



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1929 OF 2012

JOSEPHAT GITHINGIRI GITHUI.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant in this suit averred that he was employed by the respondent as shop Assistant from 1997 and later as a cashier. His initial salary was Kshs.23,311/= which was later enhanced to Kshs.47,621/=.
2. The claimant further averred that on or about the 11th April, 2010 while at work he fell down the stairs and injured his back. He sought treatment on 14th April, 2010 but when he resumed work on 15th April, 2010 his Manager refused him work saying he was not ready to work with him. He was later issued with three letters. The first was transferring him from Respondent's Junction Branch to Head Office, the second was a demotion letter and the last was warning letter which was described as second warning.
3. The claimant averred that he reported to his new station and sought audience with the Respondent's director one Vimal Shah to whom he explained his differences with his manager and the Director ordered that he be reinstated and that he be deployed to Westgate Branch. According to him he reported to the Westgate Branch and worked as a till supervisor however at the end of the month his pay was as per the demotion as shop assistant and his place of work indicated as the Head Office.
4. He complained that later on he was summoned by the Personnel Manager who informed him of allegations of his interference with the system leading to loss of credit notes worth Kshs.10,300. It was alleged that the credit notes were cashed at his till using his password. He was subsequently on 14th June, 2010 dismissed summarily for gross misconduct involving fraud.
5. According to claimant, the dismissal was done without a hearing contrary to section 41(1) and (2) of the Employment Act and without following due and fair procedure. He further complained that upon dismissal he was never paid his terminal dues, salary in lieu of notice, salary

for the month of June 2010 and salary increment from May, 2011.

6. Consequently, the claimant claims from the respondent:-

- (a) a declaration that the termination was wrongful, null and void.
- (b) Damages for unfair termination equivalent to 12 months' pay.
- (c) Salary for the month of June, 2010.
- (d) Unpaid salary increment
- (e) Three months' salary in lieu of notice.

7. The respondent on its part denied it wrongfully terminated the claimants' services stating that the termination was necessitated by the claimant's involvement in fraud and gross negligence which led to substantial loss of money. The respondent further avers that the contract of employment with the claimant permitted the termination of his services summarily on account of gross misconduct. According to the respondent, the termination of the claimant services cannot therefore be said to be unlawful or unfair since the claimant was well aware of the terms of employment contained in his letter of appointment which he signed.

8. The respondent further averred that the claimant refused to sign clearance form in order for him to be paid his notice money as well as being issued with certificate of service.

9. At the hearing the claimant reiterated most of the averments in his statement of claim and testified further that he was demoted because between October, 2009 and March, 2011 he was absent from work twice every month. The reason for his absence according to him was because his wife was unwell. It was his evidence that he sought leave to attend to his sick wife.

10. Regarding promotion he stated that the Personnel Manager was asked to effect his promotion by letter.

11. In cross-examination he admitted not pleading the issue of his wife's illness. He further conceded that he was warned on absenteeism in November, 2009. He denied receiving any 1st warning letter. He conceded that he was demoted on account of absenteeism.

12. Regarding credit note he stated that these are given when a customer wanted to exchange an item. He further stated that the credit note related to one item only.

13. When shown annexure NH2 he stated that it was a cash sale receipt and that the customer in question paid using credit note and that he was the one who served the customer. He denied being given a chance to defend himself.

14. The respondent called two witnesses. The first witness Mr. Kiragu Njiri who said he was a manager at the junction where the claimant worked, he denied any grudge with the claimant.

15. Regarding credit note, he stated that these were issued on specific items. It was his evidence that certain customers were bringing empty water bottles and were issued with credit notes by the claimant.

16. Concerning NH2, it was his evidence that the credit note was for empty water bottle and the claimant was the one who served the customer concerned. It was his evidence that the claimant was transferred because of absenteeism and also to allow for investigation into the credit note issue.

17. In cross-examination he stated that there was a circular that no credit note could be exchanged for another item.

18. The respondent's 2nd witness Mr. Odero who stated he was the respondent's Human Resource Officer informed the Court that he handled the claimant's case concerning his terminal dues and that he was one who filed the clearance form. According to him the claimant refused to collect his letter hence they were posted to his address.

19. Concerning promotion, he denied there was any such promotion and that promotions were only done after job evaluation and interview.

20. Counsel for the respondent in his closing submissions reiterated that section 43(2) of the Employment act states for termination to occur, the reasons for termination of the contract only need to be genuinely believed to exist. According to counsel this does not call on the employer to adduce conclusive proofs beyond a shadow of doubt.

21. This Court has severally stated that employment contracts are not eternal or permanent. They are by their very nature contractual and are terminable by honour or breach. Where termination is by breach, the Employment Act and law generally provides for remedies that a party affected may be entitled to further, one of the essential elements of a contract of employment is trust. The employee trusts that in diligently and competently performing his work, the employer shall commensurate to the work done compensate the employee the contracted amount and at the interval agreed. On the other hand the employer trusts that the employee shall practice honesty and commitment to serve the employer. Never putting himself in a position of conflict of interest with the employer and safeguarding the employer's property and interest.

22. Having reviewed the pleadings in this matter together with the supporting documents. Further having listened to testimony by witnesses both for the claimant and respondent, there seem to me that the respondent had a justifiable cause to terminate the claimant's services. The claimant himself admitted that the credit notes exhibited as annexure NH2 were actually processed by him. He further did not dispute that credit note only applied for the items they were meant to be exchanged for. There were allegations that as a result of the claimant's conduct, the respondent lost some Kshs.10,300/=. This may be not have been sufficiently proved but the admission by the claimant that he processed the impugned credit notes is a concession on his part that he acted in breach of trust bestowed upon him by the employer. To this extent the Court is satisfied that the respondent was justified in terminating the claimant's services.

23. However dismissal from employment has two stages; first is the reason for termination and second the procedure adopted in implementing the reasons for termination. Such that an employer may have justifiable reasons for terminating an employment contract but still found liable to such employee in damages if an unfair procedure is followed in effecting the termination.

24. Nowhere in memorandum of response, documents in support thereof or oral evidence has it been shown that prior to dismissal, the claimant was subject to a disciplinary hearing or a semblance thereof.

25. Section 41(2) of the Employment Act requires that before an employer terminates the employment of an employee or summarily dismissing such employee, he or she shall be accorded a chance to make representations on the grounds of misconduct for which dismissal was being considered.

26. The claimant in this matter was transferred to allow investigation on the credit note fraud. He was subsequently issued with a dismissal letter without being called to show cause on the findings of the investigations if any, that implicated him in the credit note fraud. To this extent the Court finds that the claimant's services were unfairly terminated and awards him 6 months' salary as compensation for unfair dismissal. This payment shall be subject to any liabilities owed

to the respondent on account of loans and salary advances which may have been drawn by the claimant while in the employment of the respondent.

27. It is so ordered.

Dated at Nairobi this 19th day of June 2015

Abuodha J. N.

Judge

Delivered this 19th day of June 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge