



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 260 OF 2015

BETWEEN

PHARES OMONDI OCHIENG' CLAIMANT

VERSUS

DEACONS KENYA LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okanga & Company Advocates for the Claimant

Federation of Kenya Employers [F.K.E] for the Respondent

JUDGMENT

1.The Claimant filed his Statement of Claim on 23rd April 2015. He states he was employed as a Customer Relationship Sales Advisor on 1st October 2011. His contract was terminated on 3rd December 2014. He earned a salary of Kshs. 23,433 as at the date of termination. His contract was terminated after the Respondent realized that an amount of Kshs. 36,000 went missing while the Claimant was acting as the Cashier. A Mobile Phone belonging to the Respondent was used in the transaction leading to loss of the cash. The phone went missing after the Claimant used it. The Claimant feels termination was unfair and unlawful, and seeks the following orders:-

a) 1 month salary in lieu of notice at Kshs. 23,433.

b) Annual leave for the year 2014 at Kshs. 18,746.

c) The equivalent of 12 months' salary in compensation for unfair termination at

Kshs. 281, 196.

Total.... Kshs. 334,310

d) Costs

e) Any other relief the Court deems just and expedient.

2. The Respondent filed its Statement of Response on 22nd July 2015. It is conceded the Claimant was employed by the Respondent. There was Kshs. 36,000 found missing from the cash till which was assigned to the Claimant on 13th November 2014. On 9th October 2014, Respondent's Mobile Phone used in the transaction by the Claimant went missing. He was suspended with full pay, and asked to show cause why he should not be disciplined. He admitted he was at fault on both occasions, and asked to be pardoned. He was heard. His explanation was not exculpatory and the Respondent summarily dismissed him for gross misconduct under Section 44[4][c]. He appealed against dismissal. His Appeal was considered and rejected by Respondent's Chief Executive Officer. His Claim has no merit.

3. Parties agreed in Court on the 14th July 2016, to have the dispute considered and determined on the strength of their Pleadings, Documents and Submissions. They confirmed the filing of their Closing Submissions on the 14th July 2016.

Claimant's Case

4. He submits it is not disputed he was employed by the Respondent as a Customer Relationship Sales Advisor, on a gross monthly salary of Kshs. 23,433. It is not disputed the Claimant was dismissed by the Respondent mainly on the ground that Kshs. 36,000 was lost from the cash till manned by the Claimant, at Respondent's Mr. Price Outlet, in Nyali Mombasa.

5. Further, Parties agree the Claimant was heard by the Disciplinary Panel, on 1st December 2014. He gave his representations as captured in the minutes dated 1st December 2014.

6. The Claimant submits however that the disciplinary hearing did not result in a recommendation that he is dismissed; the recommendation was that he is given a final warning, and was to pay the lost amount of Kshs. 36,000 in 4 installments of Kshs. 9,000. The CEO Wahome Muchiri was bound by the outcome of the disciplinary process; otherwise there would have been no need to hold a hearing, if he was not bound. 2 days after the recommendation was made, the Claimant was summarily dismissed by the CEO.

7. The Claimant was unionisable. There was a Collective Bargaining Agreement concluded between the Respondent and the Claimant's Trade Union. The Respondent did not involve the Claimant's Trade Union at all, in the process of termination.

8. It was wrong for the CEO, having made the decision to summarily dismiss the Claimant, to sit on appeal. He made the initial decision to dismiss the Claimant and should therefore not have presided over the Appeal. The so-called Appeal was a farce and a mockery.

9. Termination did not comply with the procedural standards set out under Section 41 of the Employment Act. The Claimant was not accompanied by a Colleague of his choice or a representative from his Trade Union. Both primary and secondary hearings, did not meet the test of procedural fairness. He relies on the case of ***David Wanjau Muhoro v. Ol Pejeta Ranching Limited [2014] e-KLR*** on key elements to a fair hearing. The Claimant submits he is entitled to compensation and notice pay.

10. Claimant's contract entitled him to 24 days of annual leave after 1 year of continuous service. He worked for 11 months in 2014 and merits 22 days of annual leave. The document marked appendix 6 in the Respondent's Bundle cannot be relied upon in determining whether the Claimant utilized his annual leave for 2014, as the document is full of erasures. Kshs. 9,500 indicated on the document would not amount to annual leave pay based on the Claimant's salary.

11. The Claimant was not paid salary for 14 days worked in November 2014. The pay slip for the month cannot amount to evidence of payment. He is entitled to salary for 14 days worked before his suspension.

12. The Claimant prays the Court to allow the Claim.

Respondent's Case

13. The Respondent submits the Claimant was its Employee. His basic salary was Kshs. 20,157, house allowance at Kshs. 9,500 and commuter allowance at Kshs. 2,000, total Kshs. 31,657. This is reflected in his pay slip.

14. On or around 13th November 2014 there was a cash shortfall of Kshs. 36,000, at the cash till manned by the Claimant. On 9th October 2014, he failed to account for the whereabouts of Respondent's mobile phone, which he used in the transaction on 13th November 2014.

15. He admitted the money and the mobile phone were lost. The Respondent had valid reason under Section 43 of the Employment Act, to terminate the Claimant's contract of employment.

16. He was asked to show cause why disciplinary action should not be taken. He was given adequate time to explain himself. He was heard. He was dismissed and advised on his right of appeal. He appealed. The Appeal was rejected. Due process was followed. He is not entitled to the remedies he seeks.

17. Lastly the Respondent submits Kshs. 5,000 awarded by the Court to the Respondent as costs for adjournment on the 2nd December 2015 remains unpaid. The Respondent urges the Court to make an order for payment of these costs, and dismiss the Claim with costs to the Respondent.

The Court Finds:-

18. The following facts are not contested: the Claimant was employed by the Respondent Company as a Customer Relationship Sales Advisor on 1st October 2011; he was dismissed on 3rd December 2014; the reasons for termination were that cash in the sum of Kshs. 36,000 was lost from the cash till manned by the Claimant, and the Claimant was not able to explain the whereabouts of the mobile phone used by himself, in the transaction leading to the loss of the money; he was asked to show cause why he should not be disciplined; he gave an answer conceding the money and the phone were lost; and he was given a hearing, both at primary and secondary levels.

19. The Court finds there was valid reason justifying termination of the Claimant's contract of employment, under Section 43 and 45 of the Employment Act. He was assigned work at the cash till, and money was lost, from this cash till. This is not in dispute. A mobile phone belonging to the Respondent was used in the transaction. The Claimant was not able to say how the money was lost, or subsequently how the mobile phone was lost. The Respondent would have justification in taking disciplinary measures against the Claimant, under Section 44 [4] [c] and [g] of the Employment Act 2007. He was involved in acts of gross misconduct, something he acknowledged and apologized for.

20. The hearing procedure was largely fair, the Claimant having been issued notice to show cause; having responded to this notice; having been heard; and having utilized his right of appeal. The Court does not agree with the Claimant that in terms of preparing for his defence, he was in any way deprived of a fair hearing. He was given adequate time, and the accusations against him were uncontested. The facts do not bring his case within the principles of fair hearing he relies on under the case of ***David Wanjau Muhoro***. There were nonetheless notable departures from the standards of fairness contemplated under Section 41 and 45 of the Employment Act.

21. The minutes of the meeting held on 1st December 2014 show there was no Trade Union representative accompanying the Claimant to the hearing. There was no Co-Employee of the Claimant's choice.

22. The greatest defect in the procedure relates to the outcome of the disciplinary hearing. The panel decided the Claimant would be issued a final warning, and would pay to the Employer the lost sum of Kshs. 36,000 in 4 monthly installments of Kshs. 9,000.

23. Inexplicably, the Respondent summarily dismissed the Claimant 2 days later, on 3rd December 2014.
24. Having sanctioned the Claimant by way of a final warning and surcharge for the loss, on 1st December 2014, it was unfair and unlawful to change the sanction to one of summary dismissal 2 days later. There was no new evidence or changed circumstances, to justify change in the punishment.
25. The CEO executed the summary dismissal decision. There was no Human Resource Manual or Disciplinary Code availed to the Court on the appeal procedure at the Respondent. In the view of the Court however, it would have been in keeping with the standards of fairness if the CEO had opted not to deal with the Appeal, and appointed an impartial Appeals Committee to hear the Claimant.
26. The Appeal went to the CEO, and without calling the Claimant to argue his appeal, determined that his own decision which had substituted that of the first panel, summarily dismissing the Claimant, is sustained. Objectivity was not sustained in the appeal process. It was just a case of the CEO stamping his executive authority and disregarding the views of disciplinary organs within his organization. This compromised fairness of procedure.
27. Termination was based on valid ground but flawed in fairness of procedure. ***The Claimant is granted the equivalent of 7 months' salary in compensation for unfair termination.***
28. Although the Claimant states his monthly salary was Kshs. 23,433, the Respondent commendably submits the Claimant's salary was Kshs. 31,657. The Claimant's Advocates appear to have relied on the figures indicated in the letter confirming the Claimant to employment, which issued way back on 12th September 2011. The Claimant's Advocates should have been more vigilant and not have to rely on the goodness of heart of the Respondent, in stating to the Court the correct gross salary.
29. ***He is allowed 1 month salary in lieu of notice at Kshs. 31,657.***
30. The Respondent showed the Claimant to have taken annual leave for 2014, through the application form, annexure 6 of the Respondent's Documents. The form is signed by the Claimant. The amount of Kshs. 9,500 shown to have been paid on the form is leave allowance. The Claimant appears to confuse this for annual leave pay in his Submissions, arguing Kshs. 9,500 could not be reflective of 26 days of annual leave entitlement. The Claimant was not being paid annual leave pay, as he was utilizing his days. The Court understood the sum of Kshs. 9,500 as being leave allowance. The claim for annual leave pay has no merit and is declined.
31. Termination was on 3rd December 2014. The Claimant submits he was suspended mid-November 2014, and should be paid salary for 14 days worked. The Respondent paid him for the whole month, as he was still an Employee up to the date of termination. There is a pay slip for November 2014, showing payment for the whole month. The pay slip indicates payment was through bank transfer to the Claimant's Bank Account, KCB Kengeleni, Mombasa. The Claimant should have availed his bank statements showing the money was not received. His position that he was not paid, was not persuasive in the absence of his Bank Statements for the relevant period. The claim for salary for days worked is rejected.

IT IS ORDERED:-

- a) ***Termination was based on valid ground, but flawed on fairness of procedure.***
- b) ***The Respondent shall pay to the Claimant 7 months' salary in compensation for unfair termination at Kshs. 221,599 and 1 month salary in notice pay at Kshs. 31,657- total Kshs. 253,256.***
- c) ***The amount to be paid in full within 30 days of this Judgment.***

d) No order on the costs, save that the Claimant shall pay costs of Kshs. 5,000 awarded to the Respondent on 2nd December 2015.

Dated and delivered at Mombasa this 25th day of November 2016.

James Rika

Judge