



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 829 OF 2013

REUBEN ONGAYA OPANDE.....CLAIMANT

VERSUS

HOGGERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By an amended Memorandum of Claim filed in Court on 8th April 2016 the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed an amended Memorandum of Defence 17th May 2016.

2. At the hearing the Claimant testified on his own behalf and the Respondent called its Human Resource Consultant, Caleb Mwige. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a cook initially on casual basis from 18th February 2007. He was issued with a letter of appointment after one (1) year.

4. On 2nd April 2013 he was suspended for two (2) days without pay on allegations of tampering with a CCTV camera in the kitchen at Steers Ngong Road Branch where he was deployed.

5. The Claimant avers that he was prevailed upon by the Assistant Branch Manager, Carolyne Munala and the Human Resource Manager, Muteshi Eugene to admit that he had tampered with the camera so that he could keep his job.

6. On 11th April 2013, the Claimant was issued with a termination letter on account of gross misconduct. It is the Claimant’s case that the termination of his employment was unlawful and unfair. He further claims that he was underpaid

7. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 9,266.30
- b) 11 days on suspension.....3,920.00
- c) Underpayment for 72 months.....78,933.60

d) Accrued leave 21 days.....	9,266.30
e) Public holidays (30 days).....	10,692.00
f) Severance pay for 6 years.....	32,076.00
g) 12 months' salary in compensation.....	127,874.90
h) Salary from the date of termination	
i) Certificate of service	
j) Costs	

The Respondent's Case

8. In its amended Memorandum of Defence, the Respondent admits having employed the Claimant as a cook at a monthly salary of Kshs. 6,455 effective 1st February 2008. By the time of termination of his employment the Claimant's monthly pay had been increased to a basic salary of Kshs.8,170 plus a house allowance of Kshs. 1,230. The Respondent denies that the Claimant had worked for one (1) year before being issued with a letter of appointment.

9. The Claimant's employment was terminated on 11th April 2013 for gross misconduct. The Respondent pleads that the Claimant was given a fair hearing prior to the termination.

10. The Respondent avers that in the month of March 2013, there was theft of supplies at the Respondent's kitchen at the Ngong Road Steers Branch where the Claimant was stationed. The Respondent was unable to trace the source of the theft until the Manager on duty reported to the Operations Manager that someone had tampered with and repositioned the security camera positioned to cover the kitchen on the Steers side.

11. The Operations Manager reviewed the video clips captured by the particular camera in March 2013 and established that the Claimant had a hand in the repositioning of the camera. On 30th March 2013, the Operations Manager invited the Claimant to review the video footage in the presence of another member of staff, Steve Ngandi. The Claimant admitted tampering with the camera.

12. On 2nd April 2013, the Claimant was placed on a two (2) days' suspension to pave way for investigations and on 4th April 2013 he was issued with a show cause letter. On 8th April 2013, the Claimant wrote a letter admitting having tampered with the camera. His explanation was that he was not aware he was doing anything wrong.

13. The Claimant was heard on 11th April 2013 and on the same day he was issued with a termination letter.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was justifiable and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

15. On 4th April 2013 the Respondent wrote to the Claimant as follows:

“Dear Reuben,

RE: NOTICE OF DECISION TO TERMINATE FOR GROSS MISCONDUCT

In accordance with the employment act, 2007, you are receiving this notification that the company has decided to terminate your employment because of gross misconduct.

In the month of March, 2013;

- You tampered with the steers’ kitchen Camera on more than one occasion at our Steers’ Ngong road branch.*

This letter serves as notice that you are being suspended without pay effective immediately and will receive a termination letter three days from the date on this letter unless you exercise your right to a hearing.

Please acknowledge receipt of this letter and indicate your intention to request or decline a hearing below.

For Hoggers Limited

(signed)

MUTESHI EUGENE

HUMAN RESOURCE AND TRAINING MANAGER”

16. The Claimant acknowledged receipt of this letter and requested for a hearing. His employment was terminated by letter dated 11th April 2013 stating as follows:

“Dear Reuben,

RE: TERMINATION OF SERVICE

We are writing this letter to inform you that your employment with Hoggers Limited has been terminated effective from April 2nd, 2013.

You were issued;

A letter indicating gross misconduct and the decision to terminate.

You were also given the opportunity for a hearing, which you did took (sic) advantage of.

As a result of the company’s investigations, the company has decided to terminate your services.

Kindly set up an appointment with the human resources department to return all company property in your possession, after which, your final dues will be calculated and paid. Effective immediately, you are no longer permitted in any employee-only areas of our company.

Any appeal to this decision must be made in writing to the managing director within seven (7) days of the date of this letter.

Regards,

For; Hoggers limited

(T/A steers and Debonairs pizza);

(signed)

MUTESHI EUGENE

HUMAN RESOURCE AND TRAINING MANAGER”

17. Prior to the termination, the Claimant had on 8th April 2013 written to the Human Resource Manager admitting having tampered with the camera on 20th March 2013. He claims that he was coerced and induced to write this admission in order to keep his job. Apart from the Claimant’s word, there was no evidence of any such coercion or inducement and the Court found that the Respondent had a valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act, 2007.

18. Regarding the termination procedure, the Court found that the Respondent failed to comply with the mandatory procedural fairness requirements set out under Section 41 of the Act thus rendering the termination procedurally unfair.

Remedies

19. In light of the foregoing finding I award the Claimant three (3) months’ salary in compensation. In making this award I have taken into account the Claimant’s length of service as well as the finding that there was a valid reason for the termination. I have also considered the Respondent’s conduct in the termination transaction. I further award the Claimant one (1) month’s salary in lieu of notice. I also allow salary for eleven (11) days in April 2013 and leave pay for three (3) months in 2013.

20. The claims for underpayment and public holidays were not proved and are dismissed. The claims for severance pay and salary from the date of termination are without basis and are also dismissed.

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

- a) 3 months’ salary in compensationKshs. 28,200
- b) 1 month’s salary in lieu of notice.....9,400
- c) Salary for 11 days in April 2013 (9,400/30x11).....3,447
- d) Prorata leave for 2013 (9,400/30x1.75x3).....1,645
- Total.....42,692**

22. This amount will attract interest at court rates from the date of the award until payment in full.

23. The Claimant is also entitled to a certificate of service and the costs of this case.

24. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF MARCH 2017

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JUDGE

Appearance:

Mrs. Ngetho for the Claimant

Mr. Michuki for the Respondent