



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2297 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 23rd July, 2015)

DAVID ADEMA LUGONGOCLAIMANT

VERSUS

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 11/11/2012 through the firm of Khalwale and Company Advocates alleging wrongful dismissal from employment and refusal to pay his terminal dues by the Respondents.
2. The Claimant gave his evidence in court and stated that he was employed by the Respondent on 25/2/2010 as a Sales Marketing Representative. He exhibited his letter of appointment at pages 9 to 12 of his documents. His initial salary was 44,000/= per month.

Under this contract, the contract could be terminated by giving 3 months notice or salary in lieu of notice. His work station was in South Rift which included Kericho, Bomet, Sotik, Kisii, Homabay and Migori. He was based in Kericho.

3. It is the Claimant's case that he did his work well and pushed the sales from 2 million to 50 million in 2 months. However, on 19/11/2010, he was suspended from duty on allegations that he had irregularly handled products sold to Kenya Dairy Board in collusion with outsiders and in process committed the company to storage charges at one of the Company's Agent premises.

It was also stated in the suspension letter that he had used company resources including time and vehicles to transact the business of the said products for his own interest. He was asked to show cause why disciplinary action could not be taken against him for such acts and his reply was expected by 23/11/2010.

4. The Claimant responded to the show cause letter vide his letter dated 23/11/2010 and denying the allegations leveled against him.
5. On 22/6/2011, he was served with a letter of dismissal which read as follows:

“Mr. David Adema – Sno.2127M

New KCC Limited

KISUMU SALES

Dear Sir,

RE: DISMISSAL

Reference is made to our letter Reference: HR/S.1/8023/2010/TMM/sgs dated 19th November 2010 suspending you from the services of the Company and your subsequent response dated 24th November 2010.

The Management has considered your response but found it unsatisfactory.

This letter therefore serves to advise you of your dismissal from employment with immediate effect in accordance to the provisions of the Company Code of Regulations Clause 27.2.8 for involving yourself in fraudulent deals, misuse of Company resources and blatant deviance to the established Company Regulations in respect to reporting of road accidents involving Company (State Corporation) vehicles.

Please note that your final dues if any will be paid less any liability you may be owing the Company after completing the normal clearance and handing over the Company property to the Area Sales Manager.

Yours faithfully

For: NEW KENYA CO-OPERATIVE CREAMERIES LIMITED

Signed

MAGDALENE MUTHOKA

HEAD OF HUMAN RESOURCE “

6. Other than this suspension, the Claimant avers that there were other allegations against him that he had misused the Company vehicle. The allegation was that the vehicle he misused was vehicle registration No. KAW 946 Z which was involved in an accident and was repaired purely without informing the Company Secretary or anyone in the Company. He was surcharged Kshs.68,366/= plus 126,580/= for this.

It is his claim that the surcharge totaling 194,946/= was illegal and unwarranted and he seeks a refund of the same. The Claimant avers that his dismissal was unfair and he seeks prayers as per paragraph 20 of his claim.

7. The Respondents filed their Defence to this claim on 27/2/2012 through the firm of Kale Maina & Bundotich Advocates. It is their case that the Claimant's contract precluded him from engaging in activities outside the scope of his duties.

They also aver that the Claimant was never diligent and honest in his work and committed acts of a fraudulent nature and misused the Respondents vehicle to conduct personal errands/activities which made him a liability to the Respondent.

Further, that the Claimant was careless in handling company vehicle and involved the same in accidents and thereafter conducted repairs without the knowledge of or approval of the Respondent.

8. The Respondents have also averred that the Claimant failed to give a proper account of his acts of negligence and misuse of company resources despite being afforded ample opportunity to do so.

Further, the Respondent avers that the Claimant was accorded a hearing on the complaints raised against him and he was rude and uncooperative and in any case his defence was found wanting and the same was rendered unsatisfactory and he was consequently dismissed from duty.

9. The Respondents aver that the Claimant was properly surcharged for neglect in use of company vehicle and negligent driving for which the Respondent incurred repair costs. It is therefore their position that the Claimant's dismissal was warranted and that they owe the Claimant nothing and that the Claimant's case should be dismissed accordingly.

10. Having considered the evidence for both parties, the issues for consideration are as follows:

1. ***Whether there were valid reasons to warrant dismissal of Claimant.***
2. ***Whether due process was followed before Claimant's dismissal.***
3. ***Whether the Claimant is entitled to remedies sought.***

11. On the 1st issue, the letter dismissing the Claimant stated that he was being dismissed following suspension and that his response was found to be unsatisfactory. The Respondents also stated he was being dismissed under Clause 27.2.8 for involving himself in fraudulent deals, misuse of company resources and blatant deviance of the established Company Regulations in respect of reporting of road accidents involving Company (State Corporation) vehicles.

Section 43 of Employment Act 2007:

1. ***In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***
2. ***The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

12. The reasons for dismissal must be reasons which exist and the onus of proving the same be on the Respondent. The Respondents have annexed a report subject matter:- fraudulent practices and misuse of company vehicles in relation to the Claimant.

The report was prepared by the Respondents HR department. There is a comment by the Respondent, Legal Officer that the statements of 2 people were needed to corroborate the allegations. These statements seem not to have been taken. The Claimant denied allegations raised in this report.

13. The Respondents have not led any evidence to prove allegations made against the Claimant. The Claimant's supervisor who had brought out complaints against the Claimant was not called as a witness and neither was any member of the team that investigated the Claimant. This leaves a gap in the accusations leveled against the Claimant.

The allegations if proved would warrant dismissal of the Claimant but as it were, the allegations are not established.

14. On the 2nd issue of due process, the Claimant told court that he was summoned before a disciplinary committee but the committee sittings ended up in disarray as members of the team failed to agree and the committee was expected to reconvene. This was never done.

The hearing envisaged by law is one provided for at Section 41 of Employment Act 2007 which states as follows:

“(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.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

15. In case of Claimant, the minutes of the disciplinary hearing are not exhibited in court and there is no proof that the disciplinary hearing did take place. The Claimant has denied being given any hearing and the onus shifts on the Respondent to prove there was a hearing. This, the Respondents have not proved.

16. In absence of a proper hearing, it is the finding of this court that the dismissal of the Claimant was unfair within the meaning of Section 45 of Employment Act 2007 which states as follows:

1. *No employer shall terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove:*
 - a. *that the reason for the termination is valid;*
 - b. *that the reason for the termination is a fair reason:-*
 - i. *related to the employee's conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*
 - c. *that the employment was terminated in accordance with fair procedure.*

17. I therefore find for Claimant in the following terms:

1. *3 months salary in lieu of notice as per Clause 20 of Claimant's letter of appointment = $3 \times 44,000 = 132,000/=$.*
2. *Service pay is not payable as the Claimant was a member and contributor of NSSF.*
3. *House allowance 15% of basic salary for 15 months = $15/100 \times 44,000 \times 15 = 99,000/=$.*
4. *12 months salary as damages for unlawful termination = $12 \times 44,000 = 528,000/=$.*

TOTAL = 759,000/= less statutory deductions

5. *Claim of surcharge not awarded as there is no proof that it was effected.*
6. *The Respondent should issue Claimant with a Certificate of Service.*
7. *Respondent will meet costs of this suit.*

Read in open Court this 23rd day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Khalwale for Claimant – Present

No appearance for Respondent