



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1500 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 18<sup>th</sup> September 2017)**

**DOMINIC NJOROGE NDEGWA .....CLAIMANT**

**VERSUS**

**FORTCOM CONSULT LIMITED .....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 11.9.2013 seeking payment of his terminal dues and compensation for wrongful and unfair termination. He states that he was employed by the Respondent on 15.2.1998 as a Property Estate Manager at a monthly salary of 29,100/= which employment was confirmed on 14.7.1998.
2. That he served the Respondent with loyalty, diligence and continuously without interruptions until 13.2.2013 when he was suspended on the grounds of “various errors and questionable acts pending investigations for unspecified period but not later than three months.” He was subsequently sent on unpaid leave pending investigations on 13.5.2013 but Respondent failed to substantiate the claims nor press any charges against him. On 16.5.2013 he was terminated for acts done by another employee.
3. It is his contention that during his employment the Respondent awarded him Shs.1,000,000/= as an appreciation for good performance. This award was to be staggered in five years to finance a project of his choice; only Shs.200,000/= was ever released to him.
4. By a letter dated 7.6.2013, the Respondent intimated that he would remit the Claimant’s terminal dues by 1.7.2013 which they have failed to do todate. He claims that his termination was unprocedural and unfair and as such urges the Court to allow his claim as drawn.
5. The Respondent filed a Memorandum in Reply on 16.10.2013 through the firm of Omulele and Tollo wherein they admit the employment relationship and the emoluments thereof.
6. They state that the Claimant’s actions and/or omissions caused the Respondent to experience loss of an enormous sum of money and part of the subject matter of the loss was investigated by the Police and the Respondent’s officer who reported to the Claimant at the time has been charged in Court in criminal proceedings.
7. It is the Respondent’s contention that the Claimant had previously been warned in writing about his conduct and in particular *vide* a letter dated 9.9.2011 which conduct later transitioned into gross negligence and fraud. A particular instance quoted by the Respondent was that the Claimant would report to the Respondent that a tenant had terminated the tenancy relationship with the landlord but upon

physical inspection it was revealed that the concerned tenant was still in occupation and was using the premises and paying rent to the Claimant or his juniors to the detriment of the Respondent. That his acts of gross misconduct are what led to his summary dismissal.

8. The Respondent deny the monetary claim by the Claimant and state that all statutory deductions deducted from the Claimant were duly remitted and all leave days due were clearly documented. That the award of 1 million to the Claimant was a discretionary award conditional on completion of employment, in this case the Claimant was terminated and as such the Respondent is not bound to pay this amount.

### **Submissions**

9. The Claimant submits that the allegations in the dismissal letter were unproved and could not form the basis of dismissal for reasons that:-

*1. The Respondent did not demonstrate how the loss of moneys alleged to have been lost occurred under the Claimant's watch and/or with collusion of the Claimant as alleged.*

*2. That the letter of dismissal stated that the investigations were ongoing and hence it was premature to take such action against the Claimant in the absence of a factual finding.*

*3. Further that the Claimant and his witness one Mr. Simon Ngugi did not tender any evidence of the loss as claimed.*

*4. Additionally the allegation of fraud was not proved to the required standard which is higher than on a balance of probability.*

*5. That the Court cases alleged to have been filed against him were never concluded and as such could not be used as evidence against him in reaching a decision to terminate him.*

10. From the foregoing the Claimant states that the basis of his termination was unlawful and Court should so find.

11. The Claimant further submits that the reward of 1 Million is still due as it was not conditional; it was an entitlement as a result of his good work done prior to 18.3.2011. They rely on Black's Law Dictionary which defines an entitlement as:

*“An absolute right to a benefit already accrued.”*

12. They pray for the Claim to be allowed as drawn.

13. The Respondent in submissions state that the Claimant in his claim has not pleaded that he was not accorded the right to be heard. That Infact he annexed a letter to which he attempted to explain the allegations against him and as such he was given an opportunity to be heard.

14. Further the Respondent submit that there were sufficient grounds to terminate the Claimant as set out in the statement of Claim and accordingly the Claimant was charged in Nairobi Criminal case No. 848 of 2011 for occasioning bodily harm to a tenant.

15. The Respondent submits that the Claimant is not entitled to the prayers sought and in particular the paternity leave as he never requested for such and was denied. The claim for the balance of the award of shs.800,000/= is also not payable as it was discretionary. Pay during the suspension period they submit that only half salary is due and the Court should so find.

16. The Respondent rely on the case of Mombasa **ELRC No. 493 of 2014 Salim Gulahyussein Vs Associated Warehouse Limited**; where the Claimant was awarded two months salary for being accorded

the right to be heard.

17. They also rely on the case of **Nairobi ELRC No. 602 of 2013 Erick Mbalya Vs. Athi Stores Limited** where the Claim was dismissed without compensation as the Claimant was found guilty of violating Company rules. They pray for the Claim to be dismissed with costs.

18. I have considered all the evidence and submissions tendered before me. The issues for determination before me are as follows:-

- 1. Whether there were valid reasons to warrant termination of Claimant's service.***
- 2. Whether due process was followed before Claimant's dismissal.***
- 3. What remedies if any the Claimant is entitled to.***

19. On the 1<sup>st</sup> issue, the claimant has submitted that the Respondent did not have valid reasons to terminate him. He alludes to his dismissal letter which states that:-

***“Under your supervision Jack Berrick managed to steal from the company close to over Kshs.100,000/=. The system used in getting access to the cash was that he received cash undetected. You had responsibility to oversee that this does not happen. This office takes that you either got involved or neglected your supervisory duty which lead to loophole. The same practice has been witnessed in some other plots. The investigation is still on course. We now we have no choice but to dismiss you from work as measure to save the company further losses.***

***Thank you for the time you have been working for us”.***

20. Three things emerge from this letter:-

- a) That the money was stolen by one Jack Berrick who received the cash undetected.***
- b) That the Claimant was the supervisor of Jack Berrick and is therefore suspected to have been involved in the theft or neglected his duty.***
- c) The investigations were still on going.***

21. In their defence, the Respondent have indicated that indeed the Claimant failed in his duty as per his job description as a supervisor.

22. The Respondent however have not indicated how the Claimant was negligent if another person stole money and not himself. It is in evidence that the thief went and collected rent from a tenant in cash form against Company Policy. The thief was not accompanied by the Claimant and there is no indication that the money stolen benefited the Claimant.

23. The summary dismissal letter also indicates that the investigations were still on going. With such a background, it is apparent that the reason/s the Respondent invoked to dismiss the Claimant were not valid. Section 43 of Employment Act 2007 states as follows:-

***“(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”.***

24. Such reasons that an employer would seek to rely upon should be in existence and if investigations are still on going, it cannot be said that the reasons are established or in existence. I therefore hold that there were no valid reasons to warrant dismissal of the Claimant.

25. On due process, Section 41 of the Employment Act states as follows:-

**“(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”.**

26. There is no indication that this process was even followed. It is true that the Claimant was asked to explain certain occurrences and he replied to the queries raised. There was no oral disciplinary hearing and no minutes and such a hearing have been exhibited by the Respondent.

27. It is therefore my finding that due process was not followed before the Claimant was dismissed.

28. Given the scenario above, it is apparent that the Claimant was dismissed without valid reasons and without following due process. Section 45(2) of Employment Act 2007 states as follows:

**(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.**

29. It is therefore my finding that the dismissal of Claimant was unfair and unjustified and I declare it so.

30. On remedies, the Claimant has sought payment of Kshs.800,000/= which he had been promised and which promise was not fulfilled.

31. On 18/3/2011, the Respondent’s Managing Director wrote to the Claimant a letter as follows:-

**“Dominic Njoroge Ndegwa**

**P.O. Box 34307 -00100**

**NAIROBI.**

**RE: APPRECIATION**

***You have performed well in the last ten years. This company has considered rewarding you for your good work. You are entitled to a one million reward. This does not water down any other benefit or payments due for you. This reward will be released in five stages spreads in five years starting end of this year. However we will not release the same in cash but in form of financing a project of your choice. You may present this letter to any bank to form as part of guarantee document that we are able and willing to guarantee you to a maximum of Kshs 1 Million repaid in five years provided such funds are directed to a permanent investment.***

***Thank you.***

***Yours faithfully,***

***Simon Ngugi***

***Managing Director “***

**32.** Indeed this gesture was accepted with gratitude by the Claimant and on 30/10/2012 he requested for 2<sup>nd</sup> phase of the funding in the letter he wrote to the Managing Director, it was endorsed upon it (see Appendix 11) “Apply at Equity upto 400,000/= and let Fortcom pay the interest starting 1<sup>st</sup> January 2013”.

**33.** It is not clear if Claimant went to Equity Bank as requested to seek funds for the next phase of the project or not.

**34.** That notwithstanding, the Respondent had made a promise to reward Claimant upto 1 million for the good work he had done. This reward was not subject to any other occurrence except upon identification of a viable project.

**35.** The Claimant have submitted that this is “an absolute right to a benefit already accrued” or an “entitlement”.

**36.** I do agree with this submissions. This right to 1 million for the Claimant accrued on 18/3/2011. Infact the letter indicated that the reward did not water down any other benefit or payment due to the Claimant. That being the position, I find that this promise for a reward to the Claimant is a right which accrued upon its acceptance and the Respondent cannot renege on its payment.

**37.** I therefore find that the Claimant is entitled to the release of the 800,000/= reward promised upon identification of the viable project. Given the delay in the release of this cash which was occasioned by the unjustified dismissal of Claimant by the Respondent, this money will now be released in one phase upon identification of the project in question.

**38.** I also find for Claimant as follows due to the unjustified and unfair termination:

***1. 1 months salary in lieu of notice – 29,100/=.***

***2. 12 months salary as damages for the unlawful dismissal – 12 x 29,100= 349,200/=.***

***3. Balance of unpaid ½ salary for February, March, April and May = 14,550 x 4 = 58,200/=***

***4. Leave accrued for 2012/2013 = 29,500/=***

***5. Unremitted NSSF amounts for 8 months = 400 x 8 = 3,200/=.***

***TOTAL = 469,200/=***

**TOTAL AWARDED = 1,269,200/=**

**6. Plus costs.**

Read in open Court this **18<sup>th</sup> day of September, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent