



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 808 OF 2016

BETWEEN

COLLINS WANYONYI LUSWETI.....CLAIMANT

VERSUS

EAST AFRICAN STORAGE COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Beatrice Opolo Advocate instructed by Federation of Kenya Employers for the Respondent

JUDGMENT

1. The Claimant filed his initial Statement of Claim, on 12th October 2016. He filed Amended Statement of Claim on 2nd August 2017. He avers he was employed by the Respondent as a Technician, earning a monthly salary of Kshs. 20,000. His salary was revised on 1st October 2015, to Kshs. 55,305 gross monthly salary. He was suspended on 20th July 2016 for collecting a cheque from Respondent's reception, for delivery to Respondent's Client. On 1st August 2016, the Respondent terminated his contract of employment without a proper hearing. He was denied terminal dues. He prays for Judgment against the Respondent in the following terms:-

- a) Declaration that termination was procedurally unfair.
 - b) Severance pay for 11 years at Kshs. 304,182.
 - c) 12 months' salary in compensation for unfair termination at Kshs. 663,671
- Total....Kshs. 967,853
- d) Interest at 14% per annum.
 - e) Costs.
 - f) Certificate of Service.

2. The Respondent filed its Statement of Response on 6th December 2016. It agrees to have employed the Claimant, on terms and conditions stated in the Claim. It agrees to have terminated his contract. Termination was lawful. On 19th July 2016, it came to the attention of the Respondent, that some cheques delivered to a Client by the Claimant had been cashed. The Respondent gave a letter to show cause, to the Claimant, why he should not face disciplinary action. The Claimant responded. Upon investigation, the Respondent found the cheques had been collected by the Claimant, and the figure altered in one cheque, from Kshs. 30,936, to Kshs. 300,936. On 29th July 2016, he attended disciplinary hearing in the company of a Colleague of his choice, Lazaro Mruttu. The Claimant admitted he picked the cheques; the amounts at the time of picking were less than what was cashed at the bank; and the signatures on the vouchers, except on one voucher, were his. A decision was made after hearing, to terminate the Claimant's contract. He was paid salary for July 2016; 1 month salary in lieu of notice; and

fixed overtime. His Claim has no merit. The Respondent asks the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant gave evidence on 20th March 2018, adopting his Witness Statement on record. His Witness Statement is a replica of his Statement of Claim, whose summary has been given at paragraph 1 of this Judgment.

4. Cross-examined, the Claimant testified he was employed as a Mechanical Technician. He offered services to Clients, and received cheques. He did not receive the cheques whose details are given in the Statement of Response. He did not deny he knew about these cheques, in his Amended Claim.

5. He agreed he received a cheque in his reply to the letter to show cause. He was invited for disciplinary hearing. He attended accompanied by a Colleague. Hearing did not take place. Meeting was just a formality. Decision had been predetermined. He asked the Committee certain questions, which are not disclosed in his Witness Statement. The Claimant produced a letter at the hearing to the effect that he would not answer to the allegations because he was not responsible. He was subscribed to the N.S.S.F. Redirected the Claimant stated that, he received 2 cheques. He did not sign the cheques. No investigation was carried out. He was not given a chance to be heard.

6. The Respondent testified through its Head of Finance Michael Mutuku Muthiani, and Human Resource Manager Eunice Juma. Both gave evidence on the same date as the Claimant, 20th March 2018, bringing the hearing to a close.

7. Muthiani told the Court after cheques are drawn, they are collected, to be delivered to suppliers. Cheques collected by the Claimant were found to have different amounts when deposited in the bank. The Claimant collected the particular cheques. He signed the vouchers. The last cheque was drawn at Kshs. 8,000. It was altered and banked at Kshs. 80,000. At the hearing, the Claimant admitted responsibility. Cross-examined, Muthiani told the Court if figures were rightly altered, he would countersign against the alteration. The matter was investigated by the Respondent. Banking Fraud Unit did not investigate. The matter was reported to the Police. The Witness did not have Occurrence Book Number in Court. He did not know if the Claimant made alteration, but was certain, he collected the unaltered cheques. Some of the Respondent's Clients agreed they had been overpaid. Redirected, Muthiani confirmed the Bank Statements exhibited by the Respondent supported Respondent's position on alteration of cheques.

8. Eunice Juma told the Court her role involves disciplinary matters. The Claimant was suspended after thorough investigation. There was a finding that figures were altered and inflated. The Claimant was accompanied by a Colleague to the hearing. He was heard fairly. His contract was terminated. She confirmed on redirection that the Claimant was given a full chance to rebut the accusations against him. He confirmed his signatures on the vouchers, except one voucher. Termination was fair.

The Court Finds:-

9. The Claimant was employed by the Respondent Company as a Technician, on 1st April 2005. His contract was terminated by the Respondent on 1st August 2016. It was alleged he had collected some cheques for banking in favour of Respondent's Suppliers. The amounts in the cheques were altered. The figures upon collection by the Claimant, were changed on presentation to the bank.

10. Some of the cheques collected by the Claimant and subsequently altered were detailed as follows:-

- Cheque Number 113032, payable to Gift Autoparts. The amount on collection was Kshs. 6,000. On presentation to the bank it was altered to Kshs. 60,000.

- Cheque Number 113046 [Coast Iron Engineering], drawn at Kshs. 9,230, altered and presented to the bank at Kshs. 90,820.

- Cheque Number 113050 [Interdiesel Works Ltd] drawn at Kshs. 7,656, altered and presented at Kshs. 70,656.

- Cheque Number 113,346 [Victor Jayoo Jayoo] drawn at Kshs. 8,000, altered and presented at Kshs. 80,000.

11. There is enough evidence given by the Respondent to show that its cheques were altered and presented for payment at inflated figures. The Claimant collected those cheques, and only he could say who altered and presented the cheques bearing inflated figures. He signed the payment vouchers. There are bank statements corroborating the evidence given by Respondent's Witnesses. There is evidence from one of the Suppliers acknowledging overpayment. The Claimant was shifty, denying that he collected the cheques in his evidence before the Court, while he did not deny this in his Amended Claim.

12. He was suspended, asked to show cause why he should not be disciplined, and invited to a hearing. He responded to the letter to show cause. He attended the disciplinary hearing accompanied by a Colleague, Lazaro Mruttu. He in his evidence in Court made the startling claim that hearing did not take place. There are minutes of the meeting, capturing his attendance and full participation at the hearing. A decision to terminate his contract was made after hearing.

13. The Court is satisfied that termination was substantively valid and justifiable under Section 43 and 45 of the Employment Act 2007. Procedural fairness was fully observed under Section 41 and 45 of the Act. The Claimant was involved in employment offences under Section 44 [4] of the Employment Act, warranting summary dismissal for gross misconduct. The offences were aimed at defrauding the Respondent. The Respondent in the end exercised its discretion by commuting a clear case of summary dismissal into regular termination, and paid the Claimant notice pay, among other benefits.

14. The Court does not ordinarily order Employees to meet the costs of litigation, in Claims filed against their Employers. A majority of Employees are low income earners, who must be shielded by the Court in their pursuit of industrial justice. They must not abuse the

accommodation given to them by the Court, and clog the judicial system with unsustainable Claims, safe in the knowledge that even if such Claims fail, there is no risk of meeting Employers' costs of litigating. The Claimant, in this case appears not to have had the slightest justification in bringing his former Employer to Court. His conduct in the course of the proceedings suggested he was an untruthful Witness, who came to Court on a fishing expedition. He was not forthright on the alteration of Respondent's cheques, and on the disciplinary hearing accorded to him by the Respondent before termination. He was a dicey Witness, who did not take the duty to tell the truth in Court, seriously. His Claim is completely without foundation. Parties should not saddle the judiciary with causes that do not have the slightest probability of success. This is a Claim, going by the documents on record, which did not have any chance of success from the word go. The Respondent observed every standard of fairness prescribed by the Employment Act 2007, in terminating the Claimant's contract. The Claimant was involved in clearly fraudulent activities against the Respondent. He nonetheless opted to bring the Respondent to Court, exposing the Respondent to further monetary loss by way of costs of litigation. The Court shall depart from its common practice on costs, in employment disputes, and order that ***the Claim is hereby dismissed, with costs to the Employer, the Respondent herein.***

Dated and delivered at Mombasa this 28th day of September, 2018.

James Rika

Judge