



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

PETITION NO. 1721 OF 2012

JEFFREY MUTUKU PETITIONER

VERSUS

ATHI RIVER MINING RESPONDENT

Mr. Bosire for Claimant

Mr. Masika for Respondent

JUDGMENT

1. The suit was filed vide Memorandum of Claim on 26th September 2012 seeking compensation for alleged unlawful and unfair termination of employment and payment of terminal benefits set out as follows;

- i. service pay for 12 years worked Kshs.221,530;
- ii. prorate leave days not taken in Kshs.32,000.00;
- iii. salary for days worked in July 2012;
- iv. payment in lieu of one month notice in kshs.32,000 and cost of the suit.

2. The Claims are premised on the following facts;

The Claimant worked for the Respondent as a Human Resource Officer until the 23rd July 2012 when his employment was terminated by a letter dated 23rd July 2012. At the time of dismissal from service the Claimant earned a gross salary of Kshs.31,040.000 as per the payslip for the month of May 2012 submitted in Court.

3. The letter of summary dismissal stated that the dismissal of the Claimant was for involvement in fraudulent activities amounting to Kshs. 22,989.88 uncovered following investigations by the company.

4. The summary dismissal was preceded by a show cause letter dated 20th July, 2012 in which the Claimant was accused of intentionally, causing fraudulent payment of overtime to employees in the cause of his duty as Human Resource Officer.

The Claimant had generated the payments in the payroll and escalated the same for approval and payment.

5. The Claimant was required to show cause within two (2) days why he should not face severe disciplinary action.

6. The Claimant responded to the show cause letter vide a letter dated 20th July 2012 in which the Claimant explained that; the final overtime computed on excel was forwarded to Mr. Josphat Kariuki for checking, advice and approval on 21st June 2012.

Mr. Josphat checked the overtime and replied back with attached comments which was then put on the salary template for June 2012.

The template was approved by the Human Resource Department and forwarded to the Head Office for input.

That the overtime computation was done in consultation with Human Resource Manager and the claimant and the Human Resource manager did not identify an error in the formula used on excel sheet to calculate the overtime.

The error was that the formula picked the hours an employee is supposed to work instead of the actual hours each employee had worked as per the job cards. The Claimant explained that this was not a case of fraud but one of an oversight.

That the employees were still working for the Respondent and the overpayment that resulted from the said error could be reversed in subsequent monthly payments.

7. In conclusion, the Claimant exonerated himself from any intention to defraud the company stating that his head of department Mr. Josphat Kariuki who had forwarded the excel worksheet could also not identify the mistake.

The Claimant added that his job description did not include being in charge of the payroll and was purely doing Human Resource duties. It was indeed Mr. Josphat Kariuki, who gave approval of all payroll data sent to the head office.

8. Respondent was not satisfied with explanation.

9. The Claimant was not called to a disciplinary hearing after submitting the letter of explanation and was summarily dismissed three days later on 23rd July 2012.

10. The Respondent surcharged the Claimant the overpayment arising from the payroll error in the sum of Kshs.22,989.88, instead of deducting the same from subsequent monthly payment of the affected employees who still worked for the Respondent.

11. The Claimant had a written letter of appointment dated 5th August 2010 which entitled the Claimant to thirty (30) calendar days leave for every twelve (12) consecutive months of service as per Clause 8.

12. In terms of Clause 17, titled termination; the Claimant's employment could be terminated by either party upon giving one month's written notice or payment in lieu of notice.

13. The offences for which the termination could take place are listed under Clause 17(a) which included;

Being guilty of any serious misconduct or any serious or persistent breach of any of the conditions of employment and; neglect or failure to carry out duties properly assigned *inter alia*:

14. The letter of appointment does not have provision for summary dismissal that was meted out on the Claimant.

15. The Claimant had previous warning for alleged unauthorized wages adjustment for Artisan casuals

following pronouncement of national minimum wages increase on 1st may 2011. The Claimant was accused of implementing this announcement pre-maturely and without consulting the relevant management or the immediate supervisor, the Human Resource Manager. The Claimant was therefore accused of insubordination and violation of Company Policy. The Claimant was asked to show cause, vide a letter dated 9th June 2012 to which the Claimant responded to by a letter dated 12th June 2012.

16. The Respondent did not find the explanation by the Claimant satisfactory and the Human Resource manager Mr. Josphat M. Kariuki, General Manager Projects, Mr. Baleisha Veera Malal and Mr. Belwinder Singh Head of Maintenance issued the Claimant with a stern warning letter on 20th June 2012.

17. The Claimant on 22nd June 2012, wrote to the Human Resource Manager acknowledging receipt of the stern warning and promising to abide by its contents.

18. On 2nd July 2012, the Claimant received a letter of transfer to the Respondent's Plant in Arthi River in the same capacity of Human Resource Officer with effect from 11th July 2012.

19. Barely twenty (20) days later, the Claimant was issued with the show cause letter dated 20th July 2012, upon which the Claimant was summarily dismissed on 23rd July 2012.

20. **Malice**

- i. The Claimant avers in his Memorandum of Claim that the summary dismissal was based on malice in;
- ii. Using unfair reasons to dismiss him.
- iii. Transferring him and subsequently dismissing the Claimant while in a new station before settling down.
- iv. Issuing five (5) letters to the Claimant within a span of one month with intent to find a reason to dismiss him.
- v. Maliciously accusing the Claimant for fraud for increasing wages of the casuals and overtime computation ignoring the fact that he did it after proper and documented consultation.
- vi. Portraying personal vendetta and intentionally harassing the Claimant by one Mr. Josphat Kariuki, the Human Resource Manager with intent to forcefully eject the Claimant from employment.

