



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 394 OF 2014

BETWEEN

MICHAEL KIMEUCLAIMANT

VERSUS

1. UDHABITI EDUCATIONAL TRUST KENYA

2. WOLFGANG PUTZ

3. GABRIEL KAMPENHUBER

4. CAROLINE PUTZRESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Aminga & Company Advocates for the Claimant

Inamdar & Inamdar Advocates for the 1st, 2nd and 4th Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 22nd August 2014. He states he was employed by the Respondents as an Administrator, on 1st August 2011. The 1st Respondent is a Trust. The other Respondents are the Trustees. He worked under a contract, which was to expire on 31st July 2013. He earned a salary of Kshs. 20,000 per month. His contract was renewed for 2 years upon expiry. The new contract would begin 1st August 2013, and end on 31st July 2015. His salary was increased to Kshs. 22,405 per month. His contract was however terminated by the Respondents on 4th November 2013. It was alleged the Claimant had stolen Kshs. 80,000 from a locked-up metal box, in a visitor's room. He states the allegation was false, malicious and fabricated, intended to facilitate unfair and unlawful termination. He was not given notice of termination. He was not heard. He was not given reasons for the decision. He prays for the following orders against the Respondents:-

- a) 1 month salary in lieu of notice at Kshs. 22,405.
- b) Service pay for 2 years at Kshs. 22,405.

c) Salary for the remainder of the contract period at Kshs. 470,518.

d) Unpaid leave at Kshs. 22,405.

e) Public holiday pay [12 days] at Kshs. 17,924.

2. The 1st Respondent filed its Statement of Response on the 23rd September 2014. 2nd and 4th Respondents filed their joint Statement of Response on the same date. The 1st Respondent concedes to have employed the Claimant as an Administrator, at a monthly salary of Kshs. 22,405. The Claimant agreed in April 2013, to refund through salary check-off, Kshs. 25,000 belonging to the 1st Respondent, which had been lost under the Claimant's custody. He was dismissed on 4th November 2013, after another cash amount of Kshs. 80,000 went missing. The loss was reported to Diani Police Station and Police Abstract Report issued. The Claimant was summarily dismissed, and there was no obligation to issue him notice. He was given an opportunity to defend himself. He was heard. He was accompanied at the hearing by a fellow Employee. He was given reasons for the decision in the letter of termination. The Respondent prays for dismissal of the Claim.

3. The 3rd Respondent did not file any papers or participate in the hearing.

4. The Claimant gave evidence, and closed his case, on the 2nd September 2015. The participating Respondents called 2 Witnesses. Security Guard Geoffrey Okunjuku gave evidence on 2nd September 2015. Founding Trustee of the 1st Respondent, an Advocate of the High Court of Kenya, Victor Muthoga Kamau, gave evidence on the 22nd September 2016, bringing the hearing to a close.

Claimant's Case

5. Kimeu testified he is a Tour Guide/ Driver. He met the 2nd Respondent in Kenya, when the 2nd Respondent was touring. It was before the Trust was registered. The 2nd Respondent asked the Claimant to look for land and assist in registration of the Trust. The 2nd and 3rd Respondent worked together. They returned to Kenya 6 months after they had asked the Claimant to do the groundwork. The Claimant oversaw construction of the Project Premises. He became Respondents' Driver. This was in the year 2007. He was later employed as Administrator on terms indicated above. On 4th November 2013, he was asked to go to the Respondents' Office. He was issued a letter of summary dismissal. The letter was signed by the 2nd and 4th Respondents. They alleged the Claimant was responsible for loss of Kshs. 80,000.

6. The Claimant was not aware of the circumstances under which the cash went missing. Caroline said she kept the money in a safe, in her house. The Claimant did not handle this safe. He was not aware there was such money. He was not questioned by the Police. He was called to the Police Station the following morning. He requested the Police to visit the scene of the crime. He was advised by the Police he would be summoned later on. He was not summoned. Police informed him afterwards that Caroline had withdrawn the complaint. The Claimant was not given any chance to defend. He was not heard before dismissal.

7. He testified on cross-examination that he was employed by the 1st Respondent. The contract was between him and the 1st Respondent, not the other Respondents. Other Respondents are Trustees. Termination letter was signed by the 2nd and 4th Respondents. The reason for termination is given.

8. He did not know the money was in a box, in a Visitor's Apartment. He did not know if there were spare set of keys to all Apartments. The Apartments were cleaned. Spare keys were handled by the House Mother. She did the cleaning.

9. The Claimant saw the metal box after the allegations were made. The box had a lock. The Claimant did

not notice the lock to have been interfered with. The Apartment doors did not appear to have been interfered with. The Claimant would be a suspect if he had control over the custody of the keys. He was aware Caroline reported the crime to the Police on the 5th November 2013.

10. He was not aware Kshs. 25,000 was lost earlier. He was not aware of an agreement between him and the Respondents for refund of this amount. He did not acknowledge the agreement indicated to have been signed by himself. He did not admit loss. He agreed to have deduction made upon his salary. It was a few months before his dismissal. He did not agree the Employer lost trust in him. He did not agree the Employer feared there was likely to be further loss. Jane Wanjala was the Matron. Geoffrey was the Security Guard. They both attended the disciplinary meeting. The Claimant was a paid-up Member of the N.S.S.F. There is evidence of unpaid annual leave. There was one Public Holiday between 1st August 2013 and 20th November 2013. Police told the Claimant Caroline had withdrawn the complaint.

11. On redirection, the Claimant told the Court he did not handle the keys to the Apartment. The agreement relating to loss of Kshs. 25,000 did not reveal the circumstances. Termination letter did not mention any other misconduct. There was no hearing. It was just a meeting where the Matron and the Guard happened to attend. The Claimant prays the Court to allow the Claim.

Respondents' Case

12. Okunjuku testified he worked as a Security Guard. Caroline called him and told him she had lost money. The money was in a Visitor's room. The Matron said she had gone to clean the room. The Claimant sent her to clean the room. Caroline called a meeting after the incident, attended by the Claimant, the Guard and the Matron.

13. Learned Counsel and founder Trustee, Victor Muthoga Kamau told the Court the Claimant was employed by the Trust as stated in the Claim. Some money given to the Claimant to pay electricity bills was lost. The Claimant agreed to refund the money, Kshs. 25,000, through salary check-off. The Respondents did not report this incident to the Police; they settled at their own level.

14. On 4th November 2013, the 4th Respondent discovered there was theft in a Visitor's room, where money was lost. Only the Claimant had access to the room. The door was not broken. Whoever opened the door was the Claimant, or someone with the Claimant's blessings.

15. Kamau advised the Respondents to ensure due process was followed, in dealing with the Claimant. Summary dismissal on the ground of theft or negligence, he advised, was a measure the Respondents could avail themselves. The offence was reported to the Police. It had not been withdrawn at the time Kamau gave evidence before the Court.

16. Termination letter issued on 4th November 2013, after disciplinary hearing took place earlier the same day. The Claimant merely denied the accusation. He was given adequate opportunity to give defend himself. He attended hearing in the company of the Security Guard. His explanation was unsatisfactory. Caroline was mostly in her native Austria, and unavailable to give evidence in Court.

17. Cross-examined, Kamau told the Court there were 2 incidents of cash lost. The first related to Kshs. 25,000, the second to Kshs. 80,000. The second incident led to dismissal of the Claimant. There were other Employees at the Institution. The complaint with the Police was not withdrawn. The Claimant stated he did not steal the money, and shifted blame elsewhere. He had been a diligent Employee. His contract had been extended. He had some time left before the contract expired. The Respondents lost trust and confidence in the Claimant, after the loss of its money. They pray the Claim is dismissed, with costs to the Respondents.

The Court Finds:-

18. The Claimant was initially employed by the Respondents as their Driver, after he had assisted the

Respondents in setting up Udhabiti Trust. From the documents on record, the Trust was engaged in Children Welfare and retained Visitors' Apartments.

19. The Claimant later became an Administrator. He was offered written contracts. The last was for 2 years, running from 1st August 2013. This contract was terminated prematurely, through a letter of termination signed by the 2nd and 4th Respondents, on 4th November 2013. The reason for termination is given in the letter to be- missing funds of Kshs. 80,000- from a secured and locked box, in the Visitor Apartment. Earlier on in April 2013, the Respondent alleges to have lost another sum of Kshs. 25,000, through the hands of the Claimant.

20. The questions raised in this dispute are, as is traditionally the case in unfair termination claims, whether the Respondent had valid reason or reasons in terminating the Claimant's contract; whether the decision was arrived at fairly; and whether the remedies sought are warranted. The applicable law is Section 41, 43, 45, 47 and 49 of the Employment Act, as read together with Section 12 of the Employment and Labour Relations Court Act.

21. The Claimant's contract contained tasks and responsibilities. He was the Administrator. He was in a supervisory role. He assigned duties and supervised his juniors.

22. There is no doubt the Claimant was entrusted by the Respondents Kshs. 25,000 to pay electricity bills. The cash disappeared. The Claimant signed an agreement between him and Caroline Putz, in April 2013. He agreed to have Kshs. 6,250 deducted monthly until the whole sum was recovered.

23. Questioned in Court about this incident, the Claimant gave very shaky and inconsistent evidence, which did his credibility no good at all. He stated: -

“ I am not aware that Kshs. 25,000 was lost earlier. I have seen page 6 of the 1st Respondent's Documents [agreement]. I am not aware of that document. It has my signature. It is indicated it is about loss of Kshs. 25,000. I agreed to deductions. I did not admit...’

24. This sort of evidence, cast the Claimant as an untruthful Witness, and affects his credibility with respect to other aspects of his evidence.

25. 5 months later Kshs. 80,000 went missing. The money was safely locked in a metal box, and tucked away in the safety of a Visitor's Apartment. The Claimant, and staff authorized by him, had access to the room. He was the custodian of the keys. The door was opened, and lock to the box broken. Kshs. 80,000 was gone.

26. The Court agrees with the Respondents that, either Claimant stole the money, or had knowledge of who was behind the stealing. It was not likely others gained access, without the knowledge of the Supervisor. It is not material from the perspective of employment law, what was reported to the Police, and what action the Police took or failed to take; it is sufficient that the Respondent had reasonable and sufficient grounds, under Section 44[4] [g], to suspect the Claimant had committed a criminal offence against, or to the substantial detriment of his Employer, or Employer's property. Considering the Claimant's antecedent, proclivity, and defined role, the Respondents would have reasonable and sufficient grounds to summarily dismiss the Claimant.

27. Termination was based on valid reason.

28. It is doubtful that the Claimant was heard in the manner contemplated under Section 41 and 45 of the Employment Act 2007. Counsel and Trustee Mr. Kamau states he advised the Respondents to accord the Claimant due process. There is no evidence to show they did so. There is no letter calling on the Claimant to show cause why he should not face disciplinary action; there were no charges read to him in a language understood by him; there was no Employee of the Claimant's choice, or Trade Union Representative accompanying the Claimant to any disciplinary hearing; and there is no evidence that the Claimant was heard. The alleged disciplinary hearing was in reality an investigatory process, where Caroline summoned

the Claimant, the Guard and the Matron, and took them to the scene of the crime, showing to them evidence of opened doors, broken metal box and missing cash. The Guard and the Matron were not there in fulfillment of Section 41 of the Employment Act on Claimant's right to have a Co-Employee/Representative at a disciplinary hearing; they were there to assist Caroline with the investigation. There was no hearing, and to this extent, termination was unfair.

29. Considering that the Respondents had valid reason justifying summary dismissal, there is no merit in the prayer for notice pay. The item is rejected.

30. The Claimant was a paid-up Member of the N.S.S.F. He is not entitled to service pay under Section 35 [6] of the Employment Act.

31. His contract was terminated for lawful reason. He does not merit anticipatory salaries.

32. He did not explain to the Court which year his claim for unpaid annual leave is hinged on. The relevant period was not pleaded in the Statement of Claim, or elucidated in the evidence. Similarly he did not give details of Public Holidays claimed. He prays for 12 Public Holidays, without naming them. The contract in question was from 1st August 2013, and was terminated on 4th November 2013. The Claimant did not say which 12 Public Holidays fell within this contractual period.

33. On the whole, the Court is satisfied the Claim has no merit, save that the Respondents did not meet the test of procedural fairness. Given the findings on substantive justification, the Court is inclined to grant a minimal **1 month salary in compensation for unfair termination, at Kshs. 22,405.**

34. No order on the costs.

IN SUM, IT IS ORDERED:-

a. Termination was based on valid ground, but flawed on fairness of procedure, therefore unfair.

b. The Claimant is granted a minimal compensation of 1 month salary at Kshs. 22,405, for unfair termination.

c. No order on the costs.

Dated and delivered at Mombasa this 24th day of February 2017.

James Rika

Judge