



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSES NO. 1267 OF 2013, 1274 OF 2013, 1275 OF 2013,
1340 OF 2013 AND 1884 OF 2013
(CONSOLIDATED UNDER CAUSE NO.1267 OF 2013)

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th April 2016)

BENJAMIN MWENDWA NDAUTI.....1ST CLAIMANT
IBRAHIM MUGO.....2ND CLAIMANT
EVANS ABUGA.....3RD CLAIMANT
DESMOND OWIYO ONINGU 4TH CLAIMANT
FELIX VUNGA MUNGA MULWA5TH CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT COMPANY RESPONDENT

JUDGMENT OF THE COURT

By an order of this Court on 13/11/2013, the 5 files were consolidated to be heard together under file No. 1267 of 2013.

Benjamin Nduati 1267 of 2013

1. This claim was instituted by a memorandum of claim dated 12th August 2013 praying for judgment against the Respondent for:

- 1. A declaration that the termination of the Claimant's employment on account of involvement in fraudulent activities is unlawful.***
- 2. An order for re-instatement of the Claimant to the position of the Respondents accountant.***

2. Or in the alternative:

1. An order substituting the dismissal for interdiction and or suspension from duty pending the Hearing and determination of Mavoko Magistrates Court Criminal Case No. 518 of 2013.

2. Compensation to the Claimant of twelve (12) months' salary in damages plus interest from the date of filing until payment in full.

3. Costs of this suit and interest on costs from the date of filing until payment in full.

Claimants Case

3. The Claimant states that he was employed by the Respondent as an accountant as evidenced by his letter of confirmation of appointment dated 29th of June 2007. He performed his duties diligently and according to the rules and regulations of the Respondent's Code of Ethics and Standard of Performance which resulted in promotions, where he would go and work as Finance and Administration Manager in Kampala at the Respondents depot.

4. He was interdicted vide a letter date 26th of April 2013, for alleged involvement in fraudulent activities, making a written statement dated 2nd May 2013 denying any wrong doing stating the transgressions were not part of his job description and occurred after he had left the head office.

5. He received a fresh interdiction letter on the 8th of May 2013 together with a letter dated 7th May 2013 requiring him to attend a disciplinary hearing on the 9th May 2013.

6. The Claimant contends that the notice was too short and went against the Rules of Natural Justice as well as the Respondents own Human Resource Manual which provides that an employee should be given reasonable notice and evidence against him to enable him prepare for such a Disciplinary Hearing. Moreover, he was not informed of his right to be accompanied during such hearings.

7. It was the recommendation of the disciplinary committee that more information was required to make the allegations more concrete, but should he be charged in a Court of law, his services ought to be terminated immediately. The Claimant never received more information.

8. On the 20th of May 2013, the Claimant was summarily dismissed from employment by a letter dated 20th of May 2013 which stated that his Oral and Written representations had been considered and given due consideration against facts of the case and had been found inadmissible, and accordingly a decision had been reached to summarily dismiss him for alleged conduct in fraudulent activity.

9. It is the Claimant's submission that he was not given a fair opportunity to defend himself and the disciplinary committee's recommendation for further investigation was not adhered to. His dismissal amounted to unfair labour practice, was unlawful and malicious.

10. The Claimants relies on Part VI of the Employment Act 2007 which states the procedure for Termination and Dismissal and states that these provisions are framed in mandatory terms, such that an employer who dismisses and employee under the grounds has no option but to strictly adhere to them.

11. They rely on the case of **Banking Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd [2015] eKLR** where the Honourable Court observed that, "the provisions of Section 41 of the Employment Act are not mechanical. The Provisions therein relate to an employer giving an employee a fair and honest chance to be heard in his defense. The law envision a scenario where an employee who is faced with allegations of misconduct, poor performance, or incapacity being given chance to state his case before a panel that is constituted by the employer but such an employee must be accompanied by a union representative and or a fellow colleague of his choice".

12. They further rely on the Court of Appeal case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** cited with approval in **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited [2014] eKLR** where this Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act.

13. They further state that Section 43 of the Act puts the burden of proving the reasons for an alleged termination on an employer and failure to do so, the termination shall be deemed invalid within the meaning of Section 45.

