



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 360 OF 2016

FAITH GACHERI.....CLAIMANT

VERSUS

GOLD KEY CASINO LIMITED.....RESPONDENT

J U D G M E N T

Introduction

1. The Claimant brought this suit on 20.5.2016 alleging that her employment was unfairly terminated by the Respondent on 31.12.2015. By this suit, she seeks to recover Kshs.406,800 as compensation for unfair termination of her employment. It is her case that there was no valid reason to warrant the termination and procedure followed before the termination was not fair. The Respondent has admitted having employed the Claimant but denied the alleged unfair termination of the Claimant services. She averred that the termination was fair because the Claimant was suspected to have stolen Kshs 500,000 from the manager's office on 14.12.2015 and given a chance to defend herself before her summary dismissal on 31.12.2015. She therefore prayed for the suit to be dismissed with costs.

2. The suit was heard on 28.9.2017 when the Claimant testified as Cw1 and the Respondent called her Casino manager Mr. Christopher Mathigo as Rw1. Thereafter the parties filed written submission which I have carefully considered.

Claimant's Case

3. The Claimant stated that she was employed by the Respondent as a Secretary on 10.9.2012 and later she was made the Company's banking Agent. She was earning Kshs.33,900 per month and she worked until 15.12.2015 when she was accused of theft by the Rw1 who alleged that she had stolen money from the safe. She denied the alleged offence and she was suspended and her office keys repossessed. On reaching home she demanded that the manager reports the offence to the police or she would do it herself but the manager told her to report back to the office the following day at 3 PM because after reviewing the CCTV camera footages he never found her to be the thief but he was suspecting the other 4 managers.

4. On 17.12.2015, Rw1 alleged that he was again suspecting her for the theft and showed her CCTV footages her entering the first door and the second door of the premises and stopped the show and demanded that she explained what happened on 14.12.2015 after which she arrested on the same day for the alleged theft. She however was not charged in court after the Respondent withdrew the case and told the police that she did not have evidence. On 18.12.2015 she was suspended for 2 weeks but before the period was over, she was called together with the other 4 managers and taken through fresh investigation using a Polygram Machine. Thereafter he was terminated vide the letter dated 31.12.2015 for the same allegation of theft.

5. She contended that the termination was unfair because the alleged theft was false and there was no

evidence to prove that she stole any money from the Respondent. She therefore prayed for compensation, certificate of service plus costs and interest. She however admitted that she was paid salary in lieu of notice.

6. On cross examination she admitted that when she reported to work she went straight to the cash office while carrying her handbag to check the banking report but it was missing. She then proceeded to the manager's office and opened the safe and found the usual cash bag containing money for banking. She contended that it was his routine duty to check the cash bag at the safe very morning as the Banking Agent. She further explained that after the Managers office she went to the Washroom and then proceeded to her desk. She denied that it was an offence to carry her handbag to the manager's office and contended that it was not her first time to carry it to that office. She clarified that the money allegedly stolen was not the one scheduled for banking on 14.12.2015.

Defence Case

7. Rw1 is the respondent's Casino Manager. He confirmed that the Claimant was employed by the Respondent as a Secretary and also Banking Agent. He explained that on 14.12.2015 he discovered that Kshs.500,000 which he had kept in the safe at his office was missing. He enquired from the employees and also checked CCTV footage which showed the Claimant entering the office with a bag. He summoned her to a meeting on 15.12.2015 and informed about the allegations and the investigations. He explained that on 17.12.2015 he personally showed her the CCTV footage and thereafter suspended her by the letter dated 17.12.2015. He further stated that the Claimant was arrested by the police the same day for questioning on the incidence before being dismissed summarily on 31.12.2015.

8. Rw1 contended that the dismissal of the Claimant was justified and the Respondent was entitled to dismiss because she had lost confidence in her after considering the circumstances surrounding the loss of the money. He contended that the casino industry deals with money and the respondent could not continue employing the Claimant after suspecting the Claimant of dishonesty. He contended that the original copy of the banking report prepared by the night shift managers is left at the Claimant's desk and as such the Claimant was not entitled to enter the managers' office to look for the Banking report book before passing through her desk to check the original banking report. He maintained that she was only supposed to go to the safe after confirming from the original banking report that the money for banking was less than Kshs.500,000 for purposes of planning her day. He explained that under the company's policy if the sum was above Kshs.500,000 she was supposed to call G4S firm to do the banking.

