



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 54 OF 2017

(Before D. K. N. Marete)

WILLY KIPROTICH NG'ENO.....CLAIMANT

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 13th December, 2017. The issue in dispute is therein cited as;

Unfair and wrongful termination of employment

The respondent in a Statement of Defence and Counter Claim dated 25th January, 2018 denies the claim and prays that the same be dismissed with costs. She also prays for judgement in terms of her counter-claim.

The claimant's case is that at all material times to this suit, he was an employee of the respondent. This employment was effected on or about January, 1998 to the position of Factory Clerk on permanent and pensionable terms. He was put on 6 months probation which was satisfactorily served.

The claimant's further case is that on or about 30th February, 2016, he received a letter charging him with gross misconduct. He answered this on 9th March, 2016 by appearing before the respondent's disciplinary committee where he explained in detail the circumstances under which the loss of money alleged had arisen.

The claimant's other case is that despite a recommendation by the workers union that he be reinstated for being not culpable of theft, the respondent ignored, failed and or neglected to reinstate the claimant but instead dismissed him on 14th July, 2016.

The claimant cites the following as particulars of unfairness and wrong doing on the part of the respondent;

- a) *Failure by the respondent to facilitate proper handing over of finances and relevant records at the time the claimant took over the cashier duties from his workmate name Caroline Cheptoo when the latter proceeded for maternity leave.*
- b) *Failure by the respondent to facilitate the claimant with a proper and clear procedure and avenue to account for the sum of money which came into his possession at the time he took over from his workmate Caroline Cheptoo.*
- c) *Alleging that the claimant was dishonest and lacked integrity.*
- d) *Unfairly terminating the claimant's employment so as to cover up for the failures of the respondent's management to stick to laid down rules, procedures and regulations.*
- e) *Shifting the goal posts and varying the amount allegedly lost.*

He further faults the respondent's action on the following grounds;

- a) *The respondent failed to consider the claimant's explanation with regards to the circumstances under which the money in the cash box could not be accounted for.*

b) *The respondent failed to consider an appeal by the claimant dated 26th March, 2017 seeking to be re-instated to his position as Factory Chief Clerk.*

c) *The respondent continuously frustrated the claimant by failing to facilitate a proper handover of all the company resources to the claimant by the employer of the respondent who was proceeding on maternity leave.*

d) *The respondent failed to make an inventory of the money left behind by Caroline Cheptoo, when the cashbox wherein the money was kept was opened after Caroline Cheptoo proceeded on maternity leave.*

e) *The respondent failed to ensure that an employee who was proceeding on leave handed over the keys to the cash box as well as all the money therein before commencing the said leave.*

f) *Scheming to stretch the claimant by asking him to go to Nairobi for a non-existent disciplinary panel so that his patience can wear out.*

g) *Alleging that the claimant was dishonest and lacked integrity yet the management may have stolen any money that was lost.*

h) *Unfairly terminating the claimant's employment so as to cover up for the failures of the respondent's management to stick to laid down rules, procedures and regulations.*

i) *Altering and varying the amount that allegedly got lost.*

He prays thus;

a) *Reinstatement to his position without loss of benefit and appurtenant privileges including payment of all his remuneration to date.*

b) *In the alternative, the claimant be paid 12 months' salary for wrongful and unfair termination, 6 months notice and salary for the remainder of the term before 60 years.*

c) *Costs of this suit together with interest at court rates.*

d) *Any other relief that this honourable court deems fit and just to grant.*

The respondent's case is a denial of unfair and egregious termination of employment of the claimant. She states a case of lawful termination as follows;

(a) *The claimant failed to fully account for Kshs.509,600/= held by him in the months of June and July for sale of scrap items.*

(b) *That out of the amount of Kshs.509,600/= he banked the monies in portion leaving a balance of Kshs.75,500/=.*

(c) *That although the respondent leniently gave the claimant time to deposit the undeposited funds, he failed to do so.*

(d) *In the circumstances of the foregoing, the respondent factory acted in accordance to justice and equity to terminate the claimant's employment.*

The claimant therefore mounts a counter claim for Kshs.75,500.00 amount owing and unbanked from the claimant.

The matter came to court variously until the 31st May, 2018 when it was heard with the parties reiterating their respective cases as pleaded.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Whether the respondent is entitled to the counter-claim as pleaded?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his undated written submissions seeks to rely on section 43 (1) of the Employment Act, 2007 in setting out a case of no justification for his termination of employment contract. It is his submission that in the circumstances of this case, the employer respondent failed to prove the reason(s) for his termination thereby rendering the same unlawful.

The claimant further sought to rely on the provisions of section 47(5) of the Employment Act, 2007 which provides as follows;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

It is his position and submission that there is no proof of the alleged failure to account for Kshs.75,000.00 and therefore the fallacy of termination.

