



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1366 OF 2012

PETER APOLLO OCHIENG CLAIMANT

VERSUS

AMEDO CENTRE KENYA LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the unlawful and wrongful termination from employment of the claimant, and the non-payment of his terminal dues.

2. The Claimant was employed by the Respondent and issued letter of appointment dated 26th October 1998 as a Centre manager. The employment commenced on 16th November 1998. The Claimant served diligently and was promoted through the ranks but in 2009 the Claimant was frustrated in his work and forced to resign from his employment. On 14th August 2009 the Respondent declined the resignation and instead terminated the Claimant on the grounds that his resignation was meant to pre-empt disciplinary action against him. The reasons given for termination were vague, malicious and false and in clear breach of due process.

3. At the time of termination, the Claimant was a Sales and Credit Supervisor at a salary of Kshs.18,400.00 per month. The letter of termination indicated that the Claimant would be paid salary and allowances due as at 31st August 2009 and payment for his leave earned. Such dues would only be paid upon the Claimant clearing shortages incurred and dues owing to the Respondent or Singer Sacco. Such dues have never been paid and the Respondent has never indicated what due the Claimant may be owing to them.

4. The Claimant is seeking payment of;

(i) A declaration that the termination was unlawful and wrongful;

(ii) Salary for the month of August 2009 at kshs.18,400.00;

(iii) 66 leave days at kshs.41,000.00;

(iv) Service pay for 11 years at kshs.101,500.00;

(v) General damages for wrongful termination;

(vi) Certificate of service;

(vi) Costs of the suit and interest on dues not paid.

5. In evidence the Claimant testified that upon employment by the Respondent he worked diligently and was promoted through the ranks. At the time of termination he was Western Regional Manager and also the Eldoret Branch Manager of the respondent. Around April 2009, an accounts clerk from head office visited his branch and indicated that he had been sent by the Financial Controller to count stocks at the Eldoret branch. After a day he left and after 3 days, an auditor was sent and he spent a month at the Eldoret branch. This was following the audit that had been done in 2008. In May 2009 the Auditor left but continued with *ad hoc* Appearances without specific duties and worked closely with the branch Cashier without involving the claimant.

6. On 13th August 2009 the human resource called the Claimant to report to the head office. This was 3 months after the audit. The next day the Claimant attended a meeting with the managing director, the human resource, and the finance controller. The Claimant was told that the audit had discovered anomalies and the Respondent had no trust with him and he should resign. The Claimant insisted on being given the anomalies and an explanation as to why he should resign but was given a paper to write his resignation from his position alternatively, the Respondent was going to summarily dismiss him without any benefits. The Claimant took the option of a resignation which he did and returned to Eldoret. The next day on 14th August 2009 the Claimant found the auditor waiting for him at the office and was not allowed inside his office but was required to hand over all Respondent property. He was not allowed to collect his personal belongings.

7. The Claimant also testified that in the counter-claim the Respondent has relied on a letter dated 12th May 2009. This letter was issued to him when the auditor finished his investigations and was required to respond to 3 issues.

(a) On why the Claimant closed 11 accounts. The Claimant testified that the 11 accounts belonged to IDPs (Internally Displaced Persons) affected by the 2007/8 post-election violence. These accounts holders could not pay and the borrowed assets could not be recovered.

(b) Sales agents who left service. The Claimant testified that the sales agents who had left the service of the Respondent after collecting cash from customers and did not remit to the Respondent but that the sales agents were not employees of the respondent. Such were recruited by the centre manager and the Claimant was forced to double up roles to ensure that all accounts were paid. All sales agents had a commission paid on *CATAD* of all total collections. If there were no collections made, the centre percentage would be down and the Claimant had to ensure that his centre met the set figures.

(c) Re-allocation of petty cash. The Claimant testified that as the branch manager he had sales agents working in the field. He decided to reallocate petty cash for their lunch. He consulted with the Sales and Marketing manager as his boss, Mr Peter Mgugua who approved.

8. The Claimant was also alleged to have used fake vouchers for motor vehicle repairs. He testified that he did not know where the repairs were done and the mechanic who repaired and signed receipts did so based on clear expenses. The vouchers challenged to be fake were not attached to the audit report for the Claimant to respond.

9. The Claimant was also accused of paying sales agents after they had left the Respondent but he contested such allegations on the basis that the Respondent did not employ any sales agents. He however noted that he had 3 sales agents who collected cash and did not remit to the Respondent and there was a shortage. The clients refused to make further payment unless they got receipts of all payments. The Claimant prudently addressed the matter by retaining these agents and made efforts to recover monies due when paid so as to offset what was not remitted. When the Claimant was issued with a cheque to pay commissions to the agents, the cheque being in his name and with knowledge of agents who had not remitted client's monies, he made recoveries therein. Ultimately, the Respondent did not lose any monies. The Claimant went out of his way to ensure the Respondent was well covered.

10. On allegations that he stole stock, the Claimant testified that he was at the Respondent employment for 11 years and the alleged stock of Kshs.28, 000 was not stolen.

11. Allegations that he settled 27 accounts. The Claimant testified that he went to the field he collected dues from clients and submitted these to the accountant upon return. He collected debts as the manager and as part of his duties.

12. Allegations of kshs.215, 000 reverting. Reverting entailed closing of an account after a client was unable to pay and the asset was repossessed. The Claimant reverted 11 accounts affected by post-election violence all closed in one day. He spoke to his supervisor as he was in a dilemma and his salary was being deducted for these accounts. The Claimant took the decision to address the matter to have these accounts reverted as the clients were IDPs and assets could not be recovered and he was paying for them. This was a special case requiring special measures as the issues regarding the 11 accounts were different from other cases. The applicable policy could not be used in this accounts and the Claimant had been forced to pay for them.

13. On the account for Moses Wekesa, the Claimant testified that it was not his role to open accounts. Such should have been addressed with a different officer and not him. That he did not authorise Moses Makole to remove a generator from the office as he was a driver and not an agent. Such role would not be assigned to him. The alleged home theatre stolen from the Respondent premises was never investigated properly for the Respondent to infer that the Claimant was involved. When the item was stolen, the Claimant was in Busia at the time. He never made any death threats to any workmate.

14. On cross-examination, the Claimant testified that he was ill-advised by his supervisor to revert 11 accounts belonging to IDPs. The products were never repossessed as required so as to revert these accounts. He paid Kshs.119, 416.00 for these accounts not knowing such would later be used against him. He used his own money to pay up to avoid the accounts lowering his office figures. He got sales agents and when they collected monies from clients, they were paid a commission. The Claimant as the manger had the authority to also collect monies from clients and remit through the accounts officer.

15. The Claimant also testified that he did not create a fake account. To create an account one required to have;

- 1) National identity card;
- 2) Pay slip; and
- 3) An application.

16. The Claimant would confirm the details of a new account. If such an account was not paid, the Claimant would only know after 3 months when there was no remittance. The Claimant asked a friend to hire a TV on his behalf as he was not allowed to hire with the Respondent of KCT. The policy was against such hiring. This was not fraud as the product was fully paid for through a different person.

Defence

17. The Respondent filed their defence and counter-claim. The defence is that they had employed the Claimant with his last position being Sales & Credit Supervisor but while in this capacity he was involved in a series of irregularities which amounted to gross misconduct. Such irregularities were brought to his attention but he failed to give a satisfactory response;

- a) The Claimant raised vouchers to pay for some hire purchase accounts amounting to kshs.21,057.50 only realised after cash counts on 15th April 2009;
- b) The Claimant directed the cashier to raise vouchers for laundry amounting to kshs.5, 000.00 and upon audit these were found to have gone to his personal use. The last time display materials were

taken to the laundry was in December 2007. The Claimant admitted on 12th May 2009 that he had diverted money;

c) On 26th March 2009 the Claimant raised a fake voucher for Kshs.7, 360.00; 11th April 2009 a fake voucher for kshs.6, 050.00 for vehicle repairs and upon investigations it was discovered that such was put into personal use.

d) The Claimant also admitted he paid CATAD to 3 sales agents until June 2009 and upon investigations it was discovered that they had left the Respondent employment way before;

i) Laban Kiprof left in November 2008 and had been paid kshs.4,248.00;

ii) Evans Nyakundi left in January 2009 and had been paid kshs.3,640.00;

iii) Ezekiel Kemboi left in October 2008 and had been paid kshs.13, 352.00.

e) On 22nd March 2009 the Claimant stole stock worth Kshs.27, 990.00. He was the only one in the office of this Sunday and after investigations he was held responsible for the loss;

f) March 2009 the Claimant settled accounts for 20 customers by authorising the cashier to raise fictitious vouchers at kshs.27,830.00;

g) The Claimant reverted accounts irregularly valued at kshs.215,853.00 and then he personally paid kshs.119,465.00 leaving a deficit of kshs.96,388.00;

In March 2009 the Claimant created a fake account for Moses Wekesa;

i) April 2009 the Claimant authorised Fred Makokha to remove a customer's generator from the shop and has since never been recovered;

j) In July 2009 an LG Home theatre was found missing under unclear circumstances and the Claimant failed to report the incident;

k) On 4th July 2009 the Claimant insulted Mr Mulinge and threatened to kill him and on 14th July 2009 the Claimant physically fought Mr Mulinge in the presence of all staff; and

l) March 2009 the Claimant threatened to kill Ms Dorcas Waithaka and on 19th March 2009 he sent threatening text messages to her.

18. The Respondent total loss due to the claimant's misconduct amounted to kshs.351, 953.50. At the time of termination the Claimant owed Singer Sacco.

19. Upon investigations, the Claimant was found at fault. The Claimant was called for a hearing and after being confronted with the evidence against him he decided to resign. The Respondent declined such resignation as this was to pre-empt disciplinary action against the Claimant. The Respondent took the decision to terminate the Claimant instead of the summary dismissal where he could have lost his employment benefits but the Respondent waived the 3 months' notice he was supposed to give.

1) The dues payable to the Claimant were;

2) 13 days salary at 13th April 2009 at Kshs.7, 973.00;

3) 66 leave days as at kshs.35, 200.00; and

4) Provident fund dues.

20. From the owing dues, the Respondent total loss at kshs.3512, 935.00 was recovered and a balance is still owing. The provident fund had kshs.190, 000.00 and the balance Kshs.43, 173.00 was used to offset the loss the Respondent incurred amounting to kshs.308, 762.00.

Counter-claim

21. The counter-claim is for the sum of kshs.351, 935.00 of which amount the Respondent recovered Kshs.43, 173.00 and a balance of Kshs.308, 762.00 is due and counter-claimed herein.

22. In evidence, the Respondent filed the witness statement for Howard Olume and also called Michael Nyaga the internal auditor. He testified that he joined the Respondent in 1997 and filed an audit report herein. The audit findings for Eldoret branch were on evidence of gross misconduct by the Claimant who submitted fake vouchers. Where a voucher indicated laundry and it turned out not to be so, then that voucher is fake. In this case there were vehicle repairs and the driver said that no such repairs were done and the vouchers were issued. 3 agents were CATAD and it was not correct to state that an agent had collected cash whereas the Claimant had collected the same. This was cheating and the receipts by the Claimant in this regard were fake. The Claimant branch had lost stocks and he confirmed, this was on a Sunday when the Claimant was alone in the office. The cashier noted and reported the losses while the Claimant did not. 20 accounts were made by the Claimant and the cashier was directed to raise fictitious clients – the receipts made were cash converted from fake expenses to raise them. There were reverted accounts and the Claimant wrongly reverted them without the recovery of the items which is contrary to policy that he was aware of. To revert an account meant that the items had been returned or recovered and account closed which was not the case here. A customer brought a generator to the shop and was stolen and the Claimant failed to report.

23. Mr Nyaga also testified that the Claimant had poor interpersonal relations with other staff under his supervisor. He had a fight with Mr Mulinge, threatened him with death, and sent threatening message to a sales lady. All these amounted to gross misconduct.

24. The terminal dues the Claimant would have been paid were used to offset the losses incurred. The claims by the Claimant are misplaced and should be dismissed and the counter-claim allowed.

Submissions

25. The Claimant submitted that his termination did not follow the procedure laid down under section 41 of the Employment Act. He was summoned to a meeting abruptly and at the meeting he was forced to resign which he did but was not accepted and the Respondent proceeded to terminate his employment. The Claimant was not given a hearing notice, at the hearing he had no representative present and he was not allowed to give his defence. The Claimant has relied on the cases of **Nicholas Muruka versus Equity Bank Ltd, Cause No.25 of 2013** and **Loise otieno versus KCB Ltd, Cause No.1050 of 2011**.

26. The Claimant also submitted that the Respondent had no justifiable grounds to dismiss him. Section 43 and 45 of the Employment Act requires that an employer should prove the reasons for termination. Where there are no valid reasons for termination, the same is unfair. In this case, there were no reasons that justified the termination of the Claimant and hence he is entitled to the remedies sought for unfair termination. The Claimant was never called to respond to the issues set out in the audit report and the matters forming the reasons for termination were drawn from the audit report for 2012 a time after the Claimant had been terminated.

27. The counter-claim has not been proved and should be dismissed.

28. On their part, the Respondent submit that the Claimant was fairly terminated. The Claimant while employed as the Sales and Credit Supervisor in Eldoret branch of the Respondent committed various irregularities. The Claimant admitted reverting accounts irregularly and failed to fail set procedure. The Claimant admitted paying 3 agents who had since left the Respondent employment and he also admitted converting budget expenses for other purposes other than set out. The laundry expenses were converted to

other things while he allowed for lunch expenses where there was no budget for it. His relationship with fellow employees was poor and there is evidence of text message that are threatening. Such resulted in gross misconduct that warranted summary dismissal. The Claimant when put to task offered to resign but the Respondent rejected the resignation and terminated the Claimant as the resignation was meant to avoid disciplinary action.

29. The Claimant was subjected to a fair hearing before his termination. Section 45(2) of the Employment Act allows an employer to terminate an employee where there are valid reasons. Due to the serious irregularities and losses the Claimant had forced the Respondent into, summary dismissal was warranted. The option to reduce the same to termination was at the option of the respondent. The Respondent acted in a just and equitable manner as held in the case of **Elizabeth Gathoni & 2 Others versus Andrew Nightgale and Kembu EA Ltd [2014] eKLR**.

30. The Respondent also submitted that they followed fair procedure in the termination of the Claimant. The Claimant had previous cases of misconduct while at Narok branch and was issued with a warning letter. The Claimant is therefore not entitled to any remedies sought and the counter-claim should be allowed at KSHS.308, 762.50.

Determination

Whether the termination was lawful;

Whether there are any reliefs: and

Whether the counter-claim should be allowed;

31. On 14th August 2009 the Claimant was terminated by the Respondent on the grounds that his letter of resignation submitted on 13th August 2009 was rejected; and due to gross misconduct arising out of set out cases of irregularities, the Respondent had made a decision to sever the employment.

32. Section 43 of the Employment Act requires an employer to demonstrate a valid reason that would cause a reasonable employer to terminate the employment of an employee. The burden of proof in such a case is always on a balance of probability and not beyond reasonable doubt as would be required in criminal cases. This also is the major difference between internal disciplinary proceedings for an employer to undertake unlike in a criminal case where the matter must be reported to the relevant agencies for proof beyond reasonable doubt.

33. I have examined all the 14 allegations made against the Claimant. The content and context of these allegations are very serious matters that the Respondent has noted against the Claimant. Some border on criminal conduct that should have warranted a report to the police for further action particularly the cases of theft, threats made to various workmates, and particularly the case of the Claimant engaging in a physical fight while at work. The Claimant also admitted to some of the matters set out against him in his evidence in court. He admitted to have made reallocations of budgets to accommodate lunch for sales agents; he reverted 11 accounts relating to IDPs; and he maintained accounts for sales agents who had since left the Respondent employment. The Claimant however had his reasons for his actions.

34. The matters admitted by the Claimant are grave and warranted summary dismissal. However this was not the case here.

35. What is apparent, on 13th August 2009 the Claimant was called for a hearing at the head office from Eldoret to Nairobi. He confirms attendance. The Respondent witness also confirmed that the meeting was held. What transpired at the meeting is hazy.

36. The Claimant testified that he was made to Respondent to allegation he had no prior knowledge of and then forced to resign. On their part, the respondent's evidence is that when the Claimant was faced with the serious allegations against him, he opted to resign to avoid disciplinary action. There are no

minutes taken to aid the Court in this regard as to the exact nature of proceedings. What is clear, at the meeting were the Respondent managing director, human resource officer; finance controller and the Claimant.

37. Section 41 of the Employment Act is relevant here. This part of the Employment Act is set to regulate disciplinary proceedings internally for the employer so as to ensure that an employee faced with serious allegations such as the Claimant was given a fair hearing at the shop floor where there is primary evidence. Such a hearing should commence with the employee being notified of the allegations against him and invited to a meeting/hearing in the presence of a fellow employee of his choice so as to ensure an independent person present when the employee is being heard. Without the employer following such procedures, the outcome of a hearing panel can result to a case such as this one. Where the employee contradicts what the employer has to say and vice versa. Such would have been addressed by the proceedings being put into writing and the employee being allowed to bring their representative.

38. Section 41 of the Employment Act must also be read together with section 45(5) (c). Even where the employer has a valid reason(s) that warrant the termination of the employee, termination must be in accordance with fair procedure. That procedure is to be found under section 41 of the Act while fair reasons for termination are to be found under section 45(2).

39. The provisions with regard to fair procedures leading to a termination under section 41 of the Employment Act are mandatory. Where not followed, a termination becomes procedurally unfair. Without written proceedings setting out how the Claimant was heard at the meeting held on 13th August 2009 and there being no representative to accompany the Claimant, the resulting termination became unfair. That was the best forum for the Respondent to submit all the evidence now submitted in Court in defence for the Claimant to address. The Claimant should have been notified before the hearing date and he should have been given sufficient time to prepare his defence and advised by the employer to bring another employee/representative of his choice.

40. I find the Respondent contravened the clear provisions of the law by failing to adhere to the provisions of section 41 of the Employment Act.

Remedies

41. The letter of termination is of the nature that the Claimant was entitled to Salary for 13 days in August 2009 and 66 leave days due. The Respondent also put into account the provident fund dues owed to the Claimant at the time of termination.

42. There is no evidence of a termination notice. The resignation of the Claimant having been rejected and the same lacking support as to how it arose, the Claimant was entitled to payment in lieu of such notice. The Respondent acknowledges this much in the letter of termination, that the termination was backdated to 3 months to April 2009. Even though the Claimant did not contest this fact, such is a retrogressive practice that an employer should not engage in. Where the Claimant owed any dues, payments due for a time served cannot be negated and backdated. The Claimant is entitled to 3 months' pay as set out in his employment letter dated 26th October 1998. Such is computed based on his last gross salary at Kshs.18, 400.00 and an award of Kshs.55, 200.00 notice pay.

43. The Respondent admitted that 66 leave days were due all at Kshs.35, 200.00 this is confirmed.

44. Service pay is claimed at 15 days for each year served. The Claimant submitted his pay slip which confirmed that the Respondent was deducting statutory dues to NSSf and NHIF. As such section 35 (5) and (6) read together, service pay is not due.

45. Compensation for unfair termination is due on the Court finding that the Claimant was unprocedurally terminated. Such must put into account the previous conduct of the Claimant pursuant to section 45(5) (e) of the Employment Act. There exists a warning letter against the Claimant that was issued while he was at the Narok Branch. Such related to his conduct and must come to bear in the Court assessing the

compensation to be awarded. 3 months' pay is appropriate. The Claimant is awarded kshs.55, 200.00 in compensation.

Counter-claim

46. The counterclaim is of the nature that the Claimant was owing the Respondent due to the various irregularities. On the finding that the Claimant was not taken through a fair process of hearing so as to be able to effectively give his defence, such also affects the counter-claim. Had the Claimant been allowed the protections set out under section 41 of the Employment Act, all matters against him, all matters with regard to the counter-claim should have been adequately addressed. what is also clear in the defence and documents set out in support of the counter-claim, there are only extracts of various documents which do not speak well of the respondent's case. The bundle of defence has 2 pages in between pages 17 and 18 which are strange extracts. Such are not explained and cannot be used against the Claimant as they are irrelevant. The alleged internal audit report is also an extract of an obvious long document, the part submitted is unsigned and I take it the omitted parts were unfavourable to the Respondent and would have exonerated the claimant. Such renders a fatal blow to the defence and counter-claim. Such is dismissed.

47. Before conclusion, there exists the Retirement Benefits Act (RBA) and the rules thereto. Where an employer has a provident fund, there is supposed to be a fund manager or trustees with set regulations. The provident fund regulations and the RBA rules requires that the employer should not be in control of the same as such is be managed separately. Upon severance of employment, the reason(s) notwithstanding, there are set rules and regulations over the same. Where the termination of employment is regulated in law, the contribution of the employer is thus factored. Otherwise to take and apply such funds adversely against an employer is a matter that should be reported to the tribunal under the RBA.

In conclusion, the counter-claim is hereby dismissed. Judgement is entered for the Claimant in the following terms;

- (a) The termination was procedurally unfair;**
- (b) Compensation awarded at kshs.55, 200.00;**
- (c) Notice pay at kshs.55, 200.00;**
- (d) Leave for 66 days at kshs.35, 200.00;**
- (e) Salary dues for 14 days worked in August 2009 all at kshs.9, 200.00; and**
- (f) Costs of the suit**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF APRIL 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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