



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1822 OF 2014

STEPHEN NDOLO.....CLAIMANT

VERSUS

NAIROBI WATER & SEWERAGE COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 15th October 2014 and filed in Court on 16th October 2014 is for unlawful dismissal and failure to pay terminal dues.
2. The Respondent filed a Memorandum of Reply on 28th November 2014 to which the Claimant responded on 5th December 2014. At the hearing, the Claimant testified on his own behalf and thereafter called the National Organising Secretary for Kenya County Government Workers Union, Matilda Chebet Kimetto. George Otieno Oketch and Simon J. Itubo testified for the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent on 6th January 1999. He served in various capacities and by the time he left employment on 29th April 2014 he held the position of Cashier Verification Supervisor. The Claimant's functions included collection and banking of cash and cheque receipts.
4. On 16th September 2013, the Claimant proceeded on annual leave resuming on 6th November 2013. On 8th November 2013, he was issued with a show cause letter on allegations of fraud and absconding of duty. He responded on 11th November 2013.
5. The allegations of fraud had to do with IOU imprest warrant No 23624 for Kshs. 1,200,000 which was presented to the Claimant on 24th August 2013, by two persons who claimed to have been sent by the Respondent's Managing Director, Philip Gichuki. The funds were said to be required for payment to staff attending games at Kasarani.
6. After perusing the imprest warrant which had been approved by the Managing Director, the Claimant released the funds to the two persons. The Claimant thereafter prepared the daily revenue report which he submitted to the Revenue Officer on 26th August 2016.

7. It was alleged that the Claimant had paid out the warrant fraudulently, an allegation the Claimant denies. In his further response dated 12th November 2013, the Claimant states that on 23rd August 2014, he collected Kshs.2,275,090 out of which he paid out the warrant worth Kshs.1,200,000 leaving him with a balance of Kshs. 1,075,090 which was banked on 24th August 2014.

8. The Claimant states that he submitted daily reports to the Revenue Officer and the Revenue Coordinator. He adds that the Respondent had failed to set out any procedures for payment of IOU warrants. He set out a catalogue of other warrants paid in the same way he had employed in paying warrant No 23624.

9. The Claimant was suspended on 15th November 2013 and by letter dated 28th January 2014, he was summoned to appear before the Respondent's Corporate Disciplinary Committee on 11th February 2014. On 29th April 2014, he was summarily dismissed.

10. The Claimant avers that the Respondent failed to respond to his appeal dated 22nd May 2014. He further states that despite having been summarily dismissed on 29th April 2014, he was summoned for a further suspension hearing vide letter dated 21st July 2014.

11. It is the Claimant's case that his dismissal was unlawful and unfair. He claims the following:

- a) A declaration that his dismissal was unlawful and unfair
- b) One month's salary in lieu of notice.....Kshs. 150,877
- c) Allowances during suspension.....167,466
- d) Service pay for 15 years.....719,400
- e) 12 months' salary in compensation.....805,728
- f) General damages for wrongful dismissal (lost years).....9,668,736
- g) Costs plus interest

The Respondent's Case

12. In its Memorandum of Reply filed on 28th November 2014, the Respondent admits having employed the Claimant as a Cashier on 16th September 2005.

13. Regarding the events giving rise to the cause of action herein, the Respondent states that the Claimant chose to ignore an existing rule that no cash should be paid out before it is banked. As a result, he paid out an IOU imprest warrant in the name of one Peter Njoroge who was not an employee of the Respondent. The imprest warrant was discovered to have been a forgery and by paying it, the Claimant had occasioned financial loss to the Respondent.

14. The Respondent maintains that the Claimant was lawfully suspended and later dismissed. Regarding the appeal, the Respondent states that the Claimant ought to have lodged an appeal within 15 days from the date of dismissal, which he failed to do.

Findings and Determination

15. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

16. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee.

17. The letter dismissing the Claimant is dated 29th April 2014 and states as follows:

“Dear Stephen,

RE: SUMMARY DISMISSAL

*Reference is made to your suspension from duty through our letter Ref. NCWSC/HRD/IR.2C/19672/VOL.1/2013 dated 15th November, 2013 for being implicated in fraud with intention to defraud the Company revenue (sic) where on 23rd August 2013 you paid out an IOU for **Ksh. 1,200,000** to unknown person by the name Peter Njoroge, payroll No. 04718 through an imprest warrant No. 23624 and failed to account for all the money that was collected from the banking halls leading the Company losing (sic) revenue under your custody in unclear circumstances.*

*Following your appearance before the Corporate Disciplinary Committee on 11th February 2014 on the above stated case, the committee found you guilty of the offense as charged. Please note that the said conduct amounts to gross misconduct as provided under Section 44 subsection (4) paragraph (g) of the **Employment Act, 2007, Clauses 8.23.2(viii) of the Company’s Human Resources Policies and Procedures Manual and the Company’s Code of Conduct for Employees.***

*Based on the above facts, the Company has therefore decided to **Summarily Dismiss** you with immediate effect on account of gross misconduct.*

On receipt of this letter, you are to handover your staff ID and all official tools and implements issued to you in the course of your employment. You are required to clear yourself of any liabilities with the company before your dues, if any, and certificate of service are released to you.

You have the right to appeal if dissatisfied with the above decision to the Managing Director within fifteen (15) days from the date of this letter.

Yours faithfully,

Eng. Philip Gichuki

Managing Director”

18. Regarding the burden of proof placed on an employer under Section 43 of the Employment Act, this Court has held that once a reason that would cause a reasonable employer to terminate employment is demonstrated, the burden is discharged (see *Jessy Olukutukei v Feed the Children Kenya [2014] eKLR* and *Abraham Nyambane Atsiago v Barclays Bank of Kenya [2015] eKLR*).

19. The Claimant’s line of defence to the allegations leveled against him is that he paid the imprest warrant in issue in the normal course of his duties. He however admitted paying a person who was not known to him. Granted that the Claimant may not have personally known all the employees of the Respondent, the question is whether he exercised due care in the circumstances.

20. There was unsupported evidence by the parties as to the obtaining procedure for payment of imprest warrants. According to the Claimant, it was normal to pay imprest warrants from daily collections prior to

reconciliation. The Respondent on the other hand maintained that the use of cash from daily collections was outlawed. There was even an averment that the encashment of imprest warrants had been discontinued. What is clear is that none of the parties adduced any documentary evidence in support of their evidence in this regard.

21. Nevertheless, the Court took judicial notice that the Claimant was a career cash officer, rising through the ranks to the position of Chief Cashier at the time of leaving employment. It seems to me therefore that in view of the amount shown on the imprest warrant, coupled with the fact that the beneficiary was not personally known to him, the Claimant ought to have exercised more care, which he failed to do. This Court has therefore arrived at the conclusion that the Respondent had a valid reason for terminating the Claimant's employment.

22. Having found that there was a valid reason for the termination, I will now examine the termination procedure. According to the evidence on record, the Claimant was issued with a show cause letter on 8th November 2013 to which he responded on 11th November 2013. He was subsequently suspended on 15th November 2013 and by letter dated 28th January 2014 he was summoned to appear before the Respondent's Corporate Disciplinary Committee on 11th February 2014.

23. At the disciplinary hearing held on 11th February 2014, the Claimant and two (2) union representatives were given the opportunity to make representations. The Claimant was also duly heard on appeal.

24. I have examined the disciplinary procedure adopted by the Respondent in this case and find that on the whole, the procedural fairness requirements set out under Section 41 of the Employment Act were satisfied.

25. In the circumstances, the Court finds no reason to interfere with the Respondent's decision to summarily dismiss the Claimant. Consequently, the claims for unlawful dismissal, notice pay and allowances during suspension fail and are dismissed. Having been a contributing member of Lap Trust Pension Scheme, the Claimant is not entitled to service pay.

26. In the upshot, the Claimant's entire claim fails and is dismissed. Each party will bear their own costs.

27. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF DECEMBER 2016

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JUDGE

Appearance:

Mr. Onyony Claimants

Mr. Kigata for the Respondent