



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 729 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

SAMUEL KIGIMA KAMAU.....CLAIMANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Samuel Kigima Kamau instituted this claim by a Memorandum of Claim dated 17th May 2013 and filed on 22nd May 2013 seeking damages for wrongful and unlawful dismissal and payment of dues against the Respondent, Invesco Assurance Company Limited.

He avers that he was employed by the Respondent as a Manager at their Naivasha Branch on or about 28th July 2010 on a probation period of 3 months and entitled to a monthly salary of Kshs.60,000/= and airtime allowance of Kshs. 5,000/=, that his employment was confirmed by the Respondent through a letter dated 16th December 2010 with a basic salary of Kshs.77,000/=. That he was given a Notice dated 28th November 2012 wherein the Respondent made several allegations including gross misconduct and required him to reply to the same in 7 days and which allegations were also in an internal memorandum dated 19th November 2012. That he replied to the allegations in a letter dated 04th December 2012. That the Respondent suspended him from service via a letter dated 02nd December 2012 titled “*Addendum to Notice for Termination*”.

Further, that on 28th February 2013, the Respondent served him with a letter dated 08th February 2013 purporting to summarily terminate his services. He states that he was not issued with the prerequisite notice of termination and that the reasons given by the Respondent were baseless and unsubstantiated. That he was also denied the right to be heard and defend himself. He states that he was an excellent employee and always acted within the scope of his job requirements at the time of the wrongful and unlawful termination of his employment. That he tried to resolve the matter but the Respondent never gave it a chance and as a result of both the wrongful termination and breach of his employment contract, he has suffered and will continue to suffer. He prays for the following orders :-

- a) A declaration that he was wrongfully and unfairly dismissed from his employment.
- b) A declaration that the Claimant was entitled upon his contract of employment being terminated to 3 months’ notice or pay in lieu thereof.
- c) Unpaid dues totalling to Kshs.882,312.00/= being;

Salary for the months of November 2012 to March 2013 of Kshs.622,145.00/=
- Unpaid Leave for 35 days totalling to Kshs.145,167.00/=.
- PTICL Contribution deductions of Kshs.115,000.00/=.
- d) Notice period of 3 months amounting to Kshs.373,287.00/=
- e) 12 months’ salary as compensation for wrongful and unlawful termination amounting to (Kshs.124,429 x 12) Kshs.1,493,148.00/=
- f) Damages for wrongful and unlawful termination.

g) Certificate of Service

h) Costs and incidental to this suit.

Respondent's Case

The Respondent filed its Response to Claim dated 04th February 2014 on 05th February 2014 admitting its employment terms with the Claimant and that it issued a Notice to him out of his acts of omission and commission that resulted in the loss of Kshs.3,802,220/= which he failed to satisfactorily explain to the Respondent and merely blamed other people when the responsibility of the Naivasha branch squarely lay on him. It particularises the loss as follows:-

i).... Premium refunds..... Kshs.288,057

ii)... Discounts allowed to Sentue Insurance Agency..... Kshs.478,023

iii).. New Nairobi Naivasha United Service

balance as at 07th November 2012..... Kshs.717,472

iv).. NNNUS disputed balances and reconciled/

uncorrected items..... Kshs.553,125

v)... Unexplained balances as at 07th November 2012..... Kshs. 1,765,543

Total **Kshs.3,802,220**

The respondent admits suspending the Claimant but states the addendum was wrongly titled “*Addendum to Notice for Termination*” instead of “*Addendum to Notice to Show Cause*”. That after terminating his services, the Claimant was informed of his right to appeal to the management within 14 days of receiving his termination letter which he did not, that the Respondent understood that to mean the Claimant had accepted the charges against him. It denies that the Claimant was served his termination letter on 28th February 2013 and annexed an email dated 26th February 2013 in which the Claimant was requesting for clarifications of certain payments following his dismissal. The respondent denies that the Claimant was wrongfully or unlawfully dismissed. It further denies that there is any pending unpaid salary, leave days and special damages and contends that the Claimant should be claiming the PTICL contribution deductions from the said PTICL which are shares of the company purchased by employees.

In evidence, the Claimant testified in court that he was responsible for overseeing the entire Branch, preparing periodical Business Analysis Reports and forwarding them to the head office and that he only handled petty cash and not the premiums while the cashier handled the financial matters. RW1 on the other hand testified that according to the audit report, the total amount lost is Kshs.3,357,821/= but could not explain the variance in the figures alleged to have been lost at the Naivasha office.

Claimant's Submissions

The Claimant submits that in relation to notice for summary dismissal, he relies in the case of Agnes Kavata Mbiti –v- Housing Finance Company Limited [2017] eKLR where Justice M. Mbaru stated that:

“Section 44 of the Employment Act, 2007 is quite generous to an employer. The notices required in a case of gross misconduct are shorter and where justified, the employee can be issued with less notice. What the employer must demonstrate is that there existed exceptional circumstances to warrant less notice period than in ordinary cases of misconduct”.

