



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1247 OF 2012

PHILIP KIMANZI MUNYOKI
CLAIMANT

VERSUS

YMCA (NATIONAL COUNCIL OF YOUNG MEN'S CHRISTIAN ASSOCIATION)
RESPONDENT

JUDGEMENT

1. Issue in dispute is the wrongful termination of employment and failure to pay terminal benefits to the claimant.
2. The Claimant was employed by the Respondent on 3rd June 2011 as a Computer Tutor and was based at the Respondent Nairobi South Branch. The Claimant diligently performed his duties. On 26th May 2012 the Claimant left work at 4.00pm and left all the 9 computers used for training intact. He handed over the room keys to the receptionist. As was practice, all employees were checked by the guards on duty before entering and leaving the Respondent premises and the Claimant was checked on his way from work. The next days it was reported that a computer was missing and that this was discovered 3 hours after the Claimant left the office. Nothing was noted as missing by the guards at the gate and the guard who checked the Claimant was hurriedly transferred before investigations were done. Despite the Claimant filing a detailed account of events the Respondent Hostel Manager recommended to the National General Secretary to surcharge the claimant.
3. On 11th June 2012 the Claimant was summarily dismissed without notice, hearing or being given reasons for the same. On 22nd June 2012 the Claimant appealed against his dismissal and there has been no reply.
4. The claim is that the dismissal was with malice as the Respondent failed to conduct an investigation or give the Claimant a hearing on the matter. It was never put into account that the Claimant locked and left the computer room key with the receptionist and he was checked at the gate before leaving the Respondent premises. To conceal the evidence, the duty guards was transferred and the Respondent was not keen to have the matter properly addressed. Such was meant to deny the Claimant his dues and employment which was malicious.
5. The Claimant is seeking his dues of unpaid salary and allowances for 11 days; pay in lieu of notice; compensation for unfair termination; leave days and costs of the suit.
6. The Claimant testified in support of his case. That he had a contract of employment with the Respondent for 3 years but he only worked for one (1) year. On 11th June 2012 went missing after the

Claimant left the office and he was told to give account as to his whereabouts and what he had done which he did. He was then summarily dismissed without hearing, notice or being given the reasons for it. That on the material day he left everything intact, he handed over the computer room keys to the receptionist and left after being checked by the duty guard. He was called later with information that a computer was missing of which he had no knowledge of. The matter was not reported to the police or any investigations done.

Defence

6. In defence, the Respondent case is that the Claimant was employed as a Computer Tutor and issued with a contract of employment which provided for mode of termination of service and the grounds which constitute gross misconduct which warrant dismissal. In the course of his employment, the Claimant started committing acts of gross misconduct by issuing students with certificate without training. This was established when the Respondent on printing certificates came across names of students who had not been registered as students. The Claimant was verbally warned. The Claimant also failed to receipt money which had been handed to him by parents and this was established when students started coming in for certificates yet there was no record of their registration. Female students complained that there was a man in the computer room who would caress and hug them carelessly. The Claimant was also attaching people to the institute without notifying the Respondent contrary to the terms of his employment. The Claimant would change training packages without notifying the respondent.

7. On 27th May 2012 an investigation was conducted to establish the loss of a computer. The investigations confirmed the Claimant was the last person to handle the key. Several meetings were held with the claimants and upon hearing his defence, a decision was taken to summarily dismiss the claimant. The Claimant has since refused to hand over.

8. The Respondent is seeking that the summary dismissal be confirmed and the suit be dismissed with costs to the respondent.

9. The Respondent opted not to call any witness.

10. Both parties agreed to file written submissions. Only the Claimant filed their written submissions.

11. In submissions the Claimant reiterated his case and relied on the provisions of section 45(2) (a) of the Employment Act noting that the dismissal of the Claimant was unfair. He is entitled to compensation under the provisions of section 49 of the Employment Act.

Determination

12. This Court in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited Cause No. 74 of 2013** held that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrant summary dismissal.

13. In the case of **Mary Chemweno Kiptui versus Kenya Pipeline Co. Ltd, Cause No.435 of 2013** held that;

... It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.

14. The cited cases give emphasis on the procedural requirements that before a dismissal or a termination, an employer is required to hear the employee in their defence, the matter in dispute notwithstanding. In

the **Meru North Farmers Sacco Limited** case noted above, the Court went on and held;

... In the eventuality that an employee is to face summary dismissal or termination, section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self.

15. The defence here sets a long chronology of acts of misconduct allegedly committed by the claimant. There are cited more than 3 incidents that warranted summary dismissal but nothing was done and no warning letter was issued. Even in the current case, what the Claimant was told to respond to he diligently did but was never given a hearing as contemplated under section 41 of the Employment Act. That amounted to an unfair labour practice.

16. I find the claimants evidence has not been challenged in any material way by the respondent. save for the filed defence, the Respondent opted not to call any witness to controvert what the Claimant testified to and further the Respondent did not find the need to file any written submissions.

Remedies

On the finding that the Claimant was not taken through the mandatory legal procedures of a hearing before his summary dismissal, he is entitled to compensation under section 49 of the Employment Act. Such shall be awarded at 12 months gross pay of Kshs.10, 701.00 all at Kshs.128, 412.00.

The unfair dismissal did not go with notice and the same is due at one (1) months gross pay all at kshs.10, 701.00. Such is awarded.

I find no particular challenge to the claims of unpaid salary and allowances and the 15 days accumulated leave days. Such are awarded;

11 days' pay awarded at kshs.3, 923.70; and

15 leave days awarded at kshs.4, 115.75.

The Claimant is also awarded costs.

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

