



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 544 OF 2014**

**JAMES MANGALE CHAI.....CLAIMANT**

**VS**

**ZAINUL YUSUFALI DAR T/A**

**GIGI & COMPANY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 12.9.2014. The respondent denies that she unfairly terminated the claimant's services and avers that the termination was mutually agreed upon through a written settlement after the claimant admitted stealing money from the respondent.

2. The suit was heard on 19.3.2015 and 30.6.2016 when the claimant testified as Cw1 while the respondent called Mr. Zainul Yusufali, Dar Esha Muhamed Ali and Simeon Ong'ondo Gisape as Rw1, Rw2 and 3 respectively. Thereafter both parties filed written submissions.

**Claimant's case**

3. Cw1 stated that he was employed by the respondent as an Office Messenger on 4.1.1999 and worked upto 12.9.2014 when he was dismissed by the Rw1. That on the said date, Cw1 left office at 11am to dispatch a parcel, pay water bills and buy a watch battery for Rw1. That the Rw1 gave him kshs.4500 to pay, kshs 4000 for water bill and ksh 250 for watch battery while the secretary gave him ksh.1000 for water bill and ksh 500 for sending the parcel. That he was also given a cheque to deposit in the bank. That after all those errands, he returned to the office around 1.50pm with a client who wanted to make some payment and found Rw1 alone.

4. Cw1 further explained that he called Rw1 to deal with the client as he proceeded to file the banking slips. That as he went to give the Secretary ksh.390, the balance of the money given for the bills and dispatch of a parcel Rw1 grabbed the money and retained it and called him to his office accusing him of theft. That as at that time Cw1 was still holding kshs.250, balance from the 4500 given for the bills and watch battery. That Rw1 then demanded that Cw1 should write a resignation letter which he refused and denied the alleged theft. That Rw1 then instructed the Secretary and the Accountant to write a dismissal letter and a discharge and give him. That in the meanwhile, he gave RW1 his change of kshs.250.

5. Cw1 contends that he was given a dismissal letter written in English which he did not understand well because he only did primary education upto standard 4. That he was given the letter by the Accountant who told him that it was a dismissal letter and he signed to acknowledge receipt. Cw1 contends that the dismissal was unfair because he never stole any money from the Secretary who controls the petty cash. He denied ever opening the Secretaries drawer and maintained that the Secretary found him filing the Banking slip. He further contended that the Accountant never explained the content of the dismissal letter to him. In conclusion he contends that he was not paid his terminal dues and that he never wrote any settlement agreement with the Rw1. He however admitted that he had been advanced a loan of kshs.20,000 by the respondent.

### **Defence case**

6. Rw1 is the respondents Managing Partner. He admitted that Cw1 was his employee since 1999 working as Office messenger. He explained that on 12.9.2014, he went to dispatch a letter by G4S and returned at about 1.55 pm when he was sitting in his office. He went to say that he saw through the glass wall, the claimant go to the Secretary's table and put there on the change from G4S mail and the delivery receipt. That Cw1 then bend and picked some money from the petty cash in the secretary's drawer and immediately, he called him to his office to enquire about his mission at the secretaries desk. That the claimant responded that he was putting back change for the courier petty cash but when he checked, he saw the change and the receipt on the table.

7. Rw1 went on to state that after the Accountant and the Secretary returned to the office, he asked him why he opened the Secretary's drawer, and he admitted that he stole money out of which he returned only kshs.250. That when he threatened to call the police, Cw1 apologised and returned only kshs.250 and offered to leave the employment. He agreed not to report the issue to the police although Cw1 had not refunded the whole kshs.2,000 stolen. Instead he asked the Accountant to prepare a letter for settlement in the terms proposed by the Cw1 because he was willingly leaving employment in order to avoid being taken to police to face theft charges. In conclusion Rw1 contended that he could not continue employing an employee who was stealing from him.

