



REPUBLIC OF KENYA

IN THE EMPLOYMENT COURT OF KENYA

AT M OMBASA

CAUSE NO. 439 OF 2014

AKIBA BILTON FUNDI.....CLAIMANT

VS

GRAIN BULK HANDLERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent on 2.7.2007 as a Cost Analyst clerk and later rose to the rank of Cost Analyst within the Finance Department. His salary was kshs. 64,050 per month. On 15.10.2013, he was suspended from work for gross misconduct and on 1.11.2013 he was invited to a disciplinary hearing before a committee set up by the respondent. After the hearing, the claimant was summarily dismissed by the letter dated 6.11.2013. The claimant now brings this suit alleging that his dismissal was without any justifiable cause and was procedurally unfair. He therefore prays for terminal dues plus compensation for wrongful termination of his employment contract.
2. The respondent has admitted that she employed the claimant and dismissed him as pleaded in the suit. She however denies that the dismissal was without justifiable reason, and procedurally unfair. She avers that the claimant committed gross misconduct which entitled her to summarily dismiss him. That the claimant was informed of the charge of misconduct facing him and he was given a chance to defend himself before a disciplinary committee before the summarily dismissal. She therefore avers that the claimant is not entitled to the remedies sought save for his pension contribution which she has already computed and caused a cheque to be drawn in favour of the claimant by the pension fund.
3. The suit was heard on 15.6.2015 and 12.10.2015 when the claimant testified as Cw1 and the respondent called Alice Wathika and Clement Muleke Nyanyi as Rw1 and 2 respectively. Thereafter the both parties file written submissions.

Analysis and Determination

4. The issues for determination in this suit are whether the termination of the claimant's employment was unjustified and unfair, and whether the reliefs sought ought to issue.

Unjustified and Unfair termination

5. Cw1 produced the suspension letter dated 15.10.2013 accusing him of receiving revenue from the Security department and failing to remit it to the authorized officer. He also produced the

- dismissal letter dated 6.11.2013 which cited the reasons for dismissal as breach of financial procedures by collecting revenue between 16.9.2013 and 30.9.2013 amounting to kshs. 14,800/= and failing to remit to the Finance manager, and colluding with colleagues to cover up the missing revenue. He admitted that he was given a hearing by a disciplinary committee. He however contended that the dismissal was unfair because the committee had already made up its mind to dismiss him because they were fooling him to admit an offence he had not committed. On cross examination he admitted that he collected revenue but denied that he converted it to his own use. He maintained that he kept the money in his office drawer where it was recovered. He also denied that he tried to influence his colleagues to cover up the alleged misconduct.
6. Rw1 told the court that Cw1 collected revenue in respect of penalties levied for lost visitors' badges, Company Identity cards, Port Passes and damage to property. That the penalties were imposed by the Security department and receipted by the Cw1. That Cw1 was required to prepare vouchers for all the revenue received and hand it over to the Rw1 (Finance Manager) daily. That it was wrong for Cw1 to keep the money collected till the end of the month. She denied that the dismissal was unfair and maintained that during the disciplinary hearing, Cw1 admitted that he collected revenue and failed to remit it to her. She denied that the disciplinary committee was biased against him. She maintained that good character on the part of the Cw1 was crucial because he was dealing with money for the respondent. That he collected kshs. 14,800/= between 16.9.2013 and 26.9.2013 only 14,000/= was recovered while kshs. 1,800/= was never recovered.
 7. Rw2 confirmed that Cw1 collected revenue in respect of penalties imposed by the security department and failed to remit to the Rw2. Instead he advanced himself the money and when he discovered that he was under investigation he proposed to send kshs. 12,000/= to her via Mpesa to place it in his office drawer. Rw2 however refused to the proposed cover up by the Cw1 but later kshs. 13,000/= was found in his office drawer by a colleague called Eileen. Rw2 maintained that the money was not in the drawer when she first searched it.
 8. After carefully considering the evidence by both sides, the court is satisfied that there existed a valid and fair reason for dismissing the claimant. He has admitted in his evidence herein just as he did before the disciplinary committee that he collected revenue on behalf of the respondent and formally issued receipts but failed to remit it to the Finance manager as required. The reason for withholding the money according to Cw1 is because there was time limit upon which he was to keep the money before remitting it to the Finance Manager. That explanation was not satisfactory to the disciplinary committee and it dismissed the claimant.
 9. Under section 45 (2) of the Employment Act (EA), termination is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. Fair procedure is provided for under section 41 of the Employment Act which basically requires that before an employee is dismissed for misconduct, he shall first be accorded a chance to defend himself. Under section 44 of the Employment Act, improper performance of duty and neglect of duty is a misconduct which warrants summary dismissal.
 10. In this case the claimant admitted that he collected revenue on behalf of the respondent and failed to remit it to the Finance Manager. That was gross misconduct because it involved breach of the respondents Finance procedures. The claimant was given a chance to defend himself and indeed appeared before a disciplinary committee before the decision to dismiss him was reached. Consequently, the court finds and holds that the dismissal of the claimant on 6.11.2013 was justified and fair.

Relief

11. In view of the foregoing finding that the termination of claimant's services was proper, the prayer for salary in lieu of notice and compensation for wrongful termination is dismissed. Likewise the prayer for gratuity for 7 years service is dismissed for lack of particulars and evidence. The claimant never pleaded and proved that he was entitled to both gratuity and pension. The claimant admitted in evidence that he was paid his pension and as such he will have to content with that.

Disposition

12. For the reasons highlighted above the suit is dismissed. No order as to costs.

Signed, dated and delivered at Mombasa this 12th day of February, 2016.

ONESMUS MAKAU

JUDGE