The claimant further sought to rely on the authority of **Walter Ogal Anuro Vs. Teachers Service Commission (2013) eKLR** where the court held that;

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

The claimant further sought to rely on the provisions of section 45 (1) and (2), 41 (1) and 44 (4) of the Employment Act, 2007 as follows;

45.(1) No employee shall terminate the employment of an employee unfairly.

(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 employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer

41. (1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation, and

44(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 (32) 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:-

It is the claimant's case and submission that the reasons for his termination of employment, if at all, were invalid and further that he was not subjected to appropriate disciplinary proceedings in accordance with section 41(1) of the Employment Act, 2007. Again, his summary dismissal was a violation of section 44(4) as set out above. He sought to buttress this by relying on the authority of **Donald Odeke V Fidelity Security Limited [2012] eKLR** where the court observed as follows;

I agree with the learned Judge and add that it does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair.”

The respondent in her likewise undated written submissions presented her case as follows;

5. In his testimony before this court, the claimant testifies as follows;

That he was employed by the respondent company vide a letter of appointment dated 17th November, 2003 which he produced as PEX 1. That he had made two witness statements which he asked this Honourable Court to adopt as evidence in support of his case. He testified further that his termination in July 2016 was grounded on his failure to account for Kshs.75,500/= that belonged to the respondents company.

6. However, on being cross-examined by the writer herein, the claimant made admissions which go to the heart of his case: firstly, he admitted that a disciplinary committee was constituted on 9th March, 2016 where the company raised a concern of his absenteeism to which he tendered apologies. Secondly, he admitted he sold scrap metals belonging to the respondent company and the said sale raised Kshs.509,600/=. Thirdly he admitted that by a letter dated 30th July, 2015 addressed to the respondent company accountant he stated therein that he would make arrangements to bank the money he had received from the sale of the scrap metal belonging to the respondent company.

7. On the other hand the respondent opposed the claimant's claim and set a counterclaim thereto of Kshs.75,500/= by a defence filed on 26th January, 2018. In addition the respondent averred that it was justified in terminating the claimant's services with it.

8. In his witness statement dated 16th May, 2018 and filed on even date which was also adopted by this Hononourable Court as evidence in support of its case, Antony Bor, reiterated the defence of the respondent by highlighting it as follows:-

That the claimant sold scrap metal belonging to the respondent company valued at Kshs.509,600/=. He was to bank all the said sums. He banked Kshs. 289,100/= leaving Kshs.220,500/=. That he handed over Kshs 45,000/= to Hellen and later banked Kshs 100,000/= vide bank slip produced as REX No. 25 thus leaving Kshs.75,00/= unbanked. Finally, he testified that by a letter dated 30th July, 2015, the claimant said inter alia, that he would make arrangements to bank the unbanked money and he produced Respondent Exhibit No. 27 as an exhibit in support of the case of the respondent.

The respondent in a further superimposition of her case of lawful termination of employment seeks to rely on the authority of **Francis Nyongesa Kweyu vs Eldoret Water Sanitation Company Limited [2017] eKLR** where at pages 5 – 6 this court expressed itself as follows;

*“The respondent in rebuttal to a case of unlawful termination of employment sought to rely the authority of **Theewaterskloof Municipality and South African Local Government Bargaining Council (Western Cape Division Vs Arbitrator Adv C De Kock N.O while quoting from Council for Scientific and Industrial Research v Fijen (1996) 17 ILJ 18 (AD) at 26E-G** observed thus at page 13;*

“it is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the ‘innocent party’ to cancel the agreement On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgements in the LAC to this effect ... It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow naturalia contractus.”

*The respondent further relies on the authority of **Judicial Service Commission vs Gladys Boss Shollei & Another, Civil Appeal No. 50 of 2014** where the judges of the Court of Appeal borrowing from **Michael Dowling – vs Work Place Safety and Insurance Board [2004]CAN LII 43692 at page 74**, observed as follows;*

“...It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct

This is an obvious case of lawful termination of employment. The respondent has brought out a resounding case of lawful termination of employment of which the claimant has miserably failed in rebuttal. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the respondent is entitled to the counter-claim as pleaded. The respondent’s case clearly and outrightly outlines a case where the claimant raised an amount of Kshs.509,600.00 through sale of company property. He made several remissions, albeit reluctantly, and was left with a balance of Kshs.75,500.00 unaccounted for. This, he admits, even in his oral evidence. The counter-claim therefore stands as a legitimate claim by the respondent from the claimant and I hold as such. The respondent is entitled to Kshs.75,500.00 as counter-claim and I award as such.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent. The respondent is also awarded the costs of the counter-claim.

Delivered, dated and signed this 26th day of June, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Koech holding brief for Nanda instructed by Geoffrey Otieno & Company Advocates for the claimant.
2. Mr. Migiro instructed by Migiro & Company Advocates for the respondent.