9. On cross examination, Rw1 confirmed that there was no camera in the manager's office where the safe is kept. He further confirmed that initially the alleged stolen cash was kshs.750000 but after an audit it turned out that it was Kshs. 500,000. He admitted that he wrote the letter dated 4.1.2016 to the police telling them to postpone the hearing because the respondent was still gathering evidence. He further admitted that he also wrote an undated letter to the claimant telling her that they dropping the criminal case against her not due to lack of evidence but because the money had already been lost. He confirmed that all the other 3 managers knew that the money was in the safe but maintained that it is the claimant who stole the money because at first she denied ever opening the safe until she was shown the CCTV footages. He however admitted that the claimant did not deny opening the safe in writing.

Analysis and determination

10. There is no dispute that the Claimant was employed by the Respondent as a Secretary/ Bank Agent until 31.12.2015 when she was summarily dismissed. The issues for determination are:

- (a) Whether the claimant's employment contract was unfairly terminated; and
- (b) Whether she is entitled to the reliefs sought.

Unfair termination.

11. There is no dispute that the termination of the Claimant's employment was done by the respondent. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair if he fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure.

Reason for the termination

12. In this case, the Claimant was terminated for being suspected of theft of Kshs.500,000 from the manager's safe on 14.12.2015. The Claimant admitted that she entered the manager's office on the said day carrying her handbag and even opened the safe to confirm, from the Banking Report, the amount of money available for banking. She contended that what she did a routine exercise in the course of her duty and it was meant to help her plan her day. She denied that carrying her handbag to the manager's office was forbidden.

13. Rw1 has however contended that he suspected and believed that it is the Claimant who stole the money because she breached company policy and procedures by going to the manager's office and opening the safe instead of getting the information from the original Banking report which was supposed to have been left at her desk by the night shift manager. He explained that the Banking book is filled in duplicates by the night shift manager and the original copy left at the Claimant's desk and maintained that she ought to have first gone to her desk but on the material day she went straight to the cash office, then to the manager's office to open the safe before going to her desk. The Claimant has admitted that sequence of her movement on that day but stated that what she did is what she had done for the three years of her service.

14. After careful consideration of the evidence and submissions presented to the court I find that the Respondent has failed to prove vital component of the offence allegedly committed by the Claimant, namely the presence of the Kshs.500,000 in the safe on the material date and time. Rw1 confirmed that initially the stolen figure was erroneously stated as Kshs.750,000 but after the audit it was confirmed to be Kshs.500,000. The said audit report was however not produced as an exhibit. Rw1 confirmed that the safe was accessible by 3 other managers who are supposed to have opened the safe to keep the night collection before signing off at 5.30 in the morning. They may as well be the ones who stole the money because there was no Camera in the manager's office.

15. Rw1 alleged that Casino business is money industry which requires honesty on the part of the employee and once that honesty is lost the employer cannot continue to employ the suspected employee. The foregoing statement is valid but that does not give the employer the right to dismiss an employee for theft of money, which has not been proved to exist. In my view, any suspicion that the employee is being dishonest must be based on reasonable and sufficient grounds. In the present case Rw1 never showed any reasonable and sufficient grounds that made him believe that it is the Claimant and not the night managers who stole the money before she went to open the safe that morning.

16. Having found herein above that the Respondent did not prove that the alleged Kshs.500,000 was in the safe when the Claimant opened it on the material date, I proceed to find that she had no basis to accuse the Claimant of dishonesty or theft. Consequently I hold that she has fallen short of proving the reason for dismissing the Claimant and that has rendered the dismissal unfair within the meaning of section 45 of the Act, Section 43 of the Act provides that:

“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”

Procedure followed

17. As regards the procedure followed before the dismissal, the Claimant contended that she was not accorded a fair hearing. All that was done was interrogations by the Rw1 and by investigator using Polygram machine during the investigations all which did not fit within fair procedure as

contemplated by section 41 of the Act. Under the said Section, before the employer terminated the services of his employee on ground of misconduct, physical incapacity or poor performance, the employer must first explain the reason for the intended termination to the employee in a language he understands and in the presence of fellow employee or shop floor union representative of his choice, and thereafter invite the employee and his chosen companion to air their defence for consideration before the termination is decided.

Reliefs

18. Under section 49 of the Act, I award to him, Ksh.339,000 being 10 months' salary as compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the Claimant served the Respondent for over 3 years and that she did not contribute to the dismissal through any proven misconduct.

19. The claim for certificate of service is spent because the claimant was issued with the same on 17.2.2016.

Disposition

20. For the reasons that the summary dismissal of the Claimant was unfair, I enter judgment for her in the sum of Kshs.339,000 plus costs and interest from the date hereof. The said award will be subjected to statutory deductions.

Dated and signed at Nairobi this 19th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

LINNET NDOLO

JUDGE