



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 19 OF 2014

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS...CLAIMANT

-VERSUS-

NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 8th April, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 01.02.2013 on behalf of its member Nahason Njiraini, the grievant. The claimant prayed for judgment against the respondent for:

1. Reinstatement unconditionally without loss of benefits; **and in alternative**, an order separation commenced on the judgment date; payment of arrears up to judgment date; payment for any due leave; and payment of general damages at 4.5 Million for unlawful loss of employment.
2. Payment of arrears within 30 days from the date of the judgment.
3. Compensation in damages and loss incurred when out of employment.
4. Costs of the suit to the claimant.
5. Any other relief the honourable court may deem fit to address the cause of justice.

The respondent filed the memorandum of response on 16.05.2013 through Ojiambo & Company Advocates. The respondent prayed that the entire suit be dismissed with costs.

The parties to the suit are in collective and recognition agreements. It is not disputed that the grievant is a member of the claimant union. The grievant was employed by the respondent on 1.09.1991 as a subordinate staff and the grievant was promoted to the position of senior subordinate staff.

The respondent wrote to the grievant the letter dated 14.09.2009 alleging misconduct on the part of the grievant. It was alleged that an audit investigation report revealed the loss of Kshs. 1, 106, 590 being revenue collected at the respondent's Embu Branch between 9.02.2009 and 16.02.2009. It was stated that on 17.02.2009, the grievant had failed to bank the collected revenue and on the material day of the loss of the revenue, the grievant was in possession of the safe key and for all purposes the grievant was deemed to have locked the safe before leaving the office. The letter required the grievant to show reason why disciplinary action should not be taken against him. At paragraph 2, that letter had stated, thus **“While performing the duties of a cashier at the branch it is your responsibility to capture and balance revenue collections, and ensure the revenue collections awaiting banking were securely kept in the safe at all times. In the event of failure to bank collections on a particular day, revenue should be banked the following day before noon.”**

The grievant replied to the show-cause letter by his letter dated 23.04.2009. The grievant explained that

he deeply regretted the said loss of revenue but clarified that he was not responsible for the same loss. The grievant stated in his reply that he was a supervisor support staff in the branch and his duties were to clean and to do any other duties allocated by the branch manager. He further stated that he could be called upon to assist the two cashiers Susan Muthike and Jane Wangechi to collect revenues but he had no secret computer password and he was not responsible for balancing the books. He further stated that he was not responsible for banking revenues and the cashiers had the sole safe custody of the safe keys and that the grievant could not access the safe except under supervision. Whenever he was assigned to bank revenues, the grievant stated that he would proceed to the bank and return the banking slips to the person who would have assigned him the duty.

The grievant was interdicted with effect from 29.06.2009. He was summarily dismissed by the letter dated 17.11.2010 on account of misappropriation or embezzlement of Kshs. 1,106,590.00 at the respondent's Embu Branch. The grievant appealed against the dismissal. In the appeal he stated that he had a clean record of service for 17 years and that he served as a support staff and not as a cashier. The appeal was subsequently disallowed.

The **1st issue** for determination is whether the termination was unfair. It was submitted for the claimant that the grievant was employed as a support staff and had no responsibility for the loss of revenue. It was submitted that the respondent's accounting manual in place at the time of the grievant's dismissal provided that it was the responsibility of the area office accountant to have the cash book written up and balanced daily and to verify cash at hand. The manual further provided that cash in hand was to be counted and verified with cash analysis, accounting records, duplicate receipts and unused receipts to be inspected daily. The court finds that the provisions in the manual were not in dispute and the court further finds that the duty to secure revenues and to verify daily revenues was vested in the area accountant and not the grievant who was engaged as a senior support staff at all times.

The court finds that the respondent had no genuine or valid reason to dismiss the grievant. While making that finding, the court holds that an employer cannot validly terminate an employee's services upon the reason of failure to perform technical or professional functions which like in the present case required special or professional or technical training which the employee lacked and for which a properly qualified employee was in place or ought to have been in place. It was submitted for the respondent that the grievant was in charge of the office keys. The court has considered that line of argument and finds that it did not offer any basis of liability on the part of the grievant in the circumstances whereby the details of the records on the revenue that was said to have been lost was at large and the respondent having through clear directions vested upon the area accountant the responsibility of ensuring all revenue collections are banked on daily basis. Thus, the court finds that the revenues ought to have been secured at the bank and not in the office.

Accordingly, the court finds that the termination was unfair under section 43 of the Employment Act, 2007. The claimant had served with a clean record for 17 years and he did not contribute to his termination in any manner. The court awards him 12 months' gross salaries for the unfair termination.

The **2nd issue** for determination is whether the grievant is entitled to reinstatement. The grievant has had a clean record of service but for the circumstances leading to his termination. The respondent has not urged any ground that would make reinstatement of the grievant impossible. In the circumstances, the court finds that the grievant is entitled to be reinstated with effect from 16.11.2009 with full pay of withheld and unpaid salaries and to continue in the respondent's employment as senior support staff until retirement age unless otherwise lawfully terminated from employment.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the grievant 12 months' gross pay for unfair termination.
2. The grievant is reinstated in employment with effect from 16.11.2009 with full pay of withheld and unpaid salaries and allowances, and to continue in the respondent's employment as senior support staff, with entitlement to promotions as necessary, until retirement age unless otherwise lawfully terminated from employment.

3. The respondent to pay the judgment sum by 1.06.2015 in default interest at court rates to be payable from the date of the judgment till full payment.
4. The grievant to report to the respondent's Chief Executive Officer on Monday 13.04.2015 at 9.00am for appropriate deployment.
5. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Wednesday, 8th April, 2015.**

BYRAM ONGAYA

JUDGE