submitted that under Section 44(4)(g) an employee who commits or on reasonable and sufficient grounds is suspected of committing a criminal offence against or to the substantial detriment of his employer can be summarily

dismissed. The Respondent submitted that the actions of the Claimant undermined the mutual trust and through his apology letter dated 14th January 2017 admitted the illegal activities and asked for a pardon. The Respondent submitted that this attested to the fact that the series of unlawful conduct were not accidental. The Respondent admitted that the Claimant was a permanent employee and submitted that it did not mean that the contract could not be terminated. It cited the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR** and **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR** and submitted that employment remedies must be proportionate to the economic injuries suffered by the employee. The Respondent submitted that the dismissal was lawful and action taken against the Claimant procedural, reasonable and fair. It urged the dismissal of the suit with costs.

6. The Claimant's suit was not proved on a balance of probabilities. Despite asserting that he was not heard the evidence adduced pointed to a hearing being conducted pursuant to a notice to show cause. The Claimant never admitted to a notice being issued and pleaded that he was not given notice nor heard. That was blatant lie. He additionally confessed to his crimes after the dismissal and cannot now turn around and state the letter he authored apologizing for his misdeeds was out of frustration and a desire to be reinstated. He is undeserving of the orders he seeks as he was even paid his salary for January 2017 less his statutory obligations. He ought not have filed suit as he had no cause of action. The suit is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 4th day of December 2019

Nzioki wa Makau

JUDGE