



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 633 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st March 2016)

CLEOPHAS ODOYO..... CLAIMANT

VERSUS

TOYOTA KENYA LIMITED..... RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his claim on 15.4.2014 through the firm of Rachier & Amollo Advocates.
2. The Claimant's case is that he was employed by the Respondent with effect from 2.9.2011 to 11.2.2014 initially as a Management Trainee and late promoted to Assistant Accountant on 25.6.2013 which promotion was backdated to 1.4.2013.
3. The Claimant avers that at all material times he was responsible for requisition used for the transfer of money and after he inputs the details on the payment platform, it went through 3 stages of verification by the Credit Manager as Management Accountant Treasury Manager Finance and Administration who was to verify the details entered before releasing money.
4. The Claimant avers that on or about 6.2.2014, he was on duty when a colleague of his informed him that Kenya Motor Industry, a supplier had called regarding a payment that was long overdue.
5. The Claimant avers that he checked the payments from citidirect which was the payment platform and found that payment had been effected to a wrong account. He proceeded to report the same to his supervisor but he didn't find her at her work station.
6. The Claimant further avers that on 7.2.2014, at 14.30 pm he was informed by the Security Officer one Amos Wafula that 4 other payments had been effected to the wrong account numbers all totaling Kshs.3,520,583.80/=.
7. On 10.2.2014, the Claimant was also called for further interrogation by a team comprising of the General Manager Finance and Corporate Administration, the Risk Manager and the Security Officer.
8. On that same day at about 4.30 pm he was summoned to appear before a disciplinary committee by the General Manager for HR and General Affairs wherein he was threatened that he would be charged with fraud and dismissed summarily without any further investigations or reference to the

alleged act.

9. The Claimant stated that he requested to be supplied with hard copies of the requisition forms that were allegedly used to transfer money to the said wrong account but the same were never supplied to him.
10. He also avers that he was never allowed any opportunity to defend himself of the alleged theft nor the benefit of doubt of presenting his case and his cries of innocence were scoffed at the quickly assembled disciplinary committee.
11. The Claimant avers that he was never issued with any official communication for his dismissal but was subsequently barred from accessing the work premises.
12. The Claimant avers he insisted on having an official communication of his dismissal and even emailed the Managing Director on the same upon which he was served with a letter of dismissal on 18.2.2014.
13. It is the Claimant's averment that the dismissal was discriminatory and unprocedural as he was the only one picked and summarily dismissed amongst the four persons who handled the transactions without further investigations being conducted or due regard to procedure as provided for the Company's Employee Handbook.
14. He avers that the Respondents breached the law and never accorded him a fair hearing to present his case and no documents were presented to him.
15. He now seeks to be paid his terminal benefits as per his Memorandum of Claim. He also seeks that he be reinstated or in the alternative a declaration that the manner of termination was discriminatory and unfair and that he be issued with his Certificate of Service, pension refund, NSSF remittance and compensation for unfair termination.
16. He also seeks for costs of this suit plus interest.
17. The Respondent on the other hand filed the Memorandum of Reply on 13.5.2014 through the firm of A. Muia and Company Advocates.
18. The Respondents admit employing the Claimant as pleaded and that he was employed in a position of trust as the primary originator of payment transfers and if he entered a wrong payee account numbers using bona fide supporting documents, then the verifiers had no way of confirming whose accounts those were.
19. It is the Respondents position that the Claimant would prepare payment requisition for the suppliers and initiate payment into the Citibank platform (Citi-direct) by inputting the supplier payments details after which funds would be transferred into the supplier's account. The Claimant would then clear the suppliers account to reflect the correct outstanding balance before reconciling the accounts of the suppliers for inclusion of the Respondents monthly balance sheet file.
20. They aver that to access the Citi-direct platform to make any transaction or upload any information, the authorized employees are issued by individual electronic cards with a secure password. The card and password as personal to each user and are not shared amongst users as the bank's instructions issued with each card.
21. This therefore means that all logins and transactions can be traced to the user as was done in this case. They aver that on 6th February 2014, their banker Citibank called to verify payments which had been cleared to be paid to various suppliers and which were at company's but the end payee accounts were individual accounts and when they were checked, they traced the transactions and others as having been done by the Claimant all payable to KCB Account No. [particulars

withheld] all totaling 3,520,583.90.

22. The Respondent avers that due to the gravity of the matter the same was inferred by the payables accountant in-charge to the Respondents' Security Manager and the Respondents Risk Manager to carry out further investigations and advise the Respondent on the way forward.
23. On 10.2.2014, the Claimant was asked for an explanation regarding the fraudulent transactions that had been unearthed.
24. The Claimant responded and made his explanation on the same day (Appendix PK-3). The Claimant in his explanation stated that the changes in payments were made after he finished his part. Only one payment had appropriate hard copies with his signature on it which surprised him.
25. That the outcome of the investigations was that electronic fraud had been committed by the Claimant with the intention to defraud the Respondent Kshs.3,520,583.80/=.
26. The Security Manager recommended that the matter be referred to the Banking Fraud Investigation Department and the police to establish the owner of the KCB Accounts where payments had been made.
27. The Respondents aver that upon completion of their investigations on the incident of fraud, they convened a disciplinary hearing with the Claimant together with his representative David Khisa on 10th February 2014 with Respondent's Managing Director, HR Manager, Risk Manager and Respondent's General Manager Corporate and Finance to discuss the Claimant's actions as well as give the Claimant a chance to be heard. They attached Appendix PK-6 as Minutes of the said disciplinary hearing.
28. The Respondents aver that they gave the Claimant an opportunity to be heard and having concluded the hearing, they found him in breach of an illegality and in breach of the Claimant's employment contract dated 2.9.2011 and they decided to summarily dismiss him in accordance with the provisions of Section 44(3) and 44(4) (c) and (g) of Employment Act 2007 after referring the matter to the Anti-Banking Fraud Unit and the police.
29. The Respondents aver that the Claimant's dismissal was warranted and want this claim dismissed accordingly. It is the Respondents case that they have already paid the Claimant his terminal dues, pension pay and issued him with a Certificate of Service.
30. The parties agreed to proceed with this case by way of written submissions which were duly filed by each party.
31. Having considered the pleadings and submissions filed, this Court narrows down issues for determination as follows:
 1. **Whether there were valid reasons to warrant termination of the Claimant.**
 2. **Whether due process was followed in the process of termination.**
 3. **Whether the Claimant is entitled to remedies sought.**
32. On the first issue, the Respondents have stated the reason for dismissing the Claimant was fraud involving the loss of about 3.5 million by the Respondent where they aver that the Claimant processed the payment in question to wrong recipients.
33. The Claimant denied involvement in the illegal payments insisting that he was only aware of one payment made on 22.11.2013 of Kshs.417,600/= which had hard copy documents with his signature stating that it was a genuine mistake. He couldn't however explain the other payments stating that he was not involved.

34. The Respondents insisted that payments were prepared by a secret code and it is the special code belonging to the Claimant that had processed the payments. It was the duty of Respondents to prove this allegation of the special code being used by the Claimant. This is because Under Section 47(5) of Employment Act 2007:-

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”.

35. The Respondents were able to prove that indeed the Claimant made some wrong payment which the Claimant admitted though stating that it was made in error or genuine mistake.

36. The Respondent had pleaded that they dismissed the Claimant under Section 44 (summary dismissal) and this is what is stated in the summary dismissal letter dated 10.2.2014 but received by the Claimant on 18/2/2014.

37. Under Section 45 (2) of Employment Act:-

“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”.***

38. Based on this Section, wrongful posting of Kshs.417,600/= admitted by the Claimant is a fair reason to terminate employment which the Respondent has proved and this conduct is not compatible with what was expected by the Claimant in his capacity as Assistant Accountant.

39. On the 2nd issue, the issue of procedural fairness is as stated under Section 45(2) (c) above. The procedure envisaged is as provided under Section 41 of employment Act 2007 which 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.

40. The Claimant has explained that he was not accorded a fair hearing. He was summoned on 10.2.2014, and disciplinary proceedings done on same day and the dismissal carried out also on the same day. The Claimant complained of lack of information and details of the alleged misconduct.

41. It is my view that ingredients of fair hearing include understanding what charge or misconduct alleged to have been committed, being accorded resources and time to answer to the charges. This is provided for under Article 50 of the Constitution which states as follows:

1. ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
 2. ***Every accused person has the right to a fair trial, which includes the right:***
 - a. ***to be presumed innocent until the contrary is proved;***
 - b. ***to be informed of the charge, with sufficient detail to answer it;***
 - c. ***to have adequate time and facilities to prepare a defence;***
 - d. ***to a public trial before a court established under this Constitution;***
 - e. ***to have the trial begin and conclude without unreasonable delay;***
 - f. ***to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;***
 - g. ***to choose, and be represented by, an advocate, and to be informed of this right promptly;***
 - h. ***to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
 - i. ***to remain silent, and not to testify during the proceedings;***
 - j. ***to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***
 - k. ***to adduce and challenge evidence;***
to refuse to give self-incriminating evidence;
 13. ***to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;***
 14. ***not to be convicted for an act or omission that at the time it was committed or omitted was not:***
 - i. ***an offence in Kenya; or***
 - ii. ***a crime under international law;***
 - ***not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;***
 - p. ***to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and***
 - q. ***if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.***
3. ***If this Article requires information to be given to a person, the information shall be given in language that the person understands.***

4. ***Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.***
5. ***An accused person:-***
 - a. ***charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and***
 - b. ***has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.***
6. ***A person who is convicted of a criminal offence may petition the High Court for a new trial if:-***
 - a. ***the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
 - b. ***new and compelling evidence has become available.***
7. ***In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.***
8. ***This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.***
9. ***Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.***

42. There is no letter on communication annexed by Respondents showing that the Claimant was summoned for a disciplinary hearing. He stated that he had been called to the General Manager's office and then told to wait outside before being allowed back in to a disciplinary hearing. The way this hearing was convened in a hurried manner offends the real purpose of a disciplinary hearing and this Court finds that though there was some semblance of such a hearing, the same was done contrary to the law and in breach of the Claimant's right to be given ample opportunity to prepare himself and present his side of the case.

43. This Court finds that in view of this, the dismissal was unfair as no procedural justice was followed as envisaged under Section 45(2) (c). Even the time period between 6th to 10th February 2014, when the misconduct was discovered to the dismissal potent a procedure that was hurried and therefore procedurally unfair.

44. Having found as above, I find that the dismissal was unfair and unjustified but there were valid reasons for the same.

45. I therefore find for Claimant as follows:

1. ***3 months salary as compensation for unfair termination being = 82,650 x 3 = 247,950/=.***
2. ***Salary for 8 days being salary with effect from 10.2.2014 when the Claimant was dismissed to 18.2.2014 when he received his termination letter = 82,650 x 8/30 = 22,040/=.***
3. ***1 months salary in lieu of notice = 82,650/= .***
4. ***Leave balance of as pleaded and not contented by the Respondent = 36,525.97/=.***

Total = 389,165.97/=

5. *Issuance of Certificate of Service in terms of Employment Act 2007.*

6. *Costs of this case.*

Read in open Court this 31st day of March, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Juma for Claimant – Present

Miss Muya for Respondent – Absent