



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 76 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MICHAEL OMITI 1ST CLAIMANT

ONESMUS NDAMBUKI2ND CLAIMANT

WILLIAM MUTIA3RD CLAIMANT

-Versus-

WELLS FARGO LIMITED 1ST RESPONDENT

FARGO COURIER LIMITED2ND RESPONDENT

J U D G E M E N T

By Memorandum of Claim dated 1st April, 2013 the Claimants MICHAEL OMITI, ONESMUS NDAMBUKI and WILLIAM MUTIA allege unfair termination of their employment by the Respondent and seek the following remedies:-

1. That this honourable court be pleased to find the summary dismissal and the continued withholding of the claimants dues by the respondents to be unjustified, unlawful, unfair, wrongful and illegal.
2. That this honourable court be pleased to order the respondents to pay the claimant's statutory entitlements and/or terminal dues totalling to Kshs.86,331,972.13/- with interest at court rates.
3. That this honourable court be pleased to order for reinstatement of employment in terms of paragraph 11 above.
4. In addition this honourable court is prayed to award costs of this suit to be borne by the respondents.

The Respondents, Wells Fargo Limited and Fargo Courier Limited are sister companies with same directors. Wells Fargo is engaged in Private Security Service provision while Fargo Courier is engaged in courier services as the name suggests.

The Respondents filed their joint defence on 22nd August, 2013 in which they aver that the 1st and 2nd claimants were dismissed from employment under section 44(4)(g) of the Employment Act following investigations on suspected embezzlement of funds belonging to the 1st Respondent which the two confessed to acting as conducts for. The 3rd Claimant's employment contract was terminated and

payment of terminal dues including pay in lieu of 3 months notice duly effected.

The Respondents deny unfairly terminating or dismissing the Claimants and aver that the terminations were in compliance with the law. They pray that the claim be dismissed with costs.

At the hearing all claimants testified in support of their claims. The Respondent called one witness WILLIS AYIEKO ONYANGO their Group Human Resource Director.

Claimants' Case

William Mutie the 1st Claimant testified that he was headhunted by the Respondents on 21st February, 2005 and posted to Kisumu to initiate the business there. His starting salary was shs.85,000 which was reviewed upwards with time.

The Claimant testified that his service was exemplary and by letter dated 28th June, 2011 he was commended for his good performance in growing the business in the region. In recognition his salary was increased to shs.220,000 per month together with pension of 5% contribution by both the employer and the employee.

Mutie testified that on 20th September 2012 he reported to work at 6.45 am and held meetings with his managers. At 8am 4 managers from Nairobi stormed his office. As he stood up to greet them they shoved him from his desk and instructed him to go to work in Kisii. One of them, Mr. Grey, sat on his desk.

Mutie testified that before he reached Kisii he got a call from Mr. Grey who instructed him to pick the Manager from Kisii office and go back to Kisumu with him. He complied, went to Kisii office picked the manager there and went back with him to Kisumu. Upon arrival in Kisumu the Manager from Kisii was called into the office while Mutie remained outside. Since there was nothing for him to do he went to his house which was near the office. He was later summoned back to the office and instructed to hand over. After handing over he was instructed to move out of his house which was provided by the Respondent immediately.

Mutie testified that he had children in school but this was not taken into consideration. He was driven out of the office and dropped off at Milimani Shopping Centre. Since he had nowhere to take his household goods he locked the house and informed the Respondent that he would move his belongings from the house the following day. The following day he moved things from the house to a godown.

Mutie testified that he hired a car at shs.5000 a day, moved to a guest house where he paid Shs.10,000 per day and stored his household goods in a room which he hired at shs.3,000 per month. He stayed in the guest house for 3 months for which he was claiming shs.300,000 per month. He stayed at the guest house for 3 months for which he claims shs.900,000.

Mutie further claims shs.352,000 being deposits by both himself and the Respondent to his pension scheme together with interest.

Mutie testified that he was dismissed at the age of 50 years while his retirement age was 60 years. He therefore claims for salary graduated by 10% per year from the date of termination to the date of retirement making his total claim shs.47,000,000. He further claimed gratuity for 7 years worked before he joined the pension scheme at 31% of salary per month.

Mutie testified that the termination of his employment was unfair as he was never informed of the grounds of his termination. He further testified that he was dismissed verbally on 20th September, 2012 but was issued with a letter of termination on 27th September, 2012. The Respondents later paid him 3 months' salary in lieu of notice.

Under cross-examination Mutie stated that he was paid 40 days leave but was claiming 87 leave days. He

stated he did not have receipts for hire of guest house and vehicle because he was still paying the debt.

CW2 Michael Otieno Omiti hereafter referred to as Michael testified that he first worked with the Respondent as a guard from 1989 to 1994 when he was promoted to a supervisor. From 1997 to 2003 he was in charge of the Respondent's operations at Wrigley East Africa. In 2003 he was promoted to be crew commander in Nairobi. He was transferred to Kisumu branch in 2005 when the branch was opened. He testified that he was the one who started Cash in Transit (CIT) Services in Kisumu. Through his marketing skills the branch grew and started new branches in Kisii, Kericho and Kakamega. From 2007 he was in charge of the region which covers Kisumu, Kakamega, Kericho, Kisii and Busia.

Michael testified that his first salary in 1989 was shs.807 with a house allowance of Shs.121. At the time of dismissal in 2012 his basic salary was shs.15,189 but his gross salary was shs.33,206.

Michael testified that the office held meetings every morning where he reported on CIT. The meetings were attended by Branch Manager and Guarding Manager.

Michael testified that on 26th September 2012 Mr. Mathenge, Mr. Maina and Mr. Fred Otieno arrived while they were in the morning meeting. He was the first to see them and alerted the meeting. The whistle was thereafter blown and they all went to a parade. Mr. Maina addressed the parade and asked him for a report. Michael explained that he planned to travel to Nairobi at 11.00 am to Equity and travel back with the 5pm flight.

When he arrived from Nairobi at 5pm a vehicle was sent to pick him from Kisumu airport and take him to the office. At the office he was directed to report to Nairobi office the following morning so he travelled by night bus.

At Nairobi he met Mr. Maina who sent him to Mr. Mathenge. Mr. Mathenge sent him to the Human Resource Manager Mr. Kangethe who sent him back to Mr. Mathenge.

Mr. Mathenge asked him if he had been sent money by a branch manager. He explained that he had been sent shs.5,000 to give to Mr. Mutie and did not know what the money was for. He then wrote a statement which he left with Mr. Mathenge then he was given a company vehicle to drop him at the bus stop to take a bus back to Kisumu.

Michael testified that at around 11.00 am on 27th September, 2012 he was called by Deborah, the Branch Manager, Kisumu who asked him to see Mr. Otieno in Mr. Mutie's office where he found Mr. Otieno with Mr. Ndambuki. Mr. Ndambuki was in charge of Currier department.

Mr. Otieno apologised that they had been discussing his case and informed him that he had been dismissed. Mr. Otieno confessed to him that it was not Michael's mistake, that he had tried to talk to the Respondent but the Respondent had refused to change its position. Mr. Otieno then handed him the letter of dismissal and certificate of service.

The reason for dismissal in the letter was that he had received company money. He testified that this was not true as he did not handle any money at the branch.

Michael testified that he was claiming service for the 24 years worked. He testified that he was 48 years old at the time of retirement and his retirement age was 60 years. His total claim was shs.4,780,232.34. He urged the court to find the dismissal unlawful.

Michael testified that his regional boss was Mr. Mutie but he reported to Deborah, the Branch Manager. Mr. Otieno was the Regional Manager covering Nakuru, Eldoret and Kisumu.

He stated that Deborah cried when he was dismissed.

Under cross examination Michael stated that he was sent money by Mpesa and handed it over to Mutie.

He stated that he wrote one statement in Nairobi. He denied writing a statement on 25th September, 2012 a copy of which was annexed to Respondents bundle of documents at page 19. He stated the statement was not in his handwriting. He however agreed that the statement tallied with his evidence. He stated he wrote his statement on 26th September, 2012.

He admitted that he knew the person who sent him Shs.5,000 by Mpesa to give to Mr. Mutie. He stated he did not know the purpose of the money and that he did not work directly with Mr. Mutie.

Under re-examination Michael stated that he wrote and signed his statement. He further stated that the person who sent him money by Mpesa to give to Mr. Mutie was Mr. Ezekiel Lupuko, the Branch Manager, Kisii.

CW3 ONESMUS NDAMBUKI testified that he worked for the Respondent at Kisumu Station. He testified that he was employed on 2nd July, 2008 as a Courier Escort. He was promoted to Assistant Supervisor Kisumu Branch on 1st June 2012 after attending interview in Nairobi.

Ndambuki testified that he was summarily dismissed on 27th September, 2012. The reason for dismissal was that his phone was used to convey money. He admitted that he received money in his phone from Ezekiel Lupuko, the Kisii Branch Manager. He testified that he also received money from Mr. Kwena, Branch Manager, Kakamega and Mr. Peter Matheka, Branch Manager, Kericho.

He denied that he was involved in any illegal transaction as there was no proof the money was from the company.

He testified that he was called to a meeting at the Regional Manager's Office by Mr. Grey who was with Mr. Mathenge, Mr. Otieno and Mr. Maina and asked what his position in the branch was. He responded he was in charge of Courier, and the work was going on well. He was then asked if he received money on Mpesa and he admitted he did and gave the money to Mr. Mutie.

Ndambuki stated that he was asked to write a statement, and that while writing the statement Mr. Grey was standing behind him.

Ndambuki stated he was claiming shs.33,597,729.90 which comprised of payments due to him to the time of retirement. He was 33 years old at the time of dismissal and his salary was shs.26,500/-. He reported to work at 7am and there were days he worked up to 8pm as per instructions. He stated he was also claiming gratuity.

Under cross examination Ndambuki stated that he received money from 3 Branch Managers who told him to withdraw and give the money to Mr. Mutie. He stated he could not recall how many times this happened. He stated he did not know what the money was for and did not ask. He stated he was not aware the money was from Administration Police(AP) but was aware that APs were paid in cash.

Respondents Case

Mr. Willis Ayieko Onyango RW1 testified that he is the Group Human Resource Director for the Respondents and was familiar with the issues in dispute having appraised himself with the same from records. He testified that Mr. Mutie was terminated and was paid 3 months' salary during the notice period being October to December 2012. On Mr. Mutie's allegations about oral termination RW1 stated he had no comment. He stated that Mr. Mutie's letter of termination did not state the reason for termination but stated it was in accordance with the letter of appointment.

On Mr. Mutie's claim for Pension RW1 stated that there are trustees who manage the scheme and Mr. Mutie can write to them to pay him 100% of his contributions together with Respondents contributions. He stated that Mr. Mutie is entitled to gratuity at 18 days salary per year worked, and not 31% as claimed.

Regarding the statement alleged to have been made by Michael, RW1 stated it was in Mr. Mathenge's handwriting. He explained that the statement must have been dictated to Mr. Mathenge by Michael. He stated Michael was dismissed because he could not be trusted after being used as a conduit between the sender and recipient of money.

With respect to Mr. Ndambuki PW1 stated that he was summarily dismissed because his actions bordered on gross misconduct based on his admissions and Mpesa transactions. He stated Mr. Ndambuki is not entitled to gratuity as he did not work for the minimum qualifying period of 5 years, having worked for 4 years only.

Under cross examination RW1 stated that he started working for the Respondents on 1st December 2015 and did not understand the circumstances under which the Claimants were dismissed. He conceded that Mr. Mutie's letter of termination was written on 27th September, 2012 after he had already left employment. He conceded that it was wrong to give notice and evict Mr. Mutia immediately.

Determination

I have considered the evidence on record and the pleadings. I have also considered the written submissions filed by the parties. The issues for determination are whether the termination of employment of the Claimants was fair and if they are entitled to the prayers sought in the Memorandum of Claim.

The Law

Section 41 and 43 provide for fair termination of employment. Section 47(5) provides for burden of proof as follows:-

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Section 45(2) provides that there must be both fair procedure and valid reason for termination of employment to be fair.

Fair Procedure

Section 41 as read with 45(2)(c) provide for fair procedure in the following terms -

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(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.

45 (2)(c) that the employment was terminated in accordance with fair procedure.

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

In the present case, it is not in dispute that the 1st Claimant Michael Omiti was summoned to the Respondents Head Office at Nairobi where he was interrogated and then made to write a statement. During the interrogation he was only asked to confirm if he received money on Mpesa and if he gave the money to Mr. William Mutie, the 3rd Claimant, facts which he admitted to and confirmed in the statement he wrote after the interrogation. He was thereafter served with a letter of dismissal.

The 2nd Claimant Onesmus Ndambuki was called by Mr. Grey to an office where they were joined by 3 other Managers who asked if he received money by Mpesa which he admitted and stated that he gave the money to Mr. Mutie, the 3rd Claimant. He also informed them he did not know what the money was for. He was thereafter made to write a statement following which he was issued with the letter of dismissal.

The 3rd Claimant was verbally terminated and asked to vacate the company house he occupied immediately, driven to Milimani Shopping Centre, Kisumu and dumped there. His letter of termination was issued to him a week later, on 27th September, 2012.

The provisions of section 41 are very specific and are couched in mandatory terms. In the case of *ALPHONCE MACHANGA MWACHANYA v OPERATION 680 LIMITED* [2013]eKLR the court summarised the requirements of section 41 of the Employment Act as follows -

- a) That the employer has explained to the employee in a language the employee understand the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanation by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

In the present case all claimants were not given a hearing. They were not informed prior to the dismissals, the reasons why the employer intended to terminate their employment. In fact, they were not aware of the intention to terminate their employment or reasons therefore, before the termination occurred.

The Respondents have in the written submissions stated that there were hearings where the 1st and 2nd Claimants admitted to embezzlement of funds in written statements. What transpired was an interrogation, a fact finding exercise and not a hearing as envisioned in section 41 where the employer is expected to first inform the employee of the charges against him, then the employee is summoned to a disciplinary hearing where the charges and evidence against him is tabled before the employee and his union or a colleague are allowed to respond to the charges. In a hearing under section 41 the employee must be must be informed beforehand that the hearing may lead to termination of employment for misconduct.

The facts of the present case lead to a finding that there was no procedural fairness as the Respondents did not comply with the provisions of section 41 or the principles of natural justice.

Substantive Fairness

Substantive fairness relates to the validity of reasons for termination as provided in section 43 and 45(2) (a) and (b) which provide as follows -

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

In the present case, the letters for termination for the 1st and 2nd claimants gave reasons for termination as follows -

REF: WFNRB/HRD/SKK/1302/12

September 26, 2012

Michael Otieno Omiti (140013)

c/o Ourselves

P O Box 43370-00100

NAIROBI

RE: SUMMARY DISMISSAL

Your services are summarily dismissed with effect from 27th September, 2012 following the investigations which were carried out recently by the company on suspected embezzlement/unauthorized money transactions in your workstation. You confessed that you acted as a link in the transactions of money transfer and did not report the same to the Management.

This is contrary to company rules and regulations and amounts to gross misconduct in accordance with the Employment Act 2007 Section 44 (4)(g).

Your final dues payable through the accountant upon completion of the clearance procedure are as follows:-

1. Kshs.1,200/- being uniform deposit refund.

2. Salary for days worked up to 27/09/2012.

3. Overtime worked up to 27/09/2012.

4. Payment in respect of Twenty six (26) days accrued leave.

All dues are paid net of the statutory deductions, loans, advances, loss, claims and any other deductions that may be lawfully effected.

The enumeration of your dues is as per the records held, however read and make any claim you may have as no claims shall be entertained after payment is made and received.

Yours faithfully.

WELLS FARGO LIMITED

S. K. KANG'ETHE

HUMAN RESOURCE MANAGER

27th September, 2012

ONESMUS NDAMBUKI MUTHINI

Emp. No.900088

Courier Supervisor

KISUMU

Dear Onesmus

RE: SUMMARY DISMISSAL

Following the investigations which were carried out recently by the company on suspected embezzlement or unauthorized money transactions in your work station- Fargo Kisumu, it has been established that you have been playing a crucial role in the said money transactions. Through your own hand-written statement of 20/9/2012 you have on your own free will confessed that you have been acting as a conduit through which the transactions of money transfer have been passing without raising or reporting the same to the company management.

As a person holding a position of responsibility and trust, the foregoing has completely eroded all that trust the company had in you for it casts a lot of doubt on your integrity which should be beyond reproach and as such the company has lost confidence in you. In view of the gravity of this matter, the company has decided to dismiss you summarily from its employment effective 27/9/2012. Consequently, you are instructed to ensure you return all company property or documents in your possession with immediate effect to your immediate Supervisor before departure. Also note that it will only be after successfully completing the company clearance procedure that you terminal dues will be paid to you through our Accountant which will be paid net of statutory deductions and company liability.

Yours faithfully,

For: Fargo Courier Limited

JOHN KABIRO

SENIOR HUMAN RESOURCE OFFICER

The reasons are "suspected embezzlement/unauthorised money transactions in your work station."

For the 3rd Claimant there was no reason given in the letter of termination, the same merely referring to the termination clause to the contract of employment.

Embezzlement of funds means converting money belonging to another to your own use illegally. In the present case all that there was against the 1st and 2nd Claimants was that someone sent money to their Mpesa accounts and instructed them to pay the money to the 3rd Claimant. Both of them acted according to those instructions, which were involving persons senior to them. They did not put any money to their own use. They did not benefit from the money.

More fundamentally, they were not aware about the purpose of the money. And of critical importance is that the Respondents did not prove that the money was embezzled. There was no proof that the money did not belong to the persons who sent it to the 1st and 2nd Claimant, nor was any evidence called to prove that the money belonged to the Respondents or any other person other than the sender or recipient, who was Mr. Mutie, the 3rd Claimant.

There was thus no evidence of either embezzlement of funds or unauthorised money transactions by the 1st and 2nd claimants.

For the 3rd Claimant as was admitted by RW1, no reason was given for the termination in the letter which was written 7 days after a verbal termination.

I therefore make a finding and conclusion that there was no valid reason for termination of contract of all the three claimants.

Having found that the Respondents have failed to prove both procedural fairness and substantive justification for the termination of the employment of the claimants, I find that the same were unfair.

Remedies

The Claimants prayed for the following remedies:

Loss of basic salary' gratuity, CIT allowance, holiday allowance, safari allowance, fixed overtime allowance, loss of in-charge allowance all calculated to date of retirement of 60 years. Only Mutie submitted evidence of retirement age vide the pension scheme. Michael and Ndambuki did not prove that their retirement age is 60 years.

In the protective security industry gratuity is provided for at the rate of 18 days pay for each completed year of service with qualifying service being 5 years. This means that Michael and Mutie both qualify while Ndambuki had not worked for 5 years and does not qualify for gratuity.

The employment Act provides for terminal benefits of an employee whose employment contract is unfairly terminated at section 49. Any benefits outside that section must be specifically provided for in the terms of employment of an employee for that employee to be entitled thereto.

This court has severally held that employment contracts are not intended to unfairly enrich employees and the court will not order anticipatory payments. See the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission** and **Elizabeth Wakanyi Kibe** referred to by the Respondent. Suffice to add that no evidence was adduced to support the many heads of claim the Claimants have prayed for in this suit. The only remedies the Claimants are entitled to which I award them are as follows:

1st Claimant - Michael Otieno

He prayed for the following remedies:

Notice 1 months gross	Kshs. 33,206
Compensation 12 months	Kshs.398,472
Gratuity 24 years	Kshs.478166.40

2nd Claimant

Notice 1 months gross pay	Kshs. 26500
Compensation 12 months	Kshs. 318,000

3rd Claimant

Compensation 12 months	Ksh. 2,640,000
Gratuity 6 years @ 18 days per year.	Kshs.792,000

Judgement is entered in favour of the Claimants as set out herein above against the Respondents jointly and severally. The Respondents shall also pay claimants' costs of this suit and interest shall accrue at court rates from date of judgment.

Judgement dated, signed and delivered this 12th day of April, 2017

MAUREEN ONYANGO

JUDGE