



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.93 OF 2015

PATRICK K MAINA.....CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent company as a Store/Branch Manager at Turskys Mid-Town Supermarket, Nakuru. On 25th December, 2014 the claimant was approached by one director of the respondent Mr Yusuf M Kamau who demanded to have kshs.3 million. The claimant asked for instructions from his superiors, the regional manager and who gave him the go ahead to pay from petty cash by voucher. The money was released to the director.
2. Upon release of the money, the director wrote to fellow directors informing them of the drawings and such to be deducted from his shares dividends.
3. To the claimant, this was not the first time the directors were attended to by employees in this manner despite management issuing a company policy not to pay any director from the stores.
4. Following this payment the management suspended the claimant for two weeks and invited him to a disciplinary meeting on 4th February, 2015. There were no disciplinary proceedings. The claimant was dismissed from his employment with the respondent.
5. The claimant is seeking reinstatement back to his position or compensation for unfair termination of employment. He was not given fair hearing and the termination was not justified
6. The claimant testified that he worked for the respondent for 18 years. On 25th December, 2014 at 10am one director Mr Yusuf came to his branch and asked for a file. He demanded for money from the store. The respondent had issued cash policy procedures which required compliance before money could be issued. The claimant therefore wrote to his superior and regional manager Mr Kariuki and who asked the claimant to also call the Finance director Mr Ndirangu with regard to the request for payment by one director, Yusuf.
7. The claimant was advised to pay the director from petty cash and to have a voucher singed.
8. The other directors of the respondent were John Kamau, Samuel Gatei, and Stephen Mukua and Yusuf kamau. Before this date another director, Gatei had asked the claimant for Kshs.450,000.00 and was issued.
9. When Yusuf was paid the Kshs.3 million, the claiming sent the voucher to head office.
10. In January, 2015 the Operations manager, Wamaitha wrote to the claimant and asked to know where he Kshs.3 million was. The claimant referred her to Ndirangu in finance and also emailed the voucher singed by Yusuf.
11. On 8th January, 2015 the claimant was issued with a letter over alleged misconduct and was then suspended for two week. The claimant would receive half pay.
12. The claimant was called for a meeting on 4th February, 2015 where he found 5 officers of the respondent who demanded to know why the claimant had failed to follow company procedures in payments. When the directors took cash, there was a procedure to be followed. These procedures were issued by head office and shred by email but in the claimant's case the director demanded for money.
13. After the meeting, the claimant was dismissed form his employment with the respondent.

14. Yusuf had written to the human resource office and confirmed that he had taken the kshs.3 million and that the claimant should be returned to work. The respondent did not oblige.

15. The claimant also testified that under the policy petty cash voucher were used for cash not exceeding kshs.50,000.00 all cash released had to be approved by the managers but in this case the claimant reported to the regional manager and finance. Yusuf then confirmed receipt of the cash.

Defence

16. In response the respondent avers that the claimant held different positions with them from 1st May, 2000 to 5th February, 2015. The claimant was aware by virtue of his employment that demands by Yusuf Kamau, a director of the respondent for cash of Kshs. 3 million at the branch was contrary to cash handling/banking procedures stipulated under the *Instant Sales Banking Policy* and the *Cash Float and Imprest Procedure* established on 24th March, 2014 and which came into force on 1st October, 2014.

17. The applicable policies required all sales proceeds be banked in full and without deduction or pay-outs. Petty cash could only issue up to KShs.50,000.00 which the claimant failed to comply with.

18. The defence is also that the claimant admitted that when he paid Mr Yusuf he was aware of the applicable policy and which had been circulated to all branches including his branch at Nakuru. The payment to Yusuf was therefore irregular and with gross misconduct by the claimant. The release of Kshs.3 million to Yusuf on 25th December, 2014 was at 11am and the claimant only called the regional manager at 3pm. Such was done after release of money. The later allegedly written by Yusuf is dated 24th December, 2014 and not as stated by the claimant.

19. The claimant had issued cash and sales policy to curb the practice of directors or other persons taking cash from the branches. Such policy was mandatory to all employees including the claimant. Following gross misconduct, the respondent was justified to terminate employment.

20. The claimant was invited to a disciplinary hearing following a show cause notice and where he admitted to failing to follow the cash policy. This was contrary to the terms of his employment contract and such breach justified summary dismissal in terms of section 44(3) of the Employment Act.

21. The claimant was paid in lieu of notice and the claims made should be dismissed with costs.

22. In evidence the respondent called Francis Kimani formerly the Human Resource Manager of the respondent and who testified that in 2014 the chief finance told him that Kshs.3 million had not been banked contrary to policy. The respondent had various policies on cash banking the last took effect on 1st October, 2014. No director was allowed to take cash at branches.

23. When the witness got the report the claimant was issued with a show cause notice and suspended. He was invited to a disciplinary hearing and failed to give satisfactory reasons as to why he issued cash at the branch without following the policy. Had he contacted the head office for approval, this would have been per policy but he proceeded and paid and he admitted to doing so. The disciplinary committee made a decision to dismiss the claimant from his employment. This was a case of gross misconduct.

24. The claimant filed written submission.

Determination

25. The facts leading to the suit herein are that on 25th December, 2014 the claimant was directed by one director of the respondent Yusuf to pay him Kshs.3 million which he did upon consulting with the regional manager and who approved through the finance office. The director also wrote to the other directors to confirm the payment to him. The claimant was then suspended for failing to follow procedure in the payment of cash at his branch and then suspended. On 4th February, 2015 the claimant was invited to a disciplinary hearing when he was dismissed.

26. The defence is that the claimant operations in the payment of cash were regulated by a policy which he failed to comply with when he paid a director from petty cash a sum over the allowed Kshs.50,000.00 and issued Kshs.3 million. The policy in place had been passed on 1st October, 2014. The claimant was issued with a show cause, he was invited to a disciplinary hearing where he admitted to having failed to follow the procedure. This was a case of summary dismissal but the claimant was paid in lieu of notice and dismissed with effect from 5th February, 2015.

27. Section 47(5) read together with sections 43 and 41 of the Employment Act, 2007 for the foundation of what substantive and procedural justice in addressing termination or dismissal of an employee for employment. Substantive fairness to the employee faced with termination of employment is mandatory. This position is given emphasis in the case of **Parliamentary Service Commission versus Christine Mwambua [2018] eKLR** and in **Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Ltd [2013] eKLR** and the findings that;

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper

opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

28. Even where the respondent had substantive grounds to terminate the claimant's following his admission to having paid one director Yusuf contrary to set policy, due process demanded procedural justice in accordance with section 41 of the Act.

29. Had the respondent followed the procedures outlined under section 41 of the Act and allowed the claimant such safeguards of the law, it would have become apparent that he had a good defence and a different sanction less harsh should have issued. Such was not the case here. Summary action was taken without due process. Such amount to procedural unfairness.

30. At the disciplinary committee meeting held on 4th February, 2015 the claimant was present together with various senior officers of the respondent. Also present was Joseph Muiruri, noted as supervisor and witness. This is not clarified as to whose witness he was. If he was the witness to the proceedings on any matter relating to the supervision of the claimant or that he was a witness invited to be with the claimant is not elaborated.

31. Section 41 of the Act are mandatory as set out above. The employee faced with termination of employment must be invited to such a disciplinary hearing and present must be an employee of person of his choice. This is a right for the employee to enjoy. The witness to be called should be at the discretion of the employee.

32. This right is critical to an employee. Such is to guarantee the employee the benefit of the law at the shop floor.

33. The court however notes that the claimant admitted to having failed to abide the policy in place in the payment of cash at his branch. Such is conduct that was gross as a policy regulating such payment had just been passed and he had a copy.

34. Save for the lapse by the respondent in terms of procedure, there existed justifiable grounds leading to dismissal. The sanction on the respondent as the employer having failed to abide provisions of section 41 is compensation and award of one (1) months gross pay to the claimant as appropriate.

35. In terms of section 45(5) of the Employment Act, 20077 the respondent paid to the claimant his terminal dues immediately upon dismissal. On this basis each party shall bear own costs.

Accordingly, judgement is hereby entered for the claimant with an award for Kshs.18,156.00. Each party to bear own costs.

Dated and delivered in open court at Nakuru this 18th day of October, 2018.

M. MBARU JUDGE

In the presence of:.....