



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO.701 OF 2010
STEPHEN ONGOYA CLAIMANT
VERSUS
THE NAIROBI ACADEMY (H) LIMITED RESPONDENT

JUDGEMENT

Anne Wedah & Co. Advocates for the Claimant

Wanjama & Co. Advocates for the Respondent

1. On 17th June 2010, the claimant Stephen Ongoya filed his claim for unfair termination of his employment by the respondent, the Nairobi Academy (H) Limited. On 28th April 2011, the respondent filed their defence and counterclaim and admitted that they dismissed the claimant due to gross misconduct after he committed acts of fraud and seek a refund of kshs.341, 000.00. On 22nd June 2011, the respondent filed another defence and counter-claim. On 29th June 2011 the claimant filed his defence to the counter-claim by the respondent and the respondent made a response therein dated 28th April 2011. At the hearing, the claimant gave his sworn evidence while the respondent called three (3) witnesses in support of the defence, Naomi Njeri Nyaga, Francis Mwangi Kirugu an Livingstone Mwangi Ngunjiri. At the close of the hearing both parties agreed to file their written submissions.

Claimant's case

2. The claim is that on 3rd November 1989 the claimant was employed by the respondent as Accountant/Administrative Assistant and issued with a contract with a gross pay of kshs.8, 200.00 per month. He was placed on 3 months' probation which was confirmed upon successful completion of the same on 7th march 1990. On 30th July 2007 the respondent without cause suspended the claimant from his employment and subsequently summarily dismissed him on 30th October 2007 on the grounds that the claimant had failed to account for petty cash shortage and or fraudulently manipulated the respondent's cash accounts. The claimant responded and denied these allegations.

3. At the time of termination, the claimant was earning kshs.45, 585.00. The claimant was not issued with a Certificate of Service upon termination, the respondent failed to issue the claimant with his NHIF card and the P9 Tax Form which would enable him to file his annual returns for 2007 with KRA. The claimant states that he was not given justice by the respondent as he had serve the respondent for over 18 years and thus his termination was unfair. That the ground upon which the respondent relied on to terminate the claimant were baseless meant to deny him his dues after serving very well. He was not given a hearing and without payment of terminal dues contrary to sections 41, 43, 45 and 51 of the

Employment Act.

4. The claimant is therefore seeking a declaration that his termination was unfair; unpaid salary for August, September and October 2007 amounting to Kshs.136,755.00; one month's notice pay at Kshs.45,585; 29 leave days amounting to Kshs.77,114.60; service pay; damages and reinstatement without loss of benefits.

5. In evidence, the claimant stated that by a letter of appointment dated 3rd October 1989 he was employed by the respondent as an Accountant and or Administrative Assistant earning Kshs.8, 200.00 per month. He commenced work on 20th October 1989 with duties of receiving cash and banking; handling petty cash, making purchases, book keeping, and preparation of pay roll together with the senior accountant; making statutory deductions, and other duties related to his appointment.

6. On 30th July 2007, after serving the respondent for over 18 years, the claimant was suspended from duty following a shortfall accumulated from petty cash of Kshs.341, 000.00 that the claimant had failed to account for. The claimant was asked to explain the shortfall. All along the claimant was under the supervision of the Senior Accountant, Naomi Nyaga and the Financial Controller Ephraim Ruhiu had done all audits. That when a new Accountant, Mr Ngunjiri was employed in August 2006, the shortfall was noted that the claimant was not able to explain. The claimant stated that he was unable to explain the shortfall as before his suspension, all information on his computer had been deleted but the Accountant insisted that he should go to the books of accounts to be able to explain the shortfall and or difference. That he had been given a lot of work that included organising leave for all staff, making gratuity at the end of contracts, students clearance, staff daily attendance, parents queries, receiving and banking monies, amongst other duties forcing him to work overtime and on weekends. That the indicated shortfall related to the period of 2005 to 2007 and when the claimant went to the director to try and explain himself, he was unable to meet him or have a meeting where he could give an explanation. The claimant had a good explanation on the noted shortfall when he last wanted to see the director on 20th July 2007. However at month end, the director brought in his niece to take over from the claimant and he was also given the letter of suspension.

7. The claimant further stated that while he was on suspension he was supposed to give an explanation on the circumstances giving rise to the cash shortfall which he sent to the respondent via G4S service as he was not allowed back to the respondent premises. On 18th October 2007 the claimant wrote to the respondent seeking details with regard to his NSSF and NHIF cards but there was no response. His suspension was never lifted or addressed. He was later terminated and when he went to collect his certificate of service, he was not allowed inside the respondent premises. He was never paid during the suspension, he called the director but he refused to pick his calls. The claimant tried to seek employment with the Electoral Commission but could not as he had not certificate of service from his previous employer. On 30th October 2007 he was terminated on the grounds that his explanation on the cash shortfall was not adequate and the respondent had lost Kshs.341, 000.00. The termination letter was in response to the claimant's explanation dated 7th August 2007 and after 3 months he was terminated in November 2007 and he was never paid for these months.

8. Before the suspension on 30th July 2007 the claimant was issued with an internal memo noting that there was a cash shortage of Kshs.576, 276.00 and cash shortage from petty cash of Kshs.341, 000.00. That in the first case, there was a delay in banking the Kshs.576, 276.00 since the respondent had 3 bank accounts which had been frozen by Kenya Revenue Authority (KRA) and Naomi Nyaga had instructed the claimant to keep the cash in the safe, which he complied with as this was his supervisor. The cash remained in the safe for 2 months. This money was later banked and there was no loss. With regard to Kshs.341, 000.00 shortfalls, the claimant stated that he was called on 11th July 2007 by the director who stated that an assessment of accounts from 2005 to 2007 discovered that there was this loss which the claimant disputed as the systems put in place by the respondent could have detected this loss. There were vouchers to support each transaction and all went through a process of approval by the senior accountant and to the financial controller. There was no deficit reported or cash missing. It was therefore wrong for the respondent to summarily dismiss the claimant.

9. That at the time of termination, the claimant was earning kshs.45,495.00, he was accused of committing fraud and stealing respondent cash but there are no criminal charges to support these serious allegations. The respondent accounts were audited annually and no shortfall was ever discovered for the period of 2005 to 2007.

10. With regard to the respondent counter-claim, the claimant stated that when he was asked by the respondent to explain the shortfall of kshs.341, 000.00 he told the director of the respondent that in 2007, his computer was interfered with and the petty cash records were damaged and when he wanted to proceed with the next month's accounts, he had to close the books of the current month before he could get an approval by the senior accountant. That the claimant was never allowed to go through the books to correct the anomalies. He tried to meet with the director on two occasions on 17th and 20th July 2007, but he was busy and could not meet him. He was later suspended before he could give his explanation.

11. That the claimant was never given a hearing. That his termination was unfair, he was not paid for 3 months, no notice was given and he had 29 leave days not taken for which he is seeking payment together with compensation and a certificate of service. Due to lack of the Certificate of service, the claimant has not been able to get a job despite several potential employers expressing interest. He is now 60 years old and would have retired on his job but was forced out with no benefits. He was humiliated and treated unfairly. He has suffered mental anguish and thus seeks any other relief that the court may deem fit to grant.

12. In cross-examination, the claimant detailed that he kept money in the safe instead of banking it from verbal orders of the senior accountant, Naomi Nyaga and did not find it necessary to ask for these instructions in writing as he knew KRA had frozen respondent accounts. As accountants they worked like that. It was not a wrong practice where there was no account to bank the money. The claimant did not write to the director about this practice. There was no record. There was a cash reference book kept since 1989 to the date the claimant left employment. This record was signed after each banking and the record was kept by the respondent.

13. The claimant also stated that he never received his certificate of service through his postal address. His office computer was interfered with but never reported the incident to the respondent or to the police. There was no formal report about this record and computer interference.

Respondent's case

14. The respondent admitted that they summarily terminated the claimant on 30th October 2007 after committing acts of fraud where he incurred cash shortages of kshs.576, 276.00, which he admitted and repaid and a further cash deficit of Kshs.341, 000.00 which he was given an opportunity to rectify but failed to account for, repay or give a good account of its whereabouts. That communication between the respondent to the claimant went unanswered as mails sent to his last known address was returned by the Post office and thus the respondent was unable to issue the claimant with a certificate of service and P9 tax return which he also failed to come and get. That the claimant was a good employee until 2006 when the respondent started noting cash shortages that were traced to 2005; the claimant made a refund of kshs.576, 276.00 but failed to repay a balance of kshs.341, 000.00.

15. The respondent had a counter-claim against the claimant for the sum of kshs.341, 000.00 being the amount accumulated from petty cash deficit which the claimant could not explain and refused to repay and thus the respondent is seeking that the claimant be directed to repay this amount together with costs and interest. That there was a demand of this money from the claimant but he has refused to repay.

16. To support the respondent's case, three witnesses were called. In evidence Naomi Njeri Nyaga testified that she is currently a businessperson since 2007 and before this she was the accountant with the respondent where she worked for 12 years. Her duties as the accountant were preparation of pay roll, bank reconciliations and posting of payment vouchers. She was assisted by Regina Kirori and reported to Ngunjiri and the Director. She worked closely with the respondent whose main role was receiving payments, petty cash and banking's payments and fees especially at the Karen Barclays Bank. The

claimant received cash from parents and was supposed to bank it. The claimant was reporting to Ngunjiri and Kirubu as was not accountable to the witness and could thus not give him any directions.

17. That the respondent had bank accounts with Barclays bank Karen, Standard Chartered Bank on Moi Avenue and I&M Karen. In April 2007, the respondent had problems with KRA which closed the Barclay Bank account and that at Standard Chartered Bank. As a result the respondent opened a new account with I&M bank in Karen and thus had an account at all times and cash could be banked in the new account. 18. The witness noted that the claimant was not doing banking as required from March 2007 after she did bank reconciliations. In the February statement, there were noted discrepancies similar to March and April. This was noted in the course of the usual reconciliations. She informed Mr Ngunjiri and Kirubu and soon after in August 2007 she left the respondent employment.

19. In cross-examination the witness confirmed that she discovered that the claimant was not doing banking after the month closed and she did reconciliations. All the cash receipts made by the claimant would end up with the witness and compared with the bank statements, the reconciliations led to the discovery of the deficits. All banking was done by the claimant. After making payments and banking, the claimant kept a record, receipts and vouchers that were used for reconciliations. There were breakdown on expenses and using the ledger for each month, the witness discovered differences. When KRA froze two of the respondent's accounts, a new one was opened on 21st April 2007 with I&M Bank. She left the respondent voluntarily as not as a result of termination.

20. The second witness was Francis Mwangi Kirugu, a businessman and one such business is the respondent. This business started in 1987, before he was a consultant and then became a director of the respondent. He knew the claimant well as an employee of the respondent as an accountant or cashier. He was not a professional accountant but had adequate skills and knowledge for the job with long experience and his performance was adequate. There were lapses but these were resolved. The witness received information that the claimant was teaming and lending – a practice where one receives cash and misappropriates and makes good with other receipts and continuous until one makes up the loss. That the claimant was engaged in this practice. The witness directed the senior accountant to direct the claimant to make good the loss and later report to him which the claimant did and confessed and noting the long service and the fact that he had 2 years to retirement, the claimant was asked to look for the money and repay back. He paid some but there was a balance of kshs.341, 000.00. This prompted him to issue a memo to the claimant that captured the discussions they had held over the issue and to help resolve the matter amicably after he had repaid the 341,000.00. That upon receipt of the memo, the claimant was rude and denied owing despite the detailed accounts on it and this led to his dismissal on 30th October 2007 and the respondent made a demand of kshs.341, 000.00. He never paid.

21. The witness further stated that he never instructed the claimant to keep money in the safe as there respondent had bank accounts where this cash was to be deposited. The respondent thus is claiming the repayment of kshs.341, 000.00 from the claimant that still owes. The same to be paid with interests and costs.

22. In cross-examination, the witness stated that the claimant was suspended after he was issued with a memo seeking him to explain the shortages of cash. He was terminated later after failing to explain the shortages. After the suspension, the claimant went to his advocates and made demands from the respondent and failed to give a proper explanation on the fund losses. The respondent took time to analyse all the records of account. It was about 3 months after the claimant was suspended. There was no hearing on the matter but there was an exchange of letters between the parties where the claimant was given a chance to explain himself.

23. The third witness was Livingstone Mwangi Ngunjiri the chief accountant of the respondent. The witness stated that his duties were to oversee financial operations and administrative issues for the respondent and thus when he started work with the respondent in 2006 he was working closely with the claimant who was in accounts and administrative duties by receiving cash from parents and petty cash operations. When the claimant received cash and cheques, he was supposed to bank these on a daily basis and then this would be checked by Naomi Nyaga for reconciliations. The witness noted that there were

problems in the financial returns done by the claimant which he noted immediately in May 2006 there was a deficit of Kshs.260, 377.00. That staff would come asking for cash from petty cash but the claimant indicated there was nothing and the witness noted this since they shared offices with the claimant. The books indicated there was money but in actual sense this money was not physically there. He asked the claimant, but there were no good answers. In June 2006, the deficit was Kshs.280, 525.00; in July it was kshs.306, 440.00; in August it was Kshs.340, 909.00. The witness decided to investigate these losses and the circumstance of these losses to avoid further accumulation of the same.

24. Mr Ngunjiri checked the books of accounts, the vouchers and receipts to investigate the origin and the accounting process. This was not easy for him and he was forced to trace records to January 2005 where there was a balance of Kshs.12, 927.00 which was allowable and thus decide to concentrate the investigations from 2006. He checked on the controls, the documents supporting petty cash payments. In some cases the claimant received cash, made withdrawals for petty cash and the director would give cash advances but at the end of the month report, the claimant would report the banked cash, cash collections and the witness discovered that some receipts were not related to the accounts processed but were entries into the system to match the erroneous expense. Some cash issued by the director were not posted into the system but there were vouchers to support an expense. There were debits to the account but there was no corresponding debit in the expense account. All the losses incurred from this investigation amounted in total to kshs.341, 909.00. The witness asked the claimant to give an explanation but he could not explain the differences. Further investigations were conducted and a reconciliation done and the total amounts loss were at kshs.507, 000.00 and the claimant promised to repay which was then reported tot e Director Mr Kirubu.

25. That the claimant paid part of the missing cash in instalments in May and June but by august 2009 the total amount not repaid was kshs.341, 000.00. There was no explanation as to why the claimant failed to deposit or repays this money to the respondent. The respondent had an account open at all times which the claimant was aware of. The claimant was thus suspended and not paid his dues as he also owed the respondent Kshs.341, 000.00.

Determination of the issues

Whether there was unfair termination of the claimant's employment

Whether the counter-claim has been proved

Whether there are any remedies due

26. The Employment Act has now set out procedural requirements that an employer must address before a summary dismissal or any form of termination of the employment of any of their employees. This has fundamentally changed the rules of engagement regarding termination or dismissal and Section 41 is succinct and I believe it is only fair that I reproduce it in full:

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.

41(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.

27. To reinforce the provisions under section 41, Section 43 as read with Section 45 of the

Employment Act which also obligates an employer to prove the reasons for termination of a contract and on failure to so prove, the termination would be deemed to be unfair. It appears an employer would only escape these demands in cases where contracts of employment terminate by efflux ion of time or on retirement.

The import of what I have set out above is that the Respondent was under a statutory obligation, unlike under the common law and the situation prevailing under the repealed Employment Act, Cap 226 to give the Claimant an opportunity to make representations before the decision to terminate his services was made and also to give reasons for the termination. These representations were also supposed to be made before the respondent in the presence of another employee chosen by the claimant. These provisions are mandatory. This is the holding of this court in the case of *Mary Chemweno Kiptui versus Kenya Pipeline Co. Ltd Cause No.435 of 2013* where an employee was terminated while on suspension. Also in the case of *Kenya Commercial Food and Allied Workers Union versus Meru North Farmers Sacco Cause No. 74 of 2013* where an employee was terminated after a hearing was conducted in the absence of his union representative or another employer of his own choice. In both cases the court held that it is an unfair labour practice to terminate an employee while on suspension and without a hearing in the absence of another person of their choice. In this case, due to what the respondent felt was misappropriation of funds and or fraud by the claimant, on 30th July 2007 suspended the claimant. This was to enable the respondent undertake investigations and outcome of which was to facilitate commencement of disciplinary proceedings against the claimant. But the claimant was not allowed back to work, on 30th October 2007, he was terminated.

28. This is not the scenario and or procedure envisaged as under section 41, 43 and 45 of the Employment Act. Even in a serious case of gross misconduct which warrants summary dismissal, the provisions of section 41 apply. An employee faced with a dismissal or a termination must be given a hearing and in the presence of a fellow employee of their own choice. This essentially is to ensure the rules of natural justice are respected and that there is a witness present to confirm that indeed an employee was treated fairly before an adverse decision is made against him. Had a hearing been held where the claimant was given a chance to outline his defence, the losses subject of the counter-claim by the respondent herein would have been explained or the claimant given an opportunity to explain how to repay these monies.

29. In evidence, the claimant was categorical that from the time he was placed under suspension, he was not allowed back to the premises of the respondent. Further that he was not given a hearing at all and despite his written replies, there was no physical meeting held between him and any officers of the respondent from the 30th of July 2007. Procedurally, after the suspension and the investigations that followed, the claimant was entitled to enjoy the provisions of section 41 as his suspension was just but the commencement of seeking to establish the status of the losses suspected to have occurred under the claimant's docket and thus after the investigations were finalised and it was realised that indeed huge sums of cash had been lost, then he was entitled to a hearing.

30. Where an employer fails to meet procedural requirements as outlined in law, any dismissal or termination is fundamentally flawed and unfair. Even where there is a substantial case for gross misconduct, the procedure applicable before termination must be followed. The respondent herein did not state that they made an effort to afford the claimant a hearing after his suspension. I therefore find that the termination of the claimant was procedurally unfair.

31. Upon this finding, the remedies applicable are that the salary due from the time of suspension up and until the date of termination is due. The claimant will therefore be paid his August, September and October 2007 salary amounting to kshs.136, 755.00.

32. In such a case as this one, where there was no hearing and termination was effected without the appropriate notice, then a pay for such notice becomes due. I will therefore award pay equivalent to one month in lieu of such notice amounting to kshs.45, 585.00.

33. The claim for leave days due was not opposed in any material way by the respondent. This will be

awarded at kshs.77, 114.60.

34. The claimant has attached his pay slip to the claimant as annexure 5. These pay slips indicate that the claimant was registered with the NSSF and NHIF and there were statutory deductions to this effect. Section 35(6) (d) is therefore applicable here and thus the claim for service pay does not arise with regard to the claimant. The claim for service pay is hereby declined.

35. The claim for reinstatement is subject to various conditions as outlined under section 49 of the Employment Act. This is a provision for specific performance which should only be granted in the rarest of cases. This did not stand out as one such case, the relationship between the claimant and his employer ended in an acrimonious manner and this being a private business, it would only be fair to offer compensation as against an order for reinstatement. The claimant was also seeking damages due to what he felt were lost opportunities due to lack of a Certificate of Service being issued by the respondent. I have perused the record and the respondent attached a certificate of service posted to the claimant using an address similar to what the claimant had also used. There is also the certificate of posting. The claimant did not say that the addressed used by the respondent was not his address. Upon the finding of the court that there was procedural unfairness against the claimant, he will be awarded compensation equivalent to one moth pay amounting to kshs.45, 585.60.

36. There was a counter-claim by the respondent which outline that the claimant while working for them in his capacity as Cashier and in administration failed to account to Kshs.341, 000.00. That the claimant failed to deposit these monies in the correct bank account and that his filing records were eschewed to hide misappropriations and when the accounts were assessed and analysed by the respondent there was a huge deficit. The claimant paid some amounts but failed to pay the sum of kshs.341, 000.00. in evidence, Nancy Nyaga confirmed that she was doing daily bank reconciliations whereas the claimant was supposed to do daily deposits and this would undergo a reconciliation at the close of day. That at some point the claimant kept money in the office for a period of over two months and when he was challenged as to this practice; he deposited these amounts in the respondents account. With this evidence, it is apparent that the respondent had systems in place to detect maladministration of their funds and had all the employee played their role effectively, Nancy Nyaga in the daily reconciliations would have detected any anomalies with the claimant's returns. There was also evidence that there was Ephraim Ruhui the Financial Controller a person who did annual audits. There is no indication as to the annual audit of 2005, 2006 or 2007 or the period subject to the time that the financial losses alleged to have occurred under the claimant role were realised.

37. Fraud and misappropriation of funds by an employee are very serious charges. Under the employment law they are tantamount to a reason for summary dismissal as under section 44(4) of the Employment Act and beyond these provisions, these are serious criminal acts that should be addressed by a report to the police. I take it that the respondent being mindful of the claimant's long service with them gave him time to repay but he failed to do so. Unfortunately for the respondent, that was a serious omission as once the investigation of financial impropriety were done and or concluded, the claimant was under suspension and was never called to give clarity or be subjected to a hearing or take the drastic action of a report to the police. The claimant was terminated. The respondent as the employer lost an important limb in support of their counter-claim.

38. I find the records and documents submitted by the respondent with regard to bank deposits are not evidence that these were the amounts that the claimant misappropriated. Mr Kirubu stated that the amounts he was informed as not accounted for was kshs.341,909.00 and further investigations revealed that kshs.507,000.00 had been lost. The claimant paid part of these monies and an amount of Kshs.341, 000.00 remained unpaid. On the other hand Mr Ngunjiri gave evidence that from his investigations and analysis of the respondent accounts there was losses traced to 2005, these increased over the years and by the time he decided to focus on 2006;

In June 2006, the deficit was Kshs.280, 525.00; in July it was kshs.306, 440.00; in August it was Kshs.340, 909.00. I decided to investigate these losses and the circumstance of these losses to avoid further accumulation of the same. ... I decided to check on the

controls, the documents supporting petty cash payments. In some cases the claimant received cash, made withdrawals for petty cash and the director would give cash advances but at the end of the month report, the claimant would report the banked cash, cash collections and is discovered that some receipts were not related to the accounts processed but were entries into the system to match the erroneous expense. ... Some cash issued by the director were not posted into the system but there were vouchers to support an expense. There were debits to the account but there was no corresponding debit in the expense account. All the losses incurred from this investigation amounted in total to kshs.341, 909.00.

39. There is no clarity from this witness as to how much petty cash was exactly lost while in the hands of the claimant. Part of the cash was received from the Director [Kirubu] but the amounts or record of it is not stated. Another part was drawn from petty cash received but there is no record as to the exact amounts. More losses were incurred from monies the claimant was supposed to bank but failed to bank but there is still no clarity as to the exact amounts that related to this petty cash. All these losses happened within several years under the control of the Director, the Financial Controller and Auditor as the reconciliations made by the Accountant.

40. It is evident that the respondent lost huge sums of monies but this cannot be attributed wholly to the claimant only. To do so would be unfair as the exact loss that can be apportioned to him is not clear and until the claim herein was filed, the respondent had not taken action to address this huge financial loss since 2006. This loss will therefore be borne by the respondent as I have to dismiss the counter-claim.

In this regard therefore, the counter-claim herein is dismissed and this Court enters judgement for the claimant in the following terms:

- a. **The termination of the claimant's employment was unfair.**
- b. **This court will award one month salary in compensation amounting to kshs.45,585.00;**
- c. **Salary not paid for August, September and October 2007 all amounting to Kshs.136,755.00;**
- d. **Notice pay amounting to Kshs.45,585.00; and**
- e. **Each party will bear their own costs.**

Delivered and dated at Nairobi this 4th day of February 2014.

M. Mbaru

JUDGE

In the presence of: