



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2040 OF 2014**

**HASSAN MUSTAPHA BACKHIT.....CLAIMANT**

**VERSUS**

**HIPPORA BUSINESS SOLUTIONS (EA) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 17<sup>th</sup> November 2014 against the Respondent seeking relief for the unlawful and unfair termination of his services. He averred that he was employed by the Respondent on 29<sup>th</sup> January 2012 as a General Reliever in all Tuskys, Eastmatt branches and any other branch store assigned at a consolidated monthly salary of Kshs. 20,000/- plus a travel allowance of Kshs. 3,000/-. He was later employed as a Double Checker on 1<sup>st</sup> January 2014 at a gross salary of 21,000/-. He averred that on 30<sup>th</sup> September 2014 while working at Tuskys Greenspan he was wrongfully and unlawfully arrested and taken to Buruburu Police Station cells and confined there for 24 hours for the offence of stealing by servant. He averred that he was released on cash bail of Kshs. 10,000/- and on 2<sup>nd</sup> October 2014 the Human Resource Manager of the Respondent Martha Kiere wrote a show cause letter to the Claimant. In the letter it was alleged that the Claimant had with the clients staff and suppliers colluded in fraudulent activities and failed to follow laid down procedures. He was to reply by 3<sup>rd</sup> October 2014 and appear before a disciplinary committee the same day. He averred that the Human Resource Manager did not convene the disciplinary committee on 3<sup>rd</sup> October and a suspension letter was issued instead and the suspension was extended on 9<sup>th</sup> October 2014. The Claimant was to report to the office on 16<sup>th</sup> October 2014. He averred that on 16<sup>th</sup> October 2014 he was unlawfully summarily dismissed. He thus sought one month's notice Kshs. 21,000/-, pay for 16 days worked in October 2014 12,923/-, leave for one year Kshs. 21,000/-, severance pay Kshs. 21,000/-, breach of contract and pay for balance of contract 4 months Kshs. 84,000/-, refund of uniform deduction 2,000/-, public holidays worked Kshs. 35,538/- Sundays worked Kshs. 155,077/- refund for deduction of training bond Kshs. 18,000/- 12 months compensation Kshs. 252,000/- costs of the suit 40,000/-, punitive damages for wrongful confinement Kshs. 200,000/- and a certificate of service.
2. The Respondent filed a Statement of Reply on 2<sup>nd</sup> March 2015. In the reply the Respondent averred that the Claimant was legally arrested for engaging in fraudulent activities but the Respondent opted to handle the matter internally. The Respondent averred that the Claimant was informed of an internal investigation. In response to the Claimant's averment that the disciplinary meeting was not held, the Respondent averred that the letter clearly indicated that another meeting was set for further questioning and did not indicate anywhere that the Human Resource Manager

Martha Kiere failed to convene the committee. The Respondent averred that the Claimant's services were terminated lawfully due to the Claimant's failure to perform his duty despite several warnings from the Respondent and upon investigation conducted by the Respondent. The Respondent averred that the Claimant admitted the misconduct during the disciplinary meetings and was lawfully and legally dismissed as per company rules and regulations. The Respondent averred that it conducted investigations into the involvement of the Claimant in fraudulent activities where it was found that a Brookside invoice number 193447 worth Kshs. 101,808/- dated 16<sup>th</sup> September 2014 had been raised to Tuskys, which invoice had been stamped with both Hipora and Tuskys rubber stamps, an indication that the goods had been received by both the client's clerk and the Respondent's Double Checker and an ETR receipt issued for Kshs. 101,808/- dated 12<sup>th</sup> September 2014 attached to the invoice and an LPO from Tuskys dated 16<sup>th</sup> September 2014 for Kshs. 101,003/- had been raised which documents did not have an omega stamp and were not registered in Tuskys register or the Respondent's register. The Respondent averred that the Claimant was suspended pending investigations and the investigations concluded the Claimant was involved in fraudulent activities. The Claimant was given a chance to defend himself at disciplinary meeting and he admitted culpability. The Respondent thus sought the dismissal of the Claimant's case with costs.

3. The Claimant testified on 10<sup>th</sup> March 2015 and stated that he was employed on 25<sup>th</sup> January 2012 and begun working on 29<sup>th</sup> January 2012 in all Tuskys and Eastmatt branches as a reliever. He received a gross salary of 20,000/- plus travel allowance of 3,000/- and on promotion to Checker his salary was increased to 21,000/-. He testified that on 30<sup>th</sup> September 2014 while at the Tuskys Greenspan Mall he was wrongly arrested while at work and taken to Buruburu Police Station. He was charged with stealing by servant and no one from the Respondent came for him. He was not arraigned in court and he did not see his accuser. He was released on cash bail of Kshs. 10,000/- and the company was not involved in the release on cash bail. In October 2014 the HR Manager asked him to show cause and exonerate himself from the accusations. He testified that the HR Manager Martha Kiere did not initiate the disciplinary meeting on 3<sup>rd</sup> October 2014 and he was given a suspension letter and urged not to speak to any of the Respondent's staff. On 6<sup>th</sup> October he received another letter extending the suspension as investigations were not complete. He went back on 16<sup>th</sup> October as advised and was given a summary dismissal letter. The dismissal was after a disciplinary meeting in his absence yet he was the principal participant. He thus sought award of the reliefs he had sought in his claim. He testified that to date there was no proof of wrongdoing.
4. In cross-examination by Miss Kingoi for the Respondent, the Claimant testified that he was employed as a double checker to check the supplies brought by a supplier. He testified that he was the only one from the Respondent who was arrested as the other person arrested was a staff of Tuskys. He testified that in receiving goods there is usually an LPO and an invoice and that in the case, there was no LPO but an invoice was attached. He testified that the invoice is presented to the receiving clerk and that he uses the LPO to verify and check if what is on invoice is what has been delivered. He denied that the disciplinary meeting was held and asked how he had attended without the attendance of his representative. He agreed that there was provision in his contract for summary dismissal and conceded that the company could dismiss him if he committed an offence. He sought pay for 16 days in October 2014 and the leave for 2011 as he had started in February 2011 to 1<sup>st</sup> February 2012. He stated that cash bail is refunded by police.
5. The Respondent called Martha Ituha Kiere the HR Manager of the Respondent. She testified that the Claimant was at the time employed as a Double Checker and was to countercheck the received goods and confirm the quantity of goods received and invoices. She stated that the Claimant was not wrongfully dismissed as he had colluded with receiving clerk who was an employee of Tuskys and Brookside. She testified that there was an invoice stamped and signed. This was fraud as the goods were not received. The Claimant had signed on the Respondent's side. His immediate supervisor raised the issue and 3 individuals were arrested. After the arrest he was released on cash bail and the Respondent took administrative action as the client had threatened to terminate

the Respondent's contract with them. The Claimant was suspended and investigations undertaken. After investigations he was called for disciplinary meeting and notice to show cause was given. She testified that the suspension was extended and the committee sat. The committee realised that there was further investigation to be done. She referred to the minutes and confirmed the Claimant attended and he was given a chance to defend himself. She testified previous warning letters had been given to him touching on the same mistake of stamping on invoices without ascertaining the goods. The investigations revealed he was involved in the fraud and his action amounted to gross misconduct. The Claimant was summarily dismissed. She testified that he was not entitled to the reliefs sought. She testified that he was paid for the 16 days worked in October and was entitled to leave for one year but not to severance pay as he was an NSSF contributor. On the uniform refund she stated that he should have cleared and returned the uniform to get the refund. She testified there were public holidays worked for which the Respondent was to pay and these could be computed and paid. She stated he was not entitled to training bond refund.

6. In cross exam by the Claimant she testified that the Claimant was on duty at Greenspan and the other checker was Adrienne. Adrienne was not arrested but her contract was not renewed. She stated that the stamps were provided for checkers. The letter dated 2<sup>nd</sup> October gave the Claimant time to respond by 3<sup>rd</sup> October which was more than 24 hours. She testified that the Respondent did not offend Article 51 of the Constitution. She stated that the Claimant was to appear with someone else if he so wished. Investigations were carried out and there was confirmation on who was involved. Charles was questioned and the back office person was arrested alongside the Claimant. Statements were recorded and Tuskys took action on their employees and the Respondent took action on its employees. She testified that the Claimant was put through a polygraph test. She conceded that the report was not filed but the emails to that effect are filed. She testified that the result of the polygraph test was shown to the Claimant. She stated the report was not filed as the laws of Kenya do not recognize a polygraph test. She stated that the uniform refund will be made once uniform is returned. She testified that the fraud occurred at Tuskys and Tuskys withdrew the case. She conceded the Claimant did not go on leave for one year and the Claimant was entitled to leave dues. She stated there was no malicious arrest as there was fraud and the Claimant was involved. She testified that there was no LPO used and the Claimant had signed commitment letters and was issued with a warning for failing to follow procedures. She testified the Double Checker is responsible for the stamp.
7. In re-examination she testified that the warning letter of 28<sup>th</sup> May was for careless discharge of duties while the one for 11<sup>th</sup> March 2013 was for breach of company procedures. She testified that the Claimant was arrested because he is the one who handled the invoice on that day. The invoice had discrepancy as the goods were not received.
8. The parties filed written submissions, the Claimant filed on 30<sup>th</sup> April 2015 while the Respondent filed on 18<sup>th</sup> May 2015. The Claimant submitted that the dismissal was on allegation that the Claimant did not follow laid down procedures leading to loss by client. The Claimant submitted that there was no demonstration of what procedures he failed to follow. He also submitted that no witness from the client was called to give evidence of the Claimant's wrongdoing. He submitted that the disciplinary process followed did not give him proper time to prepare for his defence since he received the letter on 2<sup>nd</sup> October 2014 and was to attend on 3<sup>rd</sup> October 2014. He submitted that he was not allowed to bring a person of his choice and no fellow worker was present from the attendance records. He submitted that there were two double checkers and the other double checker Adrienne was not arrested nor did she give a statement accusing the Claimant. He testified that he never gave any confession and no document was tabled to implicate him in the fraud. He claimed damages for malicious arrest because there was no complainant and the arrest was made with malice and ill intent due to pressure from the client. The Claimant submitted that the onus to keep records was that of the Respondent and he was entitled to pay for working on public holidays and Sundays at twice the daily rate. He thus sought entry of judgment for him.
9. The Respondent submitted that the Claimant was guilty of gross misconduct and that the dismissal

was lawful. The Respondent submitted that where an employee such as the Claimant is dismissed summarily for gross misconduct then no notice is payable. The Respondent did not dispute leave and submitted that there was no claim for unpaid wages as these were paid. The Respondent submitted that the Claimant signed a training bond and the sums due on it were not refundable to the Claimant. The Respondent admitted that the Claimant is entitled to some payment on Sunday and public holiday pay. The Respondent submitted that the Claimant was not wrongfully terminated and thus was not entitled to 12 months compensation. The Respondent submitted that the Claimant is entitled to refund for the uniform once he clears with the Respondent. The Respondent submitted that in line with Section 44(3) and 44(4)(c) the Respondent could dismiss an employee summarily for breach of obligations and thus the dismissal of the Claimant was lawful and justified within the parameters of law.

10. The Claimant was dismissed following an incident involving a fraudulent invoicing of Brookside products. The Claimant denied involvement and the Respondent asserted that its investigations revealed the Claimant was involved. He had previously been warned and given a commitment letter in which he promised to follow procedures. The Claimant was incarcerated at Buruburu police station for a night and was released on cash bail which he paid. He sought damages for malicious arrest and also compensation for unlawful dismissal.

11. Section 44(4)(g) of the Employment Act provides as follows:-

44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

12. The law is clear. If the employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property, that amounts to gross misconduct and would justify summary dismissal for lawful cause. Simply put, if there is sufficient and reasonable basis to hold there is an infringement of Section 44(4)(g) then the employee can be dismissed and the dismissal will be for lawful cause. In this case, there was an invoice which was in respect of Brookside products and the invoice was fraudulent. The Claimant was the person who was identified as the person involved on the Respondent's side. The Respondent has indicated there was a polygraph test taken and the results were not in favour of the Claimant. This would be sufficient grounds for dismissal. The Claimant was thus dismissed for just cause. The arrest was not malicious as the complaint was by the client Tuskys. The fact that the Claimant did not come face to face with the accusers or the fact that no arraignment to face criminal charges does not make the arrest by Police malicious. The Claimant paid cash bail and secured his freedom. That cannot be placed at the Respondent's door. The Claimant was however entitled to procedural fairness in his termination in terms of Section 41 of the Employment Act. Section 41 provides as follows:-

41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (underline mine)

13. The Claimant was entitled to have the safeguards under the statute. He was invited to a disciplinary meeting and a decision was taken subsequently in spite of the meeting being adjourned. This was not in keeping with expectations by the Claimant. In the premises I would hold that though he was to be dismissed, the process undertaken was flawed. For this the Court awards him 2 months compensation. The Claimant is entitled to one month for leave, he was paid for days worked and thus no claim lies on the unpaid days. His contract was abruptly terminated but for good cause and he is not entitled to the payment for the balance of his contract. He worked for some public holidays and Sundays. The figures for this are not worked out and the parties will have to sit and reconcile the same and revert to Court with a figure in the next three weeks. The Claimant is entitled to refund on uniform if he clears with the Respondent.

14. In the final analysis the Claimant is entitled to

- a. Pay for one month in lieu of leave not taken Kshs. 21,000/-
- b. Pay for Sundays and public holidays worked. Figure to be computed within 3 weeks.
- c. 2 months compensation Kshs. 42,000/-
- d. Kshs. 10,000/- as costs and disbursements for the case.
- e. Certificate of Service in terms of Section 51 of the Employment Act.

Orders accordingly.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of June 2015**

**Nzioki wa Makau**

**JUDGE**