



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1415 of 2011

CLEMENT MUTISO MUINDE.....CLAIMANT

VERSUS

BRITISH AMERICAN INSURANCE COMPANY LIMITED.....RESPONDENT

Rika J

CC. Elizabeth Anyango

Mr. Nyende instructed by Nyende and Company Advocates for the Claimant.

M/s. Muraguri instructed by Muriu, Mungai and Company Advocates for the Respondent.

AWARD

1. Clement Mutiso Muinde filed his Statement of Claim on 19th August 2011. The Respondent filed its Statement of Reply on 1st September 2011. The Claimant testified and closed his case on 8th November 2011. The Respondent did not call evidence.
2. Muinde told the Court he was employed by the Respondent on 13th October 1997 as an Accounts Assistant. He was later promoted to become the Disbursements Supervisor. His duty was to process payments. He earned a monthly salary of Kshs. 55,600. He was arrested on 17th October 2004 at the instigation of the Respondent, and charged with the offence of stealing by servant. He was acquitted by the trial court on 6th December 2007.
3. On 12th October 2007, while attending the criminal hearing, the Claimant was handed an envelope by the Respondent's Internal Auditor who had just given evidence against the Claimant. In it was the Claimant's letter of summary dismissal from the Respondent. It was dated 17th September 2004. The Claimant thought the letter came three years late, or was backdated by the Respondent. When the Claimant enquired from the bearer, he was informed the letter had been lying at the Respondent's offices. The letter stated that any terminal benefits payable to the Claimant would be computed and paid to him in due course. The Claimant testified that his terminal benefits have not been paid to-date, despite the Respondent making promises to pay on various occasions.
4. Muinde stated that his dismissal was unfair, un-procedural and malicious. He was charged in a criminal court on trumped up charges. The Respondent delayed communicating the letter of summary dismissal and has refused to pay him his terminal benefits. He prays the Court to Award-

§ Salary for September 2004 at Kshs. 55,600;

§ One month salary in lieu of notice at Kshs. 55,600;

§ Leave pay at Kshs.58,475;

§ Service pay for 7 years worked at Kshs. 389,200; and

§ 12 months' salary in compensation at Kshs. 667,200.

Total..... Kshs. 1,226,075

He also seeks a declaration that termination was unfair and unlawful. He prays for the certificate of service and any other reliefs as the Court may deem fit to grant. He availed his letter of employment; pay slips; letter of summary dismissal; and the criminal court transcripts and judgment, in support of his claim.

5. On cross-examination, the Claimant admitted that the Respondent lost over 1 million Kshs between January and August 2004. It was lost from the Claimant's department. The police investigated and arrested the Claimant. There was evidence sufficient to make the arrest. The Court ruled the Claimant had a case to answer. The Claimant did not agree that there were sufficient grounds to warrant summary dismissal. It would have been unreasonable to keep the Claimant in employment. The company suffered loss. The letter of summary dismissal is dated 17th September 2004. There is nothing to show it was received by the Claimant in 2007. The letter said any terminal benefits payable would be computed. It was possible there would be no payable terminal benefits at all. The Claimant sent his demand letter in 2008. He did not make any claims when the criminal case was going on. There was no mention of terminal dues payable to the Claimant from the subsequent communication of the Respondent. The criminal case did not stop the Claimant from filing his employment claim. The pay slips show he was subscribed to the N.S.S.F. In redirection, Muinde testified that he was not a beneficiary of the money stolen from the Respondent. The Respondent has never disputed it owed the Claimant terminal benefits. Service pay was provided for under the company practice. He was served with the dismissal letter on 12th October 2007. The Respondent's Advocates last wrote to the Claimant's Advocates on 21st May 2009, promising to revert, but did not communicate any further.

6. The Respondent agreed in its Statement of Reply that Muinde was its employee. He was arrested and tried on suspicion of theft. He was reasonably suspected of having committed an offence to the detriment of the employer. The Respondent was not bound by the outcome of the criminal proceedings. It is true the Respondent offered to pay the Claimant any benefits that would be found due. It did not find any such benefits due to the Claimant. He is not entitled to any of the prayers. He was paid his salary for September 2004; he did not merit any notice, having been summarily dismissed; he did not have any untaken leave days; he was summarily dismissed and not entitled to gratuity; and has not established any basis for compensation for unfair termination. The Respondent prays the Court to dismiss the claim with costs to the Respondent.

The Court Finds and Awards-

7. It has been the position of this Court in many of its past Awards, that employers are not limited in taking out disciplinary proceedings against their employees, in the pendency of criminal trials against such employees over related issues of fact. The disciplinary process with regard to Muinde did not have to wait the finalization of the criminal case. The Respondent exercised its managerial prerogative correctly by its summary dismissal decision.

8. The Court is satisfied that the Respondent had valid reason in summarily dismissing the Claimant. The criminal proceedings themselves show the Claimant was placed on his defense, and was acquitted on the benefit of doubt. The repealed Employment Act Cap 226 the laws of Kenya and the current Employment Act 2007, both recognize that employers can summarily dismiss an employee *who 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 employer's property.* The Respondent had more than reasonable

and sufficient grounds to suspect the involvement of the Claimant, in the loss of its finances. Termination on this account was fair and justifiable.

9. The employment law applicable at the date of termination did not warrant that the Claimant is given an elaborate hearing by the Respondent. Nothing therefore turns on procedural fairness. The Claimant stated he was served with the letter of summary dismissal on 12th October 2007, three years after the decision was made. The Court did not believe the evidence of the Claimant that he only came to learn of his employer's decision in 2007. This late service or receipt in any event, did not in any way prejudice the Claimant. The decision was made and communicated to the Claimant, at a time when the law recognized the concept of employment- at- the will of the employer. The Court does not see any legal or factual basis that would justify compensation of 12 months' salary. The claim for compensation is rejected. The Claimant did not persuade the Court that he was entitled to gratuity. It is not a benefit that is captured in the contract of employment. He testified that gratuity was given in company practice, but offered no evidence of this practice. There was no document or testimony of any other former employee of the Respondent, establishing such policy. Notice or pay in lieu of notice was not merited given the manner of the Claimant's exit. He however is entitled to his salary for September 2004, leave pay and certificate of service. The Respondent did not bring employment records on these, that would discount the evidence by the Claimant. There were promises made to the Claimant that he would receive his terminal dues. As late as the year 2009, the Respondent kept promising the Claimant that it was working on settlement. There is no reason why the Respondent should refuse to release these benefits to the Claimant, which are accrued benefits, sanctioned by law and payable regardless of the manner of the employee's exit.

The Court Orders-

[a] The Respondent shall pay to the Claimant his salary of September 2004 at Kshs. 55,600;

[b] The Respondent shall pay to the Claimant leave pay of Kshs. 58,475;

[c] The total sum of Kshs. 114,075 shall be paid by the Respondent to the Claimant within 30 days of the delivery of this Award;

[d] Certificate of service be released to the Claimant forthwith; and,

[c] No order on the costs.

Dated and delivered at Nairobi this 8th day of April 2013

James Rika

Judge