



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.990 OF 2014

ISAAC KIGUMBA AGAMA..... CLAIMANT

- VERSUS -

YARA EAST AFRICA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the statement of claim on 16.06.2014 through Enonda, Makoloo, Makori & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration and finding that the claimant's employment was wrongfully and unfairly terminated and that the said termination of employment is null and void for all intents and purposes.
- b) An order directing the respondent to reinstate the claimant to his employment without loss of position, status or benefits including but not limited to back pay.
- c) An order directing the respondent to pay the claimant all his outstanding dues as pleaded (12 months' salary for unfair termination Kshs.138, 600.00 x 12 making Kshs. 1, 663, 200.00; severance or gratuity pay Kshs.138, 600.00 x 3years x 15/30 days making Kshs.207, 900.00; total sum of Kshs.1, 871, 100.00).
- d) An order directing the claimant to issue the claimant with a certificate of service.
- e) Costs of the suit.
- f) Interest on items b, c, and e above at Court rates from the date of filing the claim until payment in full.
- g) Any other, further or better relief that the Honourable Court may deem fit.

The respondent filed the memorandum of response on 25.06.2018 through Obura Mbeche & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs to the respondent.

There is no dispute that the respondent employed the claimant effective 12.01.2011 as an assistant accountant. The claimant was suspended from duty with effect from 17.12.2013 on allegations of manipulating the respondent's accounting records and leading to massive losses. The respondent stated that the loss was approximately Kshs.146, 988, 776.98 as per the forensic audit carried out by KPMG. The claimant was given a show-cause letter and he replied.

The claimant's employment was terminated by the respondent's letter dated 25.01.2014. The letter stated that the claimant had misrepresented the original accounting figures instead of presenting the report with the proper figures so that the discrepancies were to be shown leading to further investigations by way of reconciliation. The letter stated that the claimant had deliberately manipulated the accounts records or withheld information on existing discrepancies in the reconciliation process thereby preventing the respondent from taking corrective measures. In view of the sensitive position held, the respondent had lost confidence in the claimant and his employment was therefore terminated with the following terminal dues:

- a) Salary for December 2013 and salary for January 2014 up to 25.01.2014, the date of the termination letter.

b) A month's pay in lieu of notice.

c) Nil pay for the due annual leave because all leave days had been taken.

The **1st issue** for determination is whether the claimant's termination from employment was unfair. The evidence is that the claimant was not responsible for making the entries in issue. He demonstrated that the entries had been made by his immediate supervisor one Alex Kamau user AKA on the computer system that was in place. After noticing the discrepancies in the entries, the claimant informed the Finance Manager. The Finance Manager directed the claimant to look at it and thereafter, the claimant received the show cause letter of 17.12.2013. The letter alleged that the claimant had manipulated the figures to balance accounts. The claimant replied denying the allegations as per his letter dated 19.12.2013. He then received the termination letter of 27.01.2014. The claimant testified that the audit report dated 20.05.2014 was long after his termination. He further testified that during reconciliation he noted errors and reported as much to the Finance Manager and they discussed. Respondent's witness RW testified that the claimant reported the errors by pointing them out and by discussing them with the Finance Manager. RW further testified that to rectify the errors a debit note had to be raised at sales department and the claimant would not have been responsible of making such rectification.

The Court has considered the evidence and returns that the respondent has failed to establish that as at the time of termination, the reason for termination was genuine as per section 43 of the Employment Act, 2007. In particular it has not been established that the claimant manipulated the accounting records and that he failed to report the same. The evidence is that he noted the errors, he did not make entries with respect to the errors, and he reported the errors by pointing them out in a discussion with the Finance Manager. In so far as the claimant could not correct the errors because he was not part of the sales department that could raise the relevant debit note, the Court returns that the reason for termination did not relate to the claimant's conduct, capacity or compatibility as per section 45(2) (b) (ii). The respondent failed to establish the reason for termination as per section 47(5) of the Act. Further as submitted for the claimant, whereas a show cause notice was issued, the respondent did not accord the claimant a hearing in presence of a workmate of his choice as per section 41 of the Act. In this case it has come out clearly that an oral hearing was necessary to achieve fairness particularly by the claimant explaining his role as assistant accountant and explaining the makers of the erroneous entries in issue as per the user codes on the computer system. The Court finds that the absence of the disciplinary hearing in the present case lead to serious miscarriage of justice in the entire disciplinary process that had been initiated against the claimant.

The Court returns that the termination was unfair both in procedure and substance.

The claimant prays for 12 months' gross salaries being maximum compensation under section 49 of the Act. The Court has considered that the claimant had served for over 3 years and desired to continue in employment. The claimant had not contributed to the termination and had a clean record of service. The Court finds that the award of **Kshs. 1, 663, 200.00** will serve ends of justice. The Court, in making that award, has taken into account the aggravating factor that the audit report came long after the claimant had been terminated suggesting that the respondent was not keen to establish the purported reason for termination prior to taking the disciplinary action against the claimant.

To answer the **2nd issue** for determination, the Court returns that the claimant was not entitled to gratuity because, as submitted for the respondent, the contract of service did not provide for gratuity. Further it was not a case of redundancy and severance pay would not be available as envisaged in section 40 of the Act. In any event the claimant was a member of NSSF.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's contract of service by the respondent was unfair.
- b) The respondent to pay the claimant **Kshs. 1, 663, 200.00** by 31.12.2018 failing interest at Court rates to be payable thereon from the dated of this judgment till full payment.
- c) The respondent to deliver to the claimant a certificate of service by 01.12.2018.
- d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 2nd November, 2018.

BYRAM ONGAYA

JUDGE