



**REPUBLIC OF KENYA**

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

**CAUSE NO. 825 OF 2015**

**BARRACK OMACHI ..... CLAIMANT**

**VERSUS**

**CHANDARIA INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGEMENT**

Issues in dispute;

- i. Breach of contract of employment
- ii. Unlawful dismissal
- iii. Refusal to pay salary and other dues

**Claim**

1. The Claimant is an adult male resident in Nairobi who was employed by the respondent, a limited liability company and carrying out business within the Republic of Kenya. On 19<sup>th</sup> March 2008, the Claimant was issued with a contract of employment by the Respondent as a Dispatch Clerk from 1<sup>st</sup> April 2008. The work station was in Nairobi but with a provision that the Claimant could be sent for work within Kenya. The work hours were 8am to 5pm from Monday to Saturday and occasionally this would stretch to Sundays and public holidays where required but the Claimant was not paid for overtime hours worked. The Claimant was paid a monthly salary of Kshs.12, 000 but this was increased to Kshs.48, 417.00. The Claimant also joined the Kenya Union of Printing, Publishing, paper Manufacturers, Pulp & Packaging Industries which had a *memorandum of understanding* with the Respondent with regard to work relations.

2. The claim is also that the practice at the Respondent was that a dispatch clerk would collect funds from clients and submit the same to the accountant within a period of 21 to 30 days upon reconciliation of the accounts and upon return from the field. In February 2015 the Claimant collected funds from clients and before the expiry of the balancing period of 21 to 30days he was summoned by the financial controller alleging that he had collected funds from clients and had not submitted the same to the company. The Claimant being a stammerer was not given time to explain and his explanation to the effect that he was in the process of balancing accounts and was to submit the same noting that was the 17<sup>th</sup> day and the 21<sup>st</sup> to the 30<sup>th</sup> days window period had not lapsed was not given a hearing. Due to the pressure in the forum and fear of losing his job he was forced to write a letter indicating that he had used the clients' money which position was not true and that he intended to return the same at the end of that month. The Claimant was also made to write a letter to his Sacco (AMCHA Sacco) requesting them to liquidate and transfer his shares to the respondent. Despite these efforts, the Claimant was dismissed from his employment with the respondent.

3. The claim is also that the dismissal was wrongful, unlawful, unfair and discriminatory against the Claimant and contrary to all known best labour practices. There was breach of contract as the Claimant was not given a fair hearing; he was not subjected to a fair administrative action; he was not given ample time to balance his books and submit cash as other employees did; he was dismissed despite other disciplinary measures being taken against him; the Respondent failed to take into account that the Claimant had worked with them for long; and there had been no warning letter before the dismissal.

4. The claim is for a declaration that the summary dismissal was unlawful; that there was breach of contract; that the withholding of salary and benefits is unlawful, discriminatory and contrary to fair labour practice; an award for exemplary damages for cruel and inhuman degrading treatment; payment for salary for 2 months in lieu of notice, salary due for January and February 2015, severance pay, general damages for discrimination and darer regression, cost of the suit and interest.

5. In evidence, the Claimant testified that upon employment by the respondent, he progressed in his career and became a Salesman with duties to go to customers and collect orders, get cash and cheques. The clients had 21 to 30 days to pay and the Claimant would balance his accounts according to the number of days a client got up and until 30 days.

6. On 23<sup>rd</sup> February 2014 the Claimant went out in the field and did collections and got orders. He called the credit manager and asked him since he was due to travel upcountry he would balance his books later. A client had given him cash and per the practice he would keep the cash and submit upon balancing the books. The Claimant therefore communicated with the Credit manager indicating the cash he held. On 25<sup>th</sup> March, before the Claimant could go out to the field, the credit manager called him. At his office he found the accountant Soil and Robin, the Head of Department. They were having a meeting. The Claimant confirmed that he had cash from a client as he had communicated with the credit controller. He was however told to go out as the 3 officers remained in the meeting. The Claimant could not hear what they were talking about as they were speaking in Asian. The 3 officers called the client who confirmed that the Claimant had been given cash. The Claimant had kept the cash in his locker. He was forced to write a letter admitting owing the cash. To safeguard his job he agreed to write the letter of admission stating how he got the cash and was going to pay for it. He was also forced to write to his Sacco so that the Respondent could be able to recover Kshs.11, 294.00 but the Sacco had no cash. The Claimant was asked to go and bring the cash which he paid. He was however told to hand over all Respondent property and leave. He was not given a chance to explain himself. This was despite the practice that allowed the Claimant up to 30 days to balance his books. He had no prior notice or warning. Where the Respondent conducted investigations, such were not disclosed or brought to the attention of the claimant.

7. The Claimant also testified that he is a stranger to the claim by the Respondent that he owes them kshs.69, 174.00. On 16<sup>th</sup> January 2014 the Claimant was at Bonds restaurant but the documents attached indicating that he was given cash is not signed. In April 2014 the Claimant was paid Kshs.10, 000.00 by the Respondent and if he owed them any cash, this should have been deducted.

## **Defence**

8. The Respondent filed their Response and Counter-claim. The defence is that on 24<sup>th</sup> February 2015, the respondent's credit control department contacted Cake Hut limited to make enquiries on an outstanding debt and were informed that they had since settled the debt in full through a payment made to the claimant. In total the Claimant had been paid Kshs.89, 117.00;

Cake Hut Limited had paid Kshs.17, 936.00;

Armed Terrorism Police Unit had paid kshs.21, 601.00; and

Bonds Garden Restaurant had paid kshs.46, 580.00.

9. The Claimant was required to remit all the money received on behalf of the Respondent

immediately on receipt but the above amounts were never remitted. It came to the attention of the Respondent that the Claimant had appropriated the monies received for his own purposes. The Claimant was called to account and explain and proceeded to admit to owing the monies. On 26<sup>th</sup> February 2015, he was summarily dismissed from employment. On 30<sup>th</sup> April 2015 the Claimant was paid kshs.10, 667.00 being 1 third of his salary in accordance with section 19(3) of the Employment Act.

10. The defence is also that upon dismissal of the claimant, it was discovered that he had also received kshs.12, 944 from Kymms Garden which was not remitted. The Claimant is owing the Respondent kshs.99, 061.00 of which he repaid kshs.29, 537.00 and a balance of kshs.69, 524.00 is owing.

11. The Respondent has counter-claimed for the sum of kshs.69, 524.00 being amount due and owing from the Claimant for funds received by him and not remitted at the time of termination. Such monies should be paid with costs.

12. In evidence, the Respondent called Bhavin Shah as their witness. He testified that he is the financial controller of the Respondent and worked closely with the claimant. His duties were to get quotations, sale of goods, deliver the goods and collect payments. On 24<sup>th</sup> February 2015 the credit controller, Mitel Patel told the witness that while following up with Cake Hut Ltd credit was told that the Claimant had been paid in full. The witness called the Credit controller, the Claimant and Mr Omondi to help track all credits from the claimant. The Claimant was supposed to say what had happened. On Cake Hut Ltd the Claimant said that they had not paid and this was not due until the next week. That he had not collected cash. They decided to call the client [Cake Hut ltd] in the presence of the Claimant who confirmed that he had been paid in full. The Claimant then confessed to having collected the cash and since he needed it for his personal use he would repay. He admitted to this in writing and also stated that he had no cash and was willing to write to his Sacco so as to be able to repay what he had used.

13. The witness also testified that the credit controller was asked to investigate on all accounts held by the claimant. All customers were to be audited. It was discovered that from Cake Hut Ltd the Claimant had not remitted kshs.17,936.00; the good collected by the Claimant for delivery to Bonds Restaurant had not been delivered all amounting to Kshs.36,580.00; Anti-Terrorism Police Unit confirmed payment to the claimant; but all these monies were never remitted tot the respondent. The Respondent conducted an audit that realised the owing monies from the claimant.

14. The witness also testified that when the Claimant was called for a hearing present was the human resource manager Mr Omusendi and the controller Mr Joash Bulika are Kenyans and they were not speaking in Asian as alleged. The Claimant confessed to having taken the cash from a client and put it into writing. He also wrote to his Sacco asking them to send his dues to the Respondent to offset what he owed. The Claimant was therefore given several chances to explain himself and ended up giving his letter of confession and a commitment to pay the monies he owed. This was an act of gross misconduct, appropriation of funds given to his case and not remitted and when the Claimant demanded was not able to repay as he had already committed it to his own use. The termination of employment was therefore lawful. The Respondent deducted Kshs.18, 836.00 from the terminal dues and Kshs.11, 000.00 from the Sacco but this was not sufficient to cover the owing and non-remitted funds.

15. Upon termination and based on legal advice the Respondent was able to obtain, they paid the Claimant kshs.10, 000.00 to avoid him going empty handed. Later upon his exit, the Respondent did an audit where several other anomalies emerged. Kymms Garden had paid cash to the Claimant of kshs.12, 9434.00; the Respondent got an invoice but good were never delivered; the Claimant had used the company vehicle and details indicate that he had goods worth kshs.46, 000.00 destined to Kymms Garden but were never delivered there. The Respondent has no policy that goods once paid for the employee can account in 21 to 30 days but such was to be remitted immediately. Cash was not supposed to be deposited in a personal account.

16. The witness also testified that the Respondent has counter-claimed for Kshs.69, 524.00 being the difference due from the Claimant for monies received from various clients and his terminal dues could not settle in full.

17. The second defence witness was Joash Bulika. He testified that he is the human resource officer with the Respondent and worked closely with the claimant. On 24<sup>th</sup> February 2015 he was called by the finance controller Bhavin Shah and informed that the Claimant had not remitted what he had collected. This amounted to a case for summary dismissal. He called the Claimant and present were Barvin Shah as head of institutions, Sandip as head of Controller. The Claimant was given a hearing, he was asked to call any union representative or another person but opted to proceed alone as he did not want the matter going out. The Claimant confessed that he had used the money for his own/personal needs, initially he refused to acknowledge what had happened but later changed his mind and asked for forgiveness. The witness then sent a fax to Cake Hut Ltd a call was also made to them and they confirmed having paid the claimant. Upon these disclosures, the Claimant admitted to having received the funds and used them. He wrote his confession and agreed to refund every month. He also did a letter to his Sacco to covert his shares and pay the respondent. All accounts handled by the Claimant were recalled and call made and it emerged that;

Cake Hut Ltd had paid him Kshs.17, 936.00;

Anti-terrorism unit had paid Kshs.21, 231.00

Bonds Garden had paid kshs.45, 580.00

**Total paid to Claimant Kshs.86, 117.00.**

18. This was dishonestly handled by the Claimant and amounted to gross misconduct. He was summarily dismissed. This was also theft of employer property and upon admitting to it, there was no need to report to the police as he was going to repay. The Respondent has no policy to allow staff to keep cash for 30 days. Such should be remitted immediately upon receipt.

19. The witness also testified that the Claimant was not unionised. His pay slip does not indicate any union dues deductions. Where there is a collective bargaining agreement, union dues are in a check off system.

### **Submissions**

20. In submissions, the Claimant stated that his summary dismissal was unfair. On 20<sup>th</sup> February 2015 he lost a relative and needed to attend a funeral. He called the head of department and sought permission to be away on 24<sup>th</sup> February 2015. He had by then collected Kshs.17, 936.00 from Cake Hut Ltd and he did inform the financial controller who told him to keep until he balanced his accounts upon return. On 24<sup>th</sup> February 2015, before the clamant could render accounts he was summoned and before he could submit what he had collected, the managers were speaking in Asian in a different room where he was called and forced to write a confession dictated to him. His plea to collect the cash in his possession were not heard and he was directed to clear and leave the Respondent premises. The procedure applied was unfair and despite the Claimant being lawfully away from duty, he was not given a fair chance to defend himself against allegation on him. The Claimant relies on the case of **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eKlr**, where the Court held that the failure to safeguard the procedural guarantee set out under section 41 and 45 of the Employment Act renders the dismissal unlawful.

21. The claimant also submit that the Respondent is in breach of the employment contract. The Claimant explained why he was not able to account for cash received from a client due to an emergency but was not allowed to given account upon his return. He was not given a hearing to explain himself and was forced to write a confession and ask his Sacco to pay the respondent. Any investigations conducted upon his dismissal has no credibility as he was not made ware thereof. The Claimant also submit that he is entitled to compensation; notice pay; severance pay and general damages for discrimination against him and regression of his career.

22. The Claimant also submit that the counterclaim has no basis since he was paid kshs.10,667.00 and where indeed he owed the Respondent such should not have been paid. This only amounts to confirm that he has nothing to pay the respondent. The counter-claim should be dismissed with costs.

23. The Respondent submit that there were valid reasons for the summary dismissal of the Claimant under section 45(2) of the Employment Act. He engaged in theft, breach of fiduciary duty to the employer and failed to do his duties diligently. The Claimant collected funds from a client and used it for personal reason and upon being questioned he said he had the cash but could not produce it.

24. The Respondent also submit that they complied with procedure spelt out under section 45(2) (c) of the Employment Act. The Claimant was informed of the reasons the Respondent was considering for his termination but he declined to call another employee as he did not want the issue of theft to go out to other staff. The Claimant is therefore not entitled to the claims set out.

25. The Respondent also submitted that they are entitled to the counter-claim based on evidence that the Claimant got money from various clients but failed to account for it. He had collected Kshs.99, 061 of which he paid Kshs.29, 537.00 and from his Sacco the Respondent got Kshs.18, 836.00 and a balance of Kshs.69, 524.00 is owing and should be paid with costs.

### **Determination**

26. There are few instances where an employer is allowed to lawfully terminate the employment of any employee. Such is set out under section 44 of the Employment Act in case that warrant summary dismissal. An employer can also add to the list under section 44(4) with regard to any matter where due to the nature of its business if committed by an employee would amount to gross misconduct and thus warrant summary dismissal. However, even in the worst cases that warrant such summary action, the provisions of section 41 of the Employment Act must be addressed and met unless there are exceptional circumstances that make it near impossible or simply impossible to hear an employee. Where such exceptional circumstances exist, the employer must set that out so as to be heard with regard to not giving an employee a hearing before dismissal. Also, section 47(5) of the Employment Act puts the burden on the employee to prove his case while the employer is required to justify the reasons for termination or dismissal thus;

*(5) 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.*

27. In this case, the Claimant testified that he collected cash from a client but since he had an emergency was not able to balance his books and submit the monies. He kept the cash in his locker but had called the financial controller stating that he would hand over the cash later. He resumed work on 24<sup>th</sup> February 2015 and called for a meeting before he could go to the field. He was not given a hearing as those at the meeting were speaking in Asian. He was then called to write a confession dictated to him.

28. The claimant's evidence in this regard does not add up at all. He testified in Court that;

*... On 23<sup>rd</sup> February 2014 I was in the field and collected orders. I called the Credit Manager as I needed to travel upcountry for a burial and then asked that since is was travelling I would reconcile my books later. Cake Hut Ltd had given me cash... the practice was to keep the cash for between 21 to 30 days until I would reconcile and balance my books. ... I left the money in my locker. ... When I resumed on 24<sup>th</sup> March before I could leave for the filed, the Finance Controller told me to remain behind. He then called me to his office and I found 2 people – accountant and head of department but were speaking Asian. I confirmed I had cash from client and told head of department and credit controller that I had the money in my desk. I was then sent out. They called the client who confirmed giving me cash. ... I was forced to write a letter admitting receipt of cash. To safeguard my job I decided to write the letter on how I got the*

*money and I was going to pay it.*

29. Simply put, the Claimant does not deny that he got paid by Cake Hut Ltd and he kept the money in his locker. He however said that he was allowed to keep such monies for periods ranging from 21 to 30 days but did not produce any evidence as to how he would collect cash from various clients and keep that cash for such long periods. The Claimant also testified that he was forced to write a confession which he does not deny writing save that he says it was dictated to him. However, in his evidence-in-chief and as set out above, he was clear that he admitted to having received cash from clients, he kept it in his locker and to secure his job he admitted and was willing to repay it.

30. Where indeed the Claimant had the money in his desk, he did not produce it. If at all such monies were still available and had not been used for other purposes, up and until his dismissal, the Claimant does not state as to why he failed to remit such monies and had to write to his Sacco and use his terminal dues so as to pay up what he had collected from Cake Hut Ltd. I find the evidence of the Respondent witnesses credible in that the Claimant was called for a meeting to explain why he had failed to submit monies received from clients and since he did not want the matter getting out to his workmates and to secure his job, he did not want any other person called at the meeting and he willingly offered to repay such monies. Such is logical as the Claimant upon admitting to owing Respondent money he also wrote to his Sacco directing them to offset his saving with them and submitting this to the responded. Had this not been the case, upon the Claimant instructing his advocates, the first protest should have been with regard to the alleged forced confession and the requirement to use his Sacco saving to offset the owing dues. The Claimant does not in any way challenge the evidence that he owed the Respondent and that indeed he had collected funds from clients and had not remitted this to his employer. As such, the requirement to pay such monies was a work requirement but he did not have such monies. He had appropriated it for his own use. Such is contrary to section 44(4) (g) of the Employment Act;

*(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

31. Such warrant summary dismissal. Section 44(4) (g) of the Employment Act must also be read together with section 19(1) (b) thus;

*... an employer may deduct from the wages of his employee—*

*(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;*

32. Apart from summary dismissal, any property lost while in the possession of an employee, where practically possible must be recovered from his salary or terminal dues. Such recovery is lawful as this is the property of the employer. In this case, where the Claimant received cash from client, such was the property of the Respondent as the employer and such is due and recoverable from his salaries or terminal dues.

33. I therefore find the circumstances and the conduct of the Claimant and looking carefully at his letter admitting to owing monies and willing to repay is evidence enough that he had appropriated the property of the Respondent without due authority, such is gross misconduct, he was given a chance to repay but was not able to. Such is indicative of having used the monies paid to him in the course of his work but he failed to remit as required.

34. Section 45 of the Employment Act requires the Court in assessing the validity of the reasons for termination and the fairness of it to consider the conduct and culpability of the employee.

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider—*

...

*(b) The conduct and capability of the employee up to the date of termination;*

35. In this case, the Claimant admitted to having received money from a client and such monies were not remitted to the respondent. Up and until the point to termination, the Claimant was not able to produce such monies. The Court cannot therefore reward such an employee with any positive finding. I find the termination was justified in the circumstances of this case.

36. On the counter-claim, the evidence was that other than monies received from Cake Hut Ltd that the Claimant admitted to have received, upon termination, the Respondent conducted an audit and discovered other clients who had paid him. Such clients were called and confirmed having paid the claimant. These included Armed Terrorism Police Unit at kshs.21, 601.00, Bonds Garden Restaurant at kshs.46, 580.00, and Kymm Garden. From Cake Hut the Claimant admitted having received kshs.17, 936.00.

37. In defence, the Claimant testified that he did not owe such monies and the fact that upon termination he was paid over Kshs.10,000.00 is evidence that had he been owing, such monies should not have been paid. I find this defence a sham and not of any value to controvert the evidence against the claimant. His conduct and culpability with regard to monies received from Cake Hut leave him exposed and should have given the counter-claim much thought than he did. I find the Respondent evidence with regard to the counter-claim not challenged in any material way. The owing monies are due, some have since been recovered but there remains a balance of kshs.69, 524.00 due and owing from the Claimant to the respondent.

38. On the claim for notice pay, such is not due in a case for summary dismissal. Salary due for January and February where not paid is due and owing save that the appropriated monies owing from the Claimant to the Respondent must be put into account.

39. Severance pay is due under the provisions of section 40 of the Employment Act and in a case of redundancy. The issue in dispute herein did not stand out as one such case of redundancy. Severance pay is not applicable.

40. In conclusion, the claim must fail. The counter-claim is confirmed.

**Judgement is hereby entered with a dismissal of the claim in its entirety. Judgement is hereby entered for the Respondent in terms of the counter-claim with an award of Kshs.69, 524.00 with costs.**

**Orders accordingly.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> MARCH 2016.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga

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