



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.330 OF 2014

PETER MASILA NGENGYA.....CLAIMANT

VERSUS

MEYA AGRI TRADERS LIMITED.....RESPONDENT

JUDGEMENT

On 20th January, 2003 the claimant was employed by the respondent as Chief Cashier. He served diligently.

On 27th April, 2013 the claimant was arrested and arraigned in court and charged with the offence of theft by servant in Nakuru Criminal Case No.940 of 2013. He was detained from 27th April to 2nd May, 2013.

On 1st May, 2013 the claimant reported back to work and where he was issued with letter of summary dismissal.

Upon police investigations, the criminal case was withdrawn and there was no reason to justify the summary dismissal. He reported the case of summary dismissal to the Labour Officer and it was found there was no case to warrant summary dismissal.

The claim is that the termination of employment was summary and did not allow the claimant a fair chance to be heard this has resulted in unfair termination of employment and caused him loss and credibility over allegations he did not commit. Upon termination of employment he has become unmarketable as an accountant and chances of new employment non-existent. Upon securing new employment the recommendation from the respondent was not positive and thus new employment not secured.

The claimant is seeking the following;

a) Compensation of 12 months' pay at 37,600.00 x 12 all being Ksh.451,200.00;

b) Compensation for work during public holidays for 10 years Notice pay Ksh.112,800.00;

Annual leave Ksh.37,600.00; Gratuity Ksh.188,000.00; Lost years Ksh.225,600.00;

Saturday day offs not paid Ksh.71,053.00;

Advocates' fees for criminal case Ksh.89,000.00; and

Costs for typed proceedings for the criminal case Ksh.21,000.00

c) Costs of the suit.

The claimant testified that upon employment by the respondent he worked diligently until 27th April, 2013 when the police arrested him from his office and held him in custody and then caused him to be charged in Criminal case No.940 of 2013, Nakuru. In the year 2010 the respondent managing director had given authority to senior staff to encash money from the cashier and Mr Joseph Kangethe became a signatory. Upon encashing cheques from the claimant, he would write cheques to the respondent as the Finance Manager.

The claimant also testified that upon arrest he was charged together with Mr Kangethe for theft by servant. Upon investigations it was established that Mr Kangethe had been defrauding the respondent and he was joined and the claimant acquitted.

The claimant was bonded out and on 4th May, 2013 went back to work but the respondent decided they could not take him back and was

issued with a backdated letter of summary dismissal with effect from 1st May, 2013. The reasons given for summary dismissal was theft by servant which was not true and the claimant has since been acquitted of the same. Despite filing a complaint with the labour officer, the respondent refused to reinstate the claimant or pay his terminal dues as claimed.

The claimant also testified that over the years he did not take annual leave and had a balance of 28 days not taken and not paid. He had overtime hours for working on Saturdays for an extra 3 hours for 10 years. During high seasons, he was made to work for long hours without compensation. All public holidays the claimant would remain at work and without compensation save for Jamuhuri day when he was allowed time off.

The claimant also testified that at the time he was dismissed he was aged 59 years and has been unable to secure new employment and should be compensated for the 6 years he had to his retirement. He secured employment in Nyahururu but a year later his contract was terminated. The respondent has failed to issue him with a Certificate of Service.

In defence, the respondent does not dispute claimant's employment as Chief Cashier but he was required to work with diligence and faithfully undertake his duties and promote the interests of the respondent as the employer. In breach of contract he cashed cheques from one Joseph Kangethe Njeri as fraudster and such was acting with negligence. The claimant failed to inquire about the cheques that were dishonoured before giving Kangethe cash he continuously requested, failed to inform management of the monstrous amounts that were being cashed by Kangethe and failed to exercise due care and skill when cashing the cheques taking into account and consideration of his vast work experience and expertise in accounting and banking transactions.

The claimant was in breach of his employment contract when he failed to diligently and faithfully discharge his duties and failed to conform to company regulations that required authorisation of large cash payments from top management that is the directors Mr Daniel Ngunia and Albert Njuguna. The claimant failed to protect the interests of the company by facilitating the fraud by the finance manager.

Though the claimant was not found criminally liable he was negligent in his duties as an employee and termination of employment was lawful and justified no compensation is warranted and the claims made should be dismissed.

In evidence, Mr Daniel Ngunia the managing director testified that the claimant was a senior cashier and had a contract spelling out the terms and conditions of his employment. He was to receive cash sales and ensure safe keeping and do daily banking or when there was substantial cash amounts received. Any amounts of Ksh.300,000.00 was to be banked and not kept in the office. Unless absent for good cause, the claimant had no assistant and had to do his work directly and personally do banking.

The claimant was dismissed from his employment upon discovery of fraud contrary to his terms of employment. The claimant allowed the encashing of strangers cheques without authority of the managing director in writing and paid through vouchers. Such authority was to be obtained from the managing director. The claimant had instances when he obtained written authority to encash but in a majority of instances he did not.

The encashing of cheques was to be based on a staff salary amount. He was to get the director counter-sign vouchers before payment as a standing instruction. This meant the witness had to know of all transactions.

Mr Ngunia also testified that he held a meeting with one his suppliers who informed him that his cheque had been returned by the bank unpaid. He was shocked as all along he knew there were sufficient funds to pay suppliers. He decided to visit the bank only to discover the account had been overdrawn beyond the limit without his knowledge. He called the claimant for an explanation and Kangethe and both had no satisfactory answers.

The witness then went to the claimant to find out the bank statement as he was to keep the books of accounts and which showed the respondent was within its banking limits and there was no overdrawing. The difference with the bank statements could not be explained. He directed for investigations. The claimant and Kangethe had not informed him of any fraud. The claimant had not disclosed to paying cash to third parties.

The matter was reported to the police based on an audit. It was discovered there was an overdrawing of Ksh.11 million. This was a case of fraud and theft by servant and the claimant together with Kangethe were arrested and charged in court. The case against the claimant was that of collusion as the custodian of cash and records, the claimant had colluded and aided Kangethe in defrauding the respondent.

Mr Ngunia also testified that the claimant is not entitled to any overtime pay as he worked within his contract hours from 8am to 5.30pm and Saturday from 8am to 4pm. There was a memo with regard to work hours. The claimant did not apply to take leave and if this had been done he would have been allocated time for leave. There was no provision for payment of gratuity under the contract of employment and such is not due. The claim for lost year is not due as the respondent did not have age limits. Due to the actions and omissions of the claimant, the respondent lost huge sums of money and has since not been able to recover.

Before the claimant was dismissed he had been directed to go through all the books of accounts and established the losses. The claimant filed a report but upon bank reconciliations it was discovered the collections of cheques could not be traced. Mr Wamae the auditor sought clarifications from the claimant but there was no explanations.

The claimant was given a chance to pay for the losses and money not accounted for. Previously the claimant had had several cases of cash losses in addition to what was discovered in the audit. The claimant had not been honest in his duties and the summary dismissal was not out of malice but based on matters which had been brought to his attention and good basis. The police arrested the claimant to address the criminal aspect and the respondent could not keep him in employment based on the audit findings and the huge losses incurred.

Both parties filed detailed written submissions. These have been put into account together with the pleadings and the evidence adduced

during the hearing. The issues which emerge for determination are;

Whether the summary dismissal and termination of employment was unfair; and Whether the remedies sought are due.

By letter dated 1st May, 2013 the claimant was dismissed from his employment with the respondent on the grounds that he had been arrested for interrogation by the police and then charged with the offence of theft by servant on 30th April, 2013. For these reasons he was dismissed from employment.

An employer has the statutory right to dismiss an employee by summary action under the provisions of section 44 of the Employment Act, 2007 (the Act). Such summary action must arise following a fundamental breach of the contract of employment or following gross misconduct.

The employer is however required to abide by the procedural requirements of the law set out under section 41(2) of the Act by ensuring the employee is given notice and allowed a fair and reasonable chance to a hearing. The claimant has well relied on the case of **Titus Musau Ndivau & another versus Waridi Limited, Cause No.903 of 2012** and the findings that upon a misconduct being reported the employer must make an enquiry into the matter and allow the employee to show cause why employment should not be terminated and ensure the employee is given a hearing under the provisions of section 41 of the Act. However in cases where there is a fundamental breach of the contract of employment and or gross misconduct, the motions of hearing the employee are different. Shorter time periods are allowed to allow for dismissal. Misconduct and gross misconduct is thus addressed differently. One under section 41(1) of the Act and the other under section 44 read together with section 41(2) of the Act.

Fundamentally, the procedural safeguards are largely the same, the employer holds to notify the employee and allow for a hearing however short the time given for such hearing to take place.

In this case upon the respondent discovering the loss of huge sums of money through cheques issued to third parties, the claimant was called upon to give an explanation. He filed his report but upon reconciliations with bank statement, it became apparent that there were huge losses incurred by the respondent. This led to invitation of the police to conduct investigations and discovery of fraud and whereupon the claimant and Kangethe were arrested.

Other than the criminal proceedings, the respondent on good cause and in addressing the motions of section 44 of the Act had a good basis to address the employment misconduct.

There is the audit report by P.G. Wahome & Co. dated 30 April, 2013 and has a conclusion that Matanya Hill Trading Company and the finance manager fraudulently obtained money from the respondent through dishonoured cheques. Such loss arose through fraud and the respondent lost over Ksh.11 million.

In evidence the claimant admitted that he made cash payments to Kangethe through encashment of cheques. In the claimant's statement to the police he avers that;

What prompted the Encashment of personal Cheques. ... The managing director Mr Ngunia verbally authorised him and the other top senior staff to be encashing their personal cheques through the cash office. ... this same verbal instructions/authority was passed to me through the window panes of my office and was meant to start immediately. ...

The claimant as senior Accountant and having worked for the respondent from the year 2003 to 2013 had a vast work experience and expertise in his field of work. Matters account requires diligence and attention to detail. The common practice in the profession is to ensure payment upon supporting documents and keeping of records of accounts. This is not a strange or unreasonable requirement or expectation as it goes with the job. Just like a medical practitioner is required to examine a patient before making a prescription for medicine or a lawyer required to seek instructions from a client before filing suit. In accounting, before making a payment confirmation of supporting documents is a necessity.

The evidence that there were verbal instructions to different senior staff of the respondent is without such support documents. Upon making such payments of encashing cheques for huge amounts, a diligent accountant in the nature of position the claimant held ought to have asked and made an enquiry on the same. It went with the job. Instruction through the window pane is not defence to failure to be diligent in a position requiring diligence and caution before making huge payments.

Putting the above into account, before the claimant was arrested on 27th April, 2013 there was an audit exercise by Mr Wahome. This was to enquire into matters which came to the attention of the managing director that the respondent's account had been overdrawn. This did not arise from the claimant as the senior accountant. I take it the managing director just stumbled on this information after a supplier had a cheque returned unpaid.

There was no internal alarm as to the financial status of the respondent until such discovery.

During the audit, the claimant was consulted and reported that all was well and that he had done his duties well.

The resulting discovery of losses was therefore not a matter new to the claimant. He had been brought to account for his role and this was found wanting. There was breach of duty to be diligent and take caution in making payments. This went to the foundation of his employment contract.

The resulting summary dismissal on the grounds of breach of the employment contract had a foundation and with justification. There was a

genuine reason and valid grounds leading to summary dismissal and termination of employment in accordance with the law.

In summary dismissal, notice pay is not due.

Compensation is equally not available to an employee found to have been validly dismissed from his employment. The claimant was notified of the allegations he faced and failed to give satisfactory explanations.

Whatever the reason(s) for dismissal from employment, payment for days worked and leave days earned is payable. The claimant admitted he was paid for the month of April, 2013 and in the letter dismissing him from employment the respondent is willing to pay for the leave days due subject to deduction of any liabilities. Such is a matter that the parties can thus address outside of these proceedings.

On the claims for work during public holidays for 10 years, the claimant testified that he would be at work during public holidays save for Jamuhuri day. He however fell short of setting out which other public holidays he was at work for the court to be able to assess the same and make a finding.

The payment of gratuity must be a benefit set out in the collective agreement, contract or other private treaty. It does not automatically accrue. The contract of employment submitted does not entail such benefit.

Claim for lost year is on the basis that the claimant was aged 59 years when he was dismissed by the respondent and has not been able to secure new employment. On the finding that termination of employment was lawful, the respondent cannot be held accountable for lost years. The claimant also testified he has since been able to secure new employment for year but left as the respondent failed to issue a good recommendation. Such a recommendation is not a legal requirement of the respondent as the employer. The only record the respondent should issue at the end of employment is the Certificate of Service in accordance with section 51 of the Act.

Work on a Saturday unless agreed otherwise if lawful. Unless set out as a day off under the contract of service, this should be a productive time at work. Work on such a day is not compensated at a different rate.

The claim for advocates' fee for the criminal case and typed proceedings for the criminal case are not matters for this court to address. Such do not arise from any employment relationship between the parties herein.

On the findings above, the claims by the claimant are found without basis and are hereby dismissed save that the claimant shall be issued with his Certificate of Service in accordance with section 51 of the Employment Act, 2007. Each party shall bear own costs.

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of:.....