21. The Claimant further averred that he was not afforded a fair opportunity to be heard as required by law.

The Claimant prays for the reliefs sought with costs.

22. **Response**

The Respondent in the written submission filed on 19th November 2014, maintains that the summary dismissal of the Claimant was for a fair reason and was done in terms of a fair procedure.

The Respondent states that the Claimant made an unauthorized wages adjustment for Artisan casuals in the Respondent's company without approval from the relevant management and the immediate Human Resource Manager. The Respondent warned the Claimant on 20th June 2012 as a result.

23. The Claimant accepted the warning and did not appeal the same.

24. The second incident was more serious than the first one in that the Respondent lost money as a result of generation of false payroll by the Claimant. The Claimant admits he prepared the impugned payroll in respect of overtime worked without checking their cards where overtime hours were recorded. This was serious negligence on the Claimant's part, the Respondent submitted.

25. The Respondent states that it gave the Claimant opportunity to explain himself orally in the presence of Dominic Ndulo and Robert Makau at Kaloleni Plant.

The explanation by the Claimant was not satisfactory and he was given a notice to show cause why he should not face severe disciplinary action dated 20th July 2012. The Claimant could not explain satisfactorily why he granted the salary increase unlawfully, hence the service of a stern warning. Immediately thereafter, the Claimant engaged in further misconduct hence the dismissal.

26. Mr. Peter Ndaya Ihunga (RWI) the Human Resource Manager for the Respondent testified. He told the Court that he worked with the claimant at Kaloleni Plant in 2004. He told the Court that the Respondent had not approved the overtime for casuals so Respondent concluded it was fraud.

27. RWI told the Court that the Claimant has not collected his terminal dues to date. RW1 added that the Claimant had worked for the respondent for twelve (12) years.

28. RWI further stated that, though no meeting took place before the summary dismissal, the Managing Director heard the Claimant in his office. RW1 could not recall when this took place.

RW1 said though the Claimant explained the error in computing the Respondent lost Kshs.22,989.00 as a result of the action by the Claimant and the sum was recovered from his salary.

The Claimant appealed to the Managing Director but the Appeal was not successful.

29. **Determination**

(i) Was the Claimant summarily dismissed from employment for a valid reason and in terms of a fair procedure?

(ii) What remedy, if at all is warranted by the Claimant.

30. **Issue I**

The Claimant had served the Respondent diligently for a period of twelve (12) years. The Claimant's problems started in June 2012 when he caused the general wage increase announced by the President on 1st May 2012 to be implemented in respect of unionsable employees. The Claimant has explained that he had followed all the internal procedures in implementing the payment of the wage increase. That the payment required approval of his supervisors to be implemented and therefore it is not possible that he could have processed the payment without their involvement and necessary approvals.

31. The Claimant traces this false accusations to malicious conduct of Mr. Josphat Kariuki who had deliberately embarked on harassing him for unexplained reasons.

32. An email dated 21st June 2012 and sent at 2:02 a.m. to the Claimant and a Colleague named Milton by Mr. Josphat M. Kariuki, the Human Resource Manager advised the two as follows;

1. only unionsable employees will qualify for overtime at the rates determined by the Labour laws upon approval from HOD;
2. the terms of overtime payment for unionsable employees are set out in the CBA;
3. non unionsable workers will not get overtime.

33. The Claimant stated clearly, he used this authority to process the salary increment for unionsable employees.

The Claimant also processed overtime payment for employees referred to as casuals and was immediately dismissed. The Claimant states that no payment could have been made without the authority of Human Resource Manager and the Accounts Department.

34. That he was maliciously given five warning letters within a span of one month and then dismissed without following due process.

35. The Respondent made a bare denial of these allegations by the Claimant. The Court is however satisfied that the Claimant had followed due process in generating the payroll for the casuals. That authority to pay was granted by his supervisors. The Respondent has failed to show that it had a valid reason to summarily dismiss the Claimant in terms of **Section 43** as read with **Section 47(5)** of the Employment Act.

36. The Claimant has on a balance of probabilities therefore proved that the summary dismissal was wrongful and unfair. RW1 admitted that no disciplinary hearing took place before the summary dismissal.

37. The Court therefore finds that the summary dismissal contravened **Section 45(1) & (2)** of the Act and the Claimant is entitled to compensation in terms of **Section 49(1) and (4)** of the Employment Act.

38. The Claimant had served the Respondent for twelve (12) years until when he was unlawfully and maliciously summarily dismissed. The particulars of malice against the Claimant by one Mr. Josphat Karanja, the Human Resource Manager have been established.

39. The Claimant did not receive any terminal benefits upon dismissal. He was not paid his salary for days worked in the month of July 2012 nor was he paid in lieu of leave days not taken. The Claimant did not also receive a certificate of service.

40. The Claimant told the Court, which fact was not refuted by RW1 that the Respondent normally paid service gratuity calculated at fifteen (15) days salary for each completed year of service.

This was inspite the fact that the employees were registered with NSSF and NHIF and the contributions were made.

41. Accordingly, the Court finds for the Claimant and awards him as follows;

- i. Kshs.32,000.00 being payment in lieu of notice;
- ii. Kshs.32,000.00 in lieu of one month leave;
- iii. Kshs.24,533.00 being salary for days worked in the months of July 2012;
- iv. Kshs.192,000.00 being gratuity calculated at fifteen (15) days salary for each completed year of service for twelve (12) years;

Total award: Kshs.280,000.00

- v. certificate of service within thirty (30) days from date of judgment.
- vi. costs of the suit;
- vii. interest at Court rates from date of judgment till payment in full.

Dated and Delivered at Nairobi this 19th day of June, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE