



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 392 OF 2013

HAMISI CHENGO MANGALE CLAIMANT

V

KENYA AEROTECH LIMITED RESPONDENT

JUDGMENT

1. Hamisi Chengo Mangale (Claimant) was offered a one year fixed term employment contract by Kenya Aerotech Limited (Respondent) through a letter dated 2 October 2002. The contract provided for terms and conditions of service.
2. The contract appears to have been renewed severally. The last written renewal produced in Court was dated 29 September 2011 and it stated that the renewal was up to 31 December 2012. The renewal letter indicated that other terms and conditions would remain the same.
3. On 21 October 2011, the Respondent wrote to the Claimant to inform him that his employment was being terminated with effect from the said date on the ground that on 15 August 2011 he had *overcharged a customer Kshs 19,000/- instead of Kshs 1,900/- thus damaging the reputation of the company and that the action constituted gross misconduct.*
4. The Claimant was aggrieved and on 19 November 2013 he lodged a Claim stating the dispute in dispute as *unfair termination of Mr. Hamisi Chengo Mangale from employment by the employer and non-payment of terminal dues.* The Claimant sought a total of Kshs 425,852/-.
5. The Respondent was served and on 7 April 2014 it filed a Response and pleaded that the Claimant breached the trust reposed on him and made a personal gain of around Kshs 11,400/- before he was discovered. The Respondent further pleaded that the Claimant was afforded a hearing but failed to satisfactorily explain his conduct leading to the summary dismissal.
6. The Cause was heard on 5 June 2014.

Claimant's case

7. The Claimant stated that he was employed as a Customer Service Agent on fixed term contracts which were renewed yearly and that the last contract was for 2 years to end on 31 December 2012 and at time of dismissal he was earning Kshs 18,571/-.
8. In respect of the dismissal, the Claimant testified that on 5 August 2011, some four passengers (family) enquired about airport tax and he told them it was Kshs 1,900/- per passenger. He asked for their tickets and passports and money and one of them placed Kshs 19,000/- on the counter while they were supposed to pay Kshs 7,600/-.
9. According to the Claimant, he took the money and went to pay and informed his supervisor about the surplus/balance. The Supervisor, Elizabeth instructed him to keep the balance and return it to the passenger who had paid at the end of check-in.

10. The Claimant stated that at end of check-in, he went to call the passengers and the Supervisor interviewed them.
11. The Claimant stated that the passenger informed the Supervisor that he had heard the figure of Kshs 19,000/- and that the excess was returned to the passenger and they proceeded with their journey. He also said no receipts are issued for the airport tax which is collected on behalf of Kenya Revenue Authority and that it is the boarding pass which is stamped in acknowledgment.
12. In cross examination, the Claimant denied that it is a porter called Nandwa who alerted the Supervisor about the incident. He admitted that overcharging a customer was a serious issue.
13. The Claimant further stated that his dismissal was without lawful cause and that he was not given notice or hearing.
14. On the process adopted before dismissal, the Claimant stated that he was asked to write a report and he wrote the reports explaining what happened on 12 and 13 August 2011, and that he was called to a meeting which was attended by the Supervisor Elizabeth and two other officers of the Respondent called Achoki and Ndungu.

Respondent's case

15. The Respondent called one witness Daniel Nandwa. The witness adopted his witness statement and he was cross examined on the basis of the statement.
16. He stated that on 5 August 2011 he was serving as a security agent and while near the Claimant he noticed a family of 4 passengers come to check in. The family gave the Claimant money which he counted but on reaching Kshs 7000/- he stopped counting and put the money on the counter and called the next passengers.
17. After checking the next passengers, the Claimant took the entire sum and went to the tallying desk and paid \$ 100 or Kshs 8000 for the 4 passengers and retained the balance in his hands. The witness asked the Claimant why he retained the balance and he did not answer.
18. At this juncture the witness informed a supervisor, Elizabeth who found the Claimant with an extra Kshs 11,400/- which was later handed over to the passenger who had paid it.
19. Elizabeth, the Supervisor, was not called but a statement she recorded on 5 August 2011 was produced. According to the statement, the passenger informed her that he had heard the word *nineteen* and so he thought it was Kshs 19,000/-.
20. At the close of hearing, the Court directed the parties to exchange written submissions. The Claimant filed his written submissions on 3 July 2014 but the Respondent's submissions were not on record by the time of writing this judgment.

Issues for determination

21. The dispute before Court has been presented as one of unfair termination and therefore two central issues arise for determination, these are whether the dismissal was unfair and if so, appropriate relief.

Whether the dismissal was unfair

Procedural fairness

22. Before termination, an employer is under a statutory obligation to inform the employee of the reasons or charges being considered for termination and afford the employee an opportunity to respond. If it is a case of summary dismissal, the employer is under a duty to hear and consider the representations made by the employee. An employee has a right to have a colleague present and if a member of a union, a shop floor union representative. That is the import of section 41 of the Employment Act, 2007.
23. It is not in dispute the dismissal of the Claimant was on the ground of misconduct. The Claimant stated that a meeting was held but the incident was not discussed. In the same breath, he stated that he was asked to write an explanation, which he did. The explanation was in respect to the reasons

- which led to the dismissal.
24. The approach taken in leading testimony in regard to the process followed before dismissing the Claimant was lackluster at best. But on the basis of the material placed before Court, the Court is satisfied that the Claimant knew of the charges he had to confront and that he replied to those charges in writing.
25. The process was substantially in compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007.

Substantive fairness

26. Sections 43, 45 and 47(5) of the Employment Act, 2007 require an employer to prove the reasons for dismissal and that the reasons are valid and fair.
27. The evidence before Court is that the Claimant was paid Kshs 19,000/-, far more than the 4 passengers were expected to pay. It is not clear from the evidence whether the Claimant deliberately requested for Kshs 19,000/- or it was a case of a communication jam. According to the statement of the Claimant's Supervisor, a member of the family informed her that he had heard the word *nineteen*.
28. This is a case which is really on the fringes. The Court cannot discern what could have been the intentions of the Claimant with the excess money had he not been seen by the Respondent's witness, or whether he intended to return the money and at what juncture. But that belongs to the realm of speculation which the Court should not delve into.
29. Further, it was not suggested that the Claimant had been involved in any misconduct during his near 10 years engagement. In the circumstances the Court finds that the ultimate sanction was not in accord with justice and equity pursuant to section 45(4)(b) of the Employment Act, 2007.

Relief

One month salary in lieu of Notice

30. Having made a finding the dismissal was not in accord with justice and equity, the Court would award the Claimant one month salary in lieu of notice pursuant to clause 9 of the employment contract. Evidence before Court is that the Claimant was earning Kshs 18,571/- and he is awarded the same.

October 2011 salary

31. Pursuant to section 49(1)(b) of the Employment Act, 2007 an employee is entitled to earned wages. The Claimant is awarded the Kshs 17,142/- claimed.

Accrued leave

32. The Claimant sought Kshs 52,498/- on account of 42 leave days. No evidence was led on this issue. It remains just a pleading. This head of relief is declined.

Leave allowance for 2 years

33. Similarly no evidential basis for this pleading was led. It is declined.

Severance pay

34. The Claimant was not declared redundant. This relief is rejected.

12 months compensation

35. Under this head, the Claimant sought Kshs 222,852/-. The Claimant was on a fixed term contract which had slightly more than a year to run. He had served the Respondent continuously from 2002

but on renewable contracts. He never addressed the Court directly on which of the 13 factors outlined in section 49(4) of the Employment Act, 2007 the Court ought to consider.

36. Compensation is a discretionary award though one of the primary remedies for unfair termination. The Court would award the Claimant the equivalent of 3 months gross wages as compensation.

Conclusion and orders

37. The Court finds and holds that the summary dismissal of the Claimant was not in accord with justice and equity in the circumstances of the case and therefore unfair and awards him and orders the Respondent to pay him

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| a. One month pay in lieu of Notice | Kshs 18,571/- |
| b. October 2011 wages | Kshs 17,142/- |
| c. 3 months wages as compensation | Kshs 55,713/- |

TOTAL **Kshs 91,426/-**

38. The claims for accrued leave, leave allowance and severance pay are dismissed.

39. Claimant to have costs.

Delivered, dated and signed in open Court in Mombasa on this 5th day of September 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Okemwa instructed by Siocha Okemwa & Co. Advocates

For Respondent Njenga Muchai & Associates Advocates