



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1802 OF 2011

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND RESPONDENT

Mr. Dickens Atela for the claimant

M/S. Oyombe for the respondent

JUDGMENT

1. The suit was commenced by way of a memorandum of claim dated 12th October 2011 and filed on 27th October 2011.
2. The claimant seeks reinstatement of the grievant to his employment without loss of benefits and security. In the alternative the claimant seeks maximum compensation for wrongful loss of employment of the grievant, payment of outstanding wages for the period the grievant was on suspension on half pay and notice pay in terms of the collective bargaining agreement (CBA).
3. The claimant seeks costs of the suit.

Brief facts of the case

4. The grievant Patrick Ambani was employed by the respondent on 21st October 1999 as a data machine operator at the Fund's head office. The letter of appointment dated 8th October 1998 was produced before Court which provides for termination on giving one month notice to each other or payment in lieu of notice.
5. Initial salary was Kshs.9,760 per month.
6. It is the claimant's case that the grievant was a member of the union and the CBA for the period 1st July 2009 to 30th June 2011 applied to him.
7. On 22nd October 2009, the grievant was accused of deleting an item from the system with the intention to conceal a shortage from the previous day's collection in collusion with one Mr. Jackson K. Langat. This enabled the two to falsely reconcile the day's collection for banking.
8. The deleted item was No. 100471, Savemore Distributors contribution of Kshs.5,600. The grievant then banked Kshs.14,990 at the Kenya Commercial Bank.

9. This was said to be an attempt to defraud the Fund. To accomplish the task, the grievant misused the 'password' by effecting unauthorized deletions.
10. The grievant was asked to show cause why disciplinary action should not be taken against him. The grievant responded to the show cause letter on 19th February 2009 and on 25th March 2009, the grievant was interdicted on half pay. On 20th September 2009 the grievant appeared before the fraud prevention and discipline committee of the Fund and was represented by the union shopsteward.
11. The claimant states that the charges faced by the grievant were different from those in the initial show cause letter and on 30th September 2009, the grievant responded in writing to the amended charges.
12. In brief, the grievant denied participating in the alleged offence stating that he was new in the cash office and was learning to use the new information system (CRIS) introduced in March 2008. That passwords to the system were allocated to three individuals, namely Mr. Jackson Langat, cashier; Mrs Lucy Wangeci, cashier and the grievant. That Mr. Langat had most experience in the cash office and the system. Mr. Langat had authority to delete entries into the system. He was in charge of deletions and amendments register. Any deletion is immediately reported to the branch manager who in turn validates or authorizes the deletion or amendment. The original receipt is retained under key and lock.
13. At the end of the day, the branch manager who is the branch accountant examines and ensures all day's transaction are in order.
14. The grievant states therefore that it was not possible for him to delete any transaction as alleged or at all. The claimant therefore seeks the relief sought.

Response

15. The respondent filed a memorandum of defence on 5th July 2012 in which the particulars of employment, transfer and re-assignment of duties of the grievant by the respondent are not placed in dispute.
16. The respondent states that on 15th November 2008, a total of Kshs.20,590.00 was received from various employers through the cash receipting system and the grievant together with a colleague deleted the contribution of Kshs.5,600.00 from an employer, named Savemore Distributors in order to conceal a shortage from the previous day's collection. The grievant proceeded to bank Kshs.14,900.00 instead of Kshs.20,590.00.
17. The grievant responded to the charges levelled against him by stating that he had learnt that the deletion had been done by Mr. Jackson Langat his colleague.
18. That the respondent carried investigations in Kitale branch office and it was discovered that on diverse dates between July 2008 and December 2008, the grievant and a colleague issued fake receipts to employers for the right amounts received, diverted the cash at hand and deleted these receipts from the system. It was further revealed that a total of Kshs.114,260.00 had been misappropriated and out of this, the grievant was responsible for Kshs.36,350.00.
19. This led to the disciplinary process against the grievant and the termination. That the grievant was given opportunity to show cause in writing, why he should not be subjected to a disciplinary hearing and was subsequently brought before a disciplinary hearing where he was represented by a union official.
20. That the grievant's explanation was found by the respondent to be unsatisfactory and his employment was terminated on 24th March 2010.
21. That on 1st November 2010, the claimant appealed against the termination of employment on behalf of the grievant. The respondent executive committee considered the appeal and observed that the fraud case against the grievant was established as charged in terms of section 3.4 of the code of regulations and section 44 of the Employment Act. The appeal was refused.
22. On 20th January 2011, the claimant reported a dispute to the Minister for Labour. On 7th March 2011, the Minister appointed a conciliator to whom parties made written submissions. The conciliator after considering submissions by both parties recommended that the termination was not fair and that the grievant should be paid *inter alia* the half salary withheld during interdiction and that the grievant be paid terminal benefits in terms of the CBA.

23.The respondent disagreed with the finding of the conciliator hence, this suit.

Determination

24.It is opportune to indicate that the grievant was not summarily dismissed but his employment was terminated as per the letter dated 24th May 2010.

25.It is not in dispute that the grievant was a member of the claimant union and the CBA in place at the time of termination was applicable to him.

26.In terms of clause 15(d) on interdiction in the CBA,

“if any punishment other than dismissal is inflicted, the employee may be refunded such proportion of the salary withheld as a result of interdiction.”

27.It is evidently clear that the grievant was not dismissed from employment but his employment was terminated subject to payment of notice pay.

28.It follows therefore that the grievant was also entitled to refund of the half (½) monthly pay deducted during the period of interdiction from 25th March 2009 to 24th May 2010, a period of fourteen (14) months and the Court so finds.

Furthermore, and in terms of clause 16 of the CBA, the grievant was entitled to a notice period of two months or payment of two months salary in lieu of notice and the Court so finds.

29.The grievant earned Kshs.57,235.00 gross salary per month. Accordingly, and in terms of the finding of the Court the grievant is awarded as follows;

(i) refund of the deducted half (½) salary during fourteen (14) months of interdiction – (57,235 x ½ x 14) months = Kshs.400,645.00;

(ii) two (2) months salary in lieu of notice in the sum of Kshs.114,470.00.

30.It is the Court’s considered view and finding that the respondent had a valid reason to terminate the employment of the grievant. The respondent has discharged its onus in terms of section 43 as read with section 47(5) of the Employment Act, 2007. The termination of the employment of the grievant was also in terms of a fair procedure in terms of section 45(2)(c) of the Act.

31.Accordingly, the claim for compensation is dismissed.

32.In the final analysis, the grievant is awarded as against the respondent;

(i) a sum of Kshs.400,645.00 (1/2 salary refund);

(ii) Kshs.114,470.00 (two months salary in lieu of notice);

total award Kshs.515,115.00;

(iii) the award is payable with interest at Court rates from date of filing suit till payment in full;

(iv) the respondent is to pay the claimant, the costs of the suit.

Dated and delivered at Nairobi this 15th day of January 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE