



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1807 OF 2011**

**JACKSON THIONG'O MICHWE.....CLAIMANT**

**-VERSUS-**

**EQUITY BANK LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as a Procurement Assistant on 16.5.2005 and worked until 16.3.2007 when he was summarily dismissed for alleged misconduct, namely theft of goods from the respondent's stores. He was charged in court with the alleged offence but after the trial, he was found innocent and therefore acquitted on 6.4.2011. Thereafter, he brought this suit contending that he had been unfairly and wrongfully dismissed and sought the following reliefs:

- i) Kshs.1,500,000 being the salaries and dues computed from 1st March 2007 to 30th April 2011, being the 50 months he underwent trial before acquittal.
- ii) Kshs.360,000 being the 12 months pay as damages for wrongful termination under the Employment Act.

2. The respondent admitted the employment relationship with the claimant but denied that the summary dismissal of the claimant was unfair and wrongful. She averred that the claimant was dismissed for misconduct under section 17(g) of the Employment Act after according him an opportunity to defend himself. She further averred that upon dismissal, she paid the claimant his rightful dues and issued him with a certificate of service. She therefore denied liability to pay any further dues and prayed for the suit to be dismissed with costs.

3. The suit was heard on 13.2.2017 and 18.6.2018 when the claimant testified alone but the respondent called her Security Manager Mr. Julius Thuruchiu to testify for her as Rw1. Thereafter both parties filed written submission which have carefully considered herein alongside the pleadings and evidence tendered.

**Claimant's case**

4. The claimant testified that he was employed by the respondent as a Procurement Assistant on 16.5.2005 and his workstation was Kimathi Street Branch. He started with a monthly gross pay of Kshs.25,000 but later it was increased to Kshs.30,000.

5. In January 2007, he noticed some discrepancies in stocks and reported the same to the Procurement Officer in the first week of January 2007. On 6.2.2007 he also raised a query on the discrepancies with his Assistant Mr. Joseph Kariuki, who was in charge of the stocks in the store. Thereafter investigations were done and the claimant and his assistant were summoned by the Head of Security to the Head Office on 15.2.2007 where they recorded statement before being taken to Kilimani Police Station. On 16.2.2007 they were charge in Court and released on bail the same day.

6. However, when he reported to work the following week, he was served with a summary dismissal letter citing compromise of integrity as the reason for the said dismissal. He faulted the said dismissal because it was not preceded by a notice or any disciplinary hearing. He denied any wrong doing and contended that after his trial he was acquitted.

7. On cross examination, he admitted having been issued with a certificate of service. He further admitted that the charge sheet indicated his date of arrest as 1.3.2007 and not 15.2.2007 but contended that he did not know whether on 16.2.2007 he was investigated. He also admitted that he recorded a statement and signed being but denied ever being given a chance to defend himself. He also contended that there was no audit report made or physical stock taking done to verify whether the lost items were not lying in the store.

### **Defence Case**

8. Rw1 testified that he did investigations on the fraud herein and made a finding that there was theft of 119 pieces of Lase Jett Toners Q4959A and Q5913A from the stores. He further found that the claimant was responsible for the theft because he was the Stores Assistant and he had admitted taking some of them thinking that his colleague Mr. Joseph Kariuki was also doing the same.

9. Rw1 further testified that, after his investigations, he reported the matter to the police and the claimant and his colleague were arrested and charged in court. He however admitted that after the trial the accused were acquitted. He further admitted that the claimant was dismissed from employment by the respondent before the acquittal.

10. On cross examination Rw1 admitted that it was the claimant who blew the whistle that something was amiss in the stores. He further admitted that the trial court found that the management of the respondent's stores was lose. He further admitted that he was unaware whether the claimant was accorded disciplinary hearing before the dismissal. He was also not aware whether any audit was done to verify the alleged theft. He was also not aware whether a physical Audit was done to verify whether the goods where not lying somewhere in the bank. He however explained that the 119 pieces toner were stolen over a period of time and not in one go. In conclusion, he stated that the claimant is the one who reported the theft and had admitted that there was theft.

### **Analysis and determination**

11. There is no dispute that the claimant was employed by the respondent as a Procurement Assistant from 16.5.2005 until 16.3.2007 when he was summarily dismissed from alleged misconduct. There is further no dispute from the submission by counsel that the law in force during the time when the cause of auction arose herein was the Employment Act, which was repealed by the current Act in 2008 when it came into force. The issues for determination are:

a) Whether the summary dismissal of the Claimant was substantively and procedurally wrongful and unfair.

b) Whether the reliefs sought should be granted.

### **Wrongful and unfair dismissal.**

12. The summary dismissal was done under section 17(g) of the repealed Employment Act which

provided for summary dismissal

***“(g) if an employee commits or on reasonable and sufficient ground is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.”***

13. The claimant denied the alleged misconduct and contended that he is the one who discovered the discrepancies in stocks and blew the whistle. He further contended that no audit or physical counting of the stock was done after he blew the whistle. He also contended that he was not accorded any disciplinary hearing concerning the said discrepancies in the stocks. That all what was done was to summon him to write a statement, take him to the police, have him charged in court for theft and thereafter dismiss summarily only for him to end up being acquitted of the alleged theft. The foregoing chronology of events were admitted by Rw1 who also admitted that the respondent had a Disciplinary Committee that hears employees before dismissing them for misconduct.

14. Under section 17(1) of the repealed Act, the claimant had a right to sue the employer to dispute the facts that led to his dismissal or the reason for the dismissal as being unjustified. In this case the reason cited for the dismissal according to the letter dated 16.3.2007 was compromised integrity and credibility. However, in view of the admission by Rw1 that he could not confirm whether any audit, physical count or disciplinary hearing was accorded to the claimant to verify the alleged theft which was the basis upon which the respondent based her belief that the integrity and credibility of the claimant had been compromised, I find and hold that the dismissal was done in a hurry and without establishing any justifiable reason. Consequently, I return that the summary dismissal was wrongful and unfair and indeed a breach of the contract of service.

### **Reliefs**

15. Despite the foregoing finding, I will not grant the prayer for reinstatement or re-engagement of the claimant because under section 12(3) of the ELRC Act the court is barred from reinstating an employee after the lapse of 3 years from the date of the dismissal. Instead I will consider the alternative reliefs sought under paragraph 12 of the statement of claim.

16. The claimant prayed for salary for the period March 2007 and April 2011, the period when he was facing the Criminal Charges, totaling to Kshs.1,500,000. The said prayer is however dismissed because the claimant had already been dismissed during that time. The second prayer is for 12 months salary compensation for wrongful termination but again, I dismiss it because it was not provided for under the repealed Employment Act.

17. However, I award the claimant one month salary in lieu of notice as provided for under clause 7 of his contract of service. As correctly submitted by the defence counsel, all what was payable to wrongfully dismissed employee under the repealed Act was the salary or wages he would have earned during the notice period. That was the law under section 16 of the repealed Employment Act and it was upheld in numerous judicial precedents both binding and persuasive to this court including the ones cited by the defence counsel herein.

### **Conclusion and disposition**

18. I have found that the summary dismissal of the claimant was wrongful. I have also found that the claimant is not entitled to the claim for salary after dismissal. Finally, I have found that the claimant was not entitled to compensation for wrongful dismissal under the repealed law except salary or wages for the notice period. Consequently, I enter judgment for the claimant in the sum of **Kshs.30,000** plus costs and interest from the date of filing suit.

**Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018**

**ONESMUS N. MAKAU**

**JUDGE**