



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NUMBER 158 OF 2012
KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS.....CLAIMANT

VERSUS

NAKUMATT SUPERMARKET.....
RESPONDENT

JUDGMENT

1. The grievant in this dispute was employed by the respondent as a shop assistant on 17th December, 2007 at a salary of Kshs.5,800/= per month. He was later promoted to section incharge and further as a cashier earning Kshs.15,500/= per month.
2. According to the grievant he worked until October, 2010 when his services were terminated on grounds of poor work performance. He disputed the reasons for termination hence filed the present suit through the claimant union.
3. The respondent refuted the grievant's allegations and averred that he was properly and legally terminated. According to the respondent the claimant was well aware of the reasons for terminating his services. The respondent further averred that there were several infractions committed by the grievant while in employment which were indicated in several letters to the grievant.
4. The grievant in his evidence in Court reiterated the averments in the statement of claim. It was his testimony that during the time of this employment with the respondent, he was never issued with any warning letter, complaint or caution. He stated that the allegations that he was involved in smart card fraud was brought to his notice for the first time in Court. He admitted signing petty cash voucher for payment to him.
5. In cross-examination he admitted being questioned over smartcard points redemption. He stated that he was informed that a particular customer was claiming points from his till. The respondent's 1st witness Mr. Kimachia stated he was Smart Card Executive. It was his evidence that a cashier could not redeem in excess of 1000 points without authorization of the manager. According to him there were many redemptions in a day from the grievant's till. The redemptions were more than the points awarded. He further stated that memos were issued to staff on the matter and warned to refrain from the practice.
6. The respondent's second witness was Mr. Erick Lihando who stated that he worked for the respondent as a Deputy Manager. It was his evidence that the grievant was terminated out of fraudulent

transactions involving smartcard points. He stated that there was a particular lady who used to come with a smartcard and leave it with the grievant. The lady would proceed to her shopping then go to the grievant's till where he would remove the card from under the keyboard and swipe for the lady who would then leave the store with the items without paying for them. It was his testimony that he went to the grievant and asked for the card.

7. Initially the grievant denied having any card but when he insisted, the grievant gave him the card. Mr. Lihando further stated that in 2005, there was a problem with splitting transactions to avoid seeking authorization by managers and a memo was issued prohibiting the practice.

8. In cross-examination he stated that the grievant's termination was due to poor performance. He admitted that the termination letter did not mention that the grievant was terminated on account of smart card fraud and that the email and memo on the smartcard fraud was not addressed to the grievant. He further stated that the grievant was summoned to head office over the matter and he believed procedure was followed in terminating the grievant's services.

9. Section 41(1) of the Employment Act provides that before terminating an employee's contract on grounds of misconduct, poor performance or physical incapacity, the employer shall explain to such employee in a language he understands the reason for which termination is being considered and the employer shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

10. In this matter, there were accusations against the grievant involvement in smart card fraud however nothing was presented either in form of notice to show cause, memo and or email correspondent directly addressed to him calling upon him to make any explanation or representation regarding these accusations. Exhibit number N1 – N5 attached to the respondent's memorandum of response, make no direct accusations against the grievant. There were communications regarding smart card fraud which appeared prevalent among all staff and everyone without pointing out particular person(s) were caution to desist from the practice.

11. The respondent's witness Mr. Eric Lihando informed the Court that the grievant was summoned to Head Office and he believed procedure was followed prior to terminating the grievant's services. No one from the Head Office was called to confirm this nor were there any minutes exhibited in the pleadings or produced in Court to show what transpired prior to terminating the grievant.

12. In the circumstances the Court reaches the conclusion that even if the respondent had valid and justifiable reasons for terminating the grievant's services, the same was carried out through an unfair procedure. The Court therefore finds the grievant's termination unfair and awards him six month's salary as compensation for unfair dismissal.

13. It is so ordered.

Dated at Nairobi this 2nd day of October 2015

Abuodha J. N.

Judge

Delivered this 2nd day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge