



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.1120 OF 2014**

**SAEED HUSSEIN SAID .....CLAIMANT**

**VERSUS**

**BANODA OIL LTD .....RESPONDENT**

**JUDGEMENT**

Issue in dispute – unlawful and unfair termination and claim for damages

The Claimant was employed by the Respondent as an Accountant in June, 2011 at a monthly wage of Kshs.60, 000.00. he served probation for 6 months and on 25<sup>th</sup> November, 2011 the Claimant was promoted to the position of Acting Chief Accountant at a gross wage of Kshs.100,000.00 and until he was confirmed on 27<sup>th</sup> June, 2012 and salary reviewed to Kshs.150,000.00.

The Claimant worked diligently in his position.

On 22<sup>nd</sup> January, 2014 it came to the claimant's knowledge that he was being investigated on account of his personal relationship with Mr Muthama, who had been dismissed from employment by the claimant. Mr Muthama had been the Marketing Manager until mid-January, 2014 when he was summarily dismissed.

To allow for investigations, the Claimant by letter of 22<sup>nd</sup> January, 2014 offered to go on leave as the covert investigation on him were in bad faith and amounted to expression of lack of trust in him. While on such leave, the Claimant received letter dated 27<sup>th</sup> January, 2014 placing him on 3 weeks suspension. He letter did not set out the reasons for suspension or investigations.

On 12<sup>th</sup> February, 2014 the Claimant was issued with letter of summary dismissal. This was in total disregard to the provisions of section 41 of the Employment Act, no terminal dues were paid and the salary due for time worked was not paid. Even though the Claimant was invited for a meeting on 11<sup>th</sup> February, 2014, he was subjected to a barrage of questions over matters he had no prior notice or knowledge of. Such was unfair and unwarranted.

The claim is for;

- a) *A declaration that the summary dismissal was unfair;*
- b) *Damages for unfair termination of employment;*
- c) *Pay for 13 days worked in February, 2014;*

*d) 12 days leave due ;*

*e) Notice pay;*

*f) Costs of the suit;*

*g) Certificate of service; and*

*h) Interests of the awards.*

The Claimant testified in support of his case. Upon employment, the Claimant worked diligently and was promoted and his last monthly salary was enhanced to KShs.200, 000.00. In January, 2014 the Claimant learnt from his colleagues that he was under investigations but he had not been informed. On 21<sup>st</sup> January, 2014 he came to his office and found the IT staff with his lap top and in the claimant's office. The next day when the Claimant tried to log into the system, his password had been changed and could not access. He went to his boss and proposed that he should take time off to allow the Respondent to conduct investigations on him openly instead of doing so under cover. The Claimant did a letter taking leave to allow for investigations.

The Claimant was then called and suspended for 3 weeks. On 11<sup>th</sup> February, 2014 the Claimant was called to the office for reasons not disclosed. He was subjected to various questions by different officers. He was asked to explain his letter taking leave to which he noted that it was unprofessional of the Respondent to conduct investigations against him without his knowledge to which the managing director saw to be a challenge as the Claimant was then issued with a letter of summary dismissal.

While the Claimant was away on suspension he was not given any information. The confidential report submitted by the Respondent was never brought to his attention until the pleading were filed in defence. The proceedings and minutes of 11<sup>th</sup> February, 2014 were never issued to the claimant.

The Claimant also testified that he worked in a very sensitive position and did not detect any fraud while serving the respondent. It was his duty to ensure all taxes were remitted to KRA and where the Respondent paid a penalty, this was not while the Claimant was at work. To avoid an investigation under cover, the Claimant offered to take leave. Muthama had been forced to resign. There had been no warning or show cause notice for later reporting at work or for non-remittance of tax dues to KRA.

## **Defence**

In response, the respondent's defence is that the Claimant was summarily dismissed from his employment with them under the provisions of sections 43(2) and 44 of the Employment Act for reasons well within his knowledge. The Claimant was dismissed for negligently performing his duties which according to the nature of his duties and the nature of the respondents business he was required to be careful and his failure to heed the business reporting times, deliberate breaks from office during business hours and failure to obey company authority resulted in the dismissal.

The Claimant was terminated for breach of his obligations under the contract and gross misconduct. Such is allowed in law.

The Respondent diligently followed reasonable procedures to investigate the matter and conducted a fair hearing before effecting the summary dismissal. The Claimant was given notice and shows cause as to why he was to be terminated from his employment and was given an opportunity to defend himself in the presence of another employee. At the disciplinary hearing on 11<sup>th</sup> February, 2014 the Claimant was present. The dismissal was justified, lawful and for the reason of the Claimant conduct that resulted in the substantial financial loss on the respondent. The claim should be dismissed with costs.

In evidence, the Respondent called George Muthui, the Chief Accountant. Muthui testified that he is

responsible for the respondent's financial statements and all transactions. The Claimant held a very crucial role within the business but he failed to be diligent in undertaking his duties. The Claimant had a habit of reporting late for work; he would be absent; lacked commitment to duty; and he was issued with several warnings. The Claimant failed to heed the warnings and caution letters of;

23<sup>rd</sup> August, 2011 he was issued with a warning;

14<sup>th</sup> May, 2012, a warning;

1<sup>st</sup> November, 2011, a warning;

20<sup>th</sup> January, 2012 a warning;

21<sup>st</sup> May, 2012 a warning;

10<sup>th</sup> September, 2012 a warning;

And on 17<sup>th</sup> January, 2014 the Claimant was issued with a final warning.

The reasons for the warning were habitual late reporting to work at 10am instead of 8am; frequent taking of breaks while at work; and lack of commitment to duty. As a result the Claimant was suspended from duty to allow for investigations. He was called for disciplinary hearing on 11<sup>th</sup> February, 2014 where he attended with another employee to defend himself. After hearing the Claimant a decision was made to dismiss him for the reasons of negligence of duty; failure to keep time; taking of deliberate breaks during work hours; and lack of commitment to duty.

The reason of negligence arose when the Respondent noted that Kenya Revenue Authority (KRA) officers came and found the Respondent had not paid taxes and when it was checked a fake receipt on KRA due was found. The Respondent was penalised Kshs.2.6 million. This was brought to the attention of the Claimant but he had no answers on this gross lapse of duty.

## **Submissions**

Both parties filed written submissions.

The Claimant submits that due process was not followed in his dismissal. On 22<sup>nd</sup> January, 2014 the Claimant learnt of secret investigations against him which forced him to seek leave upon which the Respondent suspended him due to his alleged association with Commercial Sales Manager, Mr Muthama which reasons only came to the attention of the Claimant in the filed investigations report by the respondent. The Claimant was called for a disciplinary hearing without being given the investigations report; without any show cause notice or notice setting out matters to be addressed at such hearing. Section 41 of the Employment Act was not addressed during the hearing of the allegations made against the claimant. The hearing was not fair.

The Claimant has relied on the cases of **David Wanjau Muhoro versus Ol Pejeta Ranching Limited [2014] eKLR; Kadenge Karisa Konde versus Coast Clay Works limited [2016] eKLR; CMC Aviation Limited versus Mohammed Noor [2015] eKLR; Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Ltd [2013] eKLR.**

The Respondent submits that the Claimant was employed as the Chief Accountant for the Respondent and his employment contract required him to devote all his time and attention to the business of the respondent. His work hours were 8am to 5pm. The position of the Claimant was sensitive to the business and was therefore required to be diligent, loyal and of utmost dedication. The Claimant was not diligent, lacked commitment and was reckless. The Claimant was habitually late, took frequent breaks which resulted in issuance of several warnings.

The Respondent also submits that the hearing on 11<sup>th</sup> February, 2014 the Claimant had notice of 8 allegations against him following investigations. The Claimant gave his responses which were found not satisfactory and led to his dismissal due to negligence of duty; failure to report on time; taking breaks and failure to obey company authority. There were valid reasons for dismissal leading to a lawful termination of employment. The reliefs sought are not due.

The Respondent has relied on the following cases, **Janine Buss versus Gems Cambridge International School [2016] eKLR; Alphonse Machanga versus Operation 680 Limited [2013] eKLR; Fredrick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR.**

### **Determination**

Gross misconduct of and by an employee is a matter subject to summary dismissal. Before such a sanction can issue, an employer is required to abide the provisions of section 41(2) of the Employment Act that;

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

The question that must be answered is whether the respondent's sanction of summary dismissal was based on reasonable and sufficient grounds. According to **section 47(5)** the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing.

In **Judicial Service Commission versus Gladys Boss Shollei, Civil Appeal No.50 of 2014**, the Court of Appeal held that;

*Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer*

The provisions of the Employment Act with regard to summary dismissal are set out under the section 44 of the Employment Act. Such reasons can be expanded by an employer noting the nature of business that requires taking into account certain things that may not be set out under section 44 of the Act. Such is to ensure that the employer is able to take charge of its business and that employees undertake their duties with due diligence. Where the employer has put such measures to outline the business objectives and address factors that may lead to summary dismissal outside the matters set out under section 44 of the Act such must be brought to the attention of the employees immediately upon employment and such must be made part of the employment contract. Failure to issue any rules and regulation, policy guidelines or work requirements to this effect, the Employment Act applies.

In this case, the defence filed does not speak to the evidence of the sole witness for the respondent, Mr Muthui. With the defence, there is the record of the claimant's warning letters and caution notices. The hearing notice said to have been issued to the Claimant calling him for disciplinary hearing is not attached and when the Respondent witness was put to task to explain the lapses he testified that;

*... we called the Claimant on 11<sup>th</sup> February, 2014 to attend a meeting on 11<sup>th</sup> February, 2014 and the Claimant was in attendance. The Claimant was to come for hearing on 11<sup>th</sup> February, 2014 but I do not have the invitation letter. The summary dismissal letter is dated 12<sup>th</sup> February, 2014.*

*... the reason for dismissal was fake KRA receipt but this is not noted on the letter of summary dismissal. ...*

The Claimant testified that he was forced to take leave when he noted that he was being investigated. He was then suspended to allow for investigations. As noted by Mr Muthui, it is apparent that the Claimant was called for disciplinary hearing on the same date, the 11<sup>th</sup> February, 2014 and hearing conducted on equal date and which was followed by dismissal.

There are a myriad of reasons cited for the dismissal which includes, late reporting on duty; lack of work commitment; and issuance of several warning letters. However, Mr Muthui in evidence stated that the main reason leading to the dismissal of the Claimant was the fake KRA receipt. However this is not a reason set out in the letter of dismissal. Such is a serious matter and borders of criminal conduct. It was not made clear as to why the respondent, having conducted investigations against the Claimant would omit such a matter in the letter of dismissal if indeed this is the real reason for his dismissal.

On reporting late for work, the only evidence submitted to this effect is the email of 28<sup>th</sup> August, 2011 sent to all employees. Such is not particular to the Claimant or directed at a particular date when he was alleged to be late for work. It is not specific to the claimant.

The internal memo dated 14<sup>th</sup> May, 2012 was to all staff. Not specific to the claimant. Similarly, the notice of 1<sup>st</sup> November, 2012 was to all staff. The only specific notice is that of 17<sup>th</sup> January, 2014 to the Claimant which is not acknowledged by him in confirmation that he received and accepted the warning.

Where the memos and emails were targeted at the claimant, nothing stopped the Respondent from issuing a specific notice of warning to him. To therefore make the warning letter of 17<sup>th</sup> January, 2014 as the *last warning* is to go against the grain and contrary to fair procedure.

The detailed warnings letter, notices, emails to the Claimant and memo to staff are clear that the Respondent was documenting work place matters. However, the hearing leading to the claimant's dismissal on 11<sup>th</sup> February, 2014 is not documented. This was a matter contested by the claimant. Indeed, where the Claimant was suspended from duty to allow for investigations, there is nothing to show how the investigations findings were brought to the attention of the claimant; the show cause on matters that he ought to have responded to; the notice calling him for hearing; and more fundamentally the mandatory compliance with section 41 of the Employment Act.

On the matters relating to KRA fake receipt and fraudulent activities, Mr Muthui testified that;

*... the financial comments dated 11<sup>th</sup> February, 2014 to the Respondent upon investigations on the same date. The Claimant was called for hearing on the same date, 11<sup>th</sup> February, 2014. This report related to investigations made to the managing director. This was done after the meeting. The report was done to the MD and the Claimant was not called to respond to the allegations ...*

Without the record of what allegations faced the Claimant during the hearing on 11<sup>th</sup> February, 2014 and the alleged fake KRA receipt or the alleged payment of a penalty of Kshs.2.6 million, the investigations and hearings against the Claimant is put into question.

Work records are vital for proceedings such as these. Such give the court a wide perspective into the general conduct of an employee. Section 10 (6) and (7) of the Employment Act requires that;

*(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.*

*(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. [emphasis added].*

Without such records, and the duty to justify the reasons for dismissal being upon the respondent, I find no sufficient or reasonable grounds set out to warrant the harsh sanction of a summary dismissal of the claimant. The modalities followed by the Respondent in addressing any form of misconduct the Claimant may have committed is not addressed in any policy, work regulations or rules that were made available to the Claimant with his employment or submitted in court. Lacking in such material evidence, the non-compliance with section 41 of the Employment Act was required which I find, the Claimant was not accorded any chance to be heard pursuant to mandatory provisions of the law. There is no record in this regard. Ultimately, the dismissal lacked in fairness in terms of substance and procedure.

**Remedies**

On the finding that summary dismissal was unfair, notice pay is due. The Claimant was earning Kshs.200, 000.00 at the time of dismissal. One month pay in lieu of notice is hereby awarded at kshs.200, 000.00.

There is no record submitted by the Respondent on payment of 12 days worked in February, 2014 when the dismissal letter was issued. Such is due all amounting to Kshs.80, 000.00.

On the compensation due, section 45(5) (e) of the Employment Act requires the court to take into account any disciplinary record of the employee in assessing the culpability and matters leading into termination of employment. The Claimant did not specifically deny that he would report to work late and would take breaks not sanctioned by the employer. A warning letter is filed and though not signed by the claimant, the content of it was not challenged. Taking these factors into account, on the finding that the dismissal was both substantively and unprocedurally unfair, an award of 6 months gross pay in compensation is appropriate in this case. The Claimant is awarded Kshs.1, 200,000.00 in compensation.

**Accordingly, judgement is hereby entered for the Claimant for notice pay at Kshs.200,000.00; 12 days worked at Kshs. 80,000.00; compensation at Kshs.1,200,000.00; and costs of the suit.**

Dated, signed and read in open court at Nairobi this 19<sup>th</sup> day of April, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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