



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2155 OF 2014

JOSEPH KINYUA NGARICLAIMANT

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

Mr. Kigata for the claimant

Mr. Mayende for respondent

JUDGMENT

1. The suit was brought by a memorandum of claim on 4th December 2014 seeking relief for unfair, unlawful, and unprocedural termination of employment and payment of terminal benefits itemised in paragraph 22 of the memorandum of claim.
2. The respondent opposes the claim and filed a response to the memorandum of claim on 27th February 2015.
3. The claimant filed a reply to the respondent's memorandum of reply on 17th March 2015.
4. The claimant filed a witness statement on 27th October 2015. Both parties rely on the pleadings, list of documents filed and the written submissions having opted not to call any witnesses in the suit.

Claimant's Case

5. Claimant was employed by the respondent by a contract dated 23rd January 2009 as a project assistant with effect from 9th February 2009, on probation. He was confirmed on 9th August 2009 and worked continuously until the 15th July 2014 when he was summarily dismissed on allegations that the claimant wilfully and/or negligently facilitated the loss of respondent's cash on diverse dates revealed in an internal audit report as follows;

(a) On 21st March 2014, the claimant allowed payout for refurbishment of Ngong end Marsabit branch without justification and approval hence occasioned the loss of Kshs.300,000/=.

(b) On various dates between 26th July 2013 and 21st March 2014, the claimant authorized payouts without confirming the delivered quantities and thus occasioned the respondent a loss of

Kshs.490,735.60 at Lodwar branch, Kshs.688,904/= at Ngong branch and Kshs.495,486/= at Marsabit branch.

(c) On various dates in the month of April 2014, the claimant allowed payment of air conditioners and electrical installation without the bill of quantities in Embakasi 2 branch and thus occasioning the respondent a loss of Kshs.481,100/=.

6. The claimant was served a show cause letter on 24th June 2014 dated 19th June 2014 and was to respond to these allegations by the same day 24th June 2014. The claimant states this was evidence of malice by the respondent against him.

7. That on 24th June 2014, the claimant responded to the letter in which he defended himself thus;

(i) He did not deal with fees in the projects nor approve payouts to contractors

(ii) He does not authorise payouts to contractors

(iii) That the alleged project (Marsabit and Lodwar) had not been completed and hence any conclusion on payment was premature at the time.

8. On 26th June 2014, the claimant was served with a second show cause letter dated 25th June 2014. The claimant responded to the same as follows;

(i) That the claimant was not involved in design, estimate, valuation, verification, payout or authorisation of mechanical service.

(ii) That in accordance to his duty he was not involved in design, estimate, valuation, verification, payout or authorisation of electrical service.

9. On 3rd July 2014, the respondent issued a third letter to the claimant inviting the claimant to attend a disciplinary hearing on 10th July 2014.

10. The claimant contends that he was not given opportunity to be heard at the disciplinary hearing.

11. That the panel was biased and had a pre-determined mind-set from the outset and that the claimant was not offered opportunity to call any witnesses.

12. That the summary dismissal was unlawful and unfair.

13. The claimant appealed by a letter dated 18th August 2014, but the appeal was not entertained.

14. The claimant states that he lost his employment, salary and benefits, he was entitled to and has suffered loss and damage. That he has suffered mental anguish, severe financial distress due to loans given to him at favourable rates which had now converted to commercial rates, defamation and loss of future earnings.

15. The claimant seeks payment;

(i) In lieu of one month's notice – Ksh.114,517/=

(ii) In lieu of 36 days untaken leave and

(iii) 12 months' compensation

Response

16. The respondent filed a response to the memorandum of claim on 27th February 2015, in which the employment of the claimant is admitted.

17. Respondent further admits it made an appraisal of the claimant from the year 2010 to 2013 and that the respondent issued the claimant with two show cause letters addressing the issue of irregular procurement practice.

18. The respondent preferred three charges against the claimant as alleged earlier and provided the claimant with opportunity to respond to the allegations.

19. The respondent avers that the claimant was guilty as charged and it followed proper procedure in disciplining him having afforded him opportunity to respond to the show cause letter and to attend a disciplinary hearing where he was heard.

20. That the claimant was accorded opportunity to appeal the decision to summarily dismiss him from employment.

21. That the respondent relied *inter alia* with the minutes of the disciplinary hearing marked CBK – 16 at pages 145 – 158 of the respondent's list of documents.

22. That the claimant had fundamentally breached his obligations stipulated in the operations manual and job description and the summary dismissal is not wrongful and unfair and the claimant is not entitled to the reliefs sought and the suit be dismissed with costs.

Matters for Determination

23. The issues for determination are as follows;

- (i) Whether the summary dismissal was for a valid reason
- (ii) If the summary dismissal followed a fair procedure.
- (iii) If the claimant is entitled to the reliefs sought

Determination

Issue I and II

24. Section 44 (4) (c) of the Employment Act 2007 provides the reason for which the claimant was summarily dismissed from employment.

25. Section 43 (1) on the other hand obliges the employer to prove the reason or reasons for the termination failing which, the termination is deemed unfair within the meaning of Section 45.

26. The above notwithstanding, the claimant has the overall burden of proving that his employment was unfairly terminated or his dismissal was wrong.

27. In the present case, both parties rely on pleadings and documentation, presented in support. Pleadings per se do not constitute evidence. However where a pleading is admitted or not denied by the other party, it becomes a fact.

28. The respondent admits the particulars of employment of the claimant and his terms and conditions of employment.

29. The claimant was employed on 9th February 2009 and was confirmed on 9th August 2009 in the position of project assistant. In the year 2010, 2011, 2012 and 2013, the claimant received performance

based rewards.

30. It came as a surprise to him to receive a show cause letter dated 19th June 2014 and on 24th June 2014 accusing him of irregular procurement practices resulting to loss by the respondent of Kshs.1,558,079.60/=.

31. The claimant denied the charges stating that he did not deal with fees in the projects nor approve payments to contractors. Furthermore the alleged (Marsabit and Lodwar) projects were on going and the conclusion on payment were premature, at the time.

32. The respondent issued the claimant with a second show cause letter dated 25th June 2014 received on 26th June 2014 requiring the claimant to explain the loss of Kshs.481,000/= in an alleged irregular procurement practice at Embakasi Branch.

33. The claimant further denied the charge stating that he was not involved in design, estimate, valuation, verification, payments or authorisation of mechanical services and electrical services and stated blame lay elsewhere.

34. The claimant further stated that he was not given the internal audit report that formed the basis of the allegations levelled against him.

35. The allegations made by the respondent against the claimant which are denied are complex technical matters which required explanation by the technical officers involved in the impugned projects.

36. In terms of Section 43 (1) as read with Section 47 (5) of the Employment Act, 2007, once the employee questions the validity of the reasons set out by the employer for his dismissal, the burden shifts to the employer to prove that the reasons for the summary dismissal existed and constituted sufficient justification to summarily dismiss the employee.

37. In the present case, the claimant has through his pleadings and documentary evidence cast sufficient doubt on the validity of the reasons preferred by the respondent. It behoved the respondent to adduce such evidence as to rebut the doubts cast by the claimant to justify the summary dismissal.

38. The respondent has fallen short of this requirement by its failure to call the technical personnel involved in the impugned projects and the claimant has therefore proved on a balance of probability that his summary dismissal was wrongful and unfair within the meaning of Section 45 of the Employment Act, 2007.

39. Accordingly the court finds that the summary dismissal of the claimant was wrongful and unfair and the claimant is entitled to compensation in terms of Section 49 of the Act.

40. The claimant is also entitled to payment of one month's salary in lieu of notice in the sum of Kshs.114,517/=. This finding flows from the finding that the summary dismissal was wrongful.

41. The claimant has not demonstrated that he was entitled to payment in lieu of 36 days leave.

Compensation

42. The court has regard to Section 49(4) in assessing the amount of compensation payable in terms of Section 19 (1) (c).

43. In this regard the claimant lost a high paying job without justification. He had a clean record and had been awarded three years in a row for good performance.

44. The claimant having been summarily dismissed was not paid any terminal benefits upon separation.

Furthermore, the claimant had served for a continuous period of close to 5 years and suffered loss and damage.

45. The respondent failed to adduce any evidence to show that the claimant contributed to his dismissal at all.

46. The court having regard to all these factors awards the claimant eight (8) months' salary as compensation for the wrongful and unfair dismissal.

47. The court enters judgment in favour of the claimant as against the respondent as follows;

(i.) Kshs.114,517/= in lieu of notice.

(ii.) Ksh.916,136/= compensation

Total award Kshs.1,030,653/=.

(iii.) The award is payable with interest at court rates from date of judgment till payment in full.

(iv.) Costs to follow the outcome.

Dated and delivered at Nairobi this 2nd day of March 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE