



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 67 OF 2014

THOMAS BARKASIAM MININGWO CLAIMANT

V

EGERTON UNIVERSITY RESPONDENT

JUDGMENT

1. Thomas Barkasiam Miningwo (Claimant) was offered temporary appointment by Egerton University (Respondent) as a Senior Accounts Assistant through a letter dated 15 July 1996. He was confirmed as a Senior Accounts Assistant through a letter dated 11 August 1998.

2. On 11 May 2012, the Respondent suspended the Claimant pending further investigations into an alleged loss of Kshs 249,699/- between 5th/6th May 2012. The suspension letter also requested the Claimant to show cause within 7 days why disciplinary action should not be taken against him for gross misconduct.

3. On 3 October 2012, the Respondent invited the Claimant to attend a disciplinary hearing on 23 October 2012 in the Old Boardroom at 9.00 am but the hearing was not concluded.

4. Consequently, the Respondent through a letter dated 29 October 2012 invited the Claimant to appear before its Staff Disciplinary Committee again on 13 November 2012.

5. Through a letter dated 15 November 2012, the Respondent informed the Claimant that he had been found guilty of

gross misconduct which led to loss of University money amounting to Kshs 249,699/- contrary to Employment Act 2007 Section 44(4) clauses (c) and (g) and he was being summarily dismissed with effect from 13 November 2012.

6. The Claimant was aggrieved by the summary dismissal and on 17 March 2014, he filed a Memorandum of Claim against the Respondent stating the issues in dispute as

a) Unfair termination

b) Reinstatement

c) Leave allowance

d) Unpaid claims.

7. In the Memorandum of Claim, the Claimant sought unpaid salary arrears and pension remittances, unpaid leave allowance for 300 days, unpaid claims and severance pay.

8. The Respondent filed its Response on 4 June 2014, and the Cause was heard on 12 November 2014 and 15 December 2014. The Claimant filed his submissions on 14 January 2015 while the Respondent filed its submissions on 4 February 2015.

9. After considering the pleadings, documents produced, testimonies and submissions, the Court has identified the issues for determination as, *whether the dismissal of the Claimant was unfair, effect of Claimant's acquittal in criminal case and appropriate remedies.*

Whether the dismissal was unfair

Procedural fairness

10. Section 41 of the Employment Act, 2007 has now made the right to a hearing before termination of employment a mandatory requirement if the reason for the termination is based on *misconduct, poor performance or physical incapacity.*

11. The Claimant was dismissed for an alleged loss of money which falls under *misconduct* and therefore the section is implicated in the present case.

12. The Respondent issued to the Claimant a suspension letter dated 11 May 2012. The suspension letter informed the Claimant of the allegations he had to confront. The letter also gave him 7 days to respond and informed him that disciplinary action was contemplated.

13. In his testimony, the Claimant admitted that he was served with the suspension letter on 11 May 2012 (at the police station) and he responded a day or so later.

14. The Claimant was also served with invitation letters dated 3 October 2012 and 29 October 2012 asking him to attend disciplinary hearings. In testimony he confirmed that he was subjected to a disciplinary hearing on 23 October 2012 and 13 November 2012. He stated that he made representations.

15. He further stated that after the hearing he received a dismissal letter and he appealed but there has been no response to the appeal. Later, in re-examination, he stated that he had abandoned the appeal.

16. The Respondent produced the minutes of the Disciplinary Committee hearings held on 23 October 2012 and 13 November 2012, and they all confirm that a hearing was held and that the Claimant made representations.

17. Although the Claimant appeared to suggest that the composition of the Disciplinary Committee changed he did not show that he suffered any prejudice or injustice. Actually it is only three or four members out of 12 who did not attend the adjourned hearing. The Claimant also did not raise any complaint about the missing members.

18. From the material placed before the Court, the Court is satisfied that the Claimant was informed of the allegations against him and that disciplinary action was contemplated, he was afforded opportunity to make representations and that Union representatives from the Union he was a member were present.

19. The Court therefore finds that the Respondent complied with the procedural fairness dictates of section 41 of the Employment Act, 2007.

Substantive fairness

20. In situations where an employer terminates the employment of an employee, it is the employer who knows the real grounds/reasons for the action.
21. In this regard, section 43 of the Employment Act, 2007 obliges the employer to prove the reasons for the termination of employment while section 45 of the Act makes it mandatory that the employer proves the reasons for termination of employment as valid and fair.
22. The effect of section 45 of the Act is that an employer cannot terminate the employment of an employee without valid and fair reasons even if there is a contractual term allowing termination on notice without reasons.
23. The reason given for the dismissal of the Claimant was gross misconduct which led to the loss of University money amounting to Kshs 249,699/-.
24. In his testimony, the Claimant stated that he received Kshs 607,000/- from Mr. Langat on 5 May 2012,(ARC Hotel Manager) although he did not sign for the same and he gave the money to a Miriam (a casual employee and his junior) in a paper bag to make payments. The said Miriam also did not sign receiving the money from him because they were acting on trust.
25. He also stated that there was no safe box for keeping money and that there were loopholes in the systems operated by the Respondent.
26. In cross examination, the Claimant stated that according to practice, the money should have been signed for by himself and Miriam and further stated that Miriam had not denied receiving the money from him. Miriam was jointly charged with him in the criminal Court, but declined to testify during the disciplinary hearing.
27. The Respondent called two witnesses. Robert Kibet Langat was the first witness who testified on behalf of the Respondent.
28. On the reasons for dismissal, he stated that on 5 May 2012 he went with the Claimant to the bank and cashed two cheques (for petty cash and paying casuals) after which he gave the cash to the Claimant. He also requested the Claimant to go to his office later to sign for receipt of the money but he never came, despite phone calls upto 7 May 2012. On Wednesday, he was informed of the loss of the money.
29. The witness testified that it was the practice to sign for such money and the systems in place were good and were still being used.
30. The Claimant admitted receiving part of the money which got lost. In examination in chief, the Claimant did not disclose how he dealt with the money or where he got it from.
31. It is only in cross examination that the Claimant gave details of the incident. According to him, he gave Kshs 249,699/- to a casual employee Miriam, but she did not acknowledge receipt of the money in writing. He also stated in cross examination that it is Miriam who called him to inform him of the loss of the money.
32. The Claimant was not ready to make a frank disclosure during examination in chief. Most of the relevant evidence (even of information he was privy to only came out during cross examination).
33. In the view of the Court, the Claimant was negligent in handling of the money entrusted to him as a senior manager in the Hotel and considering his position the buck must stop with him.
34. The Court finds that the Respondent has proved the reasons for dismissal and that the reasons were valid and fair.

Effect of acquittal

35. Listening to the testimony of the Claimant, the gravamen of his cause of action was the fact that he was acquitted in a criminal trial of the offence of theft by servant contrary to section 281 of the Penal Code.

36. The standard of proof in criminal cases is higher than in cases such as the instant one.

37. The purposes and objectives of a criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principles apply.

38. In my view, the acquittal of an employee cannot without more be a legal ground for finding that a dismissal was unfair or wrongful. In the same vein, a criminal action by the State against an employee does not generally in law require the holding up of a disciplinary hearing against the employee.

39. The Claimant's acquittal in itself could not found a cause of action for unfair termination and that fact cannot assist his case herein.

Appropriate relief

Unpaid salary arrears/pension remittances

40. Under this head, the Claimant sought Kshs 921,004/-.

41. The Claimant pleaded that this amount covered the period of suspension from 11 May 2012 to 11 July 2013. This cannot be correct because the Claimant was dismissed through a letter dated 15 November 2012. In his testimony, the Claimant acknowledged receiving the suspension letter on 19 November 2012.

42. At the time of separation the Claimant stated he was earning Kshs 65,000/- (did not disclose whether it was basic or gross).

43. In the submissions, the amount was amended to reflect Kshs 460,502/- being wages for 7 months during suspension at monthly wage of Kshs 65,786/-.

44. The general rule under common law is that suspension without pay where there is no express contractual authority or statutory provision is in breach of contract or unlawful (see *McKenzie v Smith* (1976) IRLR 345).

45. The Respondent did not demonstrate any contractual authority or statutory provision allowing it to suspend without pay (if it was based on the collective bargaining agreement, it was not produced).

46. The Court would therefore award the Claimant the pay during the suspension period based on the basic salary (he was getting house and medical allowance during suspension).

47. The Claimant further pleaded arrears arising out of a Collective Bargaining Agreement for 2010/2012. The Respondent admitted a sum of Kshs 18,147/- and the Court would award him the amount.

48. No evidence was led on the pension remittances and the same is declined.

Unpaid leave allowance for 300 days

49. The Claimant pleaded that he was entitled to leave allowance of 300 days.

50. He did not cite any contractual or statutory basis for leave allowance.

51. If by leave allowance, the Claimant meant accrued leave days not taken, that is a different issue.
52. The Respondent admitted that it was ready to pay the Claimant any outstanding leave days. In testimony the Claimant stated he had 245 days to his credit (exh. 9).
53. The Court would find in his favour and direct the Respondent to compute the equivalent cash value of the 245 days and pay the same.

Unpaid claims

54. No evidence was led on these unpaid claims and this head of claim fails.

Severance pay

55. The Claimant sought Kshs 1,842,008/- as severance pay.
56. The Claimant was not declared redundant and would not be entitled to severance pay.
57. In the written submissions, the Claimant attempted to make a case for service pay pursuant to section 35 of the Employment Act, 2007 in lieu of the severance pay.
58. The submissions suggest the Claimant was a member of a pension scheme. He would not be entitled to service pay.

Pay in lieu of Notice

59. This relief is not applicable, the Court having reached the conclusion the dismissal was fair.

Overtime arrears

60. No evidential basis was laid as to the working hours/days nor the amount disclosed. This head of relief fails.

Reinstatement

61. With the finding on dismissal being warranted, reinstatement is inapplicable.

General damages

62. The Court has found the dismissal fair, damages or compensation is therefore not available to the Claimant.

Conclusion and Orders

63. The Court finds and holds that the summary dismissal of the Claimant was fair, and dismisses the claim based on unfair termination/wrongful dismissal.
64. However, the Claimant is entitled to certain contractual/statutory benefits not dependent on dismissal and the Court orders the Respondent to compute and pay him

- (a) 245 days leave in cash
- (b) Salary arrears arising out of Collective Bargaining Agreement
- (c) Unpaid salary during suspension (basic pay)

65. The Claimant has been partially successful and the Court would award him costs at 50% of the applicable scale.

Delivered, dated and signed in Nakuru on this 27th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Chege instructed by Munene & Associates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers