



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2254 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 5<sup>th</sup> February 2018)**

**CHRISPO ZACHARIAH OGUGO.....CLAIMANT**

**VERSUS**

**AIRTEL NETWORKS KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed this Claim on 8<sup>th</sup> November 2012 through the firm of M/s Mucheru-Oyatta and Associates Advocates.
2. The Claimant contends that he was employed on 27<sup>th</sup> March 2006 to 6<sup>th</sup> July 2011 by the Respondents when he was unlawfully dismissed by the Respondents from employment.
3. The Claimant avers that on 7<sup>th</sup> July 2011, he was on duty and went to deliver his laptop under instructions from one Lucille Aveva. That, there he met the Respondent's security officer, one Nelson Mbatha and the Branch Manager, Juliet Muthoni. After handing over his laptop and signing a handover note, the said Nelson Mbatha handed to the Claimant a photocopy of a dismissal letter dated 6<sup>th</sup> June 2011 authored by the Respondent's Human Resources Director, Irene Kitinya.
4. That the said dismissal letter claimed that the Claimant was involved in fraudulent activities of postpaid accounts in Mombasa giving that as the reason for dismissal. Attached to the said dismissal letter was a certificate of service dated 6<sup>th</sup> July 2011.
5. The Claimant avers that prior to the delivery of the photocopy of the dismissal letter dated 6<sup>th</sup> June 2011 he had been on suspension from duty from 16<sup>th</sup> June 2011.
6. The Claimant contends that upon receiving the dismissal letter dated 6<sup>th</sup> June 2011, it became apparent to the Claimant that the decision to dismiss him from employment was made even before his suspension from duty.
7. He avers that it was not until 7<sup>th</sup> July 2011, that he was arrested by the police in relation to charges made by the Respondent yet the statement by the Respondent's Fraud and Investigations Team Leader Jesse Kiigu Mwangi, which commenced investigations was recorded on 15<sup>th</sup> June 2011. He therefore contends that the decision to dismiss him was made by the Respondents when they had no grounds to justify the allegations made against him in the dismissal letter of 6<sup>th</sup> June 2011.

8. He contends that two policemen who were present when the Claimant went to hand over his laptop arrested him on 7<sup>th</sup> July 2011. He was placed in police custody for the day during which time he recorded a statement. He was thereafter released on cash bail of 20,000/= and issued with a receipt indicating a charge of stealing by servant and requiring him to appear in Court on 11<sup>th</sup> July 2011 at 8 am.

9. That the case was never forwarded to the Courts and remained pending under investigation until 19<sup>th</sup> March 2012 when the investigations were closed. The closure of the investigations was confirmed by the DCIO Mombasa by a letter dated 26<sup>th</sup> March 2012 addressed to the Claimant's Advocates on record in response to their letter dated 22<sup>nd</sup> February 2012.

10. The Claimant also avers that prior to dismissing the Claimant from employment the Respondent was experiencing technical problems with its system which was erroneously loading unrequested airtime to clients directly from the system.

11. The claimant has submitted that he was employed by the Respondent on 27<sup>th</sup> March 2006 vide a contract reference number CT/SL/1229/SM.dk. At the time, the Respondent was operating under the name Celtel Kenya Limited and he was employed in the position of Corporate Sales Executive under Job Group 10 (Sales Professional 1). His gross salary was 41,747/=. He was also entitled to 21 working days leave for each year and was a member of the Celtel Staff Retirement Benefits Scheme. He received a promotion on 1<sup>st</sup> April 2007 and his position changed to Account Manager Grade 9. His gross salary rose to 80,000/=. He was also entitled to a medical cover for self and immediate family and group personal accident insurance cover for himself.

12. By a letter dated 7<sup>th</sup> May 2010, his salary was reviewed and increased to 111,789/= with effect 1<sup>st</sup> January 2010. He was also entitled to annual bonuses and commissions and the monthly commission was 30,000/=. He avers that as at March 2011, he had earned a bonus of 500,000/= which the Respondent never paid.

13. It is his contention that he was suspended on 10<sup>th</sup> June 2011 and never received any salary. That later his wife had a baby and he had to pay of the bill himself of Kshs.98,043 and this was at the time his medical benefit had been suspended on account of the suspension.

14. The claimant avers that he was treated in a cruel and degrading manner and prays for prayers enumerated under paragraph 21 and 22 of the claim.

15. In his oral evidence, the Claimant stated he was never given any opportunity to respond to the issues causing his suspension. He was just ordered to go home pending investigations. They just informed him that they were investigating some fraud which investigations cleared him of any wrongdoing.

16. He avers that he had send a message to one Bruce, (CW1) stating "send me their nos". That he was looking for sales in Mombasa and was working with Airtel distributors and looking for sales agents. He pointed the Court to page 14 of his documents which show the method of calculating bonuses and based on the formula, his bonus was 500,000/=.

17. Page 12 is an email referring to a bonus which had been approved. He stated that the email of 8<sup>th</sup> May 2013 from Elizabeth Njama- Section Manager, talks of the bonuses but that she is not the one to declare bonuses. He however states that one Pius indicated that bonuses were going to be paid and this is at page 13 of the Respondents' documents.

18. The Claimant called 2 witnesses. CW1 Bruce told Court that he knew the Claimant at Urban Police Station in Mombasa after he was summoned to record a statement when Airtel had accused him of fraud involving 19 million. The Claimant had sent him a text message – "send me their numbers" and this was because CW1 works for a promotion company and the Claimant wanted him to do some work for him so he sent the Claimant the numbers of Ndombi and Sabana who were freelance guys.

19. He states that police confiscated his phone for 8 months to do investigations and later released it to him after they found nothing to link him with the fraud. In cross-examination, CW1 says he had worked with Respondent before hiring field officers.

20. CW2 P/C Osuri stated that he is a police officer based at Karen police station and before he was at Mombasa DCIO's office. He stated that he investigated the case of fraud involving Airtel Network (K) Limited and made a report (Page 59 of Claimant's documents). His overall finding was that the Claimant was not involved in any fraud. The matter is no longer under investigation.

21. The Respondents on their part filed a Reply to the claim and a counter claim on 23<sup>rd</sup> January 2013 through the firm of Ojiambo & Company Advocates.

22. The Respondents agree that the Claimant was their employee having been employed as an Account Manager in their Sales Division based in Mombasa. That in his capacity he owed the Respondent fiduciary duties including a duty to act in good faith and in the Respondent's best interest.

23. They aver that his duties included the following:-

***a) To continually monitor his own performance against call plans and targets and to take remedial action where required.***

***b) Maintain sales records and prepare sales reports as required.***

***c) Monitor competitor activity within the region and report with recommendations for action.***

***d) Monitor account balances in order to bring down levels of outstanding debt.***

***e) Highlight problem accounts for action by credit control.***

24. The Respondents aver that they summarily dismissed the Claimant on 6<sup>th</sup> July 2011 upon genuine belief that the Claimant had been engaged in fraud leading to the loss of Respondent's airtime worth 19,969,348.90.

25. They contend that the Claimant had previously been suspended on 10<sup>th</sup> June 2011 to facilitate investigations. They annexed R-4 the incident report detailing the fraud which the Claimant was involved in.

26. The Respondents also aver that the Claimant was suspended on 10<sup>th</sup> June 2011 and later summarily dismissed on 6<sup>th</sup> July 2011. That though the summary dismissal letter is dated 6<sup>th</sup> June 2011, that this was a typographical error and this is why the letter indicated that he would be paid upto 6<sup>th</sup> July 2011.

27. The Respondents aver that they had valid reasons to dismiss the Claimant as there were investigations conducted whose results informed the decision to summarily dismiss the Claimant on 6<sup>th</sup> July 2011. Appendix R.5 is the report in question.

28. The Respondents contend that the Claimant was in communication with the fraudster who acted the 200 Z Control Service lines and who loaded them with airtime worth Kshs.19,969,350/=.

29. On bonus and commission, the Respondents deny that the Claimant is entitled to any. They also deny that the Claimant was entitled to other benefits other than salary when he was on suspension.

30. The Respondents want the claim dismissed with costs.

31. They have however filed a counter claim where they aver that the Claimant was negligent in the performance of his duties and the negligence led to fraud being committed against the Respondent.

32. They aver that on 23<sup>rd</sup> May 2011, the Claimant conspired with one Heradion Getuno in breach of trust placed on him and together created false mobile user accounts in the Respondent's mobile phone network and using these lines, fraudulently misrepresented them as genuine accounts belonging to genuine customers of the Respondent thereby withdrawing from the Respondent huge amounts of mobile phone airtime without paying for the same.

33. That the furtherance of the fraud, the Claimant on diverse dates between 25<sup>th</sup> May 2011 and 9<sup>th</sup> June 2011 with others, falsely created a total of 201 user accounts which were activated with initial start-up capital of Kshs.99,350/= each under the false names of JESSE COMPANY and ST. ROYAL'S HOTEL totaling to Kshs.19,969,348.90/= (Annex R-9).

34. That upon receipt by Bruce Ashikoye of airtime worth Kshs.19,969,348.90 in advance on 9<sup>th</sup> June 2011 and knowing that the advances had been made to him in breach of the Claimant's fiduciary duties to the Respondent, the said Ashikoye transferred the airtime to other prepaid use accounts which were used to make high cost international calls without paying for it.

35. The Respondent avers that they managed to recover airtime worth 18,997,862.90 but lost 971,485.98, which the Claimant, Heradion Getuno and Bruce Ashikoye had consumed and which amount remains unrecovered todate.

36. The counter claim against the Claimant is for recovery of the 981,475.98 obtained by fraud plus costs of the suit and interest.

37. The parties filed their submissions. The Claimant submits that he was condemned unheard. They cited **Wilson Kipkurui Yegon vs Total Touch Express Limited and 2 Others (2017) eKLR and Mbaki and Others vs Macharia and Another (2005) 2 EA 206 at page 210** where Court of Appeal reiterates the right to be heard if the action of the Respondent would prejudice the Claimant.

38. In damages that they seek, the Claimants cited **HONDA CANADA INC vs. KEAYS (2008) 2 R.C.S** where the Supreme Court of Canada stated as follows:-

***“In the employment law context, damages resulting from the manner of dismissal will be available if they result from the circumstances described in Wallace, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”. These damages should be awarded through an award that reflects actual damages rather than by extending the notice period..... Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own”.***

39. They have submitted that the dismissal was unfair and unlawful and that the Respondent engaged in behavior which was unfair and in bad faith by being untruthful, misleading and unduly insulting by sending an email to the Claimant's colleagues that he had been involved in fraud.

40. On the counter claim, the Claimant submit that there is no evidence to link the Claimant with the said loss of 981,485.98 and so the same should be dismissed with costs. They want Court to award the Claimant as prayed.

41. The Respondents on their part submitted that the dismissal was fair and justified as the Claimant engaged in fraudulent activities. They have denied treating the Claimant in an inhuman and cruel manner and submit that he is not entitled to punitive damages, which they argue in the Honda case are “restricted to advertent and wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own”.

42. They also argue that it has not been proved that the summary dismissal was high handed, oppressive or actuated by interior motives as to meet the requirements in the **HM Hand Registry case**.

43. In respect of the email send to the Respondent's staff about the Claimant, the Respondents have stated through their witness that it was standard procedure to notify the other staff to avoid dealing with an ex-employee thinking that he/she is still part of the staff. They also submit that there is nothing in the email that amounts to cruel and degrading treatment.

44. They submit that the claimant is not entitled to the prayers sought save that he is entitled to payment of unpaid leave days subject to reconciliation of the actual leave days. They want other prayers dismissed. They want the counter claim allowed.

45. I have examined evidence of the parties plus the submissions made therein. I sent as follows as the issues for determination:-

**1. Whether there were valid reasons to warrant dismissal of the Claimant**

**2. Whether the claimant was dismissed following due process.**

**3. Whether the acts/omissions of the Respondent were in any way actuated by malice or unfairness.**

**4. Whether the claimant is entitled to prayers sought.**

**5. Whether the counterclaim is proved.**

46. On the 1<sup>st</sup> issue, the claimant has stated that he was summarily dismissed vide a letter dated 6<sup>th</sup> June 2011 which states as follows:-

***“We refer to our letter of 10<sup>th</sup> June 2011 regarding suspension from duty following investigations into fraudulent activities of postpaid accounts in Mombasa, we have sufficient evidence, reasons to believe that you were involved and we are therefore proceeding to summarily dismiss you from the employment of Airtel Networks Kenya Limited .....”.***

47. From this letter, the reasons for the dismissal was the Claimant's engagement in fraudulent activities of postpaid accounts in Mombasa. The Claimant has stated that though his dismissal letter was dated 6<sup>th</sup> June 2011, he was given the letter on 6<sup>th</sup> July 2011 and that this points to the fact that the decision to dismiss him was made in June 2011.

48. He also avers that at the time there was no valid reasons to dismiss him because investigations commenced in July 2011. He stated that he was arrested by police on 7<sup>th</sup> July 2011 in relation to charges made by the Respondent. That prior to this fate the Respondents Fraud and Investigation Team Leader one Jesse Kiigu had commenced investigations against him and recorded a statement on 15<sup>th</sup> June 2011.

49. The Claimant has also submitted that though police investigated him they found no evidence to link him with the alleged fraud and never charged him but closed their file.

50. On the basis of these findings, I refer to this Court's decision *Wilson Kipkurui Yegon vs Total Touch Express Limited (2007) eKLR* where this Court opined that:

***“it is not enough for an employer to just state that a certain event had been committed by an employee and proceed to terminate him.”***

51. It is imperative that there is evidence that indeed what is alleged happened.

52. The investigations by the Respondent linked the fraudulent activities to several people who were (NjeriD – Diana Njeri) a former employee and Simon Andiki and George Ochieng whose credentials were used to load the illegal airtime.

53. Another was also Heradion Getuno who also denied activating these accounts. The only link of the Claimant to the fraud was that he received an SMS from a customer called Bruce who had asked Claimant “to send me the number”.

54. This Bruce was called as a witness by the Claimant and he stated that he sent the Claimant a message as the Claimant wanted him to do some promotions for him and he sent him numbers of Isaac Ndombi and Raymond Sabana who are freelance guys. He denied any involvement in the fraud and states that police investigated the case and found him not culpable.

55. Section 43 of the Employment Act 2007 states as follows:-

**1) “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.**

56. The import of this provision is that there must be valid, tangible reasons before a dismissal. These reasons must be proved. From the evidence of the Respondents, they just state that the Claimant was involved in the fraud. There is however no tangible evidence to connect the Claimant to the fraud. He was also exonerated by the police for any alleged fraud.

57. In view of this, it is my finding that there was no valid reason to warrant summary dismissal of the Claimant.

58. On the 2<sup>nd</sup> issue, the Respondent have indicated that they summary dismissed the Claimant.

59. Section 44(1) of the Employment Act states as follows:-

**“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-**

**(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**

**(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;**

**(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**

**(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**

**(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;**

**(f) in the lawful exercise of any power of arrest given by or under any written law, an**

***employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or***

***(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.***

60. This law provides instances when an employee can be summarily dismissed.

61. However, it is envisaged that an employee be accorded minimum opportunity to state his case. This is a common principle of natural justice that a person should not be condemned unheard. This was the holding in **Mbaki and Others vs Macharia & Another (2005) 2 EA 206.**

62. The Claimant was never accorded an opportunity to state his case after the investigation by the Respondent and for this reason, I find that no due process was followed before his dismissal.

63. Having found that the Claimant was dismissed without valid reasons and without following due process. I find the dismissal unfair and unjustified.

64. Section 45(2) of Employment Act 2007 on other hand states as follows:-

***(2) A termination of employment by an employer is unfair if the employer fails to prove:***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure.***

65. In view of the above reasons, it follows that issue No. 4 which concerns the Counter claim is also not proved. I dismiss the counter-claim accordingly.

66. Having made my findings above, I find that the decision to dismiss the Claimant was based on wrong premises. I would not term the premise as malicious because the Respondent believed that the Claimant was involved in the fraud when in actual sense he was not.

67. On remedies available, I find that the claimant's dismissal was unfair and unjustified. I will convert it to a normal termination and award the Claimant as follows:

***1. 2 months salary in lieu of notice = 111,789 x 2 = 223,578/=.***

***2. Unpaid salary for July (7 days) = 7/30 x 111,789=26,084.1/=.***

***3. Unpaid leave days = 19,060.70/=.***

***4. Bonus earned as at March 2011 and as declared = 500,000/=.***

***5. In view of the wrongful termination I also award Claimant 12 months salary as compensation = 12 x 111,789=1,341,468/=.***

**Total = 2,287,190/=**

***6. The claimant is not entitled to service pay because he was a member of the Airtel Staff Pensions Benefits Scheme.***

***7. He is also not entitled to refund of the medical costs incurred on account of treatment for his wife as he had already been dismissed by the time the bill was incurred.***

***8. The Respondent will pay costs of this suit plus interest with effect from the date of this judgement.***

Dated and delivered in open Court this 5<sup>th</sup> day of February, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Muriithi holding brief for Gathu for the Claimant – Present

No appearance for the Respondent – Absent