He submits that the Employment Act requires an employee to prove that an unfair termination or wrongful dismissal has occurred and also requires an employer to justify the grounds for the termination under Section 47(5). He submits that in this suit, no exceptional circumstances arose to warrant his summary dismissal on the ground of gross misconduct and the proper procedure in summary dismissal cases was not adhered to. He further relies on the case of *Nicholus Muasva Kvula v FarmChem Limited, Industrial Cause No. 1992 of 2011; (2012) LLR 235 (ICK)* where the court held that:

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before the decision to terminate is arrived at.”

Further, that Section 43(2) of the Employment Act is clear that there must be a valid reason before termination of employment. He submits that the Respondent blamed him for the loss of monies that were outside his assigned duties, that it did not investigate prior to his dismissal nor adduce any evidence during the hearing before this Court to support its allegations. He states that the Respondent failed to comply with Sections 41, 43, 44 and 45 of the Employment Act and the Court should find that it wrongfully and unfairly dismissed him.

It is the submission of the Claimant that Section 49(2) of the Employment Act entitles him to 12 months' salary compensation for the wrongful and unfair dismissal from employment as prayed and relies in the case of Pamela K. Butalanyi v University Council for the Kenya

Polytechnic University College [2015] eKLR where Rika J. awarded the same for unfair termination. He further submits that he is also entitled to a Certificate of Service which the Respondent failed to issue to him as per Section 51 of the Employment Act.

Respondent's Submissions

The Respondent submits that according to Section 44(1) of the Employment Act, summary dismissal occurs when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. That Section 44(3) of the Act allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. Further, that since summary dismissal is not disputed, the Claimant cannot claim 3 months' salary in lieu of notice because he is not entitled to notice.

It submits that it summarily dismissed the Claimant with valid reasons as mandated by Section 43(2) of the Employment Act because a large amount of money got lost under his watch and he was aware of the same at the time of termination of his employment because it had given him a chance to explain himself as per Section 41 of the Employment Act. The respondent submits that it was not limited to an oral hearing. That in light of section 43(2), Mbaru J in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* stated:

“These reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee.”

Further, that its internal audits happen annually and the audit done in the month of June 2013 after the Claimant's termination covered the entire financial year including the period when the subject funds were lost and that the audit report was not the basis of the Claimant's termination but it further proved that the Claimant was indeed responsible for the Respondent's loss of money at his Branch.

He submits that it is company policy that employees on suspension are entitled to their full salary and the Claimant having been duly paid until his dismissal is not entitled to February and March 2013 salaries because he had already been dismissed by then. It also submits that the Claimant has already been paid the PTICL contributions upon his own request as was reiterated by RW1 in her evidence in court. That the Claimant had utilised all his leave days prior to his termination and is therefore not entitled to any leave and that the claimant has not proved entitlement to the 12 months' pay that he claims. It relies in the case of *Julimatt Enterprises Limited -vs- V.M.K, Civil Appeal No. 262 of 2014* wherein the Court of Appeal overturned an award for 6 months' pay for wrongful termination stating:

“The trial court, having established that the termination of the respondent's employment was unlawful, it was obliged to award him some compensation; but in so doing, and so as to arrive at a reasonable award, it was by law enjoined to take into consideration several factors as set out under section 49 (4) as read with section 50 of the Employment Act. They are as follows:(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;...(k) any conduct of the employee which to any extent caused or contributed to the termination.

...in this matter, we think the learned judge ought to have considered, inter alia, the respondent's length of service; the reasons that led to the termination of his services, including his negligence that led to the loss of a considerable amount of money...In view of the foregoing, we are inclined to interfere with the arbitrary exercise of the learned judge's discretion. In our view, the award of 6 months' salary as compensation for unlawful termination of services was excessive. We hereby set aside that award and substitute it with an award of 2 months' salary.”

The Respondent finally submits that the Claimant can pick his Certificate of Service from it at any time and that having justified the grounds for terminating the employment of the Claimant while the Claimant has failed to prove that he was wrongfully and unfairly dismissed, the claim should be dismissed with costs.

Determination

The issues arising for determination are whether the dismissal of the claimant was fair and if he is entitled to the orders sought.

For dismissal to be fair there must be both fair procedure as envisaged in Section 41 of the Employment Act and justification for the same as provided in Section 43. Refer to the case of *Donald Odeke -V- Fidelity Security Limited*, Cause No. 1998 of 2011 where the Honourable Court observed as follows –

“An employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.....it does not matter what offence the employee is charged of. If the employee is not heard, the termination is ipso facto unfair.

