



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 5 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH K. NGANGACLAIMANT

-Versus-

NAKUMATT HOLDINGS LIMITEDRESPONDENT

J U D G E M E N T

The suit herein was commenced by the Claimant's Memorandum of Claim dated 21st January, 2014. In the claim he states that he was employed by the Respondent, a supermarket, at its outlet in Eldoret on 11th August, 2005 as a shop assistant. His first salary was Shs.6,270 per month. He was later promoted to the position of cashier which he held until his employment was terminated on 30th August, 2011. The Claimant avers that the termination of his employment was unfair and seeks payment of terminal dues as follows -

- | | |
|----------------------------------------------------------------------------------|--------------|
| 1. Pay in lieu of notice | Kshs. 17,528 |
| 2. Accrued leave due (21-14 days) x years worked x basic + allowances) ÷ 26 days | |
| 7 days x 5 years x (15230 + 17538) ÷ 26 | Kshs. 28,314 |
| 3. Service gratuity payment 20 days for each completed year | |
| 15,230 ÷ 30 x 20 days x 6 years | Kshs. 60,920 |
| 4. Night shift allowance | |
| (365 days in a year x 100 x 6 years) | Kshs.219,000 |
| 5. Transport allowance | |
| 2,300 per month x 12 x 6 | Kshs.165,600 |
| 6. 12 months' salary for compensation of unfair Termination | |
| 12 x 15,230 | Kshs.182,760 |

Total Claim

Kshs.674,122

The Respondent filed a Memorandum of Response to the Memorandum of claim in which it avers that the Claimant was dismissed for fraud on his admission by letter dated 30th August, 2011. It is further averred by the Respondent that the Claimant was heard by the Respondent's disciplinary Committee which recommended his dismissal.

At the hearing the Claimant testified on his behalf while the Respondent called 2 witnesses. The parties thereafter filed written submissions.

Claimant's Case

The Claimant testified that he was employed by the Respondent on 11th August, 2005 as shop assistant. In 2010 he was promoted to the position of cashier. On 30th August 2011 he was accused of stealing credit notes for Keringet Water Bottle and was stopped from working.

The Claimant explained that when a customer goes to refill a water bottle, the customer leaves the bottle at customer care desk and is issued with a credit note. After purchasing the water he is charged the full price of water and bottle then the credit note is used to deduct the price of the bottle so that the customer pays for the water only.

The Claimant testified that he was summoned to the Manager's Office with another cashier and after questioning the other cashier was released while he was sent to the Respondent's head office in Nairobi for disciplinary hearing with 3 security Officers.

At Nairobi each of them was allowed to enter alone into the room where the disciplinary committee was sitting. The claimant testified that when he entered the room he was asked who recruited him then he was directed to go and write a letter explaining why he sold a credit note. He testified that he went back to Eldoret and wrote the statement as directed by the disciplinary committee. He thereafter to report back to work not allowed entry to the workplace as the Manager said he was waiting for clearance from Nairobi.

The Claimant testified that on 9th September 2011 he wrote to the Respondent seeking a hearing as he was not accorded an opportunity to be heard when he appeared before the disciplinary committee on 30th August, 2011 but his letter was not responded to. He then went to the Kenya Union of Commercial, Food and Allied Workers who also wrote several letters to the Respondent but there was no response. He thereafter decided to file suit. He stated that his terminal dues were tabulated by the Union.

The Claimant denied any fraudulent dealing with credit notes. He explained that when a customer goes to the cashier with a credit note the customer is allowed to use it. He testified that there were 3 people at customer care desk with passwords for credit notes including himself and each of them was supposed to issue the credit note only after seeing the empty water bottle. He testified that he only gave credit to customers based on credit notes presented to him by the customers.

The Claimant testified that during the period he worked for the Respondent he was never involved in any disciplinary incident and that the termination of his employment was unfair.

Respondent's Case

RW1 Solomon Karanja Wahome testified that he worked as a cashier in Nakumatt and the Claimant was his workmate. He testified that in 2011 he was working at the customer care desk and there was a supervisor by the name Sammy Kandawalla who used to relieve him for tea break.

He testified that his duty was to receive items returned by customers and issue credit notes. He had a machine generating credit notes which was checked every evening by Sammy Kandawalla and double checked by a security officer. He testified that nobody could access his pin. He testified that someone accessed his machine and generated a credit note using his pin.

He testified that all credit notes were authenticated by the manager, and both himself, and the Manager

used biometrical identification. He testified that he had to pay for any variance on credit notes he issued at the end of the day.

RW1 testified that as far as the present case is concerned, his supervisor Sammy Kandawalla generated credit notes when Kandawalla relieved him during tea breaks. He testified that the Claimant paid any credit notes which went to him. He testified that it was a mistake to encash a credit note. He testified that credit notes for water bottles were only supposed to be used for purchase of water.

RW1 testified that when he realised that he had lost a credit note he made a verbal report to the manager who carried out investigations that revealed the credit note was encashed at a particular till. He testified that as a result 3 people were terminated. These were Kandawalla, Erick Pinto, a security guard and the Claimant. He testified that he was not terminated because he was the one who raised the complaint. RW1 testified that another cashier by the name Noah Nyamilei also reported that his machine had been used to generate credit notes that were encashed.

RW2 Chrispine Gitonga Mathaiya, the Respondent's Regional Manager, Western Region testified that in 2011 he was a branch manager at Eldo Centre Branch of Nakumatt Supermarket, Eldoret and worked with the claimant briefly for about one or two months.

He testified that a staff member reported to his office that a credit note was generated from his machine but the item purchased was not what was in the credit note. He then carried out investigations and involved the Respondent's security department. When CCTV footage of reception desk where credit notes are generated, where the staff who had complained, Solomon Karanja was stationed, it revealed that a supervisor by the name Kandawall is the one who generated the credit notes while relieving Solomon (RW1) who was away on tea break. He testified that he wanted to see where the credit note would be used and further investigations revealed that the Claimant is the one who encashed it.

RW2 testified that Solomon had complained that he had been losing credit notes over a period of time. When he checked through the records he found many other credit notes that had been encashed by the Claimant.

He testified that he called both the Claimant and Kandawalla to his office and questioned them about the credit notes but they did not give him adequate explanation. He therefore referred the matter to the Respondent's Human Resource Department in Nairobi.

He testified that the Claimant admitted having encashed the credit notes but stated he had been seeking authorisation from a Manager. However the Manager he referred to had been transferred and was not working in the branch at the time.

Under cross examination RW2 stated that a cashier would not know that a credit note is not authorised as it is the refund cashier generating the credit note who is responsible for its safety and to protect the machine. He testified that the Claimant's mistake was that the trend was alarming due to the number of credit notes he refunded.

He testified he was aware the Claimant appeared before the Disciplinary Committee as he facilitated the Claimant's travel to attend the disciplinary hearing. He however did not know the details about the disciplinary hearing because he did not attend it. He testified that according to the Claimant's letter he admitted giving money to the supervisor. He stated that all cashiers were able to do what the claimant did.

Determination

I have considered the pleadings and evidence adduced in court. The issues for determination are whether the termination of the claimant's employment was fair and whether he is entitled to the prayers sought.

Section 41 of the Employment Act provides for a fair hearing as follows -

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.

Where an employer fails to comply with the provisions of section 41 the termination of employment is deemed unfair.

In addition the Respondent must prove the grounds for termination as provided under section 43. The section provides 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.

In the present case, there is no letter summoning the Claimant to the disciplinary hearing. According to his testimony, he was called into the room where the disciplinary hearing was taking place and asked who employed him. He was then told to go away and write a letter explaining why he sold a credit note. He was later called by a workmate to collect his letter of dismissal.

The letter the Claimant wrote explaining what happened is not an apology as alleged by the Respondent. The letter reads as follows -

JOSEPH K. NG'ANG'A

P O BOX 842

ELDORET

30TH AUGUST, 2011

TO THE DISCIPLINARY COMMITTEE

NAKUMATT HEAD OFFICE

P O BOX 78355

NAIROBI

Dear Sir/Madam

REF: CASH OF CREDIT NOTES

I hereby write to tell the committee that credit note was cashed from my till authorized by Supervisor say the order was given by Manager (eg.Mr.S. Mwatha) and the list he took money from my till and give back the credit note.

The rest three was given authorized by Solomon Karanja to customer to use for purchase.

I didn't know it was a mistake but I apologise to the company not to repeat if again.

Yours faithfully

JOSEPH NG'ANG'A

The minutes of the disciplinary hearing do not give details of what transpired at the hearing. The minutes state as follows -

MINUTES FOR THE DISCIPLINARY COMMITTEE HELD ON

30TH AUGUST, 2011

Members Present

Francis Kimotho - Chair

Bonface Mbatia - Manager Karen Branch

Agnes Kimoth - HR Administrator

Mary Mbithi - HR Officer

JOSEPH KIUNGA NG'ANG'A P/NO .3938 - NAKUMATT ELDOCENTRE

He is a cashier at Nakumatt EldoCentre.

He was the cashier and would give the Till Area Supervisor money in exchange for a credit.

When asked he said that since he was his supervisor he could not question him yet he knew it was against company policy unless the branch manager gives authorisation.

He had cashed 8 credit notes that were presented by the Till Area Supervisor (Sammy Kandawala). From the 8 credit note only 2 credit notes had been authorized by the manager.

It was observed that m/s Nganga disregarded the regulations in force regulating credit notes knowing very well he was committing an offence.

He apologized to the committee for the offence committed.

RECOMMENDATION

The committee observed that the standard punishment for the offence committed is summary dismissal. However, having considered the long service that m/s Nganga had given to the company, the committee recommended that his services be terminated due to gross misconduct involving encashment of credit notes without the necessary approval thus contravening the regulations in force.

Complied by

Mary Mbithi - Secretary

Confirmed by

Mr. Francis Kimotho (Human Resource & Development Manager)

None of the persons who attended the disciplinary hearing were called to give evidence. Both RW1 and RW2 stated that they do not know what transpired at the hearing.

The letter of dismissal states that the Claimant was terminated due to fraud. From the facts and evidence on record, there is no element of fraud. All that the Claimant did was encash credit notes that were presented to him by a manager.

From the foregoing, it is my finding that the termination of the Claimant's employment was without fair procedure and for no valid reason. It was therefore unfair termination in terms of section 45(2) which provides that -

45. Unfair termination

(1)

(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

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

I therefore hold and declare the termination unfair.

Remedies

The Claimant prayed for pay in lieu of notice at Shs.17,528. His last salary was Shs.15,230 with house allowance of Shs.2,284 making a total of Shs.17,514. However, according to the minimum wages for cashier for 2011, his minimum wage should have been Shs.16,109 with 15% house allowance being Shs.2,416.35 making a total of Shs.18,525.35. In compliance with section 26 of the Employment Act and section 48(1) of the Labour Institutions Act, I award the Claimant pay in lieu of notice at the statutory consolidated minimum rate of Shs.18,525.35.

The Claimant further prayed for annual leave. He testified that he was granted only 14 days leave each year. The Respondent did not deny that the claimant did not take only 14 days annual leave per year for the entire period he worked with the Respondent, or produce records to prove the number of leave days that the Claimant took. In accordance with section 10(7) as read with section 74(1) (f) and section 28 of the Employment Act, I award the claimant the balance of 7 days leave per year as claimed for each of the 6 years he worked as follows -

18,525.35?30 x 7 x 6

Kshs.25,935.50.

The Claimant further prayed for service gratuity. He is not entitled to the same as he was a member of Respondent's Staff Pension Scheme and NSSF.

He also prayed for night shift allowance and transport allowance. I have confirmed from his payslip that he was paid for overtime worked and was also paid transport allowance. The claims are therefore not proved and are dismissed.

Having been unfairly dismissed the Claimant is entitled to compensation. Taking into account the length of service and all relevant factors, I award him 8 months gross pay at Shs.148,202.80.

The Respondent shall pay claimant's Costs.

Decretal sum shall attract interest at court rates from date of Judgment unless paid within 30 days.

Dated and signed and delivered this 2nd day of March, 2017

MAUREEN ONYANGO

JUDGE