



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1630 OF 2013

SABINA MUTUA.....CLAIMANT

VERSUS

AMEDO CENTRE KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent as a Centre Cashier earning a monthly wage of Kshs.23,560.00 all inclusive. On 26th March, 2013 and after serving for 16 years was promoted as Centre Manager, Race Course Centre. On 20th June, 2013 without notice or reason, the respondent appointed James Cheo Wakhulunya to take up the position held by the claimant and thus effectively rendering the claimant redundant. On 25th June, 2013 the claimant was suspended from duty on an alleged fraud and despite a reply thereto denying the same, the respondent failed to give her a hearing and on 7th August, 2013 the claimant was served with letter dated 25th June, 2013 confirming her termination from the employment of the respondent.

2. The claim is also that the claimant learnt that her suspension was under the disguise to create a position for James Wakhulunya. In an attempt to justify the termination of employment, the respondent embarked on instigating fabricated charges so as to disparage and bring into question the claimant's character in collusion with the Sales and Credit Manager by making fraudulent vouchers amounting to Kshs.107,029.00 in the name of Vincent Masaki. The termination of employment was thus without justification and was unfair. The allegations of fraud failed to put into account that the respondent was audited on a quarterly basis, the claimant had left the subject branch at Bruce House in January, 2013 after a proper audit and accounts approved and that the centre manager was the officer responsible and had authorised all expenses at the branch.

3. The claimant thus avers that she that due process was not followed with regard to the termination of her employment and there were no justifiable reasons to warrant such a sanction. Terminal dues were paid to her in the form of;

Basic salary

Salary for 56 leave days

Security deposit reimbursement

Gratuity for 16 months' salary being payment for 16 years complete years of service

Provident fund dues

4. Despite computing the dues owing, the respondent failed to pay the same. The claim is for a declaration that the termination of employment was unfair; payment of due salary at Kshs.70,680.00, notice pay at Kshs.23,650.00; leave at 56 days at Kshs.43,979.00; security deposit of Kshs.30,585.00; 16 years gratuity at Kshs.376,960.00; provident fund dues; certificate of service; compensation and costs.

5. The claimant testified in support of her claim. Upon employment on 19th September, 1996, the claimant service diligently and was promoted from an Accounts Clerk to Assistant Centre Manager on 26th March, 2013. She moved from Bruce House branch to Race Course branch of the respondent.

6. On 20th June, 2013 the claimant was directed to hand over to Mr James Cheo. Two weeks later the claimant was not paid her salary and when she asked, she learnt that she was being investigated over alleged fraud. On 26th July, 2013 the claimant was issued with a letter of suspension on the grounds of gross misconduct and was to reply to the same which she did on 30th July, 2013.

7. The claimant had been accused of fraudulent transaction for the sum of Kshs.107, 025.00 but the branch had been audited and no such issue had arisen and these allegations were not true. The claimant made all payment through the authority of the branch manager. All payment vouchers had to be signed for, verified and authorised. Vincent Masaka was a messenger for the respondent on causal basis and he was paid through vouchers authorised by the branch manager. In a reply to the notice to show cause, she gave her defence which was followed with a termination letter.

Defence

8. The defence is that upon the employment of the claimant by the respondent on 23rd September, 1996 as a General Clerk she was promoted as an Accounts Clerk on 1st July, 1998 and on 2nd March, 2000 she was transferred from Accounts department to Race Course centre as Cashier. She later moved to Arthi River centre on 11th January, 2005, to Bruce House branch on 26th April, 2010 and to Kirinyaga Road centre on 14th January, 2013. On 26th March, 2013 the claimant was promoted to Centre Manager, Assistant following a reorganisation of the respondent business.

9. The respondent carried out an audit at Bruce House centre covering petty cash payments made between 1st July, 2012 to 9th January, 2013. This was by the internal auditor Mr Nyaga. From the audit, it was revealed that while the claimant was cashier at Bruce House centre she involved herself in fraudulent act by colluding with the sales and credit manager, Samson Momanyi by raising fictitious vouchers amounting to Kshs.107,029.00 in the name of Vincent Misaki who was a sales agent.

10. On 25th June, 2013 the claimant was suspended to allow for investigations. On 31st July, 2013 the claimant was directed to show cause why she should not be dismissed from her employment for gross misconduct and she replied in defence. A telephone conversation was held for the claimant to clarify her responses on 25th July, 2013 as she was away in Kitui. The respondent considered the responses made, they were found unacceptable, there was overwhelming evidence against the claimant with regard to her colluding with Momanyi and a decision was taken to terminate her employment which was lawful and justified. The respondent agreed to pay the basic pay, leave days due, refund security deposit, gratuity earned and provident fund dues but the claimant declined to collect the same.

11. The claim should be dismissed with costs. There is no merit to the claims made.

12. In evidence, the respondent witness was Michael Nyaga the Internal Auditor and Elizabeth Kanini Samuel the Human Resource Assistant. The testimony is that Mr Nyaga conducted an internal audit and discovered the fraudulent activities upon which the claimant was suspended and required to show cause. Ms Samuel relied on the witness statement of Howard Olume who was the human resource officer at the time the claimant was terminated from her employment with the respondent. That the claimant was offered terminal dues but has declined to collect.

13. At the close of hearing, both parties agreed to file written submission. Only the claimant filed written submission on 2nd June, 2017.

Determination

14. The respondent in defence and through its witnesses admit they offered the claimant various dues of basic pay; notice pay; security deposit; gratuity; provident fund; and a certificate of service. That despite the offer the claimant has refused to collect these dues.

15. The above due were offered and thus entitled to the claimant save that provident fund dues are regulated by its rules and essentially should not be under the control of the employer and the respondent herein. Where the rules of the provident fund requires a written communication by the respondent for the claimant to access her benefits, such then should be done unconditionally as there is an offer by the respondent for the claimant to have the same paid to her.

16. The genesis of the claim herein is the process commenced by the respondent with regard to alleged fraudulent transactions committed by the claimant or in collusion with others and vide letter dated 25th June, 2013. The claimant was placed under suspension. The allegation was that she had involved herself in fraudulent acts by colluding with the sales and credit manager and made expense vouchers amounting to Kshs.107, 029.00 in the name of Mr Misaki who had dispute such payments and signatures. The suspension was without payment of salary.

17. On 19th July, 2013 the claimant replied to the letter of suspension and seeking to know how far the investigations into the allegations against her and on fraud had gone as her salary for June, 2013 had not been paid. A show cause was issued and the claimant replied and on 7th August, 2013 the respondent issued the claimant with a letter terminating her employment.

18. An employer has the right to suspend an employee to enable investigation into any alleged misconduct of an employee. Such an employee remains part of the respondent/employer workforce until a show cause issues or a section of termination of the employment. As such, there is no provision in law which allow an employer to suspend an employee and deny them the due salary or benefit in total. In **Thomas sila nzivo versus bamburi Cement limited [2014] eKLR** the court held that ... [no law] allows the employer to deny a suspended employee his monthly salary as “a warning of the effect of losing his job and as a reminder to the

Employee that he would lose his job if he continued being disciplined.

19. Therefore, the Withholding of an Employee’s salary cannot be a disciplinary sanction. The salary remains protected in law even during suspension. The contract of employment is still in force. To withhold an employee’s salary is contrary to the rights in employment and fair labour practice as held in **Peterson Ndung’u & 5 Others versus KP&L Company Limited [2014]**, the court held that;

The salary remains protected under Part IV of the Employment Act, even during suspension. The contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages. The Claimant is entitled to the salary and allowances for the duration he was under suspension. To uphold the Respondent’s decision in withholding these would mean that the Claimant is punished twice, over the same employment wrong

20. In **Paul Mwaura Mbugua Versus Kagwe Tea Factory Ltd & Another [2012] eKLR** the court held that

An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension. To keep an employee on suspension, without pay for over 7 months, waiting for them to blink first is not only unlawful but also inhumane.

21. It is however clear that an employee can be suspended as an administrative or disciplinary interdict and to allow for investigations as held **Fredrick Saundu Amolo versus Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR** that;

*It is important to note that there can be preventive interdicts or punitive interdicts. On the one part being an interdict that is done in the context of allegations of misconduct prior to finding of guilt and the other interdict is implemented as a sanction after the finding of guilt. a Punitive interdict can only issue in circumstances where the employment contract, the employer code of conduct, the Collective Bargaining Agreement or the law allows for it as a sanction, a good example being what would fall under the provisions of section 44 of the Employment Act in cases that warrant summary dismissal and are outlined therein. Whether it is preventive or punitive, the interdict, suspension, dismissal or a termination the same to be valid must meet the requirements of substantive and procedural fairness. This is the position articulated in **Chirwa versus Transnet and Others [2008] 2 BLLR 29, at the Constitutional Court of South Africa** and reiterated by this Court in **Industrial Petition No 150 of 2012, in the Matter of Joseph Mburu Kahiga et al versus KENATCO Co. Ltd et al.** this is so because, suspensions and interdictions are not administrative acts as the detrimental effect of it impacts on the employee's reputation, advancement, job security and fulfilment. The manner in which and the reasons for which suspensions and interdictions are effected can be outlined as;*

...employers tend to regard suspension as a legitimate measure of first resort to the most groundless of misconduct, or worse still, to view suspension as a convenient mechanism to marginalise an employee who has fallen from favour.

22. It must be therefore be clear as to the reason(s) the employer uses the sanction of a suspension. In this case, the claimant was suspended to allow for investigations on alleged gross misconduct and acts of fraud and collusion with other employees in the same. The claimant responded to the show cause and what followed was a letter terminating employment. The respondent as the employer does not demonstrate as to whether the investigations came to a complete, and whether the audit undertaken by the internal auditor Mr Nyaga was shared with the claimant before her employment was terminated. In this case there are witness statements of the internal auditor and the human resource officer but no statements from the alleged beneficiary of the proceeds of fraud Mr Misaki or an indication as to what happened with Mr Momanyi.

23. Ultimately, section 41 and 44 of the Employment Act, 2007 requires that where an employee has misconducted herself or grossly misconducted herself, there must be a hearing and at such hearing, there are mandatory safeguards to be guaranteed 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.

24. Procedural justice thus requires that the employee accused of gross misconduct even over matters that warrant summary dismissal to be accorded due process. Such an employee must be given notice and allowed a hearing in the presence of a fellow employee of her choice and even where the employee should make representations in defence.

25. Argument has been that written submissions by an employee upon a show cause are sufficient; my humble view is that the letter of the law is that section 41 of the Employment Act, 2007 envisage a hearing of the employee in the presence of another employee and such can only be achieved in a physical meeting. It also enables the parties to be present at the shop floor and draw on primary evidence and witnesses only available at the same forum. To take oral submissions of the employee without allowing the employee the chance to interrogate any material, evidence and statements of witnesses against her would thus deny the employee that crucial element of cross-examination and or interrogation of any reports or instigations against her and thus offend the procedural requirements of the law.

26. In this case, the claimant was suspended without pay on 25th June, 2013 and was not given any investigations report on the matters facing her until she wrote seeking for her salary for June, 2013. This seems to have prompted the respondent to act and which they did to her disadvantage. She was directed to show cause and upon her reply, this was followed by a letter terminating her employment vide letter dated 7th August, 2013 and backdating the same to 25th June, 2013. This placed the claimant back to the date of suspension. To backdate the termination to a date before the respondent had given the claimant a chance to argue her case; this was engaging in an unfair labour practice. Such I find has no justification looked at in view of the procedural and substantive justice in terms of section 41 read together with section 43 and 45 of the Employment Act, 2007. The termination of the claimant is hereby declared unfair.

27. The letter of termination issued on 7th August, 2013 should be the last date of the claimant's employment with the respondent. the due wages should cover up and until this date. On the monthly gross wage of Kshs.23,550.00 the claimant is entitled to the sum of Kshs.23,550.00 pay for June, 2013, Kshs.23,550.00 for July, 2013 and Kshs.5,495.00 for 7 days in August, 2013 and all amounting to Kshs.52,595.00.

28. Notice pay is due in a case of procedural unfairness in effecting termination of employment. The notice pay due is Kshs.23, 550.00 and based on the last gross wage.

29. Leave days owing at the time of termination of employment is payable and as this is not contested, the same is hereby confirmed at Kshs.43, 979.00. security deposit not contested confirmed at Kshs.30, 585.00. gratuity pay not contested confirmed at Kshs.376, 960. A certificate of service should issue unconditionally.

30. As the condition given to the claimant in her letter of termination was that her terminal dues would be paid less what had fraudulently been expended, without proof of how this amount was lost and the involvement of the claimant and this being a matter bordering on criminal conduct which the respondent failed to address with relevant authorities with the mandate to address criminal acts, the owing terminal dues shall be paid in full. The holding back to these amounts from 7th August, 2013 to this date is not lawful and or justified. These dues shall be paid with interest.

31. On the finding that the claimant was unfairly terminated from her employment with the respondent, compensation is due in terms of section 49 of the Employment Act, 2007. An amount of 6 moth's gross wage is hereby found appropriate. The claimant is awarded Kshs.141, 300.00 in compensation.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

A declaration that the termination of the claimant's employment with the respondent was unfair;

a) Compensation awarded at Kshs.141,300.00;

b) Notice pay Kshs.23,550.00;

c) Unpaid salaries Kshs.52,595.00;

d) Leave days unpaid Kshs.43,979.00;

e) Security deposit Kshs.30,585.00;

f) Gratuity Kshs.376,960.00;

g) Certificate of Service

h) The claimant shall be at liberty to apply for her provident fund dues without the respondent restricting access

i) Interests is payable on (c), (d), (e) and (f) above from 7th August, 2013 until paid in full.

j) Costs of the suit.

Delivered in open court at Nairobi this 26th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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