



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 847 OF 2011

(Before Hon. Justice Mathews N. Nduma)

PETER NGAU NZIOKA.....CLAIMANT

VERSUS

MUTHAIGA COUNTRY CLUB.....RESPONDENT

J U D G M E N T

1. The Claimant seeks the following reliefs –

- a. A declaration do issue that the Respondent's termination of the Claimant's Employment was wrongful, unlawful and which act is unconscionable in law;
- b. Payment *in lieu* of Notice Kshs.269,500.00 x 3 = 808,500.00.
- c. Damages for wrongful and unlawful dismissal;
- d. Payment in respect of 15 years of service at the rate of Kshs.269,500/- per month Kshs.4,042,500/=
- e. Payment of provident fund contribution being 10% of monthly salary for the Notice period ... Kshs.80,850/=
- f. Costs of this suit.

2. The Claimant was employed by the Respondent as a Chief Accountant on 15th August, 1993. He worked continuously until 5th June 2008, when he was summarily dismissed from employment by a letter of the same date.

3. The letter did not provide any reason for the summary dismissal. In terms of the letter, the Claimant was offered 5 days salary for June 2008, 48 ½ days' pay in lieu of leave and leave travel allowance for the year 2007/2008.

4. The cheque for the terminal benefits was attached to the letter.

5. Prior, by a letter dated 5th May, 2008 the Claimant was sent on a two weeks paid leave to allow investigations into a fraud case. The letter did not elaborate the nature of fraud. By a letter dated 15th May, 2008 the paid leave was extended by a further one week until 24th May, 2008. By a letter dated 24th May, 2008 the leave was further extended to 31st May, 2008. This was then followed by the letter of summary dismissal.

6. From the testimony of the Claimant and RW1 Lilian Wambui Njongoro, the Human Resource Manager, it is clear that the Claimant was not given any show cause letter or any opportunity to participate in the alleged investigations, or in any disciplinary hearing before he was summarily dismissed.

7. There is no record of the alleged investigations produced before court.

8. The Claimant testified that at the time the alleged fraud took place, the Respondent had put a corporate succession plan in place and in terms thereof, a Deputy Chief Accountant was employed and placed under the Claimant to undergo induction.

9. Disagreements arose between the Claimant and the Club Secretary on the manner of the induction, which resulted in the transfer of the Claimant from mainstream account and supervision to the club's expansion project costing and other extraneous duties as housekeeping and inspection of rooms.
10. It is during this time when custom made, club blank cheques, were stolen from the club and fraudulently encashed by unknown persons to the tune of Kshs.4 million.
11. The Claimant denied any involvement at all in the fraudulent activities and blames, the disruptions caused by the club secretary for enabling the fraud to take place.
12. The Claimant had been assigned duties to create a financial and operational plan for the Club for ten (10) years in conjunction with the Club Secretary. As a result, the Claimant was not directly involved in running the finance department.
13. The Claimant told the court that no proper investigations took place. The club focused on trying to recover as much money as possible through fidelity cover and by having as many employees as possible sacked to reduce salary payable. This explains why no disciplinary process was undertaken at all by the Respondent before summarily dismissing the Claimant.
14. The Claimant testified that the summary dismissal was not for a valid reason, and was not preceded by a fair procedure. The Claimant testified that NSSF was deducted and paid by the Respondent on his behalf.
15. The claimant stated that he could not get any other job in Kenya since Muthaiga Club comprises of who is who in Kenya. As a result he suffered humiliation, pain, loss and damage. He was falsely accused of fraud and had to leave Kenya, to seek employment in Tanzania.
16. Under intense cross examination by counsel for the Respondent, the Claimant confirmed that though he was the financial controller of the club, his powers had been curtailed during the Club transition period and he was not in charge of finance affairs of the club at the time of the alleged theft of cheques.
17. The Claimant confirmed that he was interviewed about the theft before he was sent on compulsory leave pending investigations, but the Respondent did not subject him to any disciplinary process thereafter.
18. The Claimant confirmed that he had written a statement on his role on the issue before he was sent home on leave. The statement was produced as Appendix '9' to the Memorandum of Claim and is dated 28th April, 2008. The Claimant explained that the financial accountant who was understudying him had taken over all his responsibilities at the material time. He said that he at times took cheques from the Secretary and handed them over to accounts payable clerk. He also would sign the cheques. That he was not at the time involved in verifying of payments. The cashier kept a batch of cheques and the secretary kept the rest. The Claimant said that he was not the custodian of the stolen cheques. That management accountant was in charge of reconciliation. His focus had been removed from day to day financial matters to set up a 10 year internal control system.
19. Claimant admitted that it was his duty to make sure systems worked and supervised staff under him including those involved in bank reconciliation. He could not note however, a payment that was not approved unless it came through him.
20. The Claimant did not know when the cheques were stolen since Mr. Benson Macharia financial controller had taken over his duties.
21. That on 1st February, 2008, one George Kamau reported to the Claimant that he had collected cheques two weeks prior but had not delivered them to the secretary as was practice. The Claimant asked to be given the remaining batch of cheques and the Claimant took them to the secretary. The new financial controller, Mr. Macharia, had not been properly inducted, hence this loophole.
22. The Claimant was asked by the secretary to sign for the cheques he gave to him and for the missing batch. George Kamau had not followed proper procedure.
23. The Claimant denied that he was responsible, over-all for the loss.
24. The Claimant stated that he had no debt with the club at the time of dismissal and stated that whereas he was over-all in charge prior to the re-assignment, he was not over-all in charge at the time the alleged theft took place.
25. The Claimant prays that the suit be allowed with costs and interest.

Defence

26. In the statement of defence filed on 23rd June, 2011, the Respondent denies the claim in toto. The Respondent set out the duties of the Claimant and stated that though the Claimant worked diligently, he thereafter neglected to carry out his duties with due diligence and care leading to the loss of over Kshs.4,000,000.
27. The Respondent called RW1 Lilian Wambui Njongoro in support of its defence. RW1 adopted her witness statement filed on 23rd February, 2017 as her evidence in chief. She told the court that, she was the Human Resource Manager of Muthaiga Country Club and knew the Claimant as an employee in the Finance department of the club. That the Claimant was employed as the Chief Account but the position was renamed Financial Controller. That the Claimant reported directly to the Club Secretary and Chief Executive Officer Mr. Stewart Vetch.

28. That the Claimant was over-all in charge of Finance Department and held that position until his termination.
29. RW1 went ahead to narrate conversations and matters that allegedly took place between the Claimant and the Secretary regarding 500 cheque books between February 2008 and April 2008. RW1 had no firsthand knowledge of these matters and her evidence was in admissible hear say.
30. The Respondent had recorded the statement of the club secretary Mr. Stewart Vetch filed on 24th October, 2016. The Respondent however did not call the club secretary to testify on the critical evidence on the matters that took place between the Claimant and the Secretary during the period material to this suit.
31. As a result, the evidence by the Claimant on the material aspects of this case remain uncontroverted.
32. No explanation was given to the court as to why the club secretary, who placed a key role in this matter was not called before court.
33. Indeed, RW1, told the court that she joined the Respondent in 2011, and relied on the available records. RW1 told the court that no disciplinary hearing against the Claimant took place.
34. RW1 added that there was no correspondence before court regarding authorization for use of the impugned cheques. RW1 explained that club secretary left the club in 2012.
35. RW1 further told the court that the theft was not reported to the police nor was the claimant charged with any offence. RW1 also confirmed that the letter of summary dismissal did not provide any reason why the Claimant was summarily dismissed from employment.
36. RW1 was unable to support, the material averments by the Respondent in the statement of defence.

Determination

37. The issues for determination are as follows:-

- (i) Whether the summary dismissal was for a valid reason and in terms of a fair procedure.
- (ii) Whether the Claimant is entitled to the reliefs sought.

Issue i

38. The Claimant gave testimony exonerating himself from the alleged theft of cheques used to fraudulently encash Kshs.4 million from Standard Chartered Bank.
39. The Claimant ably, candidly and without contradictions explained how his responsibilities as the financial controller were taken over by a new employee who was employed to understudy him with a view to take over the responsibilities of the Claimant.
40. The Claimant explained that the day to day running of financial affairs of the club was taken away from him by the club secretary, who was the Chief Executive Officer of the club. That during this time, the alleged theft took place. The Claimant told the court that he had no role whatsoever in the theft. That he was not negligent at all in his work but his responsibilities had been moved elsewhere by the CEO.
41. The only person who could have rebutted this evidence by the Claimant was the secretary of the club and the CEO. He had recorded a witness statement which was filed in court on 24th October, 2016. No explanation was given as to why he could not come to court.
42. The evidence by RW1 did not assist the Respondent's case at all. The narrative contained in RW1's witness statement was largely hearsay and inadmissible. The Claimant's evidence on all material aspects of the case remain uncontroverted.
43. The Claimant has therefore proved on a balance of probabilities that he had served the respondent diligently in the position of financial controller. That he was summarily dismissed from employment for no valid reason at all. That he was not charged with any disciplinary offence, was not given a notice to show cause nor was he called to a disciplinary hearing.
44. The Claimant admits having made an exculpatory statement before he was sent on compulsory leave only to be summarily dismissed without any due process and with no reason assigned to the summary dismissal in the letter of dismissal.
45. The court finds that the Respondent had no valid reason to summarily dismiss the Claimant and did not follow a fair procedure in executing the summary dismissal of the Claimant. The Respondent violated sections 41, 43, and 45 of the Employment Act 2007. The summary dismissal was wrongful and unfair. The court so finds.

Issue ii

46. As to whether the Claimant is entitled to the reliefs sought, the court finds that the Claimant is entitled to compensation in terms of section 49 (1)(c) of the Employment Act 2007.

47. As to the quantum of compensation, the court relies on the provision of sub-section 49(4) as a guide.
48. In this respect, the Respondent did not adduce any admissible evidence that showed that the Claimant contributed to the dismissal.
49. The Claimant was a senior officer of the club, and in the finance profession. The false accusations made against him, were gravely detrimental to his future employment in Kenya. Indeed, the Claimant after failing to get alternative employment in Kenya for a long time had to relocate to Tanzania where he finally found a job.
50. The Claimant suffered ridicule and mental torture and sustained loss and damage.
51. The Claimant was paid terminal benefits upon summary dismissal, except that he was kept at home, on compulsory leave for a considerably long period only to be dismissed without any due process.
52. The Claimant had served the Respondent in a most Senior Position of Chief Accountant/Financial Controller from 15th August 1993, until 5th May 2008, a period of over twelve (12) years without blemish and was in the circumstances of the case treated very badly by the Respondent, on mere suspicion. This clean record warranted better treatment.
53. In **Nairobi E & LRC Claytone Lawrence Indula v Anaheim Enterprises, Cause No. 595 of 2015** the court awarded the Claimant who had served the Respondent for 15 years equivalent of 10 months salary compensation.
54. In **Nairobi ELRC No. 2525 of 2012**, the court awarded the Claimant 12 months' salary in compensation for similar circumstances.
55. In the court of Appeal, **Civil Appeal No. 79 of 2012, Peter M. Kariuki v Attorney General** at page 43, the court stated –

“It bears repeating that assessment of amount of damages is matter for the discretion of Trial Judge, which must be exercised judiciously and with regard to the general conditions prevailing in the country and to prior relevant decisions”

56. The cases, cited above are fairly recent and conditions have not changed. The court takes into consideration the aforesaid factors and grants the Claimant equivalent of ten (10) months' salary in compensation for the wrongful and unfair summary dismissal in the sum of Kshs,2,695,000.

Notice Pay

57. The Claimant is also entitled to payment of three (3) months salary in lieu of notice in terms of his contract of employment in the sum of Kshs.808,500.
58. The Claims for Service Pay and Provident Fund Contribution are not well founded and are dismissed because the Claimant had NSSF and Provident Fund contributions made on his behalf by the employer during the term of his employment.
59. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows –

(a) Kshs.2,695,000 being equivalent of 10 months' salary compensation.

(b) Kshs.808,500 in lieu of three (3) months' notice.

Total award is Kshs.3,503,500.

(c) The award is payable with interest at court rates from date of judgment till payment in full.

(d) Costs to follow the outcome.

Dated and Signed in Kisumu this 7th day of March, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 6th day of April, 2018

Maureen Onyango

Judge

Appearances

Mr. Ogutu for Claimant

Mr. Njuguna for Respondent

Anne Njung'e – Court Clerk