



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 254 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ZACHARIAH OROKO CLAIMANT

-Versus-

AGA KHAN HOSPITAL KISUMU RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent, a health provider in Kisumu on 21st April 1987 as an accounts clerk in Finance Department. He was promoted to Assistant Supervisor in Credit Control Section of Finance Department in 1992 and then to Chief Cashier/Payroll Supervisor, a position he held until 12th June 2013 when he was dismissed from employment. He avers that the dismissal was unlawful and without justifiable cause. He prays for payment of Kshs.1,850,040.00 as particularised in the claim, costs and interest at bank rates from 12th June 2013 to the date of payment in full.

The Respondent filed a response denying that the summary dismissal of the Claimant was unlawful or without cause. The Respondent avers that the Claimant was dismissed for reasons that while he was Chief Cashier and Supervisor in the Respondent's Finance Department the Respondent lost Kshs.3,746,711 which was collected by front cashiers under the Claimant's supervision but the money was not banked in breach of the Respondent's policies and express instructions. The Respondent further avers that the Claimant was paid his full terminal dues following negotiations with his counsel and is therefore not owed any moneys by the Respondent. The Respondent prays that the Claim be dismissed with costs.

The case was heard on 25th October 2016. The Claimant testified on his behalf while the Respondent called 3 witnesses. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was sent on suspension for one week by letter dated 16th May 2013. On 23rd May 2013 he received another letter suspending him for 2 weeks and asking him to show cause. After he responded to the show cause letter he received a letter dated 27th May 2013 inviting him for disciplinary hearing on 30th May 2013. On 30th May 2013 he received another letter extending the suspension for 2 weeks from 31st May 2013. On 3rd June 2013 he received another letter informing him that the hearing could not take place on 30th May 2013 and inviting him to attend the disciplinary hearing on 5th June 2013.

The Claimant testified that the hearing took place on 5th June 2013 and on 7th June 2013 he received a letter of summary dismissal. The letter advised him of his right to appeal within 48 hours. He appealed on 8th June 2013 and on 12th June 2013 he received a response upholding his summary dismissal with effect

from 12th June 2013.

The Claimant testified that he was not paid salary in lieu of notice. He was also not paid salary for May 2013 and days worked in June, leave due and leave travelling allowance for 2012 and 2013 which was Kshs.2,250 per year. He testified that he was entitled to Kshs.35,000 from staff welfare which he was also not paid. He testified that he was paid Kshs.43,882 after filing suit but did not know what the payment was for.

The Claimant testified that the reason for termination was that Kshs.3.7 million was lost in his hands between 8th and 15th May 2013. He testified that he was sick suffering from back ache and not fully in office from 2nd May 2013, as Mr. Were his immediate supervisor allowed him to work for a few hours a day as he was not given sick off. He testified that the person fully in office from 2nd May, 2013 to the date he was suspended on 16th May, 2013 was Mr. Maurice Yongo. He testified that this was not the first time Mr. Yongo was holding office for him as he always worked on Saturdays when the Claimant who is a Seventh Day Adventist does not go to work. He testified that Mr. Yongo was dismissed together with him but he was not aware that Mr. Yongo had been charged in court.

The Claimant testified that some time after filing this suit on 12th September 2013 he received a call from a CID officer a Mr. Juma requiring him to report to their office to give some evidence. He reported to the CID office and after he was questioned he was informed that he had nothing to do with the lost money. He testified that he was later called and informed that Aga Khan Hospital wanted him to go to court. He was later charged and the case was pending in court.

He prayed for payment of Kshs.1,850,040. He testified that he had been paid pension in the sum of Kshs.1,004,158. He testified that he had worked for the Respondent for 26 years.

Under cross examination the Claimant stated that his duties as chief cashier was to receive and bank money from cashiers and handling petty cash but he was not doing bank reconciliation. He stated that he had one copy of the key to the safe while another key was with the Chief Accountant and Hospital Secretary/Chief Operations Officer (COO). He testified that during the period he was sick he received money whenever he was in the office. He stated that he learned of the shortfall of over Kshs.2 million of money collected on 16th May 2013. He stated that he wrote a statement on the loss on 16th May 2013 under duress.

The Claimant stated that he knows Nelson Nyaberi, a colleague at the Finance Department of Aga Khan Hospital. He stated that he informed Nyaberi that there was a problem with cash in 2012 but he did not report the shortage because the cash was returned. He stated that he had been charged with the offence of theft by servant of Kshs.3.6 million. He stated that Mr. Yongo had also been charged and the two cases had been consolidated.

