



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**  
**CAUSE NO. 274 OF 2013**

**(Before Hon. Lady Justice Maureen Onyango)**

**MAURICE OTIENO YONGO .....CLAIMANT**

**VS**

**AGA KHAN HOSPITAL KISUMU.....RESPONDENT**

**JUDGEMENT**

The claim herein was commenced through a Statement of claim filed by Maurice Otieno Yongo through Aboge & Company Advocates. The Claimant alleges that he was employed by the Respondent, a Medical Institution running a medical facility in Kisumu as a clerk in August, 2001. He was later promoted to the position of Debtors Officer due to his diligence and good performance. He was suspended on 16th May, 2013 after being accused of causing a cash shortfall of Kshs.3,746,711/= and on 12 June 2013 his employment was wrongfully, unfairly and unlawfully terminated. The Claimant alleges that handling cash was outside his docket. He prays for judgement as follows:

1. A declaration that his purported dismissal was unfair, unreasonable, null and void.
2. Six months salary in lieu of Notice
3. 52 accrued leave days for 2011 and 2012
4. All monies held by the Respondent being Welfare Fund retained by the Respondent who is its custodian
5. General damages for wrongful dismissal
6. Costs of this claim and interest thereon at court rates.

The Respondent filed a statement of response and counter to the claim on 15th November, 2013 denying that it suspended and subsequently terminated the services of the Claimant wrongfully, unfairly and unlawfully. The Respondent avers that it summarily dismissed the Claimant for fundamental breach of the employment contract following loss of Kshs.3,746,711/= caused by the Claimant and further that the dismissal complied with the law, procedural fairness and the rules of natural justice. The Respondent averred it was the responsibility of the Claimant to collect cash from cashiers and bank the money immediately, to supervise cashiers working under him and safeguard the money against theft or loss.

The Respondent counter-claimed for Kshs.3,746,711/= collected by the Claimant in his capacity as Debtors Officers between 8th and 15th May, 2013 which the Claimant failed to account for.

The case was heard on 30th June, 21st October, 26th November, 2014 and on 19th January, 2015. The Claimant testified on his behalf while the Respondent called 6 witnesses. Four of Respondent's witnesses were cashiers, the 5th witness was the Assistant Human Resource Manager and the 6th a CID Officer who investigated the loss. The parties thereafter filed written submissions..

The Claimant and 1st to 5th Respondent's witnesses testified before Justice Wasilwa, and I heard the testimony of RW6. All parties confirmed that the case proceeds before me from where it had reached.

I have considered the pleadings and the evidence on record including documents filed in court by both parties. The issues for determination as set out in the Claimant's submissions which I will adopt are the following:-

1. Whether the Claimant committed acts of misconduct
2. Whether the Respondent's decision to terminate the Claimant summarily was justified and lawful
3. Whether due process was followed before Claimant was terminated and
4. What remedies, if any, the Claimant is entitled to

The 1st and 2nd issues are the same and relate to validity of reason for termination and I will deal with the 2 issues concurrently.

Section 43 of the Employment Act provides that an employer must prove the reasons for termination or dismissal.

In his testimony the Claimant confirmed that he was responsible for cash collection whenever the Chief Cashier was away from 2009 to 16th May, 2013 when he was suspended. He testified that the work involved cash collection, writing cheques and making petty cash payments. He confirmed that he also did banking of money collected from all cashiers. He signed for receipts of money collected from other cashiers. He also testified that on 16th May, 2013 the Finance Manager went to his office and asked that they jointly carry out a cash count. The Finance Manager did reconciliation and found that there was a deficit of Kshs.3,746,711 which the Finance Manager said the Claimant had not banked. The Claimant did not deny that there was a deficit. He confirmed he was in charge of collecting cash from other cashiers between 8th and 15th May, 2013, when the cash deficit is alleged to have occurred.

In the cash count form attached as one of the exhibits to Respondent's list of documents, the Claimant signed for handing over Kshs.546,949/= to Were Wycliffe. The same form shows pending banking from 8th to 15th May, 2013 of Kshs.3,746,711.00

RW5 testified that during the Claimant's disciplinary hearing he acknowledged receiving the money from cashiers during the period in question but could not account for it.

The validation certification report by the Respondent's internal Audit Department prepared by Eric Wanjohi on 18th May, 2013 also shows that a total of Kshs.4,211,169 was collected between 8th and 15th May, 2013 and only Kshs.464,458 was available for banking. The report shows unbanked amount of Kshs.3,746,711.

In his response to the show cause letter the Claimant denied that he had a cash shortfall of Kshs.3,746,711 as alleged in the show cause letter or any other cash shortages. He also denied admitting to having such a shortfall as stated in the letter of suspension which states in part

*"You also verbally acknowledged that you have a shortfall of the said amount to the meeting in the presence of the Ass. Human*

*Resources Manager and also that you had asked your colleague for  
sometime to resolve the matter."*

From the foregoing I find that there was sufficient reason to take disciplinary measures against the Claimant for failure to account for money collected and not banked between 8th and 15th May, 2013.

The second issue I have to determine is whether the dismissal was procedurally fair.

The Claimant alleges through the submissions that due process was not followed as set out in the Collective Bargaining Agreement, that the show cause letter was not specific on the misconduct the Claimant was accused of and did not inform the Claimant of his right to present evidence, to cross examine witnesses and to be represented by the Union.

The Claimant further stated in the written submissions that at the hearing, the Respondent did not inform, consult, or copy the correspondence to the union representative. Further that the Claimant was not represented by a Shop Steward as required by the Collective Bargaining Agreement and that no witnesses were presented at the hearing. It was further submitted that no reasons were given for the summary dismissal and the Claimant was not shown any document or furnished with the Audit Report that implicated him. Claimant also submitted that he was not given copies of proceedings of the hearing to use for his appeal which was to be made within 48 hours.

The Respondent submitted that the summary dismissal was justified.

According to the evidence of RW5 the Claimant was covered by the CBA while he was a clerk, but once promoted to the position of debt collector he ceased to be a member of the Union as the position is not unionisable. This was not contested by the Claimant. The Claimant was first suspended after the cash count that disclosed Kshs.3,746,711 had not been banked. He was thereafter issued with a letter to show cause why disciplinary action should not be taken against him. After replying to the show cause letter he was invited to a disciplinary hearing. The invitation letter informed him of his right to be accompanied by a colleague. The Claimant attended the disciplinary hearing alone.

In his testimony the Claimant described what transpired at the hearing as follows:-

"At the meeting I met the Management team who asked me about the shortfall  
and I explained that I was not aware of it."

The Claimant thereafter received the letter of summary dismissal.

I find that due process was followed in the disciplinary process leading to the summary dismissal of the Claimant.

Regarding the Claimant's remedies, he admitted having been paid KShs.70,956/= which is constituted as follows

Salary for May, 2013.....	KShs. 48,500.00
Salary for June, 1st to 12th.....	KShs. 19,173.00
Annual leave 21 days.....	<u>KShs.139,173.00</u>
Total	KShs.107,073.00
Less Statutory deductions.....	KShs. 26,513.00

Less medical Bill.....KShs. 9,604.00

Net paid.....KShs. 70,956.00

The Claimant prayed for 6 months salary in lieu of notice. Having found the dismissal justified both substantively and procedurally, he is not entitled to pay in lieu of notice.

The Claimant also sought payment for 52 days accrued leave for 2011 and 2012. The claim for pay in lieu of leave in the Memorandum of Claim is not quantified.

In his testimony the Claimant prayed for what is in the Memorandum of Claim without any further elaboration. In the written submissions a sum of Kshs.84,067.00 is claimed without indication of how the amount was tabulated. No mention is made of how many days leave the Claimant was entitled to per year. The Claimant did not adduce evidence to prove that he did not take leave for 2011 and 2012. In the absence of evidence of the number of leave days the Claimant was entitled to per year or adducing evidence on how the sum claimed was arrived at, and without stating that he did not take leave for 2011 and 2012, I find the prayer for leave not proved.

The claimant further prayed for refund of welfare fund but did not adduced any evidence in respect of the same. I dismiss the claim as it has not been proved.

The Respondent counter claimed for Kshs.3,746,711. Apart from proving that the amount was not banked based on the cash count carried out by the Respondents Finance Manager and signed by the Claimant, the Respondent did not call evidence sufficient to prove the counter-claim. The evidence called by the Respondent was only sufficient to prove grounds for dismissal of the Claimant but not the counter-claim.

I therefore find the counter claim not proved and dismiss the same.

The upshot is that both the claim and counter claim are dismissed. Each party shall bear its costs.

Orders accordingly.

**Dated and delivered in the open court this 24th day of July, 2015**

**Hon. Lady Justice Maureen Onyango**

**Judge.**