



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1809 OF 2013

MERCY K. SIMON A.K.A.

MERCY KATHURE BUNDI.....CLAIMANT

VERSUS

ORIGINAL SIGONA ENTERPRISES

COMPANY LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant union brought this suit on 18.1.2013 contending that she was unlawfully and unjustifiably dismissed from employment by the respondent on 26.3.2013. She therefore prayed for the following reliefs:

- 1. Compensation for 21 Leave Days Ksh. 15,984/=
 - 2. Severance pay 4 years Kshs.35,550/=
 - 3. 28 Holiday Days workedKshs. 16,576/=
 - 4. ½ pay for February 2013 Kshs. 8,800/=
 - 5. Salary March 2013 Kshs. Kshs.17,760/=
- Total.....Kshs.112,430**

2. The respondent filed her defence on 15.6.2017 denying the alleged unlawful and unjustifiable dismissal and averred that the summary dismissal of the Claimant was lawful and justified because she was liable for the loss of the company funds. She further averred that because the Claimant was summarily dismissed, she is not entitled to any terminal dues and prayed for the suit to be dismissed with costs.

3. On 25.9.2018, the parties agreed to dispose of the suit by written submission on the basis of the pleadings, documentary evidence and written statement filed.

Claimant’s Case

4. The Claimant stated that she joined the respondent in February 2009 as an accountant and shortly thereafter she was promoted to the rank Manager of the company earning Kshs.17,760 per month. On 24.1.2013, she was suspended from duty for alleged misappropriation of Kshs.101,000 for Electricity Bills payment. She denied any responsibility in the alleged misappropriation and contended that her role in respect of Electricity Bill payments was to pass over the Bill to the Treasurer who was and still is a Director of the respondent.

5. The Claimant further stated that on 26.3.2013 she was illegally, unjustifiably and unconstitutionally dismissed from employment. She further contended that on 16.5.2013, the respondent maliciously and without any just cause, published an Advert in the Daily Nation Newspaper giving notice that she had ceased being an employee of the company.

6. The Claimant prayed for the dues pleaded in her suit contending that during her employment she was denied annual leave and was grossly underpaid. She further contended that the salary for March

2013 was never paid.

Defence Case

7. Mr. Muturi Ndungu a director of the respondent filed a written statement by which he confirmed that the Claimant was formerly employed by the respondent. That she was suspended for misappropriation of company funds and thereafter summarily dismissed from her employment. He contended that dismissal was for a valid reason and done after following due process.

8. He further denied that the advertisement in the Daily Nation Newspaper was malicious and contended that it was meant to notify the public that the Claimant was no longer employed by the respondent. He also denied that the Claimant was underpaid and contended that she was adequately compensated for her services while in employment. He concluded by contending the Claimant is not entitled to any terminal dues because she was summarily dismissed.

Claimant's Submission

9. The Claimant submitted that her suspension on 29.1.2013 and the subsequent extension was unfair because she was not given any prior hearing. She further submitted that the summons inviting her to appear before the Board on 7.2.2013 was vague and never raised the misappropriation of Kshs.101,000 as one of the

accusations.

10. The Claimant further submitted that the respondent has not proved that it was her duty to pay the Electricity bills and that she failed to do so. She further submitted that the respondent did not consider her efforts towards rectification of the electricity billing anomalies and the admission by Post Bank that Kshs.53,000 had been stolen by her staff and refunded to the respondent.

11. She further submitted that the alleged indepth Audit by Wambugu and Associates was not proved by filing an Audit Report nor was the electricity bills from Kenya Power and Lightning company produced as exhibits to prove the outstanding bills due to the alleged misappropriation. She therefore urged to the court to find that she was dismissed without a valid reason as there was no evidence

produced to connect her with the alleged misappropriation or embezzlement of funds.

12. On the issue of the reliefs sought she submitted that there was no dispute that she was entitled to 27 leave days not taken, ½ pay for February 2013, March for 2013 and one month salary in lieu of notice. She further submitted that she is also entitled to severance pay for 4 years plus 12 months salary as compensation for the unjustified dismissal. She relied on **Pamela Nelima Lutter vs. Mumias Sugar Co. Ltd [2017] eKLR** and **Abraham Gumba vs. Kenya Medical Supplies Ltd.**

Respondent's Submission

13. The respondent submitted that the law applicable to this case is Employment Act section 41, and 44. She submitted that there was a valid reason for dismissing the Claimant summarily. She submitted that the loss or misappropriation of Kshs.101,000 amounted to gross misconduct and it justified the summary dismissal of the Claimant under section 44(4) (g) of the Act.

14. The respondent further submitted that she produced evidence for indepth Audit of Electricity Bills Accounts No. 52599 and 37295 dated 28.1.2013 for the period from 31.11.2011 to 27.12.2012. That among other observations, the report revealed that the bills were paid in cash to avoid bouncing of cheques and the bills used to be overpaid to avoid disconnections. She therefore submitted that Kshs.101,000 went missing in the said process under the watch of the Claimant who had the actual authority to receive, control and bank the funds for the benefit and interest of the company. She relied on **Evans Kamadi Misango vs. Barclays Bank Ltd [2015]eKLR** to urge that the court should not substitute the views of the employer on the reason for terminating his employer's services and should not re-enact the internal disciplinary process already undertaken at the workplace.

