



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 32 OF 2014**

**JOSHUA WACHIRA WANJOHI..... CLAIMANT**

**-VERSUS-**

**KARATINA UNIVERSITY..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 24<sup>th</sup> April, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 18.02.2014 through Mathaiya Baru & Associates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the dismissal of the claimant by the respondent was wrongful and unlawful.
- b. A declaration that the transfer of the claimant from the Main Campus to Riverbank Campus by the respondent was wrong and unlawful.
- c. Payment of the claimant's terminal dues.
- d. Costs of the claim.
- e. Interest at court rates.

The respondent filed the statement of response on 20.05.2014 through Muriuki Ngunjiri Advocates. The respondent prayed for judgment against the claimant for a declaration that the claimant's summary dismissal was just and lawful; and the claimant's suit be dismissed with costs.

The claimant was employed by the respondent as a kitchen attendant grade III on permanent basis between 1.02.2012 to 8.07.2013. The claimant was deployed to serve in the respondent's Main Campus and it was submitted for the claimant that he was transferred to the respondent's Riverbank Campus on 15.04.2013. The claimant was suspended from employment by the letter dated 9.05.2013 on the grounds that on diverse dates in the month of April 2013, the respondent lost unknown amount of money from kitchen sales at Riverbank Campus during the time the claimant had been on duty. The claimant was invited to attend a disciplinary hearing on 24.06.2013 at 8.00am to answer charges stated in the letter as follows:

- a. Stealing or appropriating Kshs.49, 220.00 collected out of revenue sales from the Riverbank kitchen on different dates between 28.03.2013 and 27.04.2013.
- b. Destroying and attempting to destroy cash sales records so as to conceal the misappropriation of the funds.
- c. Using threats and intimidation against fellow employees.

The claimant appeared as scheduled and was subsequently summarily dismissed from employment by the letter dated 8.07.2013. The dismissal letter stated that the claimant had been found guilty of all the

charges which amounted to gross misconduct and was terminated from service with effect from 8.07.2013. The claimant was entitled to appeal within 14 days, he appealed and the appellate board upheld the dismissal as per the letter dated 5.12.2013.

The 1<sup>st</sup> issue for determination is whether the summary dismissal was unfair. Under section 47(5) of the Employment Act, 2007 the respondent as the employer carries the burden of justifying the grounds for the termination of the employment. Further, under section 43(1) of the Act the respondent is required to prove the reasons for the termination and failing which the termination is unfair.

The court has considered the evidence on record. The claimant was employed as a kitchen attendant grade III. At the disciplinary meeting of 24.06.2013, the Staff Disciplinary Committee after giving the claimant a hearing found that the claimant's defence was inconsistent with the account by other suspects and the committee concluded that the claimant was dishonest. Further, the committee found that it was the claimant who directed the other staff to the toilet where the stolen books of accounts were recovered and the committee inferred that the claimant was the one who had stolen the Kshs. 49,220.00 and destroyed the cash sale books to conceal the misappropriation of the funds. The committee further observed that the claimant constantly gave false information to the committee and contradicted his earlier information and the account as given by co-accused employees. Thus, the minutes show that the committee decided to dismiss the claimant from employment.

The court has taken into account the events leading to the dismissal including the suspension, invitation to a hearing and the hearing. The court finds that the respondent had a genuine reason to terminate the claimant's employment as envisaged in section 43 of the Act. The court further finds that the claimant was given a notice and hearing before the dismissal and the respondent observed due process as envisaged in section 41 of the Act. Accordingly, the court finds that the termination was not unfair.

While making that finding the court has taken into account the respondent's submission that the respondent had financial constraints so that all staff serving in the kitchen handled cash due to staff shortage as there was no designated cashier. The court has further taken into account that the respondent in evidence and submissions stated that there were no clear systems of revenue collection. Of defective operational systems and policies, this court stated in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR as follows,

**“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”**

In the present case, the court finds that there were deficient operational policies and systems governing the respondent's revenue collection at the kitchen. However, the claimant's termination was not attributable to the deficient operational policies and systems but it was attributable to the claimant's overt actions as stated in the letter of invitation to a hearing and as considered by the committee at the hearing. It was not the claimant's case that while trying his best to implement the deficient operational system, he nevertheless incurred the alleged liability or misconduct. Not so! In this case it is that the claimant took advantage of the deficient operational system, weakened it further by inappropriately interfering with the revenue books that he is said to have destroyed so as to unjustly partake of the revenues. In the circumstances, the court has found that the termination was not unfair as it was not attributable to the deficient operational policies and systems but to the claimant's deliberate involvement in misconduct as

leveled against him in the letter of invitation to the hearing and as deliberated upon by the committee at the hearing.

The **2<sup>nd</sup> issue** for determination is whether the transfer was unfair. The court has revisited the record and finds that the claimant has not established the respondent's policies or binding contractual term between the parties or provision of law which was contravened in the process of his deployment from the Main Campus to the Riverbank Campus. Thus, the court finds that the transfer was regular and lawful.

The **3<sup>rd</sup> issue** for determination is whether the parties are entitled to the remedies as prayed for. The court has already found that the termination was not unfair and the transfer was regular and lawful. The claimant's prayers in that respect will therefore fail.

In conclusion judgment is entered for the respondent against the claimant for dismissal of the claimant's suit with costs.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 24<sup>th</sup> April, 2015**.

**BYRAM ONGAYA**

**JUDGE**