



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 374 OF 2011

DANIEL SONGA SILA CLAIMANT

VERSUS

PROPERTY DEVELOPMENT &

MANAGEMENT LIMITED RESPONDENT

M/S Muendo for Claimant

M/S Muli for Respondent

JUDGMENT

1. The suit was commenced by way of a Memorandum of Claim dated 9th March 2011 and filed on 14th March 2011. The Claimant Daniel Songa Sila seeks payment of various terminal benefits and compensation for unlawful and unfair dismissal in the sum of Kshs.866,190/=.
2. The Respondent filed a response to the claim dated 23rd March 2011 on 28th March 2011 seeking to have the Claimant's suit dismissed with costs.
3. The issues for determination are;
 - i. Whether the summary dismissal was lawful and if the same was done in a fair manner;
 - ii. Whether the Claimant is owed arrears salary;
 - iii. Whether the Claimant is owed payment in lieu of leave not taken;
 - iv. Whether the Claimant is entitled to payment in lieu of Notice; and
 - v. Who should pay the costs of the suit.

Facts of the case

4. It is common cause that the Claimant was employed by the Respondent as an Office manager on 5th January 1993. He earned a monthly salary of Kshs.15,180/= at the time of separation.

The Claimant worked continuously for the Respondent until the 10th August 2006, when he was summarily dismissed from his employment for alleged fraud, committed by himself with others in the course of his duties.

5. It is also not in dispute that sometimes in 2005 the Claimant was sent by the Respondent to Nairobi City Council offices to pay Land rates on behalf of the Respondent's Clients vide Standard Bank Cheque No. 765706 for Kshs.484,072.30, Standard Chatered Bank Cheque No. 765795 for Kshs.130,152.20 and Diamond Trust Bank Cheque No. 015571 for Kshs.1768,675.30 all in favour of Nairobi City Council.
6. Undisputed evidence was adduced by both the Claimant and the witness for the Respondent M/s Judith Nduta Mutumbo Ngethe, the Company Secretary (RW1) for the Respondent from February 2006 to September 2012 to the effect that the payments aforesaid were not credited into the Respondent's Clients accounts and on 9th May 2006, the Respondent received a demand note from Nairobi City Council which demand note was produced in Court for payment of arrear rates.
7. It is also not in dispute that RW1 wrote to the Nairobi City Council on 18th July 2006, seeking clarification on the matter as the Respondent's records clearly showed that all the outstanding rates for the year 2005 had been paid.
8. Subsequently, the Respondent caused the matter to be investigated by the Nairobi City Council authorities leading to the arrest and charging of the Claimant with the offence of forgery in Nairobi Criminal Case No. 1472 of 2006 Republic Versus Amsa Cherotich Keitany and Daniel Songa Sila.
9. Investigations revealed that the two cheques given to the Claimant by the Respondent were used to pay rates for 3rd parties and the 3rd cheque could not be traced.
10. RWI, told the Court, which evidence the Court wholly accepts as true that the Claimant was questioned by RW1, the Chief accountant and the Chief Executive Officer Mr. Hashan of the Respondent on 10th August 2006, upon his request that, the City Council Police who were investigating the matter be allowed to step aside to allow the Claimant to talk to his employer and in the process admitted the following;
 - i. That he had given the three (3) cheques to a man from Kisii who had asked if he wanted to make some money and the man requested him not to present the cheques to the City Council.
 - ii. That the Claimant met this man subsequently at a Capucino Restaurant, in Nairobi. The man was in the company of a lady called Hamsa and a man called Govel;
 - iii. That the three persuaded him to hand over the three (3) cheques to them and was promised to get the receipts and some money after a few days;
 - iv. That after a few days, the said persons gave him receipts which he filed at the Respondent's office and was given Kshs.30,000/=;
11. Upon making this admission to the employer, the Claimant was summarily dismissed by a letter dated 10th August 2006.

Though the Claimant has denied that he admitted committing the fraud with others, the Court has after a careful evaluation of his testimony and that by RW1, concluded that the Respondent's version of the events that took place is truthful as it is supported by the copies of the two (2) cheques which were written in favour of the Respondent's Clients but the cheques which were at the material time in the custody of the Claimant were used to pay City Council rates for other third parties to the loss and detriment of the Respondent.

12. The only reasonable explanation for that happening is that the Claimant participated in the unlawful diversion of the proceeds of the cheques entrusted to him by the Respondent for the benefit of himself and other persons and to the loss and detriment of the Respondent.

13. **Section 44(1)** of the **Employment Act, Cap 226** which was operational at the time provides;

“summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than to which the employee is entitled by any statutory provision or contractual term.”

Section 44(3) permitted the employer to summarily dismiss an employee as follows;

“subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

14. The Claimant’s primary duty, as a messenger was to undertake important errands on behalf of his employer, the Respondent. It has been proven on a balance of probabilities that the Claimant fundamentally breached his obligation to undertake the duties entrusted on him by the employer in his position as a messenger under the contract of employment by engaging in fraudulent activities which led to the loss and detriment of the Respondent involving over two (2) million shillings.

15. It is the Court’s considered view that the summary dismissal of the Claimant was lawful.

The Respondent has established that, it gave the Claimant opportunity to explain his case before taking the drastic action against him. In fact, in the process, the Claimant to his credit admitted the grave offence he had committed with the assistance of others. To this extent, the summary dismissal was effected in terms of a fair procedure.

16. Accordingly, the Claimant is not entitled to payment of one month’s salary in lieu of Notice and is equally not entitled to compensation in terms of the *Employment Act Cap 226* of the *Laws of Kenya*.

17. It is immaterial whether or not the Claimant was eventually acquitted of the criminal charges preferred against him in **Nairobi Criminal Case No. 1472 of 2006, Republic Versus Amsa Cherotich Keitany and Daniel Songa Sila**.

18. The Criminal prosecution is a matter quite separate from the disciplinary process that took place at the work place. The Court is satisfied that the disciplinary charges were proved on a balance of probabilities as opposed to the high standard of proof required in criminal proceedings which is beyond reasonable doubt.

19. Indeed, often, parties delay to approach the Industrial Court on termination and dismissal matters pending conclusion of criminal proceedings commenced against former employees at the instance of the employer. This practice is ill advised as it often leads to cases being filed out of time and thus caught by the doctrine of laches.

Arrear salary

20. The Court is satisfied that the Claimant was paid for all worked days and is therefore not owed any arrear salary by the Respondent.

Payment in lieu of leave

21. Equally, the Court is satisfied that the Claimant had exhausted all outstanding leave as at the time of summary dismissal. He is not entitled to any payment.

Gratuity

22. The Claimant was registered with the National Social Security Fund (NSSF). He admitted that he was paid his lump sum pension and the rest is payable upon attaining the retirement age.

23. The Claimant breached a position of trust to the loss and detriment of the Respondent. He ought to have accepted his fate but instead has occasioned further injury by way of costs incurred to the Respondent.

Accordingly, the entire claim is dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 24th day of Sept. 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE