



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 472 OF 2014

DANIEL K. GICHUKI.....CLAIMANT

VS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 18th March 2014 and filed in Court on 24th March 2014 is for unlawful termination of employment.
2. The Respondent filed a Memorandum in Response on 25th April 2014 but did not attend the hearing in spite of due notice. The matter went to full trial and the Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Shop Assistant on 14th August 1996. He was later promoted to the position of Accounts Assistant. His monthly salary at the time of termination stood at Kshs. 64,590.
4. On 28th June 2013, the Claimant was sent on compulsory leave on allegations of making irregular payments. On 19th August 2013, he was invited to appear before the Disciplinary Committee. He claims that no proper charges were placed before him. On 1st October 2013, the Claimant was issued with a termination letter.
5. It is the Claimant's case that the termination of his employment was unlawful and unfair. He now claims the following:
 - a) A declaration that the termination of his employment was unlawful
 - b) Reinstatement or in the alternative:
 - i) 12 months' salary in compensation.....Kshs.775,080
 - ii) 1 month's salary in lieu of notice.....64,590

iii) Unpaid house allowance @ 15% of monthly salary

iv) Damages for loss of employment being expected earnings up to the retirement age of 60 years

c) Costs plus interest

The Respondent's Case

6. In its Response dated 24th April 2014 and filed in Court on 25th April 2014, the Respondent states that it had received queries from its suppliers regarding double payments approved and posted by the Respondent's employees in the Finance Department.

7. In order to allow for investigations into the irregular payments, some employees, including the Claimant were sent on compulsory leave. The investigations confirmed that irregular payments had been made on fake invoices.

8. The Respondent states that it was the duty of the Claimant to verify the invoices in the system before authorizing payments, adding that the Claimant failed to verify the authenticity of the subject invoices.

9. The Respondent further states that on 17th September 2013, the Claimant was invited to answer to allegations of gross misconduct before an impartial Disciplinary Committee. The Claimant was duly informed of the allegations against him to which he responded.

10. The Respondent avers that the Claimant was sent on paid compulsory leave following suspicion that he had purposefully passed the fake invoices with intent to defraud the Respondent. However, following investigations and the Claimant's explanation during the Disciplinary Committee proceedings, it was found that the Claimant had been negligent and had improperly performed his duties which had led to irregular payments being made.

11. It is the Respondent's case that the termination of the Claimant's employment was lawful and fair. Further, the Claimant was paid all his dues which he duly acknowledged.

Findings and Determination

12. There are two (2) issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

13. The termination of the Claimant's employment was effected by letter dated 1st October 2013 stating as follows:

"Dear Daniel,

RE: TERMINATION OF EMPLOYMENT

Kindly refer to our show cause letter dated September 21, 2013, and your reply of the same dated September 23, 2013.

The management has considered and deliberated on your reply and found it unacceptable and recommended the termination of your employment effective October 1, 2013.

This is therefore to communicate to you that your services with Nakumatt Holdings Ltd have been terminated effective October 1, 2013 due to negligence and improperly performing your duties. (sic)

Please return any company property in your possession and make the necessary arrangements to clear with the Human Resource department.

You shall be paid your final dues in accordance with the regulations in force.

We wish you success in your future endeavors.

Yours faithfully

For: Nakumatt Holdings Ltd

(Signed)

F.N Kimotho, FKIM

Human Resource and Development Manager”

14. According to this letter, the Claimant’s employment was terminated on account of negligence and improper performance of duties.

15. Prior to the termination, the Claimant was sent on compulsory leave to facilitate investigations involving irregular payments made in the Finance Department. The compulsory leave was extended twice and ran until 1st October 2013, the effective date of the termination.

16. The question for determination is whether the Respondent has demonstrated a valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act, 2007. This Court has held in the past that the burden placed on an employer under Section 43 is to establish a reason that would cause a reasonable employer to terminate employment (see ***Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Ltd [2015] eKLR***)

17. According to the documents filed in Court, the Claimant was accused of complicity in the processing and posting of fraudulent invoices. The details of the subject invoices were however not provided and the exact charges facing the Claimant were therefore in doubt. On this account, the Court formed the opinion that the Respondent was on a fishing expedition against the Claimant.

18. In its pleadings and submissions, the Respondent states that the termination of the Claimant’s employment was preceded by some investigations. This notwithstanding, no investigation report was laid before the Court and there was no evidence that the Claimant was involved in any such investigations nor was he supplied with a copy of the investigation report.

19. As held by this Court in ***Rebecca Ann Maina and 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*** an employee facing disciplinary action is entitled to notice of the exact nature of the charges, sufficient time to respond as well as access to relevant documents in the employer’s possession.

20. This mark was missed in the Claimant’s case and the Court finds that the Respondent failed to discharge its burden under Section 43 of the Employment Act. That being the case, the Court further finds that the disciplinary process was at best a mechanical box-ticking exercise and .did not meet the threshold set by Section 41 of the Act. This might explain the unusual occurrence where the show cause letter was issued after the disciplinary hearing.

Remedies

21. Overall, the Court finds the termination of the Claimant's employment substantively and procedurally unfair and awards him twelve (12) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

22. From the pay slip produced by the Claimant, his salary was inclusive of a housing component. The claim for house allowance is therefore without basis and is dismissed. The claim for expected earnings up to the retirement age of 60 years is also without basis and is dismissed.

23. Finally I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....Kshs.775,080

b) 1 month's salary in lieu of notice.....64,590

Total.....839,670

24. This amount will attract interest at court rates from date of judgment until payment in full.

25. The Claimant will have the costs of this case.

26. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF JANUARY 2017

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JUDGE

Appearance:

Mr. Mandala for the Claimant

Mr. Nyaberi for the Respondent