15. On the issue of the procedure followed, the respondent submitted that she acted in accordance with justice and equity by according the Claimant a hearing as provided by section 41 of the Employment Act. She relied on **Anthony Mizala Chitari vs. Malindi Water and Sewerage Co. Ltd [2013] eKLR** where the duty of the employer to inform the employee the reason for the intended termination and consideration of the defence by the employee before the termination was considered.

16. In this case the respondent submitted that the Claimant was summoned to a hearing by the respondent's Board where she was informed the allegation of the missing Kshs. 101,000 and she defended herself and thereafter a dismissal letter was issued to her.

17. On the reliefs sought the respondent submitted that the summary dismissal was justified and as such the Claimant was not entitled to salary in lieu of notice and compensation under section 49 of the Act. She further submitted that the Claimant was not entitled to salary for the period of suspension because section 17(1) only allows pay for work done. She relied on **Robert Mofat Odhiambo vs. Harambee Sacco Ltd [2018] eKLR** where the court found that the respondent's terms of service provided for no salary during suspension period.

Analysis and determination

18. There is no dispute that the Claimant was employed by the respondent as the Manager of the company until 26.3.2018 when she was summarily dismissed. The issues for determination are:

(a) Whether the dismissal was justified and unlawful.

(b) Whether the reliefs sought should be granted.

Unfair /Unjustified dismissal

19. Under section 45(2) of the Employment Act, termination of an employee contract of Service is unfair if the employee fails to prove that the it was grounded on a valid and fair reason and that a fair procedure was followed. A valid and fair reason is one that relates to the employees' conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure is one that accords to justice and equity and basically relates to due process of according the employee a fair hearing before the termination.

Reason

20. In this case the reason for the dismissal of the Claimant is that she presided over misappropriation or embezzlement of funds while serving as the Manager of the respondent. The respondent contended that the Claimant was the overall authority to ensure proper application of the company funds but she failed. That the Claimant allowed payment of electricity bills by cash and even over payment allegedly to avoid disconnections or bouncing of cheques.

21. The Claimant admitted that there was loss of funds but denied that she had role in the said loss. She produced her letter to Wambugu and Associates (Auditors) by which she explained the anomalies in the electricity bills and the way she worked hard to ensure that part of money lost was refunded by Post Bank after it was found that it was her staff member who had stolen the money instead of remitting to Kenya Power. She has however not disputed the allegation by the defence that she had allowed payment of electricity bills in cash instead of cheque and as result money got lost.

22. After considering the evidence and the submission by both sides, I find that, as the Manager of the company, the claimant was bound by duty to ensure that the respondent funds were properly managed to avoid losses as it happened herein. It was not the right way to pay electricity bills through her junior officers using cash. I agree with the defence that she presided over the misappropriation or embezzlement of the company funds by encouraging payment of bills using cash, and even overpayment using cash yet there was company cheque.

23. Under section 44 (4) (g) of the Employment Act, the employer is entitled to summarily dismiss his employee for committing or on reasonable suspicion that he committed a criminal offence against the employer or to substantial detriment of the employer or his property. In addition, an employer is entitled to dismiss the employee if he carelessly or negligently performs his duty like it happened in this case. Consequently, I find and hold that the respondent has proved on a balance of probability that there was a valid reason for dismissing the Claimant.

Procedure followed

24. In this case the Claimant was accorded a hearing by the respondents' Board before the dismissal. That the Claimant produced the letter dated 2.2.2013 inviting her to the hearing. The letter stated the charge against her as the missing or misappropriation of Kshs.101,000. She did not dispute that she was accorded a fair hearing before dismissal. All what she contended that before suspension she was not accorded any hearing. I however do not think that the failure to accord hearing before the suspension can render an otherwise fair dismissal, unfair and unjust.

25. After considering all the material presented to the court, I am satisfied that the respondent has discharged her burden of proving and justifying the reason for terminating the Claimant's contract of service as required by section 43 and 47(3) of Employment Act. She has also proved that a fair procedure was followed before the dismissal as provided by section 41 of the Act. Consequently I return that the dismissal was justified.

Reliefs

26. In view of the foregoing finding that the summary dismissal was justified, I dismiss the claim for salary in lieu of notice and compensation.

27. The claim for severance pay is also dismissed because the Claimant was not dismissed on account of redundancy. Likewise the claim for

28 holidays worked is dismissed for lack of particulars and evidence.

28. The claim for salary for February and March 2013 is however granted. No good reason was given to prove that the Claimant was not entitled to salary during suspension. I therefore award the Claimant the outstanding ½ salary for February 2013 plus salary for

26 days upto 26.3.2013 when she was dismissed.

Conclusion and Disposition

29. I have found that the summary dismissal of the Claimant from service was justified. I have also found that the Claimant is entitled to the

salary during suspension upto 26.3.2013 when she was dismissed. Consequently I enter judgment for the Claimant in the following terms:

(a) ½ salary for February 2013.....Kshs.8,800

(b) Salary March 2013.....Kshs.17,760

Total Kshs.26,560

The Claimant will also get ½ costs of the suit plus costs and interest at court rate from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU

JUDGE