



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1893 OF 2013
AHMED SHEE MUKHTAR.....CLAIMANT
VERSUS
INTERIORS ELECTRICAL & MEDICAL
SOLUTIONS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent to resolve a dispute that was framed as non-payment of employee's terminal dues and accrued rights as well as wrongful and unlawful termination of employment. The Claimant averred that he was employed by the Respondent on 2nd November 2012 as an electrical engineer earning a monthly salary of Kshs. 91,310/-. He wrote an email to a client using his personal email address and was called to a meeting with the Respondent's Director Mr. Douglas Mutuku. He averred that at the meeting he satisfactorily explained the circumstances under which he wrote the said email. Even after explaining the same to the Respondent, the Respondent changed its mind and demanded that the Claimant writes a report on the same. The Claimant had reason to believe the matter had been concluded and instead of listening and explaining the same to him the Respondent interpreted that to mean disobedience and proceeded to summarily dismiss him on 18th September 2013. At time of dismissal he earned Kshs. 92,000/-. He averred that he was denied paternity leave when his wife delivered a baby and was not accorded the safeguards under the Employment Act before his summary dismissal. He thus claimed one month in lieu of notice, compensation for unfair termination of employment, paternity leave (10 days), interest, certificate of service, costs of the suit as well as any other relief the Court may deem fit and just to grant.
2. The Respondent filed its Response on 15th January 2014. In the Response the Respondent denied that the Claimant was employed on 2nd November 2012 and averred that the Claimant was engaged on 7th January 2013 though the letter appointing him was dated 2nd November 2012. It averred that the Claimant was in breach of company policy and regulations and in contravention of the confidentiality clause in his letter of appointment. The Respondent averred that the Claimant sent official emails through his personal account in gross violation of the company code and flatly refused to give an explanation after the same was sought by the company Director and the in-charge Human Resources. It was denied that the Claimant ever sought paternity leave or that he was not allowed to go on paternity leave. The Respondent averred that it paid the Claimant his entire dues up to the date of dismissal including his outstanding annual leave days.

3. The Claimant testified on 18th November 2014 that he was an electrical engineer by profession and was employed by the Respondent on 2nd November 2012 but started on 7th January 2013 at a monthly salary of Kshs. 92,000/-. He was terminated on 18th September 2013 and the main reason for dismissal was that he used his personal email to communicate with a client. He used his email to write to the contractor seeking reasons why the design had been altered without his input. The contractor acted on the email. He was asked by the administrator Doreen why he had written the email and explained that the email was written because of changes in design. His director Douglas Mutuku popped in and said the email had caused a big scandal and that he was on his own. He was called on Monday 16th September to write a letter and he explained that he had given the reason and felt he did not need to explain again. On 18th he reported to work as usual and was given a letter of dismissal at 5.00pm. On 25th October 2013 he got a cheque for Kshs. 71,617.55. He made a demand through his lawyer and the Respondent responded through its lawyer. He was not invited to a disciplinary meeting and on 18th September he was given his dismissal letter which he accepted humbly. There was no reason to refuse to accept the certificate of service. He thus sought a declaration that his dismissal was unfair and unconstitutional. He sought paternity leave and costs of the suit as well as one month notice.
4. He was cross-examined by counsel for the Respondent and testified that he did not recall the staff meeting on 3rd May 2013. Staff meetings were at times held to discuss projects. He did not recall receiving a letter asking him to explain his conduct in writing. He explained his conduct verbally to Doreen as to why he had written the email. Doreen did not say anything after that. On Monday 16th he was called for a meeting and the meeting was with Doreen and Douglas and that Douglas was trying to incriminate him. He was referred to his contract and he conceded he could be dismissed for disobeying an order. He stated that he did not think he disobeyed an order. He testified that on Saturday 14th Douglas came and said that the writing of the email had cost him his job. He came in on Monday and was called and he explained to Doreen and Douglas that he had given the reasons for the email. He never thought that if he wrote it down he would be given a fair hearing as he had been told he was on his own. Regarding the claim for paternity leave he stated that one has to write a letter and he conceded there was no letter but that he had called to inform the Respondent as the birth was through caesarean. He spoke to Douglas who told him that he could not go on paternity leave on account of the projects he was handling. He did not receive a certificate of service and felt that his dismissal which was abrupt was unfair.
5. In re-exam he reiterated that he did not get the certificate of service and was not issued with a letter summoning him to a meeting. He did not recall a meeting on the use of emails.
6. The Respondent called Douglas Mutuku the general manager as well as a director at the material time. He testified that the Claimant was his colleague who was dismissed for misconduct. He stated that he received a call from a client Mehta Electricals limited and the client complained about a refusal to discuss a design change. He sought time to trace the subject email and after going through the company emails none was found. He thus asked Mehta Electricals to send a copy of the email in question and on receiving the email from Mehta Electricals he was shocked to note that it was sent by the Claimant from his personal email. This was contrary to company policy which provided that emails be sent from one focal point. He stated that it is not permitted to send official emails from personal email addresses. He testified that he held a meeting with staff on 3rd May 2013 and the Claimant was in attendance and even commented on an item at the meeting. He stated the issue of emails came up at the meeting and it was incorrect to say the Claimant was not there. He asked Doreen to seek an explanation from the Claimant when the email emerged and when none was forthcoming he asked Doreen to invite the Claimant to a meeting. An invitation was sent by letter for meeting and the Claimant attended and said he could not write a letter explaining why he wrote an email to a client from his personal email address. The meeting ended in a stalemate. He felt he did not have control over the Claimant and decided to terminate the Claimant's services. The Claimant was paid Kshs. 71,617.55 being the Claimant's salary and leave days due. He never saw any paternity leave application form for the Claimant and

- denied receiving any call from the Claimant. Paternity leave was granted to employees without failure. No notification of birth was brought to him as proof of the birth. Regarding the email rule he stated that the Respondent dealt with design of projects for clients and it was imperative that the designs reach the right people hence the regulation and company rule that correspondence must be from one source.
7. In cross-examination he testified that the confidentiality in the letter of appointment covers the affairs of customers or clients. The email was from the Claimant to an employee of one of the customers and related to electrical design. The customer was entitled to receive that information. Regarding the meeting in May 2013 he stated that he and Doreen signed them and the Claimant did not sign them. He however maintained the minutes were circulated. The Claimant's dues were paid and a certificate of service prepared. He confirmed receipt of the demand letter but did not send the certificate of service to counsel for the Claimant.
 8. The Claimant filed submissions on 3rd February 2015 and 4th March 2015. He submitted that the Respondent had not discharged its burden under Section 43 of the Employment Act. He relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** and stated that the dismissal was unfair for want of compliance with the provisions of Section 45 of the Employment Act. The Claimant also submitted that the Respondent did not prove the existence of any warning letters. He relied on the case of **John Mwalimu Mwema v Backlite Limited [2014] eKLR**. He thus sought the grant of prayers as sought in his statement of claim.
 9. The Respondent submitted that the Claimant in his testimony had alluded to 2 meetings contrary to his submissions. The Respondent submitted that the Claimant flatly refused to explain the reasons for sending out emails from his personal email address contrary to company policy. The refusal to make a written explanation was sufficient cause for the Respondent to summarily dismiss under clause 10 (a) of the letter of employment. Regarding the paternity leave, the Respondent submitted that the Claimant had not availed the documents to prove his claim and that this claim must fail. The Respondent relied on the case of **Kenneth Karisa Kasemo v Kenya Bureau of Standards [2013] eKLR** a decision from the Court of Appeal at Malindi.
 10. In the submissions filed on 4th March 2015 the Claimant replied to a point of law and submitted that the decision relied on by the Respondent was in respect of the repealed law and thus not relevant.
 11. The Claimant was dismissed for a reason stated in the letter of dismissal. He however was not issued with a certificate of service. What precipitated the dismissal was the email of 12th September 2013. The Claimant sent an email to a client using his personal email address to the chagrin of his supervisors. The Claimant confirms being called to a meeting on 14th September 2013 and also on 16th September. In the meeting on 14th September he met Doreen and Douglas who allegedly told the Claimant his time was up. He also met the two on 16th September 2013 and refused to record his reasons for writing the email from his personal account. The Claimant asserts that the letter of 17th September was an afterthought and the minutes of the meeting of May 2013 cooked up. The Respondent's witness was categorical that no call was received on paternity leave for the Claimant and no evidence was adduced. Parties relied on authorities and sections of the law in their submissions.
 12. In any case for unlawful dismissal it is upon the parties to prove various aspects. The Claimant ought to under Section 47(5) of the Employment Act, show the termination was unfair whilst the Respondent had a burden to justify the termination. There was cause to castigate the Claimant for the refusal to write the letter of explanation. The Claimant could lawfully be dismissed for refusal to obey an order by his superiors as provided for in his letter of employment. The manner of his dismissal was abrupt and the sequence of events as narrated by both witnesses leaves a lot to be desired. Be that as it may, the Respondent was bound to apply the provisions of Section 41 of the Employment Act.

13. Section 41 Employment Act makes provision on the procedure to be adopted when terminating the services of an employee on the grounds of poor performance or incapacity. Section 41(1) provides as follows:-

41 (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 reason 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.

14. It is not demonstrated that this was done. Whereas a meeting was held on 14th September and a follow up on 16th September 2013, no indication is given that the Claimant was given this explanation. He received a letter of termination on the evening of 18th September 2013. The Claimant was entitled to be told that the Respondent contemplated to dismiss him for his misconduct. As the procedural requirement was not complied with I would hold the dismissal to be unfair.

15. The authority cited by the Respondent does not apply to this present dispute. It relates to a case under the old regime of laws and the Court of Appeal was right in applying them to that case as the dispute arose when the repealed Employment Act held sway. At the time the damages awardable were limited to the period of notice. The position has changed under the Employment Act Section 49 which frees the Court to grant relief including compensation up to 12 months. In this case, it is not fit to award the 12 months compensation as there were cogent reasons for some censure to the Claimant. I note the Claimant was very stubborn in his refusal to comply and for that reason a month's salary as compensation would suffice. He was not entitled to notice for summary dismissal. His dues were settled in respect of leave and days worked. He failed to prove his claim on paternity leave and the prayer would fail.

16. The upshot of the forgoing is that the Court declares the dismissal unfair within the meaning of the law and awards one-month compensation. The Claimant is entitled to receive the certificate of service displayed in the Respondent's pleadings. There will be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April 2015

Nzioki wa Makau

Judge