



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1708 OF 2013

FRANCIS KAIGA.....CLAIMANT

VERSUS

INSTITUTE FOR SECURITY STUDIES.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for:

A declaration that the Claimants' contract of employment was unfairly terminated by the Respondent.

- (a) Payment for 21 unpaid leave days**
- (b) 12 months' salary as compensation for unfair termination Kshs. 1,020,927.00**
- (c) 1 month salary in lieu of notice – Kshs. 85,077.00**
- (d) Damages for breach of contract**
- (e) Certificate of Service**
- (f) Any other relief that this Court deems fit to grant**
- (g) Costs of the suit**

2. The respondent denied the alleged unfair termination of the Claimant's contract of service and averred that the termination was grounded on a valid reason and done after following a fair procedure. It is the defence case that the Claimant committed 3 acts of dishonestly and embezzlement and he was accorded a disciplinary hearing before the termination. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 8.5.2018 and 7.6.2018 when the Claimant testified as CW1 and the respondent called her former Director Mr. Peter Alingo Okoth as RW1. Thereafter both parties filed written submissions which I have considered carefully alongside the evidence tendered.

Claimant's Case

4. The Claimant testified that he was employed by the respondent as a driver on 17.11.2007. That after working for 4 years, he was charged with 8 counts of misconduct and accorded disciplinary hearing. That he denied all the charges because they were false but he was acquitted on 5 counts and was dismissed for 3 counts. He maintained that he was innocent of the offences charged in the said 3 counts. He denied ever forging receipts for accommodation as charged under count one and maintained that the receipts were the ones given to him after paying the hotel. He further denied any wrong doing in withdrawing from the bank Euro 4600 and USD. 7750 on 31.1.2012 without signing any cheque for the same as charged under count 4 and 5. He contended that the withdrawals were done on the basis of letters signed by the management, and that he surrendered all the money withdrawn to the Accountant as required.

5. CW1 further testified that he was not given a fair hearing because his witness was ordered to remain silent and the Audit report which

allegedly implicated him was not shown to him. He therefore prayed for the reliefs sought in his claim.

6. On cross examination, CW1 admitted that he went to Voi on an official trip on 7.11.2010 using the respondent's vehicle. He further admitted that he presented receipts for Kshs.16800 from Fine Breeze Hotel Voi to the respondent to prove the amount he was charged and paid for accommodation. He further admitted he withdrew Euro 4600 and USD7,750 using letters from the office and surrendered the money to the Accountant one Steve Muriithi. He admitted that he was respondent's Bank Agent but denied that he stole any money from the respondent. He further admitted that the Accountant was his boss and also a friend who used to send him to deposit money to his bank account at CFC Stanbic. That on 8.7.2011 and 28.3.2011 the Accountant sent him to deposit Kshs.900,000 and Kshs. 60,000 respectively, in his Account. He however denied knowledge of any fraud. That the said money was given to him at the office but he never asked the Accountant where he got the money from. However he admitted that the Accountant was charged in court and dismissed from employment for the same offences as himself (CW1)

Defence Case

7. RW1 testified that the Claimant was accused of forgery of receipts, and encashing Euro 4600 and USD. 7750 without signing the cheques for the same. That as a result of the said misconduct, the respondent lost money because the money encashed without a cheque was never brought to the respondent and the receipts for Kshs.16800 was overstated. He contended that the loss was confirmed by an Audit by KPMG but explained that the Audit report was not for use in court.

8. RW1 further testified that the Claimant was depositing money into the personal account of Steve Murithi who was the respondent's financial accountant and the latter was later changed in court and convicted in relation to matters raised herein. RW1 contended that the Claimant was dismissed for dishonestly under clause 3.4. of the respondent's Disciplinary Policy after being found to have played part in matters that led to loss of money to the respondent. That before the dismissal the Claimant was given a fair hearing and therefore RW1 prayed for the suit to be dismissed.

9. On cross examination RW1 admitted that he joined the respondent in 2013 after the dismissal of the Claimant. He contended that the dismissal of the Claimant was for 3 reasons founded on an Audit Report done in 2010. He however did not produce the report in court. He further failed to produce the cheques for Euro 4600 and USD.7750 which the Claimant failed to sign when he encashed the said accounts. He however confirmed that the said money was withdrawn using letters given by the Finance Officer Mr Muriithi dated 31.1.2012 which were also signed by the Director management and endorsed that payment be made without cheque. Finally RW1 contended that there was a book in the office for recording money withdrawn from the bank, but he never produced the book in court as an exhibit.

Analysis and Determination

10. There is no dispute that the Claimant was employed by the respondent as a driver under fixed term contract running from 1.1.2012 to 31.12.2012. There is further no dispute that the Claimant was dismissed from employer on 3.7.2012 before the expiring of the contract. The issues for determination herein are:

(a) Whether the termination of the Claimant's contract of service was unfair.

(b) Whether the Claimant is entitled to the reliefs sought.

Unfair termination

11. Under Section 45(2) of the Employment Act, termination of contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that fair procedure was followed. Valid and fair reason is one that relates to the employee's conduct, capacity and compatibility or the employer's operational requirements. Fair procedure on the other hand refers to the process of hearing the employee before arriving at the decision to terminate his services.

Reasons for termination

12. In this case the Claimant was dismissed for forging receipts for Hotel accommodation and withdrawing money from the respondent's bank account without signing cheques for the same. That due to the alleged misconduct, the respondent lost Kshs.16800, Euro 4600 and USD. 7750. RW1 stated that the said misconduct and loss was revealed by an Audit Report by KPMG but the report was not produced in court.

13. The Claimant denied the alleged offences and contended that the receipts he presented to the respondent were genuine receipts given after paying the money for accommodation at the Fine Breeze Hotel Voi. He further contended that the Euro 4600 and USD 7750 withdrawn on 31.1.2012 was not through cheques but letters given by Finance officer Mr. Steve Muriithi. That the said letters were also signed by the respondents Director management and endorsed for payment without cheques by the same signatories. He therefore denied any wrong doing.

14. Under Section 43 of the Employment Act, the burden of proving the reason for terminating the employees services is upon the employer. In this case, I find that the respondent has failed prove the reasons for terminating the services of the Claimant. The Audit report that implicated the Claimant was not produced in court. Secondly no witness was called from Fine Breeze Hotel to confirm that the receipts for Kshs. 16800 presented by the Claimant to the respondent were indeed forged. Finally the evidence by Claimant that the withdrawing of EURO 4600 and USD. 7750 without cheque was lawful was not rebutted. Instead, the respondent produced letters dated 31.1.2012 and Bank Statements to prove that the money was withdrawn without a cheque but letters signed by the respondent's managers for payment without a cheque. The persons who authorized such withdrawals have not been called as witnesses to deny that method of withdrawal or to deny that the money was surrendered to the office after the withdrawal from the bank. Under section 43, failure by the employer to prove the reason

for the termination of employee's services renders the termination unfair within the meaning of section 45 of the Act.

Procedure followed

15. There is no dispute that the Claimant was invited to attend disciplinary hearing in the company of a fellow employee of his choice . There is also no dispute that he was accorded a chance to defend himself. However, he contended that the hearing was unfair because his companion to the hearing was ordered to remain silent, and that documents referred in the charges he was facing were not availed to him including the Audit Report by KPMG.

16. After perusing the proceedings, of the disciplinary hearing held on 3.7.2012, I find a reflecting of a fair hearing. The Claimant was told the nature of the charges he was facing and successfully defended himself against 5 of the eight counts. He never requested to have his representative say anything. There is no indication that the representative was denied the opportunity to make his presentations under section 41 of the Act. All what is required for hearing to be fair is that before terminating the employee, the employer must explain to the employee the misconduct for which termination is being considered and accord the employee a chance to defend himself before the termination is decided. That the said proceedings must be conducted in a language of the employee's understanding and in the presence of a fellow employee or Shop Floor Union representative of his choice. All the said ingredients were met in this cause and I therefore return that the respondent has proved a balance of probability that she followed a fair procedure before dismissing the Claimant.

Relief

17. In view of the finding herein above that the employer has failed to prove a valid and fair reason for dismissing the Claimant, I make declaration that the Claimant contract of employment was terminated unfairly. Flowing from the foregoing declaration, I award the Claimant 5 months salary compensation for unfair termination plus one month salary in lieu of notice under section 49 and 35 of the employment Act. In awarding the said compensation I have considered the fact that the Claimant had reasonable expectation to work for the remainder of his fixed term contract which was 5 months.

18. In addition, I award him salary for 3 days worked in July 2012 plus 5.5 leave days outstanding as offered by the termination letter. The claim for 21 leave days was however not proved in evidence and it is dismissed.

Conclusion and Disposition

19. I have found that the respondent has failed to prove that she dismissed the Claimant for a valid and fair reasons and that has rendered the dismissal unfair. Consequently I enter judgment for the Claimant in the following terms based on the salary of **Kshs.104,818.91** reflected in his latest payslip produced as exhibit:-

One month Notice	104,818.91
5 months salary compensation	524,094.55
3 days salary	12,094.48
5.5 days leave	<u>22,173.23</u>
	Kshs <u>663,181.20</u>

The said sum shall be paid subject to statutory deductions. The Claimant will also have costs of the suit plus interest at the court rates. Finally, The Claimant will also be issued with a certificate of service as required under section 51 of the Employment Act.

Dated, Signed and Delivered in Open Court at Nairobi this 9th day of November, 2018

ONESMUS N. MAKAU

JUDGE