Section 12 of the Employment Act requires employers to have a statement of disciplinary rules that specify disciplinary and grievance handling procedure. None has been referred to herein which may indicate that the respondent does not have any. There was therefore no structured disciplinary process through which the claimant was subjected. He was first issued with a notice to show cause on 28th November 2012 which he responded to on 4th December 2012, within the 7 days he was required to respond to the same. Before the seven days were over, he was again on 2nd December 2012 sent a letter titled “*ADDENDUM TO NOTICE FOR TERMINATION*” which required him to stay away from the office and directed him to hand over the company's laptop and adaptor to the head of Human Resource and Administration pending further communicator “*as regards your employment status upon receipt of your response*” to the show cause letter.

The claimant thereafter received a letter of summary dismissal dated 8th February 2013 signed by the Chief Executive Officer and advising him of the opportunity to appeal to “*management*” within 14 days. As correctly pointed out by the claimant, having received his letter of

dismissal from the Chief Executive Officer, he did not know which authority to appeal to. And without a disciplinary procedure, he did not even know the forum through which the appeal should be made.

Section 41 is couched in mandatory terms, that an employer **shall, before terminating** the employment of an employee, explain the reasons for which the employer is considering termination of the employee, in the presence of either a colleague or shop floor union official of the employee's choice, and further hear any representations that both the employee and the person accompanying him may make.

In this case, the respondent did not give the claimant any opportunity to make representations. A show cause letter is not what is anticipated under Section 41 of the Employment Act.

Besides the foregoing, the respondent did not inform the claimant what the reasons for his summary dismissal was. The show cause letter referred to loss of more than Kshs.3,802,220/= through the claimant's "*acts of commission or omission*" and attached some documents for reference, and referred to the omissions and commissions to be of a criminal nature. No specific allegations of impropriety were made against the claimant. In his response he pointed out that there were no proper reporting structures as the persons responsible for collection of funds at the Naivasha Branch reported directly to the Finance Manager at the Head Office in Nairobi as did the claimant.

Section 45(1) provides that no employer shall terminate the employment of an employee unfairly while Section 45(2) provides that –

(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 employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Section 47(5) further provides that –

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.

I find that the respondent has not discharged its burden to justify the grounds for termination and further that the respondent failed to comply with the mandatory procedures for fair hearing provided in Section 41 of the Act.

As was stated in the case of *Mary Chemweno Kiptui –V- Kenya Pipeline Company Limited*, the reasons for termination must be addressed before the termination notice is issued and the employee subjected to a hearing to establish if the employee has a defence that is worth consideration.

Further, as held in the case of *Nicholas Muasya Kyula –V- Farchem Limited*, it is not sufficient for the employer to make allegations of misconduct against an employee. The employer is required to have internal processes of undertaking administrative investigations and verifying the occurrence of misconduct before the decision to terminate is arrived at.

Even Section 44(4) of the Employment Act which the respondent referred to in the show cause letter to the claimant provides that the grounds cited therein do not preclude an employee from disputing whether the facts giving rise to the allegations against the employee constitute justifiable or lawful grounds for summary dismissal.

I find that the summary dismissal of the claimant was unfair both procedurally and substantively.

Remedies

The claimant having been unfairly terminated is entitled to pay in lieu of notice. His contract provided for three months' notice or pay in lieu. At the time of termination the claimant's gross salary which is the basis for pay in lieu of notice under Section 49(1) of the Act, was Kshs.124,429. I therefore award him Kshs.373,287 in lieu of notice. The claimant further testified that he was not paid salary from November 2012 to March 2013 and claims Shs.622,145.

The claimant testified that he received the letter of summary dismissal on 26th February 2013. He is therefore entitled to salary withheld up to that date being Kshs.488,828.20 which I award him.

The claimant further prayed for leave. Under Section 10(3)(a)(i) and Section 74(1)(f) of the Act, the respondent is supposed to keep and to produce in any legal proceedings, the records of annual leave sufficient to enable the employee's entitlement to be precisely calculated. Asked about the claimant's leave entitlement, RW1 stated "*I do not have any evidence the claimant went on leave.*"

I therefore find the respondent has not discharged its burden under Section 10(7) and I accordingly award the claimant 35 leave days as claimed based on basic salary at Shs.103,653.85.

Having been unfairly dismissed the claimant is entitled to compensation.

The claimant confirmed that he was paid PTICL.

Taking into account the circumstances under which his services were terminated, the length of services the fact that he was never specifically found culpable of any wrongdoing, I award the claimant, six months' gross salary as compensation in the sum of Kshs.746,574.

The respondent shall pay claimant's costs for this suit and interest shall accrued on decretal sum at court rates from date of judgment.

The respondent shall also issue a certificate of service to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE