



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 1235 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st May, 2017)

SILAS OWITI OLUOCH..... 1ST CLAIMANT

JITEN SUMARIA2ND CLAIMANT

VERSUS

FIDELITY COMMERCIAL

BANK LIMITEDRESPONDENT

JUDGMENT

1. The Claimants herein filed their Memorandum of Claim on 25th July 2011 through the firm of Ochieng Opiyo and Company Advocates claiming unlawful and unfair dismissal.
2. The 1st Claimant stated that he was employed by the Respondent on or about the 14th June 2010 as an Officer Cashier vide a letter of appointment dated 17th May 2010 (Appendix 1).
3. The 2nd Claimant was employed on 1st November 2010 as a Management Trainee attached to cash office as per his letter of appointment dated 25th October 2010 (Appendix 2).
4. The Claimants aver that they performed all their duties efficiently, competently and diligently in terms of their contract and were subsequently confirmed in appointment as per their confirmation letters Appendix 3 and 4 – dated 14th December 2010 and 16th May 2011 respectively.
5. The Claimants contend that despite their commitment to work, the Respondent dismissed them from employment with effect from 7th July 2011 purporting that they had been guilty of misconduct as per their summary dismissal letters Appendix 5 and 6.
6. The Claimants contend that they had not committed any misconduct and were not liable to summary dismissal. They state that the Respondents dismissed them unfairly on mere suspicion that they had been involved in the loss of Kshs. 1 million.
7. They aver that on 14th June 2011, while on duty, they had paid out sums of Kshs.1,017,781 and 533,918/= to one Abdi W.A. Maalim in the course of duty on 23rd June 2011.

- 8.** The Claimants received letters from the Respondents requiring them to explain reasons for defrauding the Respondents of 1 million and why they should not be charged in Court. It was alleged that on 14.6.2011, they received Kshs.4 million from cash reserve and divided the same each taking 2 million as evidenced by the CCTV cameras at the bank yet they aver that, their recollection was very clear that they took 3 million.
- 9.** The Claimants responded to the Notice to Show Cause letters vide their annexures 9 and 10 stating that the bundle of four notes as evidenced by the CCTV footage were two bundles of Kshs.1000 notes totaling 2 million while the other two bundles were of Kshs.500 notes totaling 1 million.
- 10.** They also state that it was evident from those proceedings that the bank reconciliations are done every day at the cash reserve and there was no anomaly detected by the Operations Manager on 14.6.2011 only for the issue to be raised on 24.6.2011 approximately 10 days later.
- 11.** Further, the Claimants aver that as per the termination letter, it is clear that the decision to dismiss the Claimants was based on suspicion that they were involved in the loss of 1 million Kshs.
- 12.** The Claimants' position is that the bank did conduct its investigations and summoned one Abdi W. Maalim who clearly showed the bank the withdrawal slip that the money he had received was 1.5 million and not 2 million as alleged.
- 13.** The Claimants have further stated that after these investigations, the Respondent decided to withhold the Claimants' salaries for June 2011 and also dishonored cheques issued by 1st Claimant and also held the 2nd Claimant's personal account.
- 14.** The Claimants wrote to the Respondents protest letters (Appendix 11 and 12). Thereafter their services were terminated as per Appendix 14 and 15.
- 15.** At the time of dismissal, 1st Claimant was earning a basic salary of 35,000/=.
- 16.** The Claimants seek judgment against Respondent seeking damages for unlawful termination, notice pay, damages equivalent to the remainder of the contract period plus costs and interest.
- 17.** The Respondents filed their response to Memorandum of Claim on 12.8.2011 through the firm of M/S Muma & Kanjama Advocates. It is their position that the Claimants were neither efficient, nor competent and diligent in their duties but instead were habitually neglectful in performing their duties and failed to perform the same with due care and attention.
- 18.** They also aver that the Respondent lost 1 million and investigations were carried out resulting in an internal audit report dated 29th June 2011 which concluded that there was sufficient reasons to support that the Claimants were responsible for the loss and hence their subsequent dismissal.
- 19.** The Respondents' evidence is that a shortage of 1 million was discovered on 20th June 2011. Subsequent investigation into the disappearance of the money was done and several of Respondent's employees interrogated.
- 20.** A cash count was also done on 23rd June 2011 and it showed the general ledger balance in the Bank's Realm and the CCTV footage was also reviewed. From the investigations, it emerged that there were discrepancies between the sums the Claimants allege having received and those their Operations Manager alleges having handed over to the Claimants.
- 21.** That the investigations also reviewed the CCTV footage for 14th June 2011 to verify the opposing claim. The footage shows the Operations Manager Ms. Najma coming out of the same with 4 bundles of cash and placing them on 2nd Claimant's cubicle. After the 2nd Claimant receives the 4 bundles, he is seen handing over two bundles to 1st Claimant who hands over the same to a Client Mr. Wahab.

22. The client was later asked by Respondent and he said he had come to withdraw 1.5 million. That from the casual look at CCTV footage of his transaction with 1st Claimant, the two bundles he was handed look like they are both for Kshs.1000 denominations.

23. The Respondent also noted that the 2nd Claimant operated another account other than his salary account opened on 22nd February 2010. As at 27th June 2011, the account had a total of Kshs.164,170/= credits and 116,018 debits. The net balance in account was 48,152/= and the 2nd Claimant said this was the account where he deposited his personal savings.

24. The 1st Claimant had in his testimony according to Respondent stated that 2nd Claimant had received a total of Kshs.3 million from the safe on 14th June 2011 and posted having received 1.5 million while the 1st Claimant erroneously posted figure of Kshs.2 million making a total figure of Kshs.3.5 million. That the 1st Claimant therefore passed a reversing entry for the difference to the safe.

25. The Respondents aver that they considered evidence collected from the internal investigations and found the Claimants and the Operations Manager responsible for the loss of Kshs.1 million and were found guilty of gross misconduct and were summary dismissed from employment with attendant loss of all terminal benefits.

26. The matter was also reported to police who are conducting their own investigations.

27. The Respondents have submitted that the dismissal of the Claimant was justified as he was reasonably suspected of having stolen from the Respondents 1 million while in employment which was adequate ground for summary dismissal under Section 44(4) of Employment Act.

28. They aver that the Claimants' conduct caused a breakdown in the employment relationship and violated an essential condition of their employment contract and destroyed the Respondents' inherent faith in them as employees.

29. The Claimants filed their submissions and so did the Respondents.

30. I have considered all the evidence and submissions filed by both parties and I set the following as issues for determination:

1. *Whether there were valid reasons to warrant summary dismissal of Claimants.*
2. *Whether due process was followed.*
3. *What remedies to award in the circumstances.*

31. On the 1st issue, the Claimant was summarily dismissed as per Appendix 5 which state as follows:

“RE: SUMMARY DISMISSAL

We refer to the sum of Kshs.1,000,000/= say (Kenya Shillings One Million) that has been reported missing at your branch as on 20th June 2011. We have since then had the branch audited and investigated as to the causes of the loss and this has led the management to have reasonable grounds of suspicion that you were involved in the offence, to the detriment of the bank.

In the circumstances we have lost confidence in you and hence your services are terminated with effect from 07th July 2011. Your last day shall therefore be on 07th July 2011.

You are instructed to handover your duties and all the banks materials in your possession to the

branch manager who will then forward them to head office, Human Resources Department-----“.

32. The reasons advanced for the dismissal are ***“reasonable grounds of suspicion that you were involved in the offence and lost confidence”*** (emphasis is mine).

33. Indeed the investigations carried out by the bank did not make any determination that indeed the Claimant was the thief.

34. Even the CCTV footage evidence as explained by Respondent – the casual look at CCTV footage shows Claimant holding two bundles of what look like 1000 denominations. It is as if the Respondents’ investigations were not conclusive and even alleged investigations by police have yielded no results to date.

35. Under Section 43 of Employment Act:

“(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”.

36. The reasons the employer relies on to terminate must be tangible reasons and not based on mere suspicion.

37. Even under Section 44(4) of Employment Act, when it comes to matters of summary dismissal:-

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal....”.

38. From this subsection, the enumeration of any matter or decision of an employer to dismiss an employee summarily shall not preclude an employer or employee from disputing the said facts or proving them and an employer who alleges criminal acts must demonstrate their commission.

39. In the case of **Nicholas Otinyu Muruka vs. Equity Bank Limited Nairobi ELRC case No. 25 of 2013**; Hon. Justice Mbaru held that an employer in cases of summary dismissal must demonstrate reasonable and sufficient grounds that link an employee to acts of gross misconduct warranting summary dismissal. She states thus:

“Mere suspicion is not enough. There must be reasonable and sufficient grounds. Otherwise if employers are allowed to hold mere suspicions, they would use these simple reasons to harass, intimidate and/or harass their employees for no just cause. Even where an employer has a just cause as to apply the provisions of Section 44(4)(g), the same must comply with the provisions of Section 41 and 43 of Employment Act. If the reasons for termination are not proved to amount to gross misconduct, then the application of Section 41 of the Act will apply. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct”.

40. I agree with my learned sister and find that indeed in the case of the Claimants herein the allegations

of theft or involvement in loss of the 1 million remain mere suspicious which the Respondents could not establish from their investigations and they cannot use this suspicion or loss of confidence to summarily dismiss the Claimants.

41. Also, as stated by Hon. Justice Mbaru never gave Claimants any chance to be heard to dispute the facts alleged against them.

42. It is my finding that the summary dismissal of the Claimants was unfair and unjustified and I declare it so. As found in the case of **CMC Aviation Limited vs. Captain Mohammed Noor Civil Appeal No. 199 of 2013**, I convert it to a normal termination.

43. The Claimants are therefore awarded as follows:

1. 1 months' salary in lieu of notice =

- **1st Claimant = 35,000/=**

- **2nd Claimant = 37,500/=**

2. 12 months' salary as damages for unlawful termination

- **1st Claimant = 12 x 35,000 = 420,000**

- **2nd Claimant = 12 x 37,500 = 450,000**

Total = 1st Claimant = 455,000/=

2nd Claimant = 487,500/=

3. Costs of this suit and interest at Court rates with effect from the date of this judgment.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wilson holding brief for Ochieng Opiyo for Claimant

Anyona holding brief Kanjama for Respondent