14. They rely on the case of **Banking Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd supra**, where the Court in determining the issue of termination of an employee stated that “beyond the requirement for procedural fairness, the subject of dismissal must find basis in the reasons for the same as laid out under Sections 43 and 45 of the Employment Act. The employer must give reasons for the dismissal and apart from taking up such duty to give reasons; the law further requires that such reasons must be valid and fair. The burden is then on the employer to demonstrate that it acted in accordance with the tenets of justice and equity in each case of dismissal. This then forms the basis of the court assessing the substantive fairness accorded to the employee.

15. It is the Claimants submission that the one day notice given for the disciplinary hearing was inadequate. They rely on the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where Lady Justice Ndolo observed the following in regards to notice required. “*I agree with Counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defense. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defense. The employee is further entitled to call witness to buttress their defense.*”

16. The Claimants quotes the Respondents own Human Resources Manual that sets out Disciplinary Procedure to be followed stating:

“The supervisors will have regard to the requirements of natural justice. This means that employees should be informed in advance of any disciplinary hearing of allegations that are being made against them together with the supporting evidence and be given the opportunity of challenging the allegations and the evidence before decisions are made. (Clause 12.5(b) of the Human Resources Manual page 101 of the Claimant’s bundle)”

17. In conclusion, the Claimants submits that they were treated unfairly by the Respondent in the lead up to the dismissal as he was not accorded a fair opportunity to be accompanied during hearing, nor was he asked to waive this right. Further, he was not explained to the exact charges against him as he received two separate letters of interdiction; the dismissal was contrary to the recommendations of the committee and went against the law and their own human resource manual.

18. The Claimants prays that this Honourable Court issues an order to substitute the Summary Dismissal with an indefinite suspension pending the hearing and determination of Mavoko Criminal Case 518 of 2013 and any other order that the Court deems fit to grant.

The Respondents Case

Benjamin Nduati

19. The Respondent filed a statement of response to the claims dated 12th day of November 2013.

20. In it they admit that the Claimant was their employee who updated two fraudulent receipts in the JDE and GL totaling Kshs. 1,744,996.00 without confirming or validating the same before posting to the detriment of the Respondents interests. Following this, he was interdicted to pave way for investigations

and given 7 days within which to respond to the allegations which time was more than the 48 hours assigned by the HR Policy Manual.

21. Via a letter dated 3rd of May 2013, the Respondent amended the charges against the Claimant asking him to respond which he did on the 8th of May 2013. A letter was sent out to him on the 7th of May 2013 asking him to appear before a disciplinary committee where the Claimant made both written and oral representations.

22. The committee considered the representations and made its recommendations to the management of the Respondent and acting on those recommendations, the Claimant's services were summarily dismissed.

23. This dismissal was in line with Section 12.2 of the Respondent's Human Resource Manual Policy 3rd Revision 003/June 2011 as read with Section 12:6:3 (i) which defines gross misconduct offences, the Claimant having involved or knowingly failed to report fraudulent acts leading to organized loss of the Respondent's revenue.

24. The issue of massive fraud was reported to the police for further investigations to determine culpability of those concerned.

25. The Respondent denies all allegations of unfair Labour Practices, the Claimant was arrested and charged in Mavoko Criminal Case no 567 of 2013 and it was within their right to dismiss the Claimant summarily during the pendency of the criminal case.

26. The Respondent further avers that it was within its rights to act as it did as the Claimant by his conduct fundamentally breached his obligations arising under the Contract of Service.

27. The Respondent prays that the Claim is dismissed with Costs.

Evans Abuga 1275 of 2013

Case Summary:

28. This claim was instituted via a memorandum of claim dated 12th August 2013 praying for judgment against the Respondent for:

1. A declaration that the termination of the Claimant's employment on account of involvement in fraudulent activities is unlawful.

2. An order for re-instatement of the Claimant to the position of the Respondent's accountant.

Or in the alternative:

1. An order substituting the dismissal for interdiction and or suspension from duty pending the Hearing and determination of Mavoko Magistrates Court Criminal Case No. 518 of 2013.

2. Compensation to the Claimant of twelve (12) months' salary in damages plus interest from the date of filing until payment in full.

3. Costs of this suit and interest on costs from the date of filing until payment in full.

The Claimant's Case

29. It is the Claimant's case that he was at all material times employed by the Respondent as a cashbook accountant grade 9 and later promoted to cashbook accountant grade 7 as seen in his appointment letter dated 19th November 2008. He performed his duties diligently and in accordance with the Respondent's

Code of Ethics.

30. On the 26th April 2013, the Claimant was interdicted from duty for alleged involvement in fraudulent transactions which costs the Respondent colossal sums of money. The Claimant Responded vide a letter received by the Claimant on the 2nd May 2013, where he denied any wrong doing on his part and explained it was not possible to detect the kind of fraud alleged since the same could not be detected through bank reconciliation.

31. On the 7th of May 2013, he received a letter that he was required to appear before a disciplinary committee on the 9th of May 2013 which notice he contends was too short and did not give him sufficient time to prepare nor did it specify the nature of the evidence against him to enable him prepare a defence.

32. Moreover, he was not informed of his right to be accompanied during such hearings.

33. It was the recommendation of the disciplinary committee that more information was required to make the allegations more concrete, but should he be charged in a Court of law, his services ought to be terminated immediately. The Claimant never received more information.

34. On the 20th of May 2013, the Claimant was summarily dismissed from employment via a letter dated 20th of May 2013 which stated that his Oral and Written representations had been considered and given due consideration against facts of the case and had been found inadmissible, and accordingly a decision had been reached to summarily dismiss him for alleged conduct in fraudulent activity.

35. It is the Claimants submission that he was not given a fair opportunity to defend himself and the disciplinary committee's recommendation for further investigation was not adhered to. His dismissal amounted to unfair labour practice, was unlawful and malicious.

36. The Claimants relies on Part VI of the Employment Act 2007 which states the procedure for Termination and Dismissal and states that these provisions are framed in mandatory terms, such that an employer who dismisses an employee under the grounds has no option but to strictly adhere to them.

37. They rely on the case of **Banking Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd [2015] eKLR** where the Honourable Court observed that, "the provisions of Section 41 of the Employment Act are not mechanical. The Provisions therein relate to an employer giving an employee a fair and honest chance to be heard in his defense. The law envision a scenario where an employee who is faced with allegations of misconduct, poor performance, or incapacity being given chance to state his case before a panel that is constituted by the employer but such an employee must be accompanied by a union representative and or a fellow colleague of his choice".

38. They further rely on the Court of Appeal case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** cited with approval in **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited [2014] eKLR** where this Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act.

39. They further state that Section 43 of the Act puts the burden of proving the reasons for an alleged termination on an employer and failure to do so, the termination shall be deemed invalid within the meaning of Section 45.

40. They rely on the case of **Banking Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd supra**, where the Court in determining the issue of termination of an employee stated that "beyond the requirement for procedural fairness, the subject of dismissal must find basis in the reasons for the same as laid out under Sections 43 and 45 of the Employment Act. The employer must give reasons for the dismissal and apart from taking up such duty to give reasons; the law further requires that such reasons must be valid and fair. The burden is then on the employer to demonstrate that it acted in

accordance with the tenets of justice and equity in each case of dismissal. This then forms the basis of the Court assessing the substantive fairness accorded to the employee.

41. It is the Claimants submission that the one day notice given for the disciplinary hearing was inadequate. They rely on the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** (supra).

42. The Claimants quotes the Respondents own Human Resources Manual that sets out Disciplinary Procedure to be followed stating:

“The supervisors will have regard to the requirements of natural justice. This means that employees should be informed in advance of any disciplinary hearing of allegations that are being made against them together with the supporting evidence and be given the opportunity of challenging the allegations and the evidence before decisions are made - (Clause 12.5(b) of the Human Resources Manual page 101 of the Claimant’s bundle)”.

43. In conclusion, the Claimants submits that they were treated unfairly by the Respondent in the lead up to the dismissal as he was not accorded a fair opportunity to be accompanied during hearing, nor was he asked to waive this right. Further, he was not explained to the exact charges against him as he received two separate letters of interdiction; the dismissal was contrary to the recommendations of the committee and went against the law and their own Human Resource Manual.

44. The Claimants prays that this Honourable Court issues an order to substitute the Summary Dismissal with an indefinite suspension pending the hearing and determination of Mavoko Criminal Case 518 of 2013 and any other order that the Court deems fit to grant.

Respondents Case

Evans Abuga

45. The Respondent filed a statement of Response dated 12th November 2013.

46. He admits that the Claimant was in his employment in the Position of Cash Book Accountant from the 19th of November 2008. He states that following investigations into massive fraud within their organization the Claimant was implicated in perpetuation of fraud. He was at that time responsible for reviewing and approving reconciliations.

