



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 263 OF 2013
MARGARET AUMA INGWE.....CLAIMANT
VS
KENYA POWER AND LIGHTING CO. LTD.....RESPONDENT
AWARD

Introduction

1. The Claimant's claim brought by way of Memorandum of Claim dated 26th February 2013 and filed in Court on even date seeks compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Memorandum of Defence and Counterclaim on 19th April 2013 to which the Claimant responded on 3rd July 2013.

2. The Claimant testified on her own behalf and the Respondent called its Chief Security Officer, Patrik Njue; Manager-Budgeting and Financial Planning, Mohamed Somo; and Chief Human Resources and Administration Officer, Elizabeth Kalei.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Clerk Grade V effective 28th July 1986. She rose through the ranks to the position of Cashier Grade IIC as at the time of leaving employment. Her last monthly salary stood at Kshs.89,768.00. The Claimant served in various stations with her final station being Electricity House in Nairobi.

4. The Claimant states that she had an excellent employment record spanning over 25 years.

5. On 27th April 2012, the Claimant was suspended on allegations of theft of Kshs.650,000.00 and on 29th April 2012 she was arrested on suspicion of having participated in the theft of Kshs.642,618.00 belonging to the Respondent. She was subsequently charged in the Chief Magistrate's Court at Makadara in Criminal Case No 2281 of 2012 in which she was acquitted on 26th November 2012 under Section 202 of the Criminal Procedure Code.

6. The Claimant's suspension was lifted on 15th May 2012 and on 21st June 2012, she was summarily dismissed. She states that her dismissal was without any valid reason and that she was not paid her terminal benefits. Her appeal against the dismissal was declined.

7. The Claimant was a member of the Kenya Electrical Trade and Allied Workers Union (KETAWU)

which had negotiated a Collective Bargaining Agreement (CBA) with the Respondent. It is the Claimant's case that in terminating her employment, the Respondent violated its own Regulations and Procedures as well as the CBA and the Employment Act, 2007.

8. The Claimant's claim is as follows:

- a. Unconditional reinstatement without loss of benefits and payment of salary arrears from July 2012 until the date of the Award at Kshs.89,768 per month
- b. A declaration that her termination was wrongful, unlawful and unfair
- c. 4 months' salary in lieu of notice.....Kshs.359,076.00
- d. Unpaid salary in June 2012.....Kshs.23,939.13
- e. Unpaid salary from July 2012-November 2012.....Kshs.448,845.00
- f. Salary from December 2012-December 2017.....Kshs.16,248,189.00
- g. Claimant's amount withheld by the Respondent.....Kshs.7,382.00
- h. Maximum compensation (12) months.....Kshs.1,077,228.00
- i. Costs plus interest

The Respondent's Case

9. In its Memorandum of Defence and Counterclaim filed in Court on 19th April 2013, the Respondent admits having employed the Claimant on 1st August 1986 in the position of Clerk Grade V at a monthly salary of Kshs.1,350.00. At the time her employment was terminated, the Claimant worked as a Cashier IIC in the Finance Department, Pay Office at Electricity House, Nairobi.

10. On 26th April 2012, the Claimant reported the loss of Kshs.650,000.00 to her immediate supervisor. She told her supervisor that an unidentified man had visited her at Electricity House Pay Office on Wednesday, 25th April 2012 and demanded Kshs.1,000,000.00. She reported that the unidentified man who appeared to be armed had threatened her.

11. The Claimant then transferred the sum of Kshs.650,000.00 from the cash box to her locker. At around 7.00 pm as she was leaving the office, the Claimant met the unidentified man who was in the company of two other men. She handed the sum of Kshs.650,000.00 to the unidentified man. She states that she was forced into a car by the unidentified man and his colleagues and was later dropped at Kencom House at 1.00 am.

12. The Respondent carried out investigations into the incident and found that:

- a. The Claimant gave out company money to unknown persons without authority;
- b. The Claimant kept the Respondent's money in her drawer without authority and contrary to the rules of handling money;
- c. The Claimant failed to report the threat to anybody during the day and at night when she went back to collect the money;
- d. The Claimant decided to handle the whole situation in her own way without involving the Respondent to whom she owed a duty of fidelity and trust;

e. The Claimant ignored, refused and/or neglected to adhere to the laid down procedures of the Company which she was privy to.

13. The Claimant was suspended on 27th April 2012 to allow for further investigations into the loss of company money. The Respondent's Chief Security Officer submitted a report on 2nd May 2012 and on 15th May 2012, the Claimant was notified that her suspension would be lifted with effect from 21st May 2012.

14. On 18th May 2012, the Claimant was issued with a show cause letter by which she was required to make her representations within 72 hours. The Claimant responded to the show cause letter on 21st May 2012 stating that the loss of money was occasioned by fear of what would have happened to her and her family had she failed to comply with the demands of the unidentified men. On 28th May 2012, the Claimant's supervisor recommended stern disciplinary action against the Claimant.

15. By letter dated 31st May 2012, the Claimant was invited to a disciplinary hearing to be held on 5th June 2012. The Claimant was notified of her right to be accompanied by a union official or fellow employee and the disciplinary hearing took place as scheduled.

16. The Claimant admitted that she had made a mistake stating that she was willing to pay the money back. She was however not sure of how she would react if faced with a similar situation. A further hearing was conducted on 7th June 2012 during which the minutes of 5th June 2012 were signed. Upon recommendation by the disciplinary panel, the Claimant was summarily dismissed by letter dated 21st June 2012.

17. By way of counterclaim, the Respondent claims the sum of Kshs.642,618.00 being the amount of money lost by the Claimant.

Findings and Determination

18. The following are the issues for determination before the Court:

- a. Whether the Respondent had a valid reason for summarily dismissing the Claimant;
- b. Whether in effecting the dismissal the Respondent observed due procedure;
- c. Whether the Respondent has made out a proper counterclaim against the Claimant.

Reason for the Dismissal

19. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. This requirement applies in normal termination as well as in cases of summary dismissal.

20. The Claimant's letter of summary dismissal dated 21st June 2012 states as follows:

“Further to our explanation letter dated 18th May 2012, your response dated 21st May 2012 and the disciplinary hearing on 7th June 2012. This is to advise you that your explanation has not been accepted on the following grounds:-

- 1. For loss of cash amounting to Kshs.642,618/= in Electricity House, Nairobi,*
- 2. Failing to report the incident immediately and un-procedurally giving Company money without authority to unidentified persons occasioning the loss to the Company.*

Note that the above actions amount to fraud and negligence of duty. This is therefore to advise you that you have been dismissed from the services of the Company with effect from

22nd June 2012 under Clause 11 of your Employment Agreement.

You are entitled to your salary upto and including 22nd June 2012 your last working day. You are also entitled to payment in lieu of 66 days accumulated leave.

Yours faithfully,

for: THE KENYA POWER & LIGHTING CO. LTD.

L.YEGO

CHIEF MANAGER, FINANCE”

21. From this letter and the preceding communication between the Respondent and the Claimant, the reason for the Claimant's dismissal was the loss of Kshs.642,618/= entrusted to her by virtue of her employment with the Respondent. From the evidence placed before the Court, it was common cause that the Claimant did indeed hand over these funds to some unknown persons. The point of departure was whether it was lawful and reasonable for her to do so.

22. In **Rashid Jeneby v Prime Bank Limited [2015] eKLR** this Court held that the burden placed on an employer under Section 43 of the Employment Act is to demonstrate, on a balance of probability, the existence of a valid reason that would move a reasonable employer to terminate employment. In considering a claim for unlawful and unfair termination therefore, the Court does not ask itself what action it would have taken if it had been in the position of the employer; it asks whether in the circumstances of the case before it, the employer acted lawfully and reasonably.

23. The Claimant justified her action of handing over the Respondent's money on the ground that she had been threatened. She added that her action was informed by a past incident in which she had been assaulted by robbers while on duty at Eastleigh. The Court was however unable to understand why the Claimant did not report to anyone, including her husband who was also an employee of the Respondent, when she was first threatened by the unidentified man at around 4.00 pm.

24. The Respondent's first witness, Patrick Njue who was the Chief Security Officer gave a detailed account of the security arrangements at Electricity House in general and the Pay Office where the Claimant worked in particular. From this account, the Court formed the opinion that the Claimant's work station was well secured and there would have been immediate assistance at hand.

25. Further, the Respondent's second witness, Mohamed Somo gave the chain of command from himself as the Manager, Budgeting and Financial Planning through the Cost Accountant and the Paymaster to the Claimant. There was no credible reason why the Claimant did not report the threat immediately to any of her supervisors in the chain of command.

26. In the final submissions filed on behalf of the Claimant, it was submitted that because the Claimant was acquitted of the criminal charges instituted on account of the loss, then she could not possibly be culpable under the internal disciplinary process. There was also the suggestion that where an employee facing internal disciplinary proceedings is charged with a criminal offence, the internal disciplinary proceedings should be held in abeyance until conclusion of the criminal case.

27. I hold a divergent opinion on this matter. First, as held by **Majanja J in Republic v Public Service Commission of Kenya Ex Parte James Nene Gachoka [2013] eKLR** and by the Court of Appeal in **Kibe v Attorney General (Civil Appeal No 164 of 2000)** an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer.

28. Second, a criminal trial and internal disciplinary proceedings at the work place are two distinct processes with different procedural and standard of proof requirements. It follows therefore that while an employer may rely on the outcome of a criminal trial to make its decision on an employee, going against

the outcome does not by itself render the employer's decision wrongful or unfair.

29. Third, an employer cannot rely on the pendency of a criminal trial to hold an employee under discipline *ad infinitum*. An employer who commences internal disciplinary proceedings against an employee must have the ammunition to push the process to its logical conclusion and this responsibility cannot be abdicated to the investigator or the prosecutor in a criminal case facing the employee.

30. It was therefore well within the Respondent's right in this case to pursue internal disciplinary proceedings against the Claimant irrespective of the status or outcome of the criminal charges against her.

31. For the foregoing reasons, the Court finds that the Respondent had a valid reason for terminating the Claimant's employment and the termination was therefore substantively fair.

Termination Procedure

32. I will now examine the procedure adopted by the Respondent in effecting the Claimant's dismissal. The charge against the Claimant falls under what is commonly known as misconduct and Section 41 of the Employment Act establishes the procedure for handling of such cases as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

33. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

34. Being a unionisable employee and a member of KETAWU, the Claimant's case was subject to the obtaining CBA. Clause 25 of the CBA provides that an employee facing dismissal is entitled to an opportunity to defend themselves.

35. Following a notice to show cause issued to the Claimant on 18th May 2012 and her response dated 21st May 2012, the Claimant was invited to a disciplinary hearing on 5th June 2012. The invitation letter which was dated 31st May 2012 was not served on the Claimant until 4th June 2012. The Respondent's third witness, Elizabeth Kalei who is the Chief Human Resources & Administration Officer told the Court that she did not know why the invitation letter was served late and the Court was left wondering whose responsibility it was to ensure that the Claimant was served in good time. The Court was even more perturbed by Kalei's assertion that it was good human resource practice to notify an employee of an impending disciplinary hearing the day before.

36. On her part, the Claimant testified that her representatives and witnesses were not allowed to participate in the disciplinary hearing because she had submitted their names past the deadline set in the invitation letter. The dictates of Section 41 of the Employment Act are not empty procedures. They are intended to avail employees facing disciplinary action an opportunity to prepare and present their defence before disciplinary action is taken against them.

37. In ***Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*** this Court held that for a disciplinary process to pass the fairness test set out in Section 41 of the Employment Act, the charges made against the employee must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.

38. In handling the Claimant's case, the Respondent failed to avail her adequate time to prepare her defence and for this reason, the Court finds the dismissal unfair for want of due process.

Remedies Available to the Claimant

39. The Claimant claims reinstatement which is a remedy uniquely available in this Court. However, the law provides that this remedy is to be granted in very exceptional circumstances. To my mind, in granting this remedy, the Court is called upon to examine the Claimant's employment record in every respect. In this regard, the finding that the Respondent in fact had a valid reason for terminating the Claimant's employment puts this remedy beyond the Claimant's reach.

40. I therefore decline the Claimant's prayer for reinstatement and instead award her eight (8) months' salary in compensation for unfair termination of employment. In making this award I have taken into account the Claimant's length of service alongside my finding that the Respondent had a valid reason for terminating her employment. I further award the Claimant one (1) month's salary in lieu of notice. The Court found no basis for the claims for unpaid salaries and money withheld by the Respondent which are hereby dismissed.

41. The cumulative award in favour of the Claimant is as follows:

a. 8 months' salary in compensation.....Kshs.718,144.00

b. 1 month's salary in lieu of notice.....Kshs.89,768.00

Total.....Kshs.807,912.00

The Respondent's Counterclaim

42. By her own admission, the Claimant handed over the sum of Kshs. 642,618 entrusted to her by the Respondent. In light of the finding that her action was wrongful, the Respondent's counterclaim for the sum of Kshs. 642,618 is allowed.

43. Each party will bear their own costs.

44. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF JUNE 2015

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JUDGE

Appearance:

Mr. Rakoro for the Claimant

Mr. Molenje for the Respondent