8. On cross examination Rw1 admitted that Cw1 worked for him for over 16 years. He clarified that on 12.9.2014, Cw1 stole kshs.2000 from the Secretary's drawer and left kshs.3000. He admitted that Cw1 returned change and put it on the Secretaries desk together with the receipt but denied that he send Cw1 to buy a watch battery. He changed his story to say that after Cw1 stole the money from the Secretaries desk he went to the toilet and when he returned he searched him and recovered only kshs.250 from his pocket. He denied that he coerced Cw1 to admit the offence. He however admitted that he gave Cw1 the option of admitting the offence and leave employment on 12.9.2014.

9. Rw2 is the respondent's Secretary and the one in charge of petty cash. She stated that on 12.9.2014 at 2pm, she returned to the office and found Rw1 talking to Cw1. That Rw1 and Cw1 then walked to her desk and Rw1 told Cw1 to return the money he stole. Cw1 then went to the kitchen or bathroom and brought kshs.250 and placed on the table. Cw1 then admitted stealing the money and pleaded not to be taken to the police in consideration of his long service. That Cw1 then accepted to leave employment so that the matter is not reported to the Police. That thereafter the Accountant who was also present was instructed to draft a letter to that effect and the Cw1 signed it and left.

10. On cross examination, Rw2 confirmed that Cw1 had worked with her for a long time and they coped well. She however contradicted her written statement to say that when she returned from Lunch on 12.9.2014 at 2pm she found Rw1 sitted on her chair and then he stood up and then walked away to his office. That he then called Cw1 to his office and continued talking with him after which he came out and said Cw1 had stolen money and demanded that he produces the stolen money of which he produced kshs.250.

11. Rw2 admitted that she did not count the money in her drawer and as such she could not tell how much it was. She also did not know whether Rw1 had counted the money after she left for lunch. She further stated that her drawer had a lock and key but she never used to lock it. She admitted that on 12.9.2014

Rw1 and Cw1 held a meeting in the Rw1's office and no other employee was called in.

12. Rw3 is respondent's Accountant. He stated that on 12.9.2014 he returned to the office from lunch break some minutes past 2.00pm. That on arrival, Rw1 and Cw1 came to the front office and the Rw1 said Cw1 had stolen kshs.2000 petty cash. Rw1 then told Cw1 to bring the money and Cw1 went to the kitchen and/or the kitchen and brought kshs.250. However Rw1 said that he saw Cw1 steal more than kshs.250 and Cw1 admitted and begged for forgiveness and not to be taken to the police. That Cw1 and Rw1 then reached an agreement that he would leave employment and the matter would not be reported to the police. Rw1 then instructed him to draft the agreement and the Cw1 signed and left. In conclusion, he contended that Rw2 is the only person who operates the petty cash and no other staff is allowed to access the petty cash drawer.

13. On cross examination Rw3 stated that he returned from lunch break together with Rw2 and Rw1 told them that Cw1 had stolen over kshs.2000. That when Rw1 told Cw1 to return the money, Cw1 went to the kitchen side and brought kshs.250. That Rw1 then asked Cw1 whether he wanted to continue with employment and the matter be reported to the police or whether he would instead leave employment, and Cw1 opted to leave the employment. He admitted that after drafting the termination letter he took it to Rw1 for approval after which he took it to Cw1 for signing.

### **Analysis and Determination**

14. There is no dispute that the claimant was employed as an office messenger by the respondent from 1999 to 12.9.2014 when he was dismissed for stealing his employers' money. The issues for determination are:

**(a) Whether the termination of the employment contract was by mutual agreement or unfair termination.**

**(b) Whether the reliefs sought should be ordered.**

### **Unfair termination or Mutual Agreement**

15. The respondent's case is that the claimant freely opted to leave employment and avoid being taken to the police for theft of over kshs.2000 from her petty cash. The defence witnesses have contended that Cw1 admitted the alleged theft and chose to leave employment after Rw1 gave him that option to avoid being taken to police. The question that arises is whether the alleged option to leave employment was voluntary.

16. The claimant has denied that he signed the termination agreement voluntarily. According to him, the letter was not read and explained to him by the Rw3. That he signed without reading the letter because it was written in English and being a standard 4 primary school dropout, he could not understand the English letter. The Rw3 has not denied that he is the one who delivered the letter to Cw1 for signing. He has also not denied the allegation that he never read and explained the contents of the letter dated 12.9.2014 to the claimant. The burden of proving fairness in proceedings then lead to termination of employment of an employee lies with the employer under section 45 of the Employment Act. In this case the respondent has not proved on a balance of probability that he accorded the claimant procedural fairness including ensuring that he understood the offence he allegedly committed and that contents of the letter termination his services. Consequently, I find that the respondent has not proved on a balance of probability that the claimant voluntarily resigned from his employment. In my view, the evidence adduced by both parties support the finding that the claimant did not exercise free will when he signed the termination letter dated 12.9.2014 and as such I hold that he was unfairly terminated by the respondent.

17. Under section 45(2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case Rw2 who is the custodian of the petty cash confirmed that she did not know the amount of money she had kept in her drawer. She also never verified whether money had

been lost or not. All what she said was that Rw1 told her that over kshs.2000 had been stolen by the claimant. Nothing was recovered from the claimant except the kshs.250 which was the change due to Rw1 after paying for his bills and watch battery. The rest of the change due to the petty cash after payment of bills and mailing was securely on the desk for Rw2.

18. In all fairness, I find that the defence has not proved that Cw1 stole any money from the petty cash drawer. If that was so, Rw1 who is the owner of the business could not have allowed Cw1 any chance to hide the money. The allegation by Rw1 that he searched Cw1 after returning from the toilet is not true and it is an afterthought. In his written statement which he adopted as his evidence in chief, Rw1 confirmed that when he saw Cw1 stealing the money he asked him what he was doing and while interrogating him, Rw2 and Rw3 arrived. That Cw1 then admitted the theft, produced only kshs.250 and begged for forgiveness.

19. This foregoing version of evidence differs from that of the Rw1 and Rw2 who stated that after questioning by the Rw1 in their presence Cw1 admitted the theft and went to either the bathroom or kitchen and brought kshs.250. Such contradiction in the defence evidence is material and I resolve it by finding favour of the claimant that the respondent has not proved on a balance of probability that Cw1 stole her petty cash from the drawer of the Rw2.

### **Procedure**

20. Under section 41 of the Employment Act, the employer is barred from dismissing his employee on ground of misconduct before first explaining the offence to the employee in the presence of a fellow employee or shop floor union representative of his choice, the reason for which his dismissal is counterplated. That the said proceeding must be in a language of the employees understanding and the employee and his chosen companion must be accorded a chance to air their defence for consideration before the dismissal is decided. In this case, the foregoing was not followed before Cw1 was dismissed. According to Rw2, the Rw1 and Cw1 held a private meeting in the office by the Rw1 after which they came out and Rw1 declared that Cw1 had stolen petty cash from her drawer. Consequently, I find and hold that the claimant was dismissed without following a fair procedure.

### **Reliefs**

21. In view of the finding that the termination of the claimants employment was unfair both substantively and procedurally, I proceed to award him damages under section 49 (1) of the Employment Act. He will get one month salary in lieu of notice being kshs.13,000 plus 12 months salary as compensation for the unfair termination of his employment contract being kshs.156,000. In awarding the maximum compensation, I have considered the claimant's long service to the respondent.

22. The claim for service is however dismissed because the claimant was disqualified from such benefit by section 35(6) of the Employment Act by virtue of him being a contributor to the National Social Security Fund. Upon perusal of all the payslips produced as evidence by the claimant. It is clear that he was deducted money for the NSSF and no evidence was adduced to prove that the respondent never remitted the rightful contributions to the NSSF.

### **Disposition**

23. For the reasons stated above, I enter judgment for the claimant in the sum of **kshs.169,000** plus costs and interest.

**Signed, dated and delivered at Mombasa this 9<sup>th</sup> day of December 2016.**

**O.N. MAKAU**

**JUDGE**