



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2166 OF 2015

MICHAEL MARARO WAMBUI.....CLAIMANT

- VERSUS -

GIVE AND TAKE FOREX BUREAU LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 08.12.2015 through Laichena Mugambi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment by the respondent was illegal, unjustified and unlawful.
- b) Salary for the month of April 2015 being Kshs.30, 000.00 (allowed by consent at the hearing).
- c) Pay in lieu of one month notice Kshs. 30, 000.00.
- d) Pay for 11 days worked in May 2015 Kshs. 15, 708.00 (allowed by consent at the hearing).
- e) Payment of accrued leave days being 120 days Kshs.120, 000.
- f) Damages for discrimination against the claimant for delay and withholding payment of his salary.
- g) Service payment for years worked.
- h) Damages for illegal, unreasonable termination of services.
- i) Interest on (b) (c) (d) (e) (f) (g) and (h) above.
- j) Any other or further relief that the Honourable Court may deem fit to grant.

The response to the memorandum of claim was filed on 31.05.2016 through Waruhiu, K'Owade & Ng'ang'a Advocates. The respondent prayed that the claim be dismissed with costs.

The claimant was employed by the respondent from around June 2011 and his last duties were as a cashier. The claimant testified that on 20.04.2015 the amount that was missing was Kshs. 591, 000.00. The claimant testified that he had taken the cash when his operating fund was low. He discussed the issue with his boss because when he was balancing, the books of accounts failed to balance. In the letter dated 29.04.2018 the claimant admitted that the money went missing. The evidence is that he converted the cash to his own gain. By the letter dated 04.05.2015 the claimant dedicated his salary to recovery of the missing money to be deducted at Kshs. 10, 000.00 per month. There was no doubt that the claimant took the cash from the strong room and failed to account for it. The claimant's last day at work was on 11.05.2015 when the respondent suspended him pending the outcome of the investigations. His services were terminated on 13.05.2015.

To answer the **1st issue** for determination the Court returns that prior to the termination and before the Court, it has been established that the claimant failed to account for Kshs. 591, 000.00 and he offered to refund by monthly instalments of Kshs. 10, 000.00. The Court returns that as at the time of termination, the respondent had a valid reason to terminate the claimant's employment as per section 43 of the Act. Further the Court returns that the termination was after detailed meetings at which the claimant admitted his misconduct and offered to refund. The procedure was fair as envisaged in section 45 (2) (c) of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the outstanding remedies as prayed. The Court returns that the prayers for compensation, notice pay and service pay will fail on account that the termination was not unfair and he was a member of NSSF so that section 35 of the Act applies. The claimant was not clear on the leave days due because he admitted taking some leave. The Court further finds that the claimant is undeserving of any of the prayers made especially that he admitted owing the respondent all the money he failed to account for.

In conclusion the suit is hereby determined with a finding that the claimant is undeserving of the award of the residual remedies as prayed for. A decree shall issue accordingly.

Signed, dated and delivered in court at Nairobi this Friday 16th November, 2018.

BYRAM ONGAYA

JUDGE