47. The Respondent states that the Claimant approved bank reconciliation for the month of August 2011 which were found to contain fraudulent receipt number for the sum of Kshs. 900,000.00 leading to a substantial loss on their part. Moreover the Claimant reviewed bank reconciliations for the months of January, June, August and September 2012 that failed to detect or conceal suspicious receipts used to defraud the Respondent.

48. The Respondent admits that he interdicted the Claimant and gave him 7 days to respond to the allegations more than the 48 hours the HR Manual provides for, and responded to the said allegations via letter dated 26th of April 2013. He was invited for a disciplinary committee hearing where he made both oral and written representations.

49. It was after the consideration of these representations that the Respondent through the Disciplinary Committee terminated the Claimants services by way of summary dismissal.

50. The said dismissal was lawful and in line with Section 12:12 of the Respondents Human resources Policy Manual 3rd Revision/June 2011 as read with Section 12:6:3.

51. The issue of massive fraud was reported to the police for further investigations to determine

culpability of those concerned.

52. The Respondent denies all allegations of unfair Labour Practices, the Claimant was arrested and charged in Mavoko Criminal Case no 567 of 2013 and it was within their right to dismiss the Claimant summarily during the pendency of the criminal case.

53. The Respondent further avers that it was within its rights to act as it did as the Claimant by his conduct fundamentally breached his obligations arising under the Contract of Service.

54. The Respondent prays that the Claim is dismissed with Costs.

Ibrahim Mugo 1274 of 2013

Case Summary:

55. This claim was instituted via a memorandum of claim dated 12th August 2013 praying for judgment against the Respondent for:

1. A declaration that the termination of the Claimant's employment on account of involvement in fraudulent activities is unlawful.

2. An order for re-instatement of the Claimant to the position of the Respondents accountant.

Or in the alternative:

1. An order substituting the dismissal for interdiction and or suspension from duty pending the Hearing and determination of Mavoko Magistrates Court Criminal Case No. 518 of 2013.

2. Compensation to the Claimant of twelve (12) months' salary in damages plus interest from the date of filing until payment in full.

3. Costs of this suit and interest on costs from the date of filing until payment in full.

56. The Claimant was employed as a financial accountant from the year 2007. He has also been performing the role of treasury accountant in charge of the company payments. On the 1st of November 2012 he was transferred to the Audit department to take up responsibilities of the internal Auditor, and was required to hand over his duties to the Acting Financial Accountant and report to the Head of Internal Audit and Risk Management.

57. On the 14th of December 2012 he was summoned by CID officers who were investigating a case in which the company had lost money in the finance department and wrote a statement. However, six days after the summons, he was interdicted via a letter date 20th of December 2012 for suspected involvement in fraudulent acts against the Respondent.

58. The Claimant replied to the letter of interdiction by making written explanation dated 24th December 2012 where he denied any wrong doing on his part, stating that the alleged fraudulent transaction were not his job description and further went on to explain where the alleged anomalies may have occurred and the reasons as to which he could not have detected then in his position. (page 241 Claimants Bundle).

59. Over the next four months, the Respondent sent what was referenced as additional charges to the Claimant where he was accused of perpetuating or concealing fraud in the performance of his duties. He responded to the charges where he reiterated that there was no wrong doing, pointing the Respondent to where he thought the wrongdoing may have arisen. (page 254 Claimants bundle).

60. On the 7th of May 2013, he received a letter that he was required to appear before a disciplinary

committee on the 9th of May 2013 which notice he contends was too short and did not give him sufficient time to prepare nor did it specify the nature of the evidence against him to enable him prepare a defense.

61. Moreover, he was not informed of his right to be accompanied during such hearings.

62. It was the recommendation of the disciplinary committee that more information was required to make the allegations more concrete, but should he be charged in a court of law, his services ought to be terminated immediately. The claimant never received more information.

63. On the 20th of May 2013, the Claimant was summarily dismissed from employment via a letter dated 20th of May 2013 which stated that his Oral and Written representations had been considered and given due consideration against facts of the case and had been found inadmissible, and accordingly a decision had been reached to summarily dismiss him for alleged conduct in fraudulent activity.

64. It is the Claimants submission that he was not given a fair opportunity to defend himself and the disciplinary committee's recommendation for further investigation was not adhered to. His dismissal amounted to unfair labour practice, was unlawful and malicious.

65. The Claimants relies on Part VI of the Employment Act 2007 which states the procedure for Termination and Dismissal and states that these provisions are framed in mandatory terms, such that an employer who dismisses an employee under the grounds has no option but to strictly adhere to them.

66. They rely on the case of **Banking Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd [2015] eKLR** where the Honourable Court observed that, "the provisions of Section 41 of the Employment Act are not mechanical. The Provisions therein relate to an employer giving an employee a fair and honest chance to be heard in his defense. The law envisions a scenario where an employee who is faced with allegations of misconduct, poor performance, or incapacity being given chance to state his case before a panel that is constituted by the employer but such an employee must be accompanied by a union representative and or a fellow colleague of his choice".

67. They further rely on the Court of Appeal case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** cited with approval in **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited [2014] eKLR** where this Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Employment Act.

68. They further state that Section 43 of the Act puts the burden of proving the reasons for an alleged termination on an employer and failure to do so, the termination shall be deemed invalid within the meaning of Section 45.

69. They rely on the case of **Banking Insurance & Finance Union (Kenya) v Co-operative Bank of Kenya Ltd supra**, the Court in determining the issue of termination of an employee stated that "beyond the requirement for procedural fairness, the subject of dismissal must find basis in the reasons for the same as laid out under Sections 43 and 45 of the Employment Act. The employer must give reasons for the dismissal and apart from taking up such duty to give reasons; the law further requires that such reasons must be valid and fair. The burden is then on the employer to demonstrate that it acted in accordance with the tenets of justice and equity in each case of dismissal. This then forms the basis of the court assessing the substantive fairness accorded to the employee.

70. It is the Claimants submission that the one day notice given for the disciplinary hearing was inadequate. They rely on the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where Lady Justice Ndolo observed the following in regards to notice required. "*I agree with Counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defense. The employee is also entitled to documents in the possession of the employer which would assist them in*

preparing their defense. The employee is further entitled to call witness to buttress their defense.”

71. The Claimants quotes the Respondents own Human Resources Manual that sets out Disciplinary Procedure to be followed stating:

“The supervisors will have regard to the requirements of natural justice. This means that employees should be informed in advance of any disciplinary hearing of allegations that are being made against them together with the supporting evidence and be given the opportunity of challenging the allegations and the evidence before decisions are made - (Clause 12.5(b) of the Human Resources Manual page 101 of the Claimant’s bundle)”.

72. In conclusion, the Claimants submits that they were treated unfairly by the Respondent in the lead up to the dismissal as he was not accorded a fair opportunity to be accompanied during hearing, nor was he asked to waive this right. Further, he was not explained to the exact charges against him as he received two separate letters of interdiction; the dismissal was contrary to the recommendations of the committee and went against the law and their own human resource manual.

73. The claimants prays that this Honourable Court issues an order to substitute the Summary Dismissal with an indefinite suspension pending the hearing and determination of Mavoko Criminal Case 518 of 2013 and any other order that the Court deems fit to grant.

Response to Ibrahim Mugo

74. The Respondent Responded to the Claim via way of Statement of Response dated 12th November 2013. He admits that the Claimant was in his employment as an Accounts Assistant charged with the responsibility of updating receipts.

75. The Respondents states that following investigations into massive fraud in their organization, it was found that the Claimant had been implicated in either concealing or perpetrating fraud.

76. It was found that between the 16th of February 2011 and 26th of November 2011 the Claimant updated 79 fraudulent receipts in the JDE and GI totaling Kshs. 105,390,000.00 without confirming or validating the same before posting to the detriment of the Respondent. Moreover, he reviewed bank reconciliations for July, August and September 2011 and failed to detect or conceal suspicious receipts used to defraud the Respondent.

77. He was interdicted and given 7 days to respond, which was more than the 48 hours mandated in the HR policy, which he did on the 24th of December 2012 and more charges were arraigned on the 18th of April which he responded to on the 19th of April 2013.

78. He was invited for a disciplinary committee hearing where he made both oral and written representations.

79. It was after the consideration of these representations that the Respondent through the Disciplinary Committee terminated the Claimants services by way of summary dismissal.

80. The said dismissal was lawful and in line with Section 12:12 of the Respondent's Human resources Policy Manual 3rd Revision / June 2011 as read with Section 12:6:3.

81. The issue of massive fraud was reported to the police for further investigations to determine culpability of those concerned.

82. The Respondent denies all allegations of unfair Labour Practices, the Claimant was arrested and charged in Mavoko Criminal Case no 567 of 2013 and it was within their right to dismiss the Claimant summarily during the pendency of the criminal case.

83. The Respondent further avers that it was within its rights to act as it did as the Claimant by his conduct fundamentally breached his obligations arising under the Contract of Service.

84. The Respondent prays that the Claim is dismissed with Costs.

Desmond Owinyo Oningu: (1340 of 2013)

85. The Claimant filed a Claim herein on the 15th of August 2013 against the Respondent praying for judgment against the Respondent for:

(a) A declaration that the termination of the Claimant's employment by way of summary dismissal is unlawful.

(b) An order of stay of the Respondents decision issued on the 20th day of May 2013 of termination the Claimant's employment herein on account of alleged involvement in fraudulent activities pending hearing and determination of the Principle Magistrates Court at Mavoko Law Courts Criminal Case no 518 of 2013.

(c) An order of stay of Respondent decision issue in the 20th day of May 2013 of the terminating of Claimant/Applicant employment herein on alleged involvement in fraudulent activities pending the hearing and determination of this suit.

Or in the alternative:

(a) The Honorable Court grants an order of interdiction or an order of suspension from duty pending the hearing and determination of criminal case number 518 of 2013.

(b) An order that the Claimant is entitled to an award of General damages from the date of dismissal on 20th May 2013 to the date of reinstatement upon judgment of this honorable court.

(c) Costs of this suit.

The Claimants Case:

86. The Claimant was employed on the 3rd of September 2001 as an Accounts Clerk. He performed his duties diligently and was promoted to the position of Accounts Assistant – Kampala Depot with effect from the 15th of May 2003.

87. On the 30th of March 2011 via internal memo, the respondent made a few changes in staff which transferred him to the Finance Headquarters as Treasury Accountant, however, the Respondents Head of Human Resources sent another internal memo dated 4th of April 2011 advising that the Claimant had been redeployed to AG Treasury Accountant.

88. He was first suspended from duty by the Respondent on the 8th of July 2011 for alleged laxity and inefficiency exhibited in the performance of his duties at the Depot in Kampala prior to his transfer to the head office.

89. He was issued with a Notice which set out all the Claims made against him by Respondent. He was given an opportunity to show cause within 14 days why severe disciplinary action could not be taken against him alleged gross misconduct.

90. The Claimant issued to and served upon the Respondent a detailed response to each such claim on 20th July 2011, and was summoned to appear before a Disciplinary Committee on the 5th of October 2011. He was questioned and the suspension was lifted and directed to report to Kampala as an

accountant which he did on the 16th of April 2012.

91. He states that this hearing was in keeping with the rules of natural justice as he was informed in advance, made aware of the allegations, and given the opportunity to challenge the said allegations before a decision was made.

92. The Claimant was again interdicted on the 18th of April 2013 on allegations of involvement in and perpetration of fraud leading to the loss of 2,970,000.00 he drew up the response and served it on the Respondent on 22nd of April 2012 and was interviewed by KPMG auditors. He was questioned on transactions dated 02/04/2011 and 14/04/2011 which he explained could not have been his doing as he was away from his station on those days.

93. While he was still under interdiction, the Respondent was invited on the 7th of May to appear before the Disciplinary Committee on the 9th of May 2013. He contends was too short and did not give him sufficient time to prepare nor did it specify the nature of the evidence against him to enable him prepare a defense. He did not make any oral presentations at the hearing.

94. He was summarily dismissed on the 20th of May 2013, has requested to be supplied with the proceedings and findings of the Disciplinary Committee despite having been requested in writing on the 27th of May 2013 and 8th of July 2013.

95. He was arrested by CID detectives and charged in the Principal Magistrate Court at Mavoko Law Courts in Criminal Case No. 518 of 2013 and feels that it is unfair, oppressive and unconstitutional for the Claimant to sustain his dismissal before the conclusion of the case.

96. For the said reasons, the Claimant submits that he is entitled to the prayers sought, and on general damages, he is entitled to one months salary in lieu of notice Kshs 140,560.00 general damages of twelve months being $12 \times 140,560.00 = 1,687,720.00$.

Felix Vunga Munga

97. The Claimant filed the Amended Claim herein dated 11th February 2014 praying for judgment against the Respondent for:

(a) A declaration that the termination of the Claimant from employment on the 20th of May 2013 was premature, unprocedural and unlawful.

(b) An order requiring the Respondent to reinstate the Claimant to his employment with full salary and benefits and/or compensation for lawful termination equivalent to twenty six (26) months salary in damages as follows:-

(i) Kshs35,000.00 x 26 months = Kshs.910,000.00

(ii) Service gratuity 35,000.00 x 4 months = Kshs 140,000.00

Total ... = Kshs.1,050,000.00

Plus Interest on the same from the date of filing of this claim until payment in full.

(c) Costs of this suit.

98. The Claimant was employed on a three year contract by the Respondent herein as Debtors Clerk at a monthly salary of Kshs. 35,000.00 ; the Claimant contract was to run up to 30th June 2015.

99. On the 20th of December 2012, he was unfairly interdicted from duty for alleged gross misconduct and gave an explanation as to why he should not be dismissed from service for alleged gross misconduct. He made a reply to the interdiction giving an explanation as to why he should not be dismissed from service for alleged gross misconduct.

100. He received a fresh interdiction letter purportedly altering the allegations by additional charges and replied to the same.

101. He received further interdiction via a letter dated the 7th of May 2013, that he was required to appear before a disciplinary committee on the 9th of May 2013 which notice he contends was too short and did not give him sufficient time to prepare nor did it specify the nature of the evidence against him to enable him prepare a defense.

102. He was not asked to given any evidence relating to the charges against him or given any chance to make any oral representations. This he claims goes against the Human Resource Policy Manual and the foundations of Natural Justice.

103. He claims that he played a big role in starting and perusing the investigations and it was grossly unfair on the Respondent to deny him a hearing.

104. On the 20th of May 2013, he received a letter that he had been summarily dismissed from employment, which was unfair and unjustified for reasons stated above.

105. He asks the Court to award as prayed.

Response to Felix Vunga Mulwa

106. The Respondent in this Case via a Statement of Response date 14th day of May 2014.

107. The Respondent admits that the Claimant was employed by them as a Debtors Clerk on a three year contract.

108. He was interdicted on the 20th of December 2012, on reasonable suspicion that he was involved in fraudulent acts against him which led to substantial loss of the part of the Respondent where he was given 7 days to respond, which he did via letter dated 24th December 2012.

109. The interdiction led to an in depth investigation which led to the discovery that the Claimant used his position to generate 71 fraudulent receipts totaling Kshs. 100,410,000.00 on diverse dates between 16th of February 2011 and 26th of November 2012. The claimant had infact shared his system pass word to perpetrate the fraud.

110. Following this He was invited for a disciplinary committee hearing where he made both oral and written representations.

111. It was after the consideration of these representations that the Respondent through the Disciplinary Committee terminated the Claimants services by way of summary dismissal.

112. The said dismissal was lawful and in line with Section 12:12 of the Respondents Human resources Policy Manual 3rd Revision / June 2011 as read with Section 12:6:3.

113. The issue of massive fraud was reported to the police for further investigations to determine culpability of those concerned.

114. The respondent denies all allegations of unfair Labour Practices, the Claimant was arrested and

charged in Mavoko Criminal Case no 567 of 2013 and it was within their right to dismiss the Claimant summarily during the pendency of the criminal case.

115. The Respondent further avers that it was within its rights to act as it did as the Claimant by his conduct fundamentally breached his obligations arising under the Contract of Service.

116. The Respondent prays that the Claim is dismissed with Costs.

117. Having considered the evidence and submissions of all the parties, this Court sets down issues for determination as follows:

1. Whether there were valid reasons to dismiss the Claimants employment.

2. Whether the Claimants were given fair hearing.

3. What remedies to award in the circumstances.

118. On the 1st issue, each of the Claimants have submitted that there were no valid reasons to warrant their dismissal. They each contend that the suspension by the Respondents was not warranted. To buttress their position, they refer to the contested disciplinary proceedings they were subjected to where in all cases involving Evans Abuga, Desmond Oningu and Benjamin Mwendwa Nduati, the committee stated that sufficient facts needed to be established further to avoid the matter not standing in court. However, that they could be dismissed if charged in Court however, they ended up being dismissed even before they were charged in Court.

119. In case of Ibrahim Mugo and Vunga Mulwa, the Claimant avers that they were not given an adequate opportunity to present their case.

120. From the Respondents own disciplinary hearing process, the Respondents found that for the three Claimants i.e. Evans Abuga, Desmond Oningu and Benjamin Mwendwa Nduati, there was inadequate evidence against them to warrant termination and even recommended further investigations in the matter.

121. There is no proof that the said investigations were ever carried out as no evidence of the investigation report was adduced in Court. They were also dismissed before they were charged in Court as recommended by the disciplinary committee. This shows that there were no valid reasons to warrant the trios dismissal.

122. In case of the other 2, i.e. Ibrahim Mugo and Vunga Mulwa they were taken through the disciplinary hearing. The charges against them were tabled before them and they were heard. The reasons if established were valid reasons to warrant their dismissal as they are valid reasons for summary dismissal under Section 44 of Employment Act 2007.

123. On the 2nd issue, is the contention that the disciplinary hearing was flawed - It was a hearing where the Claimants contend that they were not given adequate opportunity to defend themselves. The Claimants have stated that they were summoned on 7th May 2013 and asked to appear for the disciplinary hearing on 9th May 2013 in case of Benjamin Nduati, Evans Abuga, Ibrahim Mugo and Felix Vunga.

124. For Desmond Oningu he avers that he appeared before the disciplinary committee on 5/10/2011 and after the hearing, the suspension was lifted and he was directed to report to Kampala as an Accountant which he did on 16.4.2012. He was again interdicted on 18.4.2013 and summoned for a disciplinary hearing on 9.5.013 and the letter was served on him on 7.5.2013.

125. The Claimants avers that 2 days they were given was not adequate to prepare their defence and defend themselves and that they were not given materials to defend themselves. They were not informed adequately of the charges against them. It is their contention that the Respondents flouted provision of

Section 41 of Employment Act and their own HR Manual which sets out the disciplinary procedure to be followed vis:

“Employees should be informed in advance of any disciplinary hearing of allegations that are being made against them together with the supporting evidence and be given the opportunity of challenging the allegations and the evidence before decisions are made in clause 12.5 (b).

126. The question then is whether the Claimants were informed in advance of the allegations against them as per the Respondents HR Manual. A letter for instance inviting Desmond Oningu to appear before the disciplinary committee dated 7.5.2013 states as follows:

“Following your suspension for duty on 18th April 2013 for offences already communicated to you, appear before a disciplinary committee on Thursday 9th May 2013 at 9 am to give your representations”.

127. Details of the offences are not annexed to this communication. This was the case in all other cases of the other Claimants.

128. Under Article 50(2) of the Constitution:

“(b) Every accused person has a right to a fair trial which includes the right to be informed of the charge with sufficient details to answer it.

(c) to have adequate time and facilities to prepare a defence

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence-----“.

129. This is also what is envisaged Under Section 41 of Employment Act 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.

130. In either case, the Claimant aver that 2 days notice was not adequate to prepare for their defence and that they were not properly informed of the charge against them.

131. I do agree with the Claimants. Reasonable time should have been accorded to them to prepare for their defence and be ready to defend themselves and in this case reasonable time would in my view be at least seven days. This would in any case also include details of the charges against the Claimants which details were not provided.

132. I therefore find that in terms of Section 45 of the Employment Act, the termination of the Claimants in all cases was unfair for lack of following due procedure before termination and in the case of Benjamin Nduati, Evans Abuga and Desmond Oningu for lack of adequate reasons for dismissal. It is apparent that the Claimants are currently facing criminal charges at Mavoko Law Courts. In the circumstances, suspending them would have been the best option pending determination of the criminal cases as provided for under Article 12.10 of the Respondents HR Police Manual.

133. In the circumstances, I find that the dismissal of the Claimants was unfair in the circumstances and I now convert the dismissal to suspension pending hearing and determination of the criminal case at Mavoko Law Courts.

134. As for Felix Vunga who was serving on contract and whose contract has since expired in 2015, I would order he be paid as follows:

1. 1 months salary in lieu of notice = 35,000/=

2. Any leave days due.

3. Gratuity under the contract.

4. 3 months salary as damages for unfair termination = 35,000 x 3 = 105,000/=.

135. The Respondents will pay costs of this suit.

Read in open Court this 18th day of April, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ogutu holding brief for Oonge for Claimants in 1340/13, 1275/13 and 1274/13 – Present

No appearance for other parties