

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

Cause Number 891 Of 2011

Kudheiha Workers.....CLAIMANT

VERSUS

Kenya Railways Golf Club...RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on behalf of Martin Kiarie Kamau (grievant) alleging unfair and wrongful termination of the grievant's contract of service by the respondent on 2.7.2009 and prayed for the following prayers:

- a)The grounds of summary dismissal be invalidated and therefore set aside;
- b)The grievant be reinstated unconditionally without loss of status, rights and benefits;
- c)If in the opinion of the Honourable Court, the reinstatement is impossible, then the grievant be paid as per the parties CBA with additional 12 months' salary as compensation for unfair and wrongful loss of employment;
- d)The cost of the suit.

2. The Respondent denied the alleged unfair termination and averred that he was summarily dismissed for gross misconduct under section 44 (4) of the Employment Act 2007 by stealing money. It therefore prayed the suit to be dismissed with costs contending that the Claimant is not entitled to the reliefs sought in its memorandum.

3. On 31.10.2017 the parties recorded partial settlement in the following terms:

a)	3 months' notice	-	KShs.	75,000
b)	Leave	-	KShs.	25,000
c)	Service gratuity	-	KShs.	18,333__
	Total	-	KShs.	118,333

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Thereafter the parties adduced evidence for the court to determine the remaining issue of compensation for unfair termination.

Claimant's case

4. The grievant testified that he was employed by the respondent in April 2007 as Assistant Accountant but he was not given any letter of appointment until March 2008. By letter dated 12.5.2009, he was appointed the acting Club manager. Thereafter he asked for an acting allowance and the respondent's Vice Chairman told him to bill the respondent. He then raised a bill of Kshs.25,000 by way of a voucher and it was approved by the respondent's treasurer followed by a cheque in his favour which was signed by the respondent by the respondent's chairman, vice Chairman and the treasurer.

5. On 2.9.2009, the grievant was verbally send on compulsory leave for one month. He denied being served with the compulsory leave letter dated 2.7.2009 and contended that the only letter he was served with is the summary dismissal letter dated 31.7.2009. The reasons cited for the dismissal were that he fraudulently paid himself the said Kshs.25,000 and kept floating cheques in his desk. He denied committing the alleged offences and contended that he was not given a chance to defend himself.

6. Nancy Manzi Mundu testified for the respondent as Rw1. She stated that she is the respondent's club manager since 19.4.2017. She told the court that she received a brief of this case during her orientation. She stated that the claimant was employed by the respondent as Assistant Accountant until 2009 when he was dismissed for paying himself Kshs.25,000 fraudulently and keeping floating cheque in his desk. She contended that before the dismissal the claimant was served with the letter and memo by the Vice chairman dated 18.6.2009 and another letter by the treasurer dated 23.6.2009. Rw1 concluded by stating that the dismissal was justified because of his gross misconduct and prayed for the claim for compensation to be dismissed with costs.

7. On cross examination, Rw1 admitted that the claimant was not served with any show cause letter or accorded any hearing before his dismissal. She also admitted that there is no evidence to prove that the letters dated 18.6.2009 and 23.6.2009, the Memo dated 18.6.2009 were served on the claimant. He further admitted that the claimant was not a signatory to the respondent's cheque but contended that the claimant misled the management to sign the cheque for Kshs.25,000 in his favour. She denied seeing the letter dated 12.5.2009 which appointed the claimant as the acting club manager. She did not produce as exhibits the alleged floating cheques that were found in the claimant's desk and admitted that the alleged fraudulent payment of kshs.25000 was not reported to the police.

8. She however contended that there was a valid reason for dismissing the claimant because the letter appointing as the acting manager lacked a stamp to authenticate it and even if the letter was authentic, the amount of the acting allowance was not indicated. She further contended that the claimant was not entitled to any hearing in the circumstances.

Analysis and determination

9. After careful consideration of the evidence and submissions, there is no dispute that the claimant was employed by the respondent from April 2007 to 31.7.2009 when he was summarily dismissed for alleged gross misconduct. As earlier indicated herein above, the only issue for determination agreed by the parties is whether the claimant is entitled to compensation for unfair termination. The said issue cannot be determined before answering the question whether the termination of itself was unfair. Consequently, I have framed the following questions for determination:

- a) Whether the summary dismissal of the claimant on 31.7.2009 was unfair
 - b) Whether the claimant is entitled to the compensation sought.
- Unfair summary dismissal

10. Under Section 45 (a) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A reason is fair if it relates to the employees' conduct, capacity and compatibility, or the employer's operational requirements. The procedure is fair if it complies with section 41 and 51 of the Act, which entails, granting of the employee a hearing before termination and issuing him/her with certificate of service.

Reason for the dismissal

11. The claimant denied that he fraudulently paid himself Kshs.25,000 as allowance for acting as the respondent's club manager and contended that the payment was lawfully made to him by the respondent's chairman, Vice Chairman and treasurer who were signatories for the respondent's bank account. The said signatories did not give evidence herein to deny that the claimant was appointed acting manager and they signed the cheque for Kshs.25,000 in his favour. In addition, the floating cheques allegedly kept by the claimant in his desk were not produced as exhibits herein. Consequently, I return that the respondent has failed to prove on a balance of probability, the reasons for dismissing the claimant as required by section 43 of the Act.

Procedure followed

12. Rw1 admitted under oath that the claimant was neither served with any show cause letter nor accorded any hearing before the summary dismissal. In her view, the claimant had committed gross misconduct and as such he was not entitled to any hearing before his dismissal. That was contrary to the provisions of section 41 of the said Act which provides that 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. The foregoing view is fortified by the persuasive decision in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where it was held that:

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair, as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”

13. In view of the admission by the Rw1 that the claimant was never accorded any hearing before his summary dismissal on 31.7.2009 and the finding herein above that the respondent has failed to prove a valid and fair reason to justify the summarily dismissal, I return that summary dismissal was unfair within the meaning of Section 45 of the Employment Act.

Compensation for unfair dismissal

14. Flowing from the foregoing finding that the summary dismissal of the grievant from employment by the respondent was procedurally and substantively unfair, I further make a finding that he is entitled to compensation under section 49 and 50 of the Employment Act. Section 49 (1)(b) of the Employment Act of 2007 provides for the compensation for wrongful dismissal and unfair termination as the equivalent of salary or wages not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal.

15. In this case, I award the claimant, on behalf of the grievant, Kshs.150,000 being 6 months gross salary as compensation for the unfair and wrongful summary dismissal. In awarding the said compensation, I have considered the length of the grievant's service to the respondent and the fact that he did not contribute to the dismissal through any proven misconduct. The said award is in addition to the amount agreed vide the said pre-trial settlement.

Conclusion and disposition

16. I have found that the summary dismissal of the grievant on 31.7.2009 was wrongful and unfair. I have also found that the grievant is entitled to compensation for the unfair and wrongful summary dismissal in addition to the amount agreed on before the trial. Consequently, I enter final judgment for the claimant in the following terms:

a)	3	months'	notice		Kshs.	75,000
b)		Compensation			Kshs.	150,000
c)	Leave				Kshs.	25,000
d)	Service	gratuity		Kshs.	18,333	
		Total		KShs.	268,333	
	Less	paid			KShs.	118,333
	Net	due			Kshs.	150,000
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17. The claimant is awarded costs and interest at court rates from the date hereof. The sum awarded is subject to statutory deductions.

Signed, dated and delivered at Nairobi this 23rd day of November, 2018.

ONESMUS

N.

MAKAU

JUDGE