The Claimant stated that he received a letter inviting him for disciplinary hearing and attended the hearing following which he received a letter of dismissal. He confirmed having been paid Kshs. 1.4 million by Jubilee Insurance, Kshs. 35,000 from welfare and Kshs. 43,000 from the Respondent. He stated that he was not aware that the full amount he was paid was Kshs. 109,831 less PAYE, NSSF, NHIF and Hospital bill of Kshs.38,608.

Respondent's Case

RW1 HADIJA IBRAHIM testified that she was a cashier at Patient Service Department of Aga Khan Hospital Kisumu where she was on her 5th year of service, and that work station was at the Coffee shop. Her duties were to receive cash, issue receipts and at the end of her shift, verify the cash and hand it over to the Chief Cashier who verifies the cash, tallies with summaries then signs in a banking slip. She testified that the cashiers who received money in May 2013 were Zacharia Oroko who was assisted by Maurice Yongo. She testified that between 8th and 15th May 2013 she handed over cash to Oroko on 9th Kshs. 13,640; 10th Kshs.10,0070; 13th Kshs.9,750, on 14th Kshs. 14,490 and on 15th Kshs.10,600. She said that there are banking slips signed by the cashier as acknowledgment for receiving cash. She testified

that there is also a handing over sheet between the incoming and outgoing cashier at the end of a shift.

Under cross examination she stated that at the coffee shop they sell beverages and food, that the money she handed over to Mr. Oroko was banked and that although she was aware that she had come to court to give evidence against Mr. Oroko she was not aware of what he had done.

RW2 NELSON ATUTU NYABERI testified that he is a debtor officer at Aga Khan Hospital Kisumu where he had worked for the past 20 years. His work was to collect debts. He testified that he knew the Claimant who was his workmate and a friend through the church. He testified that he recalled some time in 2012 when the Claimant confided in him that when he came from leave there was some money which was missing and he suspected that the person he was working with must have misappropriated the money. RW2 testified that he advised the Claimant to report the matter immediately. He kept following the Claimant to confirm if he had reported but after a week the Claimant informed him that the matter had been sorted out. He testified that the colleague the Claimant was talking about was Mr. Yongo.

RW3 MAURINE ROSELINE ARWA testified that she works at Aga Khan Hospital as a Senior Assistant Human Resource Manager, a position she had held for about 6 years. She knew the Claimant who was the chief cashier at the hospital.

She testified that on 16th May 2013 the finance department reported that there was a fraud in the Chief Cashiers office and there were investigations. She testified that on the same day there was a meeting between the Chief Operations Officer, the Director of Finance and Administration, the Finance Manager, Mr. Zacharia Oroko, the Claimant and Mr. Maurice Yongo. She testified that the Claimant stated at the meeting that he had discussed the matter with Mr. Yongo who asked for more time to return the money. She subsequently issued a suspension letter to the Claimant. The suspension was extended on 23rd May 2013 when the Claimant was also issued with a show cause letter. She testified that in his response to the show cause letter the claimant stated that he was unwell and had nothing to do with the fraud. She arranged for a disciplinary hearing for 30th May 2013 and informed the Claimant by letter dated 27th May 2013. On 30th the suspension was extended and the disciplinary hearing rescheduled to 4th June 2013. The Claimant attended the disciplinary hearing and was subsequently informed of the outcome on 7th June 2013.

RW3 testified that the reasons for dismissal of the Claimant were that he failed to take ownership of the Chief Cashier's office and that there was no proper handing over between him and Mr. Yongo. He was further accused of recanting his statement that he failed to account for moneys in his role as Chief cashier. The Claimant appealed against the summary dismissal on 8th June 2013 but after considering the appeal the Respondent did not see any reason to reverse its decision to summarily dismiss the Claimant. The Claimant was informed of the outcome of the appeal by letter dated 12th June 2013 which also set out his entitlement being 12 leave days and refund of his contributions to the pension scheme less any liabilities to the Respondent. The Claimant was subsequently paid his terminal benefits.

RW3 testified that the Claimant's summary dismissal was lawful, that the Respondent followed due process and there were valid grounds for disciplinary action. She testified that there were staff who stated that they had banked money for the Claimant. She testified that there were also clear records of cash handed over to the Claimant which he could not account for.

Under cross examination RW3 stated that the Claimant said he had discussions with Mr. Yongo but Mr. Yongo was silent. She stated that according to her Mr. Yongo's silence meant that what the Claimant said was true as he would have objected if it was false. She stated that she did not have the written proceedings of the disciplinary hearing or the appeal hearing in court. She stated that the Claimant was not invited for hearing of the appeal which was considered by the Chief Operating Officer. She stated that she did not have the investigations report in court, that the report was from the internal audit and was on cash count. She testified that the amount lost was Kshs. 3.7 million which is also the amount Mr. Yongo agreed to refund. She stated that Mr. Yongo was responsible for the cash.

Determination

I have carefully considered the pleadings and evidence on record. I have also considered the submissions filed by the parties. The issues for determination are the following:

1. Whether the summary dismissal of the Claimant was fair, and
2. Whether the Claimant is entitled to the remedies sought.

Summary Dismissal

Section 45(1) of the Employment Act prohibits employers from unfairly terminating employment of their employees while section 45(2) provides for what constitutes fair termination as follows:

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

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

Section 41 provides for fair procedure while section 43 provides for validity of reasons for termination.

According to the evidence on record there is no dispute that the Respondent subjected the Claimant to a disciplinary hearing. What is contested are the grounds for summary dismissal.

According to the evidence on record the Claimant was unwell during the period 2nd to 15th May 2013 when the shortfall in cash collected at the cash office occurred. He stated in his response to the show cause notice that "*...I wish to clarify that I am not involved anyway on the lost or missing money. On the days the cash is alleged to be missing, I was undergoing treatment for a severe backache. I am sure my immediate boss (Mr. Were) can bear me witness because I informed him about my sickness....*" Again in his appeal the Claimant stated as follows: "*In fact during the period in question I was sick suffering from severe back ache, the information which my immediate boss was aware of and indeed it was his duty to assign someone to take over the office as I don't have the powers and the mandate to do so, of which he did and as regards to handing over, in fact I did it the same way we have done it in all the years whenever I am out of the office.... As regards to the unaccounted for monies not banked between 8th and 14th May 2013, I once again clarify that I was unable to be full time in the office due to my sickness(severe back pain) something my immediate boss was fully aware and had allocated the responsibilities to another staff as stated earlier above.*

Infact the information about my sickness and treatment was passed over to my boss earlier that 8th June 2013 and the same can be extracted from the hospital records..."

According to the evidence of RW3 the Senior Assistant Human Resource Manager, Mr. Yongo admitted that he failed to bank the missing money and had in fact sought time to bank the same. The letter of suspension accused the Claimant of not informing his supervisor about the shortfall caused by Mr. Yongo until a cash count revealed the shortfall, yet the shortfall was for the period 8th to 14th May 2013 when

the Claimant clearly explained he was not fully in the office due to his sickness and that it is his immediate supervisor Mr. Were who had assigned Mr. Yongo to be in charge of the Chief Cashiers office. The Claimant is further accused of abetting and condoning a fraudulent act when his immediate boss was in charge. The Respondent did not adduce any evidence to controvert the Claimant's averments that he was unwell and it is his immediate supervisor who assigned Mr. Yongo to do the work of Chief Cashier and who was therefore responsible for supervision of Mr. Yongo during the period.

The letter of summary dismissal however states that the disciplinary hearing found the Claimant liable as follows-

(i)You failed to take ownership of the cash office and instead abated responsibilities. For instance there was no proper handing over mechanism between yourself and Mr. Yongo that is verifiable.

(ii)You recanted a statement you wrote willingly and without duress, for which we have a statement from one of your colleagues in whom you confided to about the issue; he confirms your statement as per the enclosed copy.

(iii)Lastly you failed to account for the monies, as expected and understood in your role as chief cashier that were not banked between 8th May 2013 and 14th May 2013.

The letter of dismissal then goes on to state-

"In view of the above, management through the disciplinary hearing committee has decided to summarily dismiss your services with the hospital. We are giving you 48 hours notice in which to appeal this decision."

From the foregoing, it is not clear what the Claimant was suspended for and what he was dismissed for. It is even not clear what he was accused of at the hearing as no minutes of the disciplinary proceedings have been availed to the court. Further, the letter inviting the Claimant for a disciplinary hearing does not state what charges he was expected to defend himself against. It is further not clear why the Respondent dragged the issue of the confidential discussion between the Claimant and Mr. Nelson Atutu Nyaberi RW2 which related to banking of cash in 2012 which were resolved without bringing to the Respondent's attention when the charges against the Claimant were explicitly for cash collected and not banked between 8th and 14th May 2013.

Having found that the grounds for summary dismissal are not clear, it follows that the Respondent did not prove those grounds as required under section 43 of the Act. All that the Respondent attempted to prove during the hearing and through the voluminous documents filed in court is that money was collected by the cash office, a fact that is not disputed by the Claimant and which evidence by RW3 shows Mr. Yongo admitted not banking and sought time to bank. The money the Claimant was accused of not banking is the same money that Mr. Yongo admitted he failed to bank and asked for time to bank. It is further clear from the evidence that the claimant was not in charge of banking during the period in question and his boss Mr. Were had assigned Mr. Yongo to be in charge of the cash office including the banking. It is curious that the Respondent did not call Mr. Were as a witness yet he was the supervisor of the Claimant and featured prominently in the proceedings. The upshot is that there were no valid grounds for summary dismissal of the Claimant.

Remedies

The Claimant prayed for payment of terminal dues amounting in aggregate to Kshs.1,850,040. The Respondent however submitted that should the court find the Claimant's summary dismissal to be unfair what the court should grant should be restricted to only the salary in respect of the period of notice which in this case is one month. The Respondent relied on the following authorities which all support its position on damages for wrongful dismissal/termination being limited to notice;

Central Bank of Kenya v Nkabu; Central Bank of Kenya v Martin Kingori; Kenya Revenue Authority v Murgani; Walter Musi Anyanje v Hilton International Kenya LTD & Anor. (in which the court of Appeal quoted with approval the case of **Kenya Ports Authority v Edward Otieno and Addis v Gramophone Company (1909)AC 488**, and the case of **Rift Valley Textiles Limited v Edward Onyango Ogada and Ombonya v Gailey Roberts**; and the case of **Robert Kennedy Moi v Hon Attorney General & 2 Others**. All these cases with the exception of the last one (whose copy was not availed to the court) relate to periods before the enactment of the Employment Act, 2007 which introduced the concept of unfair termination and compensation for the same. They are therefore not relevant to the determination of this case.

The Respondent further referred the Court to **Kisumu Industrial Court Cause No. 274 of 2013** filed by the Claimant's colleague **Maurice Yongo**, his assistant in which judgment was delivered on 24th July 2015 dismissing the claim. The decision in the said case is in consonance with the decision herein as it found that Maurice Yongo, and not the Claimant herein, was responsible for the money that was not banked at Aga Khan Hospital Kisumu between 8th and 14th May 2013 which is also the subject of this suit.

I will now consider each of the remedies sought by the Claimant.

i. Notice

Under section 49(1) of the Employment Act, the Claimant is entitled to one months' gross salary as notice or pay in lieu thereof, the court having found that he was unfairly terminated. I award the Claimant Kshs.59,000.

ii. One year's salary

Under section 49(1)(c) of the Employment Act the Court is authorised to award an employee-

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

The Claimant herein had worked for the Respondent for 26 years with a record that must have been incident free as no adverse records were submitted to court and no mention was made of any adverse history of misconduct. Having found his summary dismissal unfair I award him 12 months' salary as compensation in the sum of Kshs.708,000.

iii. Leave pay

The Respondent stated that it paid the Claimant's outstanding leave together with his terminal benefits, a fact I find that the claimant did not controvert. The prayer is dismissed.

iv. Leave Travel Allowance

The Claimant stated under cross examination that this was paid as a tradition but did not provide any proof of the same. I find that this claim has not been proved and dismiss it.

v. Pensions

The Claimant admitted having been paid his pension by the Respondent's Employee pensions fund. I therefore make no orders on the same.

vi. NSSF for 12 months.

The Claimant did not give any basis for this claim and the same is dismissed for want of proof.

vii. Gratuity

As correctly pointed out by the Respondent the Claimant is not entitled to gratuity either under his terms of employment or under the law. The claim is thus without basis and is dismissed.

viii. 1/2 x 59,000

It is not clear what the Claimant was claiming under this head. The same is dismissed for want of proof.

ix. Unpaid salary for May and June 2013

The Claimant admitted having been paid the salary for days worked in May and June 2013. I therefore make no order in respect of the same.

x. Unpaid leave for 50 days worked in 2012/2013

This is a duplication of prayer (iii) above.

xi. Unpaid Leave Travel Allowance

This is a duplication of prayer (iv) Above.

xii. Unpaid Staff Welfare

The Claimant admitted having been paid the same after he filed suit.

Conclusion

In conclusion I find and hold that the summary dismissal of the Claimant was unfair and award him the sum of Kshs.767000 only in respect of one months' salary in lieu of notice and maximum compensation of 12 months' gross salary.

The Respondent shall also pay Claimant's costs for this suit and decretal sum shall attract interest at court rates from date of judgment.

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE