



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 131 OF 2013
JOSEPH NJOROGE THIGA CLAIMANT
VERSUS
INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

Mr Waiganjo for the Claimant

Mr. Ogeto for the Respondent

JUDGMENT

1. The suit was brought vide a Memorandum of Claim dated 29th January 2013 on 31st January 2013 seeking payment of six month's salary in lieu of notice and maximum twelve (12) months compensation for unlawful and unfair termination of employment.

The Claimant also seeks provision of a certificate of service.

2. Particulars of Claim

The Claimant was retained by the Respondent over a period of time until he was confirmed as an employee by a letter dated 6th October 2010 earning a monthly gross salary of Kshs.82,500. Effective date of confirmation was 1st October 2010.

By a letter dated 25th March 2011, the Claimant was appointed Assistant Claims Manager litigation with effect from 1st April 2011.

3. The Respondent by a letter dated 28th September 2011 provided the Claimant with additional terms and conditions of employment which included;

- i. Contributory pension on 10% : 5% ratio for the employer and employee respectively;
- ii. Termination by either party on one month's notice or payment of salary in lieu of notice;
- iii. Other terms to be found in the Human Resource Policy and procedure manual;
- iv. Twenty one (21) days leave among others.

4. By a letter dated 31st January 2012, the Claimant was awarded a salary increment to Kshs.90,750 with effect from January 2012. The Claimant also earned a monthly Airtime allowance of Kshs.5,715.

5. The Claimant was registered with NSSF and NHIF and the Respondent remitted the statutory contributions accordingly.

6. The Claimant states that he performed his work diligently and to the highest standard as recognized by his peers in Employee Appraisal document marked JNT 3 a & b annexed to the Memorandum of Claim in which he was rated in all performance indicators except one at Grade 4 which means 'Exceeds Expectation' and '5' on Conflict Resolution at work place, which is 'Exceptional' score.

7. This notwithstanding, on 29th August 2012, the Head of Human Resource and Administration, M/S Berenice Nasimiyu, wrote the Claimant a Notice of Termination of Employment with immediate effect, upon being paid one month's salary in lieu of notice.

8. This followed a double payment to Ndonge and Associates Advocates allegedly at the instance of the Claimant by signing two cheques in regard of the same payment.

9. The Respondent alleges that upon carrying out investigations the Respondent had arrived at the conclusion that the Claimant was in custody of the two cheques prior to their release to the Advocates for payment and therefore, the Respondent no longer trusted the Claimant.

10. That this conclusion was arrived at upon reviewing testimony of at least three witnesses. The Claimant vehemently denies the allegations.

11. The Claimant had fourteen (14) days to Appeal the decision. The Claimant wrote an explanation of his role in the suspect transaction that had caused double payment.

12. The Claimant blames the Finance manager, M/S Phyllis Makori for causing a replacement cheque to be signed by him before she had stopped payment of the first cheque which she alleged to have been misplaced.

13. The Claimant denies he was in custody of the cheques and had taken the initial cheque to the firm of Advocates.

The Claimant noted that the two accountants Cynthia and Ojwang regretted their conduct in the transaction by processing the third cheque without stopping payment of the lost cheque.

14. The Claimant states that he had at all times served the Respondent faithfully and had received salary increment on 1st October 2010 due to his strong negotiation skills on claim settlements which saved the company in excess of 20 million shillings.

The Claimant prays the Court to uphold his claim for unlawful and unfair termination of employment.

15. It should be noted that prior to the termination of employment, the Claimant had been placed on indefinite suspension pending investigations to answer charges of being involved in issuing instructions which led to overpayment of Kshs.325,000 via a notice to show cause dated 7th June 2012.

He was required to respond in writing to the allegations which he did prior to the termination of his employment by the Respondent.

16. **Statement of Response**

The Respondent filed Memorandum of Response and list of documents in support of its case on 26th March 2013.

In the Memorandum of Response, the Respondent denies the particulars of unlawful and unfair termination set out in the Memorandum of Claim.

17. That the Respondent had overwhelming evidence from Samwel Ojuong, Paul Gichuki and Joseph Mbithuka whose witness statements were admitted by consent of the parties to the effect that the Claimant caused the wrongful double payment to the loss and detriment of the Respondent in the sum of Kshs.325,000. 18. That instead of the agreed payment of quantum of compensation to a client in two instalments of Kshs.325,000 each, three cheques of equal amounts were written and were paid instead.

That the extra cheque No. 002666 was at all material times in the custody of the Claimant.

That the discovery of the extra payment happened during financial conciliation.

19. That the Claimant went out of his way, and beyond his normal course of duty to instruct Cynthia Wanjiku to pay a third cheque a clear indication of interest in the particular claim and this amounted to misconduct on the part of the Claimant especially because he knew the 2nd cheque had been misplaced and he did not know if it had been presented for payment or not.

20. The Respondent concluded that the Claimant deliberately caused the overpayment against the best interest of the Respondent.

The Respondent urges the Court to dismiss the suit with costs.

21. On procedural fairness the Respondent states that the Claimant was subjected to proper due process in that he was given a show cause letter to which he responded to in writing. Was called to a disciplinary meeting on 12th November 2012. That in that meeting the Claimant admitted that there was failure on his part in following up the matter once the file left his hands and was being handled by the claims Accountants Cynthia Wanjiku and Samwel Ojwang.

22. **Determination**

In terms of **Section 43** of the Employment Act, 2007.

“(1) in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45(1)

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

22. **Section 47(5)** on the other hand provides

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrong dismissal shall rest on the employer.”

23. The provisions appear to confuse the issue of burden of proof the way we know it, that is; he who alleges must prove. This is however not the case. The over all burden of establishing that an unfair termination or wrongful dismissal has taken place is on the employee, whereas the employer has the lesser burden of justifying the reason(s) given for the termination or wrongful dismissal.

24. In the present case, going by aspects of the case which are not in dispute from the narrative by the Claimant and that by RW1, RW2 and RW3 it would appear that the Claimant and the three witnesses carry a share of the blame by their own acts of commission and omission.

25. The Respondent has in the Court's view not only provided a reason(s) for the decision to terminate the employment of the Claimant but has also successfully justified the said reason(s).

26. The Respondent genuinely believed that the Claimant played a significant role in causing the overpayment of the insurance claim to the Advocates in the sum of Kshs. 325,000.

27. The Respondent genuinely believed that the over-enthusiasm by the Claimant in following up the payment of the claim is indicative of interest that was adverse to the Respondent.

The Respondent has thus discharged its onus in terms of **Section 43(1) & (2)** as read with **Section 47(5)** of the Employment Act, 2007.

28. It is the Court's finding that the Claimant's termination was in accordance with the terms and conditions of employment between the Claimant and the Respondent contained in the letter dated 28th September 2011. The Claim for six months pay in lieu of notice has no basis.

29. Accordingly, the suit by the Claimant is dismissed with costs to the Respondent.

However, the Respondent is directed to provide the Claimant with a certificate of service within fourteen (14) days from the date of this judgment.

Dated and Delivered at Nairobi this 15th day of May, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE