



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 306 OF 2013**

**PIUS WAFULA BULUMU .....CLAIMANT**

**VERSUS**

**BULORE AFRICA LOGISTICS .....RESPONDENT**

**J U D G M E N T**

The Claimant has brought this suit claiming Kshs.1,306,102.67 as accrued employment benefits and compensation for unfair termination of his employment by the Respondent on 15.4.2013.

The Respondent has denied liability and contended that the dismissal of Claimant was lawful and fair both substantially and procedurally.

The suit was heard on 17.2.2014 and 25.5.2014 when CW1 testified CW1 and the Respondent called Dickson Kimani as RW1.

**CLAIMANT'S CASE**

CW1 as employed by the Respondent on 19.10.1992 as Accounts Clerk and later was appointed a cashier. His salary was Kshs.56,582. He worked continuously until 14.3.2013 when he was served with a Show Cause Memo accusing him of not receipting money which came to his custody in the IRIS and secondly paying out petty cash to Patrick Mbogo without any supporting cash voucher approved by duly authorized validators and failing to alert the management about it.

CW1 responded to the said show cause memo on 16.3.2013 and was invited for a disciplinary hearing on 19.3.2013 and 25.3.2013. The findings of the disciplinary panel blamed Patrick Mbogo for collecting money without recording it and thereby exonerated CW1 from the charges.

CW1 however later received a letter dated 26.3.2013 dismissing him summarily with effect from 15.4.2013. CW1 has contended that his dismissal was only an afterthought meant to please the proprietors of the company in France and to enable the Respondent recover insurance compensation.

According to the CW1, the Respondent did not pursue Patrick Mbogo about the alleged misappropriation of finances because Patrick had a dossier which could expose the Respondent's corruption and tax evasion to the Government of Kenya. CW1 contended that the senior management were privy to the corrupt dealings in respect of which Patrick was withdrawing and paying out the money in dispute.

According to CW1, he was only in charge of Kshs.600,000 and USD 3000 of which he recorded all its transaction. He contended however that he had no control over the other monies which was dealt with by his boss, Patrick. CW1 explained that sometimes the money was brought to him sealed in envelopes and his duty was only to keep the parcel in the main cash box in his office with no right to know how much it was or where it was destined. The only thing he knew was that the money was for bribe in soliciting for work from clients and bribe to the people who were handling the Respondent's matters. CW1 maintained that he was only a sacrificial lamb because he had not done anything wrong.

He prayed for 3 month's salary in lieu of notice being Kshs.169,748, salary for 15 days in April 2013 being Kshs.28,291, 7.5 leave days not taken being Kshs.14,145, gratuity for 11 years before he joined pension scheme as provided for under the CBA being Kshs.414,920, 12 months salary for unlawful termination being Ksh.678,984 and service pay for 10 years before the pension scheme being Kshs.414,934.67.

On cross-examination CW1 confirmed that he holds an accounting certificate. He confirmed that an accountant deals with money in and money out records. He denied that money for petty was lost while under his custody. He contended that he kept record of all petty cash under his control. He maintained that all the other money was for operations and bribes was managed by his boss, Patrick Mbogo.

CW1 confirmed that the disciplinary panel made a finding that he did not keep records of payment of advances. CW1 denied the said finding contending that the mid month payout was prepared by the Payroll Manager and CW1 used to pay out advances after the payees signed on it. CW1 admitted that the dismissal letter offered to pay salary for the days worked plus leave earned. He however refused to take the pay and to sign the clearance form because they provided for less gratuity than the one provided by the CBA in force. He contended that Clause 44 (v) entitled him to gratuity for the years served before joining the pension scheme in 2002. That the CBA provided for gratuity at the rate of 22 days pay per completed year of service and not 15 days pay as indicated in the clearance forms. CW1 confirmed that since his employment he was a member of NSSF.

## **DEFENCE CASE**

RW1 is in charge of Finance and Accounts at the Respondent. He confirmed that CW1 was working in RW1's department. RW1 stated that there was fraud surrounding the cash office and about Kshs 100 million was lost. The money was coming from the bank and taken to the cash office where CW1 was manning the main cash office safe. According to RW1, CW1 was supposed to receipt the money received and record the money released. CW1 however did not do so. He also allowed his supervisor Mr. Patrick Mbogo collect the money without recording on many occasions. After investigations, RW1 noticed that there were lapses in the cash office which led to the theft. RW1 blamed CW1 for not keeping records of the released money which was allegedly taken away by Patrick Mbogo. As a result CW1 was served with a show cause memo dated 14.3.2013 and later invited him to a disciplinary hearing on 19.3.2013 where CW1 was represented by his union officer and shopsteward.

According to RW1, the disciplinary panel blamed Patrick Mbogo and CW1 for breaching accounting rules and regulations as a result of which the Respondent lost millions of money. CW1 was also blamed for not reporting to the management when Patrick intimidated him to take away money without records. RW1 did not know whether the dismissal was unfair because he was not from the HR department.

On cross examination RW1 stated that he did not know whether CW1 was ever charged with any criminal case. RW1 confirmed that he did not participate in the disciplinary hearing but other officers who are still working for the respondent. RW1 confirmed that Patrick Mbogo was implicated by the disciplinary panel hearing CW1's case. RW1 also confirmed that CW1 and Patrick Mbogo were not signatories to the respondent's bank account. He also confirmed that the bank could not pay without a call-back unless the cheque had the banks input code.

RW1 maintained that there was no money received at the cash office which was not for receipting. According to RW1 the office has a ERP system (IRIS), a software which is used to process receipt and payment of money. RW1 contended that there was company policy for juniors to report their seniors in case they were intimidated. RW1 confirmed that, respondent has not sued CW1 to recover the last money.

After the hearing both parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

The court has perused the pleadings, and considered the evidence and the submissions and the following issues have arose for determination:

- 1. whether the dismissal of the claimant by the respondent was unfair.**
- 2. Whether the remedy sought should be ordered.**

### **Unfair termination**

The claimant contends that his summary dismissal was unfair because he was not given fair hearing and the reasons cited for dismissal were not proved. According to him his mandate and duty was only limited to managing a petty cash of ksh.600,000 and USD 3000 and no more. He maintained that he kept record of the said petty cash receipts and payments including mid month salary advances to workers.

He however contended that any other money brought to the cash office was for operations and bribes and it was under the control of his supervisor Mr. Patrick Mbogo. CW1 maintained that money was brought to the cash office just because that is where the main cash safe was located. He did not even know how much money it was because at times it was contained in sealed containers. He contended that the main culprit in the alleged fraud and theft is Patrick Mbogo and the respondent has failed to pursue him in fear that he may expose the respondents corruption and tax evasion.

The respondent on the other hand has justified the dismissal on grounds that the claimant failed to comply with the accounting rules and procedures of receipting all the money he received in the cash office and thereafter recording all the money released from his custody. He also failed to report the conduct of his supervisor of taking away money from the cash office without following the accounting rules and procedures through intimidation. Lastly, the respondent has maintained that the dismissal was done after following a fair procedure. According to the defence, the claimant was first served with a show cause memo inviting him to respond in writing. Thereafter he was invited to a disciplinary hearing where he attended in the company of his union officer and shop steward.

This court is alive to the fact that the burden of proving both substantive and procedural fairness in a dispute regarding dismissal rests on the employer by dint of Section 43 and 45 of the Employment Act. Under Section 45(2) of the Act, termination is considered unfair unless the employer proves that the reason for the termination was valid and fair and that the procedure followed to terminate the employment was fair. The reason for termination is fair if it relates to the employees conduct, capacity and the employer's operational requirements.

The procedure is fair if it is just and equitable and in compliance with Section 41 of the Employment Act. Section 41 above provides that before an employer terminates an employee for misconduct and poor performance, he shall invite him to a disciplinary hearing in company of workmate or shop floor union representative of his choice. At the hearing the employer shall explain the reason for the intended dismissal in a language the employee understands and thereafter invite him to defend himself. After considering the defence tendered by the employee and his companion, the employer may proceed to make a decision on the intended dismissal.

The court has considered both the law and the evidence and it is of the considered finding that the respondent has proved that the dismissal of the claimant was fair both substantially and procedurally.

Firstly, the claimant was charged vide a show cause memo to which he wrote his defence. Secondly he was invited to a disciplinary hearing where he attended with his union officials and all were heard on 19/3/2013 and 25/3/2013 in line with Section 41 *supra*. Thereafter the respondent considered the representations made by the claimant in defence and thereafter dismissed him. That far, the procedure followed was fair within the meaning of Section 41 and 45 of the Employment Act.

On the other hand, the respondent has proved on a balance of probability that the claimant who was a qualified accountant and with long serving experience failed to follow the basic accounting rules and procedures. The claimant failed to record all the money he received from the bank and also failed to record all the money released from his custody. The allegation that some money was brought to him in sealed containers and that he did not know the amount is neither here nor there. The fact is that he had clear instruction to feed all the data in the IRIS so that the computation could process a receipt automatically and thereafter he was to prepare a voucher for the release of the money. That is a very basic requirement for dealing with cash in accounting circles. CW1 therefore condoned the illegal conduct of his supervisor Mr. Patrick Mbogo of breaching accounting procedure. He allowed Patrick to withdraw money from the bank, bring to him for safe custody without feeding it in the accounting systems and thereafter released the same to him without signing any voucher. Even if Patrick intimidated him as his supervisor, CW1 had all the freedom to report the matter to the higher authority.

The court respectively finds that even if the respondent did not prove theft on the part of the claimant, she has succeeded in proving that he did not perform his duty properly as required by virtue of his office, profession and experience as an accountant. He has also failed to report cases of corruption and tax evasion being committed against his own state by aliens.

### **Reliefs sought**

In view of the finding that the summary dismissal was fair, the prayer for salary in lieu of notice and compensation for unlawful termination is dismissed. The claimant will however get salary for 15 days in April 2013 being ksh.28291. He will also get ksh.14,145 being pay in lieu of 7.5 days leave not taken. He will also get service gratuity for the period worked between 19/10/1992 and 1/1/2002 when he joined the pension scheme as provided for under Clause

44 (V) of the CBA produced by the defence.

The CBA provides for 22 days pay per completed year of service. The period under consideration is 9 years x 22/30 x kshs.56,582=Ksh.373,441.20. The claimant will also be entitled to his pension as per the dismissal letter.

### **DISPOSITION**

For the findings and reasons stated above, judgment, is entered for the claimant for payment of his accrued employment benefits amounting to ksh.415,877.20 plus costs and interest.

Orders accordingly.

**Dated, Signed and delivered this 25<sup>th</sup> July 2014.**

**O. N. Makau**

**Judge**