



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 1959 OF 2011

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DANIEL WAWERU KINYUA.....CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant averred that he was employed by the respondent as a clerical officer on 27th October, 1983 and worked until 5th September, 2008 when received a letter from the respondent's Human Resource Manager suspending him from employment on allegations that he had been implicated in corrupt deals. He was given 21 days to explain why stern disciplinary action should not be preferred against him. On 5th February, 2009, the claimant received a letter of summary dismissal on account of loss of trust.
2. According to the claimant, the dismissal was high handed and the respondent never considered his defence to the show cause letter where he explained that his password may have been stolen by a colleague who used it without his knowledge.
3. The claimant further averred that he was not, prior to the dismissal, afforded a fair hearing as contemplated by section 41 of the Employment Act.
4. The respondent on its part pleaded that the claimant was summarily dismissed due to grave misconduct, dishonesty, fraud and corruption contrary to his contract of employment dated 16th September, 2005. It was the respondent's contention that despite giving the claimant the opportunity to explain the circumstances leading to the fraudulent dealings with the respondent HE engaged in blame game WITH his co-workers without any tangible evidence.

5. According to the respondent, the termination was done procedurally within the contract of employment and the law. The claimant was accorded the chance to defend himself before the disciplinary committee but failed to give an account of how the fraudulent adjustments were made in respect of some customer's accounts under his custody.
6. The respondent further averred that the claimant was not entitled to terminal dues as he was summarily dismissed on account of gross misconduct and further that in law, he was not entitled to severance pay.
7. In his oral testimony before Court, the claimant reiterated most of the averments in the memorandum of claim. He denied receiving any bribes and that the details of the bribes were not disclosed to him. It was further his evidence that he was called to a disciplinary meeting and told he was involved in fraudulent adjustment of an account. He denied giving any details. He stated that he suspected someone used his password.
8. Regarding leave, he stated that he had 195 days of pending leave.
9. In cross-examination, the claimant stated that he had diploma in computing and that he understood his role very well. He stated that he was issued with a password and that a password had to be safeguarded. He further stated that he was the only one who had access and could adjust customer's accounts. He admitted that his password was used. The claimant further admitted to attending a Disciplinary Committee hearing where he explained his position. He received a dismissal letter thereafter.
10. The respondents witness Mr. Peter Mwangi informed the Court that the claimant was a Data Entry Supervisor and that his work entailed analyzing billing data which was done through the computer. The claimant was to analyse data and resolve anomalies to ensure the integrity of the system. It was his evidence that there were restrictions to the system and authorized persons could only access using their password.
11. According to the witness, the claimant was terminated due to fraudulent accounting. Account number 117104601 was adjusted to a credit balance of Kshs.86,024/25. In the records the Commercial Director traced the adjustment to the claimant. The Commercial Director then wrote to the Human Resource Director for Disciplinary Action against the claimant. The process was undertaken after which the claimant was dismissed summarily. It was his evidence that the claimant honoured the summons and attended the disciplinary hearing.
12. Upon dismissal the claimant was paid his terminal dues in the sum of Kshs.310,297.20. The benefits were as per the Collective Bargaining Agreement between the respondent and the claimants union.
13. Regarding leave it was his evidence that the application by the claimant was for 2008 and that his work leave balance was 25 days.
14. In cross-examination he stated he had no evidence the claimant solicited bribes or received any gifts. Further that the dismissal letter did not talk about bribery.
15. Mr. Nyabena for the claimant submitted that the respondent had difficulty proving that there existed a valid reason to terminate the claimant's services. According to Counsel, the respondent's witness admitted that there was no evidence in the record to indicate that the claimant solicited or received any bribe as alleged in the letter of suspension.
16. According to Counsel, it was the claimant who first wrote to the Commercial Director about the fraudulent entries and requested for investigations to unearth the culprits and even went further to point out a suspect.
17. Counsel for the respondent on the other hand submitted that the claimant conducted himself in a

manner to portray gross misconduct on his part. These actions were a fundamental breach of his contract of employment and he was liable for disciplinary action. According to Counsel, the claimant conceded that he was issued with a show cause letter, suspended and invited to appear before the respondent's disciplinary committee. His assertion that he was not so processed was therefore hollow.

18. Regarding the remedies sought, Counsel submitted that the respondent in good faith paid all the terminal dues to the claimant even though some were paid when the present claim was pending. The claimant is therefore not entitled to any of the reliefs sought.

19. Concerning leave pay the respondent submitted that the claimant led no evidence to support this claim. The respondent on its part supplied evidence that showed the claimant took leave.

20. The claimant herein was terminated over involvement in fraudulent activities. The basis for this accusation was that his password was used to adjust account number 117104601 to credit balance of Kshs.86,024/25.

21. It was common ground and was conceded by the claimant, that passwords were confidential and personal and could not be shared. To permit or suffer to be accessed ones password is a case of negligence. It matters not that the claimant subsequently benefited from the fraud or malfeasance committed. The mere act of letting one's password land in the wrong hands is enough. The respondent therefore had a good reason to dismiss the claimant.

22. Regarding the process of termination, the Court is persuaded from the claimant's own testimony as summarized in this judgment that due process was followed.

23. In conclusion the Court finds this claim without merit and dismisses the same with costs.

24. It is so ordered.

Dated at Nairobi this 23rd day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 23rd day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge