



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1722 OF 2014
JOHN CHEGE WACHIRA.....CLAIMANT
VERSUS
PRIVATE SAFARIS (E.A) LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. John Chege Wachira, the Claimant in this case worked for the Respondent in the position of Finance Manager. He brought this claim by a Memorandum of Claim dated 3rd October 2014 and filed in Court on 7th October 2014 seeking relief for unlawful and unfair termination of employment. The Respondent filed a response on 28th October 2014 to which the Claimant responded on 13th November 2014.

2. When the matter came up for hearing the Claimant testified on his own behalf and the Respondent called its former Executive Director, Frank Glettenberg. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 18th July 2011. He earned a monthly salary of Kshs. 300,000 which was later increased to Kshs. 315,000.

In his position as Finance Manager, the Claimant's responsibilities included:

- a. Managing the consolidated accounting function;
- b. Monitoring and improving the internal control system;
- c. Preparing forecasts and budgets;
- d. Managing internal audit;
- e. Managing cash flow;
- f. Ensuring compliance with audit;
- g. Developing and motivating finance staff;

h. Ensuring that accurate and timely reports are prepared on regularly required basis.

4. On 3rd March 2014, the Claimant together with the Chief Accountant, Geoffrey Macharia Wairimu and Senior Accountant (Payables), Julius Mbindyo were questioned by the Respondent's Chief Executive Officer, Chief Finance Officer, Thomas Iten and some police officers about a company by the name 'Little Farm Produce'. It turned out that the said company was owned by Geoffrey Macharia Wairimu.

5. The Claimant was sent on compulsory leave on the same day. He handed over keys, bank tokens and passwords to the Chief Finance Officer (Africa). He was arrested on 4th March 2014 and was charged with fraud alongside Geoffrey Macharia Wairimu and Julius Mbindyo.

6. By letter dated 20th May 2014, the firm of L.M. Kinuthia & Associates notified the Respondent that the Claimant would cease attending further disciplinary meetings as they bore no fruit. In response, the firm of Hamilton Harrison & Mathews invited the Claimant to attend a meeting scheduled for 23rd May 2014 at 12.30 pm at the Intercontinental Hotel in Nairobi. The Claimant waited at the hotel reception from 12.00 noon until 3.00 pm but no one showed up.

7. On 17th July 2014, the Respondent served the Claimant with a summary dismissal letter.

8. On 23rd July 2014, the firm of L.M. Kinuthia & Associates wrote to the firm of Hamilton Harrison & Mathews refuting claims that the Claimant had evaded the meeting of 20th May 2014 and asking that a second chance be availed to the Claimant. Hamilton Harrison & Mathews wrote back on 23rd July 2014 stating that the Respondent's officials had met earlier than scheduled, between 11.30 am and 12.45 pm and that they had gone round the hotel lobby looking for the Claimant.

9. It is the Claimant's case that his dismissal was unlawful and unfair. He therefore claims the following:

a. An order for compensation for violation of his constitutional rights

b. A fine of Kshs. 100,000 against the Respondent for failure to comply with Section 51(3) of the Employment Act, 2007

c. Punitive and aggravated damages

d. 3 months' salary in lieu of notice.....Kshs. 964,000

e. 12 months' salary in compensation.....3,857,000

f. School fees allowance.....857,000

g. Unpaid leave days.....964,000

h. Unpaid salary arrears from March 2014 to July 2014.....893,000

i. Costs plus interest

The Respondent's Case

10. In its response dated 27th October 2014 and filed in Court on 28th October 2014, the Respondent admits having employed the Claimant as Finance Manager from 18th July 2011. On 1st May 2013, the Claimant was appointed as Head of Finance.

11. The Respondent further admits that the Claimant was sent on leave on 3rd March 2014 and that he was arrested and charged alongside Geoffrey Macharia Wairimu and Julius Mbindyo.

12. By a letter dated 24th January 2014 signed by the Claimant and Patrick Bourgeix, the Respondent instructed its bankers, Citibank NA that all payments on the electronic banking system should be to pre-formatted payees whose details were to be approved by at least two signatories. All such payments had to be originated, authorised and released by employees of the Respondent acting within their authority as notified to the Bank.

13. The Claimant was one of the persons mandated to authorise payments. John Kamau, who was employed by the Respondent until 10th June 2013 was authorised to originate payments.

14. Between 16th October 2012 and 26th February 2014 instructions were issued through the electronic banking system by the Respondent's Accounts Department to Citibank NA for 81 payments to be made from the Respondent's bank account to *Little Farm Produce*. The total value of those payments was Kshs. 104,660,512. *Little Farm Produce* was not a pre-formatted payee.

15. The Respondent states that many of the payments to *Little Farm Produce* were authorised by the Claimant who as Finance Manager was under a duty to verify the authenticity of payments. The Respondent adds that there were no supporting documents to authenticate the payments to *Little Farm Produce* with whom the Respondent had no business relationship. *Little Farm Produce* was a business owned by Geoffrey Macharia Wairimu who was the Respondent's Chief Accountant.

16. The Respondent goes on to state that as Finance Manager, the Claimant ought to have seen that after 10th June 2013, many payments to *Little Farm Produce* purported to have been originated by John Kamau who was no longer an employee of the Respondent. The Claimant failed to take any action to investigate who was in possession of John Kamau's token and password.

17. The Respondent states that by letter dated 24th April 2014, the Claimant was invited to attend a hearing on 2nd May 2014. On 2nd May 2014, the Respondent handed to the Claimant a letter setting out the matters of concern and inviting the Claimant to a hearing on 14th May 2014. The contents of the letter and the nature of the Respondent's concerns were discussed extensively at the meeting of 2nd May 2014.

18. The Claimant attended the hearing of 14th May 2014 when the Respondent handed over to him a letter of even date providing additional information as requested by the Claimant. The Respondent accepted that the Claimant would need more time and the hearing was rescheduled to 23rd May 2014. On 20th May 2014, the Respondent forwarded further information to the Claimant as requested by him.

19. On 21st May 2014, the Respondent's Advocates, Hamilton Harrison & Mathews in response to letter dated 20th May 2014 from the Claimant's Advocates, L.M Kinuthia & Associates confirmed that the Claimant would be given a hearing on 23rd May at 12.30 pm.

20. The Respondent states that its representatives were present from 11.30 am to 12.45 pm on 23rd May 2014 but the Claimant failed to attend or to make any representations in answer to the concerns already explained to him.

21. In the absence of any representations from the Claimant the Respondent resolved to summarily dismiss him, which was effected by letter dated 17th July 2014, a copy of which was sent by the Respondent's Advocates to the Claimant's Advocates on 18th July 2014.

22. It is the Respondent's case that the Claimant's dismissal was lawful and fair.

Findings and Determination

23. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

24. The Claimant was dismissed by letter dated 17th July 2014 stating as follows:

"Dear John,

We refer to our letter dated 2nd May, 2014; to the meetings on the 2nd and 14th May, 2014 pursuant to Section 41(1) of The Employment Act and the various documents that we have provided to you. You did not attend at the hearing under Section 41(2) of the Employment Act which was fixed for the 23rd May, 2014.

Having considered carefully the matters set out in the letter of the 2nd May, 2014 and the information you gave at the meetings on the 2nd and 14th May, 2014 and in the absence of any representations from you under Section 41(2) of The Employment Act we hereby summarily dismiss you pursuant to Section 44 of The Employment Act. The dismissal is with immediate effect.

Yours faithfully,

Private Safaris (E.A.) Ltd

(Signed)

Frank Glettenberg

Director

(Signed)

Susan Kuria

Head of Human Resources"

25. Section 43 of the Employment Act, 2007 requires an employer to establish a valid reason for ending the employment of its employee and in defining the burden placed on the employer by this provision in ***Kennedy Mwendwa Kalali v Chemserve Cleaning Services Ltd [2017] eKLR*** this Court held that in inquiring into the employer's decision, the Court is not expected to substitute the employer's decision with its own. If the reason for termination or dismissal appears reasonable on the whole, the Court will not interfere.

26. From the evidence on record, the Claimant's dismissal was triggered by the discovery of massive fraud committed through the Respondent's electronic banking system. According to the Respondent, the fraud which was committed between 16th October 2012 and 26th February 2014 involved a company by the name *Little Farm Produce* which was owned by the then Chief Accountant, Geoffrey Macharia Wairimu and the loss incurred in the fraud stood at Kshs. 104,660,512.

27. The Claimant did not contest the fraud and its particulars as stated by the Respondent. He also admitted that his token was used to effect some of the fraudulent transactions. Additionally, John Kamau's token which he handed over to the Claimant upon leaving the Respondent's employment continued to be used long after Kamau's exit.

28. In his Memorandum of Claim, the Claimant gives a detailed account of his responsibilities including monitoring the internal control system and managing cash flow.

29. In the course of cross examination, the Claimant told the Court that at some point the Respondent was experiencing unexplainable cash flow challenges. He therefore sent Macharia to Mombasa to check but Macharia came back with the report that all was well.

30. The Claimant admitted that he did not conduct any spot checks on the transactions through the Bank. He relied on the bank reconciliation reports which showed no payment to *Little Farm Produce*. In his further witness statement dated 23rd October 2015 he states as follows:

“That I relied on reports from my team and the external auditor and there was no indication of fraudulent activity in any of the reports.”

31. In light of his responsibilities as set out in his own Memorandum of Claim, it seems to me that the Claimant was a hands-off manager who abdicated his primary responsibilities to staff working under him and the Respondent’s external auditors. To whom much is given, much is required. The Claimant occupied a senior finance position in the highly sensitive environment of electronic banking. By his own admission, he had custody of a record five (5) tokens which he likened to a cheque book or an automated teller machine (ATM) card. He kept these tokens in his drawer and he had no idea how they were used to commit fraud over a period of close to two (2) years running to over Kshs. 100,000,000.

32. Taking all these factors into account, I have reached the conclusion that the Claimant failed to exercise due care thus exposing his employer to major fraud with capacity to bring down the entire enterprise. I therefore find that the Respondent had a valid reason for dismissing the Claimant.

33. Having determined the justifiability of the dismissal, I now turn to the question whether the Respondent observed due procedure in effecting the dismissal. On 24th April 2014, the Claimant was invited to a disciplinary hearing on 2nd May 2014. On 26th April 2014 he wrote to the Respondent asking for specific documents and particulars to enable him prepare his defence. The hearing did not take place on 2nd May 2014; instead the Claimant was served with a letter of the same date detailing the complaints against him and rescheduling the hearing to 14th May 2014.

34. On 14th May 2014 and in light of the Claimant’s request for additional documents the disciplinary hearing was further rescheduled to 23rd May 2014. The Respondent supplied additional documents to the Claimant on 20th May 2014.

35. The Claimant states that he showed up at the venue of the hearing on 23rd May 2014 but there was no one from the Respondent. On its part, the Respondent maintains that the Claimant failed to attend the hearing prompting his dismissal.

36. By letter dated 20th May 2014, the Claimant’s Advocates informed the Respondent that they had advised the Claimant not to attend any disciplinary hearing because there was a criminal case pending against him. The Court did not find any evidence that this advice had been revised. Further, the Claimant appears to have made no effort to reach any of the Respondent’s officers if indeed he found no one at the venue of the disciplinary hearing.

37. From the record, the Respondent went to great lengths to make the disciplinary hearing possible. They supplied the documents and particulars as requested by the Claimant. Applying the applicable standard of proof which is on a balance of probability, I adopt the Respondent’s account on the fate of the disciplinary hearing scheduled for 23rd May 2014.

38. Consequently, I find that the Claimant willfully failed to attend the disciplinary hearing scheduled for 23rd May 2014 and as held by this Court in ***Jackson Butiya v Eastern Produce Kenya Limited (Cause No 335 of 2011)***, an employee who squanders the opportunity to be heard cannot turn around and claim that they were never heard.

39. That said the Claimant’s claim for unlawful and unfair termination fails and is dismissed. The claim for notice pay must also fail. No evidence was led in support of the other claims which are in the nature of special damages which similarly fail and are dismissed.

40. The result is that the Claimant's entire claim fails and is dismissed with costs to the Respondent.

41. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF JULY 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Kinuthia for the Claimant

Mr. Fraser for the Respondent