



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.333 OF 2015**

**DANIEL MUTINDA MUTUA.....CLAIMANT**

**V**

**BUZEIKI ENTERPRISES LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent on 6.10.2014 as a Cashier and placed under probation for 3 months. He worked upto 24.11.2014 when he received a letter terminating his services with immediate effect for incompetence. He has now brought this suit claiming terminal dues plus compensation for unfair termination of his employment because the reason for termination was invalid and the procedure followed was unfair.
2. The respondent has denied liability for unfair termination and averred that the termination was lawfully done and the claimant was paid all his terminal dues. When the suit come for hearing on 22.9.2015 the parties recorded consent to the effect the claimant was paid kshs.34,269.00 less statutory deductions leaving a net of kshs.26,269.00 towards notice, salary arrears and off days worked. The issues for determination were therefore narrowed down to compensation for unfair termination. The claimant testified as Cw1 and Mr. Nicholas Kemboi testified as Rw1 for the respondent. There after both parties filed written submissions.

**Analysis and Determination**

3. As stated herein above the only issue for determination herein is whether a claim for compensation for unfair termination can arise with respect to an employee under probation. There is no dispute that the claimant was serving under probation when he was terminated for incompetence. Section 42 of the Employment Act Cap 226 provides that the provisions of Section 41 of the said Act shall not apply where termination of employment terminates a probationary contract. Section 41 aforesaid entitles the employee to mandatory procedural fairness before termination of his employment for reason of misconduct, poor performance and physical incapacity. The said procedure requires that the employee be accorded a personal hearing in the presence of another employee or Shop floor union representative of his choice. The question that arises however is what about termination for an invalid and unfair reason within the meaning of Section 45 2(a) and (b) of the Act.
4. In this case, Cw1 told the court that the reason for the termination was invalid because he did nothing wrong. That the reason for his termination was that he send money by Mpesa to a wrong number. He however contended that he send the money to telephone number 0720491948 as indicated on the requisition list by the HR Manager (Rw1) and approved by the Chief Accountant Mr. Omondi. That the money paid was kshs.25,700.00 as per the said requisition.
5. On the other hand Rw1 stated that Cw1 paid the money to the wrong number without verifying the number and the name of the payee. He however admitted that he made a mistake on the last digit of the phone number by indicating 0720491998 instead of 0720491999 but insisted that it was the duty of the Cw1 to verify the payee details. He further admitted that the payees were paid in bulk of upto 200 per day.
6. After carefully considering the evidence before the court, the court forms the opinion that the

claimant was terminated for no good cause. The reason for the termination was invalid and unfair. The person who made the mistake which led to payment to the wrong payee is the Rw1. He admitted the wrong doing under oath and as such he was the right material for the dismissal and the innocent Cw1. As the cashier, Cw1 did his work faithfully by paying the money to the phone number indicated on the requisition list by Rw1 and approved by the Chief Accountant. In this courts view the person preparing the requisition and the one who approved, it were duty bound to exercise due diligence before authorizing the cashier who was still under probation to make the payment. For that reason, the court finds that the termination of the claimant for the said invalid reason was not only wrongful but also unfair and unjustified within the meaning of Section 45 (2) (a) and (b) of the Act. Although section 42 of the Act disqualifies an employee under probation from procedural fairness under section 41 of the Act, it does not give the employer the right to dismiss the innocent employee on behalf another offending older employees.

### **Reliefs**

7. In view of the foregoing finding that the claimant was terminated for an invalid and unfair reason, the court makes declaration that his dismissal during his probation was unfair. He is therefore awarded kshs.54,000.00 being two months salary as compensation for the unfair termination. The reasons for giving two months is because the claimant had only worked for a short time. In addition the court has also considered the fact that the claimant could not possibly secure another employment within the two months.

### **Disposition**

8. For the reasons stated above judgment is entered for the claimant declaring his dismissal unfair and awarding him **kshs.54,000.00** plus costs and interest.

**Dated, signed and delivered this 6<sup>th</sup> May 2016.**

**ONESMUS MAKAU**

**JUDGE**