REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 38 OF 2020

JAMES MUTEMBEI MUTEGI.....CLAIMANT

- VERSUS -

SEACON (K) LTD.....1ST RESPONDENT

MICHAEL KINUTHIA NJUGUNAH.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The claimant filed the statement of claim on 05.08.2020 through Muriithi & Masore Law. The amended statement of claim was filed on 10.08.2020. The 1st respondent's enterprise is to provide shipping, forwarding, warehousing and transporting services and is specialised in handling petroleum products and bulk project cargo. The 2nd respondent is a shareholder and managing director of the 1st respondent. The claimant prayed for judgment against the respondent for:

a) Kshs. 617, 614.46 on account of illegal, unlawful and unjustifiable salary deductions.

b) Kshs. 823, 653.00 on account of payment in lieu of notice.

c) Kshs. 730, 952.40 on account of unpaid house allowance in lieu of provision of reasonable accommodation.

d) Damages for discrimination.

e) Kshs. 64, 715.59 on account of unpaid wages for 22 days worked in May 2020.

f) Kshs. 82, 365.30 on account of one month's gross salary in lieu of termination notice.

g) Kshs. 988, 383.60 as maximum compensation for unfair termination being 12 months' gross salary.

h) Costs of the claim plus interest.

The respondent's memorandum of response was filed on 26.10.2020 through Muturi Gakuo & Kibara Advocates. The respondent pleaded that the claimant's suit be dismissed with costs.

The claimant testified to support his case and the respondents' witness (RW) was Erastus Mutua Kitolo, the 1st respondent's Accountant. The parties filed their respective final submissions. The Court has considered all the material on record. The pertinent determinations are as follows.

To answer the **1st issue** for determination, per the pleadings, evidence and submissions, there is no dispute that the parties were in a contract of employment. The respondent employed the claimant as a Declaration Officer by the letter dated 01.08.2013 and effective the same date. The claimant had applied for employment by his letter dated 31.07.2013 in which he stated that he had over 10 years of experience in clearing and forwarding as a documentation clerk performing duties of lodging of entries, IDF's, kwatos system, doing pick up of orders and CAMIS system for KRA and follow up documentation with various shipping lines. The parties agreed to an initial salary of Kshs. 25, 000.00 per month and as at separation the claimant earned Kshs.71, 622.00.

The **2nd issue** for determination is whether the respondent terminated the claimant's employment. The evidence is as follows.

The respondents issued the letter of suspension without pay dated 22.05.2020. By that letter the respondent referred the claimant to the warning letters of 18.05.2018 and 23.05.2019. The letter stated that the warning letters well outlined reasons for their issuance but it had been noticed that the claimant had not changed. The letter of suspension without pay further highlighted performance issues including:

a) Sharing of wrong (car) estimates hence misleading the customers.

b) Sharing confidential client documents with another potential and the respondent lost business because the new client viewed the respondent as very risky.

c) Lost his official working computer in circumstances which portray the claimant was not even responsible or careful with company property.

The letter concluded thus, "**We hereby grant you suspension without pay until you are able to get the computer. Please note you cannot remain in the office without the machine to work with**."

The evidence was that the laptop was stolen from the claimant while traveling to work on 21.05.2020. The claimant reported the loss to the police per Mjambere Police O.B No. 09/21/05/2020 at 0655Hrs,

By an SMS message to the 2nd respondent the claimant conveyed that he was unable to recover the lost laptop and the claimant offered to replace the laptop. The claimant further wrote to the 2nd respondent an email dated 27.05.2020 referring to the SMS and confirming that the data on the lost laptop could not be accessed by the thieves because of the password that had been in place. The 2nd respondent replied by his email dated 28.05.2020 raising numerous issues including the following:

a) The respondents had been very patient with the claimant for a while during the claimant's drinking issues. He had moved from that and gone on to betting and neglected his duties thereby making mistakes in his work. Thus, the respondents were forced to continuously surcharge the claimant for his own mistakes which the claimant gladly accepted as the respondents continued to fire fight and sweet talk clients to continue giving the respondents business and, the claimant seemed not to care.

b) The claimant had been given written and verbal warnings for uncountable times. The government had imposed the work from home policy (in view of the Covid 19 situation) and the respondents had implemented that policy for safety of all staff but the respondent had breached the protocols such as working from a saloon with high traffic with people not wearing masks. By so doing the claimant had exposed himself, he was carrying company documents, bag, laptop, and continued to act irresponsibly as if he did not care. In the process he took photos of himself and his associates and posted them on the 1st respondent's WhatsApp group to show his heroism to other staff members. The staff complained about the claimant's conduct as a danger to them and their families, but he did not seem to care. The staff took the view that if the claimant came back to the office he would be a health risk to others.

c) The email concluded thus, "**James, currently the issue is not ONLY the laptop as you are taking it. It is a combination of all above and other already documented issues. You have continuously acted irresponsibly and carelessly, putting your experience and age to a real shame. You are among the oldest in Seacon, expected to be a role model. We are told you have been threatening to go to court or report your suspension to some authorities. It is within your rights. But your rights do not supersede those of the employer, not to mention, those of other staff and their health. For now, the unpaid suspension remains until such time a decision is made, depending on how situations/conditions turns out to be**."

The claimant replied to the 2nd respondent's email of 28.06.2020 by email of 05.06.2020 and by way of comments in red fonts on each of the matters the 2nd respondent had raised. The claimant's reply was to the following effect:

a) If his drinking had made him incapable of performing duties, then the respondents would not have been patient to continue working with him.

b) At no time had he involved himself in betting to a level of neglecting his duties and he used to bet at his free time. The respondent had no policy against staff involvement in betting.

c) He may have made mistakes leading to a surcharge but the mistakes had not been intentional as he was human as each employee is bound to make mistakes and other employees had had surcharges if records were referred to. Further, "**Being issued with a warning doesn't then make me a non-performer neither does it make my demeanour questionable.**" He confirmed he made mistakes, he was cautioned and reformed so that as at time of suspension he had no valid warning on record.

d) That he breached Covid 19 protocols is mere grapevine and working from home did not mean being confined within walls of the home. Salon had not been shut down as people were entitled to grooming and he had the sole responsibility to take care of himself. He had not endangered other staff who were equally groomed meaning they must have also visited salons or barber shops.

e) It was normal for staff to share photos on staff WhatsApp group and by sharing his photos he was not proving anything.

f) The suspension without pay was based on no respondents' policy on suspension and how it should be done. His suspension was not pending investigation but it was to wait and see how the situation would turn out to be.

It is pleaded for the claimant that the respondent constructively terminated the contract of employment by suspending the claimant without pay devoid of contractual or statutory basis; suspending the claimant without a fair hearing; the suspension was indeterminate; imposing the

impossible precondition of returning the laptop for resumption of duty; disregarding the claimant's offer to return the laptop; disregarding the unsuccessful attempts by the claimant to recover the stolen laptop; and introducing unfounded allegations about breach of government measures to contain Covid 19 pandemic. It was further pleaded that the claimant was willing to work as contracted but the respondent unilaterally denied him that opportunity and without pay.

The respondent pleaded that during service the claimant was numerously guilty of misconduct and negligence whose particulars included:

a) Habit of abusing alcohol and reporting at work while drunk.

b) Giving wrong declarations despite his vast experience as a declaration officer.

c) Giving wrong estimates to the clients hence misleading clients.

d) Sharing confidential client information with third parties.

e) Mis-declarations resulting to the company incurring more taxes and penalties.

f) Delay in operating, entry, estimates and online messages.

g) Engaging himself in other activities during working hours.

h) Losing 1st respondent's property as a result of being negligent leading to loss of business.

The respondent pleaded that the claimant was issued with warning letters of 18.05.2018 and 23.05.2019 but did not improve his conduct. Further, he was suspended on 22.05.2020 when he lost the laptop while intoxicated.

While it is submitted for the respondents that the suspension was pending full investigations, the suspension letter and the ensuing emails exchanged between the parties show that the suspension was a final decision bringing the employment contract to an end. As urged for the claimant, the suspension letter amounted to constructive termination because by that letter, the respondent breached a fundamental term of the contract namely for the claimant to work and to be paid accordingly. The claimant's action of swiftly instructing his advocates to issue the demand letter dated 01.07.2020 shows that the claimant did not condone the respondents' fundamental breach of the contract of service when they suspended him without pay and in place of initiating the due disciplinary process of a notice and a hearing per section 41 of the Employment Act, 2007.

The Court has already found that the suspension was final in its wording and it was not that it was issued pending investigations and as was submitted for the respondents. While the Court upholds the submissions made for the claimant that the purported human resources policy document did not apply because it was not incorporated in the contract of service and the claimant had never signed for or been given the policy document, the document's provision that suspension would be imposed pending investigations and it would be with pay was clearly not complied with by the respondents in the manner the suspension letter was worded. Thus, even if the policy document were to apply, it would not aid the respondent's case. To confirm the finality of the suspension, the respondents disregarded the claimant's offer to replace the laptop with a new one and instead reminded the claimant about his otherwise unclean record of service and conveyed that he would remain on suspension without pay as the turn of the situation was observed.

The Court therefore returns that the claimant was entitled to consider himself terminated effective 22.05.2020 when the letter of suspension without pay was issued by the respondents. The letter of suspension without pay amounted to a constructive termination.

To answer the **3rd issue** for determination the Court returns that the termination of the contract of service was unfair because it entailed breach of the due procedure of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The Court considers that the respondent ought to have initiated due disciplinary procedure towards dealing with the issue of the lost laptop and then the other issues of poor performance and misconduct that the 2nd respondent appears to have been concerned about as per the emails the parties exchanged thereafter and as earlier highlighted in this judgment.

The **4th issue** is whether the claimant should be awarded the remedies as prayed for. The Court makes findings as follows:

a) The claimant prays for Kshs. 617, 614.46 on account of illegal, unlawful and unjustifiable salary deductions. In the email dated 05.06.2020 the claimant stated that he was human, he made mistakes just like other staff, and like other staff he had been surcharged – the surcharge now being subject of the present claims for alleged unfair deductions. Again, in his testimony he stated that he was involved in an accident whereby the 1st respondent's motor vehicle was damaged and RW confirmed that he was deducted ensuing motor vehicle expenses Kshs. 27,000.00 and towing charges of Kshs. 7,000.00. the claimant also testified that he agreed there were errors in entries he made. His further evidence was that whenever he noticed deductions in his pay he discussed the issue with RW who gave him explanation that it related to the errors in declarations the claimant made. RW testified that the claimant shared wrong estimates with the clients for example underestimating the value of cargo in issue. Further, such wrong declarations by the claimant meant penalties and higher taxes are paid to Kenya Revenue Authority (KRA) as incurred by the respondent. The Court has considered the evidence. It is that the claimant was genuinely deducted for losses incurred by the respondent and attributable to the claimant's mistakes or negligence in performance of his duties. The deductions are found to have been genuine and at all times known to the claimant and by his own words, he was human, he made mistakes, and he was surcharged. The claim and prayer in that regard will collapse. The Court upholds the submission made for the respondents that the deductions were within the lawful deductions an employer can make from an employee's salary under section 17(1) of the Employment Act, 2007. While making that finding the Court has also considered that throughout service there appears to have been no grievance about deductions and in the

emails after the suspension, the issue of deductions or surcharge came up and the claimant did not say surcharge was unfair but that, he had been surcharged in view of his mistakes in discharge of duty – and other staff had been surcharged in similar circumstances.

b) The claimant prayed for Kshs. 823, 653.00 on account of payment in lieu of annual leave. The claimant and RW are by testimony in agreement that the claimant did not go on annual leave throughout service. RW testified that nevertheless, staff were paid in lieu of annual leave at the end of every year. RW referred to relevant annual payment schedules as exhibited but they were headed "**bonus**" for the reason that in that way tax implications falling on the payment were manageable. The claimant did not dispute receiving the annual payment. The only dispute was how the use of bonus would imply pay in lieu of annual leave. The material on record does not show that there existed a grievance between the parties throughout the service on the issue of annual leave. The Court has also considered that the claimant has not shown that bonus was due under his contractual arrangements. The Court considers that the respondent cannot have opted to be generous to pay a non-contractual annual bonus and not meet the statutory obligation to pay in lieu of annual leave. The Court finds that in the circumstances and on a balance of probabilities, there is no reason to discount RW's evidence that the annual payment styled as bonus was indeed in lieu of annual leave. However, the Court finds that for year 2020 the claimant is entitled to prorate leave now awarded at half monthly salary making Kshs. 71, 672.00/2 thus **Kshs.35, 836.00**.

