



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 264 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> October, 2014)**

**ERICK WANJOHI..... CLAIMANT**

**VERSUS**

**THE AGA KHAN HOSPITAL, KISUMU..... RESPONDENTS**

**JUDGMENT**

The claimant Erick Wanjohi filed his claim on 28.9.2013 through the firm of Bruce Odeny & Co. Advocates. The claimant avers that he was appointed by the respondent with effect from 13.2.2012 as an Internal Auditor at a salary of Kshs 110,000/= per month. The appointment letter dated 10.1.2012 was attached as claimant's **App 1**. It is the claimant's case that he served the respondents well and did his work diligently until the 13.8.2013 when the respondents wrongfully terminated his employment in breach of the terms of service. He avers that he was not given sufficient notice or pay in lieu of notice. Neither was his accrued leave paid for. He avers that the provision of the Employment Act were flouted. He contends that he never committed any acts of gross misconduct and had never been served with any warning before. He contends that there was some financial fraud perpetrated at work by some officers which he unearthed. Some people were even sacked. An appraisal was then carried out which appraisal should have been done 3 months after he was appointed. He contends that this appraisal was done by a panel not properly constituted. Made up of Internal Auditor, Mombasa Human Resource Manager, Chief Operating Officer, Finance Director and Board members. This, he avers was unprocedural as he was to report to the Audit Board Chair directly and the said Audit Chair was absent.

It is after this appraisal that the claimant was sacked and it is the claimant's averments that the appraisal was used to set him up. He contends that the termination was not justified. He now seeks to be paid 3 months salary in lieu of notice, 42 leave days, August salary, 18 months pension not remitted and damages for wrongful termination. He admitted he received Ksh 245,893/= as part of the settlement.

In cross – examination by counsel for the respondents, the claimant informed court that he did 15 audits out of the 23 he was expected to do. He also told court that he didn't provide an audit plan for 2013 and he denied harassing staff to get information for audit. He told court that he was reporting to one Nadim who was his immediate boss and not Salma who was a contemporary based in Mombasa. He denied committing acts of gross misconduct and he denies refusing to follow lawful instructions.

The respondents filed their statement of response to the claim on 14.11.2013 through the firm of L. G. Menezes Advocates. It is the respondents contention that the services of claimant were lawfully terminated after complying with procedural fairness after the claimant willfully neglected to perform proper internal audit and/or carelessly and improperly performing the said internal audit.

It is respondents position that they summarily terminated the claimant's services due to the claimant's conduct on reasonable grounds and in strict compliance of the law as well as strict observance of procedural fairness and the rules of natural justice. The respondents further avers that, while the claimant was their Internal Auditor, the respondents lost a total of Kshs 3,746,711/= from the Chief Cashiers office and Kshs 746,496/= from the front office cashiers yet it was a key responsibility and contractual obligation of the claimant as the Internal Auditor to promptly detect such theft and report to the management on any seeming or suspected financial impropriety, which the claimant did not. That had claimant put in place mechanism to safeguard the respondent's case collections or otherwise advise the respondents management on appropriate ways to ensure money collected are not stolen, the theft would not have occurred.

It is further the respondents averment that the claimant was dismissed for under performance and gross misconduct. That after being subjected to performance appraisal, he scored dismally at 38% only. It is the respondents position that the claimant is not entitled to prayers sought as he was summarily dismissed and not entitled to 3 months salary in lieu of notice but in good faith, the respondents paid him 1 month salary in lieu of notice. On leave, the respondents claim that the claimant had 37 and not 41 days accrued leave for which he was paid through his advocate. On payment of days worked in August i.e 1st to 13th August 2013 and payment of pension not remitted, it is the respondents contention that the same was paid to the claimant through his advocate. The respondent also made a counter-claim for the Kshs 3,746,711/= and 746,496/= which they contend was lost due to the negligence and non performance of the claimant. The counter-claim was denied by the claimant. Other than the statement of response and counter-claim, the respondents called 3 witnesses who reiterated the contents of the statement of claim.

Having considered evidence of parties and their respective submissions, the issues for determination are as follows:-

1. **Whether claimant committed acts of gross misconduct.**
2. **Whether the respondents decision to summarily terminate the claimant was justified and lawful.**
3. **Whether due process was followed before claimant was terminated.**
4. **What remedies if any, the claimant is entitled to.**

On 1st issue, the respondents contention is that the claimant was guilty of gross misconduct for failing to follow lawful instructions. Section 44(4) of Employment Act 2007 envisages situations under which an employee's services could be terminated summarily. The grounds are as follows:-

**“44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—**

**(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**

**(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;**

**(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;**

**(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**

**(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;**

**(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or**

**(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property”.**

Of the listed grounds, the respondents wish to rely on ground (c) above as the reasons why they summarily terminated the claimant's services.

Under S. 43 of the Employment Act:-

**“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”**

The need to prove reasons for termination as provided above are also enshrined in Article 4 of ILO Convention 158. Termination of Employment Convention which states:-

**“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker as based on the operational requirement of the undertaking, establishment or service.”**

The question then is whether there was a valid reason to summarily terminate the employment of the claimant. Did he neglect his duty. Did he cause the loss of the over 4M alleged. It is worth noting that the claimant was an Internal Auditor and it was his duty to trace and seal any loopholes of loss of money. It is claimant's position that he indeed traced and unearthed the loss of the 4M as per his mandate and this led to the sacking of some staff in finance department. He was not the one who stole the money and the culprits responsible were trace. This contention has not been refuted by the respondents. To turn around and now accuse the claimant for the loss is a form of witch hunt and is not a reason that should be termed as gross misconduct. It is not a reason that would attract instant dismissal. The ILO Committee of Experts on Protection Against Unjustified Dismissal in their General Survey of 1995 at paragraph 94 had this to say in relation to such an issue:-

**“If lack of capacity or aptitude or the part of the worker take two forms. It can result from a lack of the skills or qualities necessary to perform certain tasks leading to unsatisfactory performance. Lack of capacity is therefore distinct from bad conduct, for which it is necessary to demonstrate a certain degree of “guilt” on the part of the worker---”**

Such incapacity cannot lead to dismissal and at paragraph 91 of the Report, the Committee of Experts states that:-

**“--- the worker can be offered some safeguards with regard to termination for reasons connected with capacity such as careful assessment of his work, warning him about the possible consequences if the quality of work does not improve and allowing him to demonstrate his skills and to improve his work performance ---”**

In the case of the claimant herein, even with the performance appraisal as graded at 38%, summarily dismissal would not have been the solution. It is therefore the finding of this court that there were no proper reasons to warrant claimant being dismissed summarily. The respondents seem to have even conceded to this by paying the claimant some money and which have already been acknowledged.

In answer therefore to question No. 1 and 2, the respondents was not therefore justified to summary terminate the claimant summarily as there was no act of gross misconduct committed by the claimant and performing below average is also not a case of gross misconduct.

Was due process followed before the claimant was dismissed? In answer to this question, the guiding principles are found in S. 41 of the Employment Act which states:-

**“(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 reasons 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.**

**(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 sub – section (1) make.”**

The claimant was not given any hearing as envisaged. Because of lack of being given a hearing, I find he was unfairly terminated. It is also the finding of this court that he is entitled to the following remedies:-

1. **3 months salary in lieu of notice as provided for under Clause 12 of his letter of employment = 120,000 (salary at time of dismissal) X 3 = 360,000/=**
2. **Leave accrued of 41 days = 189,230/=**
3. **Salary for days worked in August 2013 – 13 days = 50,333/=**
4. **15 months pension not remitted = 86,000/=**
5. **12 months salary as damages for unlawful termination = 120,000 X 12 = 1,440,000**

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**TOTAL = KSHS 2,125,563**

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**Less already paid = KSHS 245,893**

**Balance = KSHS 1,879,670/=**

**Less statutory deductions.**

The claimant will also be issued with a certificate of service. The respondents will meet costs of this case.

On the counter-claim, there is no proof that the claimant stole the over 3m claimed and I find the counter-claim has no merit and I dismiss it with costs to the claimant.

**HELLEN S. WASILWA**

**JUDGE**

**30/10/2014**

**Appearances:-**

Odeny for claimant

Menezes for respondents

CC. Wamache