



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

AT NAIROBI

CAUSE NO.471 OF 2014

ELINATHAN G KAIRU.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGEMENT

Issue in dispute – wrongful, unlawful and malicious termination of employment

1. On 18th July, 2017 the court allocated the parties a hearing date following three previous adjournments by the respondent for various reasons. The hearing date allocated in the presence of both parties was 18th October, 2017. On the due date, respondent's advocate sought an adjournment on the grounds that the respondent was not able to secure its witness who was in strike. the court proceeded on with the hearing noting previous adjournments and that the respondent as a corporate, its directors and or key staff alleged to be on strike go contrary to how the respondent has been defined and described in the claim and defence as a Private Limited Liability Company.

2. The respondent's advocate opted to be absent at the hearing. The respondent did not call any witness.

Claim

3. The claimant being a male adult was employed by the respondent a private limited liability company and registered under the Companies Act and with the main objective of running a chain of supermarkets in Kenya among other businesses.

4. The claimant was employed as an Accounts Assistant on 30th September 1999 to 1st October, 2013.

5. On 22nd June, 2013 while the claimant was on duty he was sent on compulsory leave with no explanation why such drastic action was necessary. The leave was extended to 23rd August, 2013 to 23rd September, 2013 on the grounds that the respondent was undertaking investigations involving unspecified irregular payments.

6. On 17th August, 2013 the claimant was invited to attend before the disciplinary committee which consisted fellow employees who were biased against him. Before the hearing the claimant had not been given any specific allegations to respond to or be able to prepare for his defence or seek representation.

7. When the claimant asked to know why he had been abruptly been invited to the disciplinary committee,

no explanations were given and the respondent proceeded to issue him with a letter of termination dated 1st October, 2013. The reasons for termination were than the claimant had been negligent and improperly performed his duties which allegations were different from the previous allegations made against him and which had formed the basis for investigations against him. the claimant had been sent on compulsory leave for the respondent to investigate allegations of irregular payments in the Finance Department and the show cause issued to him was on the grounds that he had been involved in irregular payment to a supplier M/S Kapari Limited amounting to Kshs.996,218.00.

8. The show cause issued to the claimant on 19th August, 2013 had unsubstantiated allegations. The resulting dismissal from employment was unlawful and unfair as there was no time given for the claimant to prepare for his defence.

9. The claimant is seeking;

- a) Notice pay of one month at Kshs.91, 551.00;
- b) Compensation at Kshs.1, 098,612.00;
- c) Damages for loss of employment and uncompleted earning years to 60 years or an order of reinstatement; and
- d) Costs of the suit.

10. The claimant testified in support of his claim. Upon being sent on leave, the allegations made against him for investigations were different from the allegations in the show cause notice and what was on the letter of his dismissal. The alleged fraudulent transactions to M/S Kapari Limited were not processed by him and had the respondent followed the paper trail, the employee who dealt with this payment would have been established. It was unfair to terminate the claimant on allegations that were unfounded. That the claimant was the first to discover irregular payment and made a report to the respondent. The customer/client M/S Kapari Limited first made a report to the claimant who forwarded the same to the respondent. The material was then used against him which was an unfair practice.

Defence

11. In response the respondent admit the claimant was dismissed from his employment with the respondent due to negligence and improper performance of his work. The respondent was receiving many questions by various suppliers as to several overpayments that they had been receiving from the respondent and which included double payment that had been approved and posted by the employees at the finance department. The respondent conducted an investigation into this irregular payment and thus sent several employees including the claimant on compulsory leave.

12. Upon investigations the respondent found there were irregular payments whose remittances had been generated by members of the finance department particular the section where the claimant had been designated to manage and supervise. The claimant had authorised and approved fake invoices to be posted into the computer system and payments made on the same.

13. When the claimant was notified by suppliers of overpayments, the claimant failed to alert the respondent or failed to stop the irregular payments. The claimant had the knowledge of fake invoices all along.

14. On 17th September, 2013 the claimant was invited to appear before the disciplinary committee to answer to gross misconduct. The claimant attended and responded to all issues against him. His responses were found not satisfactory and thus he was found negligent in the performance of his duties. The respondent followed the law in addressing the claimant's case and the decision to terminate his employment was justified.

15. As noted above, no evidence was called by the respondent.

16. Save for the staff clearance form attached to the defence, the respondent has not attached any material(s) in this case with regard to the claimant's work records. This is contrary to the provisions of section 10(6) of the Employment Act, 2007. What the court is left with is material records submitted by the claimant.

17. The offence of negligence of duty is serious in employment and labour relations. Such is addressed under section 44 of the Employment Act, 2007 as amounting to gross misconduct and a subject to summary dismissal. However, before such action can follow the employer must comply with the mandatory provisions of section 41(2) of the Employment Act, 2007. Hear the employee on his defence in the presence of a fellow employee and where the allegations made are found to be genuine, valid and justified, then dismissal can follow.

18. The letter terminating the claimant's employment is dated 1st October, 2013 and refers as follows;

Kindly refer to out show cause letter dated August 19, 2013 and the staff disciplinary committee sessions that you attended in person on August 19, 2013.

The staff disciplinary committee at its meeting held on August 26, 2013 deliberated on your written and oral submissions and recommended the termination of your employment effective October, 1, 2013.

19. The claimant had been on extended compulsory leave to allow for investigations. On 17th August, 2013 he was invited to attend disciplinary hearing scheduled for 19th August, 2013. On 20th June, 2013 the claimant had made a written statement noting that;

.....I remember on 15th June, 2013 when I received a mail from a supplier Kapari LTD; regarding payment cheque No.064616 as per attachment claiming out-rightly suspicious of huge quantities he had never supplied to our branches.

I forwarded the said mail to management i.e. Mr Haku, the MD Mr Ireri, for further investigations.

This is all I know.

20. The show cause issued to the claimant on 19th August, 2013 alleged that;

... you were involved in a fraudulent payment to a supplier M/S Kapari Ltd of

Kshs.996, 218.00. On the recommendations of the staff disciplinary committee at its meeting held on August 19, 2013 which you attended in person, you are called upon to show cause as to why disciplinary action should not be taken against you for the alleged offence.

Your reply should reach the undersigned within 7 days from the date of this letter. ...

21. From the wording and conclusion of the show cause letter to the claimant, it is apparent that he was on 19th August, 2013 invited to attend at his disciplinary hearing and then issued with a show cause notice to reply within 7 days. He was then terminated from his employment on 1st October, 2013.

22. Was the claimant given the benefit of the investigations report following his compulsory leave? Were the findings made known to him before the disciplinary hearing?

23. The essence of any investigations at the workplace is to address an issue apparent. The employer has

the right to send any employee on leave to allow for investigations. Such is to allow the removal of such an employee from the shop floor for independent investigations. See **Saundu Amolo versus Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR**. The rationale is that a suspension must be clear as to its purpose. It must be clear as to whether a sanction or an interim measure is to allow for investigations. Once the purpose of the suspension is addressed, the employee must be taken through the motions of section 41 of the Employment Act, 2007.

24. In **Sabina Mutua versus Amedo Centre Kenya Limited, Cause No.1630 of 2013** the court held as follows;

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; ...

25. In this case, where the claimant was on leave until 19th August, 2013 and on which day he was heard before the disciplinary committee and then issued with a show cause letter, the end of such show cause period ought to have been the forum after which his case should have been heard. What then was the purpose of the disciplinary hearing on 19th August, 2013 before the claimant had a show cause notice against him? a case of putting the cart before the horse?

26. Fair labour practice demands that an employee alleged to have misconducted himself be given a fair chance to defend himself. Where the claimant was sent on leave and wrote his statement on his role in the alleged irregularly payments to M/S Kapari Limited, he was categorical that his only role was to receive the compliant and which he forwarded to management. What then did the investigations conducted in this regard reveal? What role did Haku and Ireri as the *MD* and *management* undertake to follow up on these matters? Such are grey areas not addressed by the respondent.

27. As noted above, in the case of **Sabina Mutua**, cited above, the court held;

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.

28. Once a show cause is issued, the employee must be allowed to respond thereto in the nature of procedure set out under section 41 of the Employment Act, 2007. To do otherwise would be to deny the employee a fair chance to be heard in the presence of his representative of choice and thus condemn him unheard.

29. In the absence of evidence from the respondent, I take the claimant's evidence in court to be correct. He was not given a fair hearing before his termination of employment and his rights in law were not protected. Such is unfair in view of section 43 and 45 of the Employment Act, 2007.

30. On the remedies sought, the claimant is entitled to notice pay following an unfair termination of his employment by the respondent. in the computation of terminal dues, the claimant was paid two (2) month notice. On the finding that the procedure followed did not meet the threshold set out in law, the claimant is entitled to compensation and a gross pay for 10 months is sufficient taking into account the time of service and the procedural unfairness of his termination of employment. The claimant for payment of salaries for loss of employment until the claimant is 60 years is devoid of evidence and merit. The claimant did not state his age, whether he is unemployed and failed to address his current circumstances. Such is declined.

Accordingly, judgement is hereby entered for the claimant against the respondent for compensation at 10 months gross wage of kshs.915, 510.00; and costs of the suit.

Delivered in open court at Nairobi this 31st day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: David Muturi & Nancy Bor

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