c) The claimant prayed for Kshs. 730, 952.40 on account of unpaid house allowance in lieu of provision of reasonable accommodation. Is submitted for the respondent that parties agreed on a consolidated monthly salary. The claimant testified that they agreed upon a consolidated pay which was increased over time. The last payslip shows basic pay and gross pay as Kshs. 71, 622.00. The material on record does not show that the parties were in a dispute or grievance about provision of housing or house allowance and the Court considers that the claim was a mere afterthought. The claimant testified in his re-examination that there was no agreement on housing and the payslips indicated no house allowance. In cross-examination he testified thus, "**I was employed by the respondents as Declarations Officer. We agreed on consolidated salary. It was verbal….**" In view of that evidence and in absence of a grievance about house allowance or provision of housing throughout the claimant's service, the Court finds that the parties agreed upon a consolidated monthly salary with an element inclusive of reasonable provision for housing as envisaged in section 31 of the Act. The claim and prayer in that regard is declined.

d) The claimant prayed for damages for discrimination. The claimant pleaded and testified that when another staff was involved in an accident and the respondent's motorbike was damaged, the employee was not suspended like in his case when the respondent's laptop was stolen from him. He also testified that the motorbike was insured but he did not know if the laptop was also insured. The Court has considered the claimant's case and returns that the claimant has not established that the cases were similar and further, the record of service and other circumstances surrounding the claimant and the other employee have not been shown to have been similar. The Court returns that the claimant has failed to establish discrimination in terms of section 5 of the Act. In any event the Court considers that an employer has a prerogative to initiate disciplinary process and the discretion to do so against one employee and not the other will not constitute discrimination especially in instances of completely distinct transactions constituting the basis of the alleged discrimination like in the instant case.

e) The claimant prayed for Kshs. 64, 715.59 on account of unpaid wages for 22 days worked in May 2020. The claim is not disputed and is awarded accordingly at 22/30 x Kshs. 71, 622.00 making **Kshs. 52, 559.50**.

f) The claimant prayed for Kshs. 82, 365.30 on account of one month's gross salary in lieu of termination notice. The Court finds that since the constructive termination has been found to have been unfair, the claimant is awarded at **Kshs. 71, 622.00** being the last monthly gross pay and in view of section 35 of the Act.

g) The claimant prayed for Kshs. 988, 383.60 as maximum compensation for unfair termination being 12 months' gross salary. The Court has considered the factors for award of compensation under section 49 of the Act. The claimant wished to continue in employment. However, he seriously contributed to his termination. He admitted to make mistakes in his service delivery and while he was surcharged, there is no reason to doubt that the claimant's conduct seriously strained the relationship between the respondents and the customers so that the business must have suffered adversely. The claimant admitted that he received the two warning letters on record. The claimant also adopted an aggressive and combative individualistic approach towards the 2nd respondent in the manner he responded to the concerns raised about the drinking habit and the compliance with the government measures for combating Covid 19 epidemic. There was no denial that on the latest situation, indeed the laptop had got stolen in the claimant's hands and while he was willing to replace it, the respondent's business must have been seriously disrupted and crucial data was lost. Looking at the claimant's record of service, the Court finds that he caused the respondents anxiety and trouble. The Court returns that the claimant significantly contributed to his termination and he is awarded only one months' gross salary making **Kshs. 71, 622.00.**

h) The Court has considered the parties' margins of success including the claimant's contribution to the ensuing termination and the Court returns that the respondent will pay 50% of the claimant's costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1) The respondent to pay the claimant **Kshs. 231, 639.50** (less PAYE) by 01.04.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

2) The respondent to pay the claimant's **50%** costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE