



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT MOMBASA
CAUSE NO. 52 OF 2019

WILBERFORCE BARASA MWASAME.....CLAIMANT

- VERSUS -

SOGEA SATOM KENYA LIMITED..... RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 22.08.2019 through C. Masinde & Company Advocates. The claimant's case is as follows.

It is pleaded that the claimant was employed by the respondent as a Site Engineer in the respondent's Mombasa site from 16.07.2018 to 14.06.2019 when his services were terminated by the letter dated 13.06.2019 received by the claimant on 14.06.2019. The letter of appointment dated 09.07.2018 provided for monthly salary of Kshs. 120, 000.00, monthly house allowance of Kshs. 30,000.00 and a transport allowance per stipulated transport allowance guidelines subject to statutory deductions. From that letter of appointment, the monthly gross pay was Kshs. 150, 000.00.

The claimant further pleads that the termination letter dated 13.06.2019 referred to alleged events on 13th and 20th May 2019 but the claimant's case was that the incident relied upon by the respondent occurred on 24.05.2019. Further, on that 24.05.2019 his co-worker one Mr. Paul Le Mee possessing mobile phone No. 0727xxxxxx called the claimant's personal cell phone No. 0724 xxxxxx in the morning and instructed the Claimant to collect a request for quotation booklet from the desk of the said Paul Le Mee as they all shared an open office space. The claimant went to the desk as was instructed but failed to trace the quotation document. The claimant then went back to trace the said Paul Le Mee (hereinafter simply 'Paul') to give him the feedback. Paul returned to the office - and called the claimant who together with his colleague Mr Matthieu De Salins were out of the office to go to the office. The claimant and Salins went to the office and were locked up at the office and questioned whether they had taken Paul's money of unknown amount and they were locked up without involving the police. Later Paul released Salins but the claimant remained detained and locked in the office and the claimant avers that the same amounted to violation of his constitutional rights as it was unlawful.

The claimant's further case is that he was the only Kenyan employee in top management stationed at the respondent's Mombasa office and working with Paul, Salins and Jean Baptiste Chabbert all being white and he was the only one detained and the white colleagues were not detained and locked at the office at all. The claimant alleges discrimination and violation of the constitution, Employment Act, and the International Convention on the Elimination of all Forms of Racial Discrimination. The claimant's further case is that he had a clean record of service with no warnings and the alleged theft of unknown amount of money was unfair and discriminatory especially that there were no police investigations. Further, the termination was on account that he was a person of questionable character and his professional reputation has suffered and lowered his employability. Further, his termination breached sections 41, 43, and 44 of the Employment Act, 2007 as it was with no notice, reasons or hearing. His contract was due to lapse on 10.07.2020. Further, the claimant attempted to resolve the grievances but the respondent failed to resolve and failed to pay the claimant's final dues.

The claimant claimed for:

- a. Damages for defamation Kshs. 4, 000, 000.00.
- b. Aggravated damages for racial discrimination Kshs. 4, 000, 000.00.
- c. Damages for character assassination Kshs. 4, 000, 000.00.
- d. Damages for unlawful detention and harassment Kshs. 2, 000, 000.00.

- e. 13 months' salary pending expiry of the contract Kshs. 1, 950, 000.00.
- f. Salary for the month of June Kshs. 80,000.00.
- g. 12 months' compensation for unfair and unlawful termination Kshs. 1, 800, 000.00.
- h. Notice pay Kshs. 150, 000.00.
- i. Compensation for 24 years pending retirement age of 60 years Kshs. 3, 600, 000.00.
- j. Annual leave for year 2018/2019 Kshs. 150, 000.00.
- k. Certificate of service.
- l. Total claim Kshs. 21, 730, 000.00.

The claimant prayed for judgment against the respondent for:

- a. A declaration that termination of the claimant's employment was unfair and unlawful.
- b. A declaration that termination of the claimant's employment was unfair and unlawful.
- c. Payment of Kshs. 21, 730, 000.00.
- d. Costs of the claim plus interest at court rates.
- e. Certificate of service to be issued to the claimant.
- f. Any other relief court deems fit to grant.

The respondent filed the response to the claim on 30.10.2019 through Theuri Wanjohi & Company Advocates. The respondent admitted that it employed the claimant from 16.07.2018 to 14.06.2019 as pleaded for the claimant. The respondent pleaded that the letter of termination stated that the termination was due to lost confidence. The respondent pleaded that it was a stranger to the alleged detention and lock up by Paul and was a stranger to allegations of defamation and discrimination and if at all took place, it was by third parties and not by the respondent.

Further, the alleged incident happened in an open office shared by the claimant, Paul, Salins, Baptiste and one Nicholas Passera and all of them were required to explain their whereabouts at around 7.30am of the date the incident took place. They all complied with the request. Further the claimant never mentioned going to Paul's desk on the material morning but instead stated, "**I reported to work at 7.20am and went into my office, opened my desk top. I went to get water reading for the meters as I do every morning. At around 7.30am I went for the pre-start meeting which lasted for 15-25 minutes.**" Further, contrary to his explanation a video recording had been taken by a camera on Paul's desk top that captured the claimant moving over the desk and doing something underneath the same where subject bag had been kept and the video had been captured at 7.30am. in view of the discrepancy in the explanation, he was given a letter and asked to show cause why disciplinary action should not be taken against him for dishonest conduct. A hearing was conducted the same day and the claimant given chance to defend himself. The claimant offered the quoted explanation at the hearing but after he was shown the video clip, he changed the explanation and recanted the same and introduced the explanation about having been sent by Paul to collect a requisition form from his desk. Further, at the hearing the claimant was shown another earlier clip of his similar behaviour at Paul's desk and when Paul had also reported loss of money – and the claimant explained that on that occasion he was looking for a pen under Paul's desk. Thus, the claimant was given a chance to be heard, the matter was handled fairly, and the termination was not unfair. The reason for termination was lost confidence in view of the claimant's dishonest explanation and not that he had actually stolen the money in issue and asserting lost confidence did not amount to character assignation as was alleged for the claimant. Further, sections 41, 43 and 45 of the Act were not breached at all. In particular:

- a. He was given chance to show cause on 24.05.2019 and he gave a written explanation. He was also given a hearing on the same day. Sections 41, 43 and 45 were complied with accordingly.
- b. The claimant did not provide a dishonest explanation and was dismissed on account of lost confidence.

The respondent pleaded that the claimant was not entitle to the claims and prayers and the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Agnes Anyanje Tikolo, the respondent's Human Resources Manager. Final submissions were filed for the parties. The Court has considered the material on record and makes pertinent findings as follows.

To answer the **1st issue**, there is no dispute that the respondent employed the claimant as Site Engineer at the Mombasa Office at a gross monthly salary of Kshs. 150, 000.00.

To answer the 2nd issue, there is no dispute that the contract of employment was terminated by the respondent's letter dated 13.06.2019. The termination was with immediate effect for loss of confidence related to incidences which occurred on 13.05.2019, 20.05.2019 and, on 24.05.2019 on Mombasa site where the claimant was designated as the Site Engineer. The letter advised the claimant to clear within 7 days and to get paid salary up to 14.06.2019; 1-month in lieu of notice; 13.50 leave days earned but not taken; and less liabilities owed to the respondent.

The 3rd issue for determination is whether the termination was unfair in procedure or substance or both. The evidence by the claimant and RW confirm that the event of alleged Paul's stolen money took place on 24.05.2019. The evidence is that after the incident which was reported the claimant was invited to make an explanation on the alleged loss of Paul's money and the claimant testified that he did not know the amount of money involved. He made the explanation and was told to go away and await further instructions. For two weeks he was not recalled and he wrote emails to find out his fate. He was then summoned to the head office on 14.06.2019 and when he attended he was given the termination letter without any explanation. The claimant testified that the respondent consulted its Advocate about the incident of 24.05.2019 and after viewing the video clips in issue the Advocate concluded that the claimant was not culpable of the alleged theft of money. The respondent's pleading and evidence is that the claimant misled and was dishonest about the events. The Claimant has relied on the analysis by the respondent's Advocate, one Theuri Wanjohi & Company Advocates, as the evidence that he never stole the money. The Advocates were the independent consultant the respondent referred all the material in issue for analysis. The Court finds that the Advocates' analysis as per the email dated 29.05.2019 (and not disputed by the claimant) to be the true account of what happened and it was as follows:

“I have now studied the materials forwarded with your email below. I understand that the Company would not want an employee of questionable integrity. Honesty should be upheld by all employees. The employees should also respect the properties of their employer and their co-workers.

The evidence available is however inconclusive. The videos shows someone searching for something under the desk. It is not clear what he was looking for. It is not clear whether he found whatever he was looking for. The video does not show him taking anything. It is therefore not evidence of stealing. You may wish to confirm if the clip covers the whole incident.

Secondly, the video does not show that there was a bag at the place the person is searching. It is therefore not clear whether he searched side a bag or not. There is also no evidence that there was money or any other thing. It is a matter the word of one employee saying money was stolen and the suspect denying the allegation. Accordingly, there is only suspicion about the conduct of the person.

The suspicion is made stronger by the fact that he did not disclose his entry into that office. His show cause answer does not mention the presence in the office. He also denied it initially at the hearing only to recant upon being confronted by the video.

As the evidence is inconclusive, I do not think the allegation of stealing has been proved. I would suggest that a suitable warning be given as th conduct of the employee is suspicious.

I trust that you will find the foregoing to be useful.

Regards

Theuri Wanjohi Advocate”

The claimant has relied on that email. The Court finds that the email together with relevant documents on record shown that the incident was reported, the claimant was notified about it, he was given a letter to show cause and he replied in writing, the parties held a meeting and the issue discussed and videos played in the claimant's presence and, he was told to go away to await further instructions. The Court returns that the respondent complied with due process of notice and a hearing per section 41 of the Employment Act, 2007. It cannot be said that the respondent failed to invoke a fair procedure prior to the termination. The emails by the Advocate as exhibited by the claimant show that the respondent was keen to proceed in accordance with the law. The Court finds that due procedure was followed prior to the termination.

Was the reason for termination valid and genuine as existing at the time of termination per section 43 of the Act? Did the reason constitute a fair reason as relating to the claimant's conduct, capacity or compatibility as employed; or based on the operational requirements of the respondent as envisaged in section 45(2) of the Act?

The Court finds that per the Advocate's email of 29.05.2019 and as per the claimant's own evidence, the claimant was not honest about his going to Paul's desk on the material date of the incident at about 7.00am. While pleading that Paul called him and instructed him to pick a tender document from Paul's desk, he does not state so in his reply to show-cause dated 24.05.2019. In his reply the only time Paul is said to have called him was at 8.32am and when he went, Paul locked the claimant and Salins at the office. The Advocate's email also confirms that the claimant was seen at the desk at the material time and he gave contradictory account to the respondent in that regard. The claimant testified in cross-examination thus, “... After incident of 24.05.2019 I was given opportunity to give the written explanation at page R19. I see my witness statement on events of morning of 24.05.2019. I say Mr. Paul Le Mee called me per last paragraph page 1/5 and first paragraph page 2/5. The time Mr. Paul asked me to get document was about 7.30am. At around 7.30am I went to Paul's desk to look for the document. In my explanation page R19 I was to explain what I was doing at 7.30am. I mention I reported at 7.20am as I went to my office. At 7.30am I state I went for pre-start meeting at boardroom. I do not state I had been at Paul's desk at around 7.30am. I do not mention that fact in my explanation....” The claimant also failed to exhibit the call logs of the alleged call from Paul allegedly instructing him to pick documents from Paul's desk and the Court returns that the evidence is that such a call did not take place at all.

The Court returns that by that claimant's evidence and per evidence by RW confirming the respondent's pleaded reasons for termination, the Court finds that the respondent has established that the reason for termination existed as at termination, it was genuine, and it related to the

claimant's conduct and compatibility. Thus, as submitted for the respondent, the reason for termination was consistent with the provisions of the sections 43 and 45 of the Employment Act, 2007.

The Court upholds the submissions made for the respondent that the termination was not unfair both in procedure and substance. The claimant lamented that the termination letter referred to events of 13th and 20th and 24th May 2019 but he only knew about events of 24.05.2019 and the Court finds that it is sufficient that the dispute related substantially to events of 24.05.2019 which the claimant was well informed about.

To answer the 4th issue for determination, the Court finds that as pleaded and submitted for the respondent, the respondent was a stranger to the alleged harassment by way of the claimant being allegedly locked up and detained by Paul and further, the alleged discrimination. The Court finds that the alleged lock-up and detention was not proved sufficiently because if indeed it took place, it amounted to a serious offence to have been reported to the respondent's management and the police but no such report was shown to have been made by the claimant. Second, even if Paul would have been shown to have locked up the claimant as alleged, it could be that the same would be outside the respondent's authority to Paul so that Paul would be held personally liable exclusive of the respondent and yet, Paul was not a party to the suit. The Court's view is that an employer is not vicariously liable for civil wrongs by their employee where the employee has acted outside the authority conferred by reason of that employment and, unless it is shown that the employer authorised or condoned the civil wrong and the employee was acting in official capacity.

The claimant's case for discrimination was that he shared the open office with four white colleagues but who were not subjected to the same disciplinary process. However, the evidence is that the respondent required all the persons sharing the office to explain themselves with respect to the events on the morning of the material day. The responses by all the employees concerned were exhibited and the Court returns that the allegations for discrimination were unjustified. The evidence is that the respondent engaged in a genuine investigation following the complaint Paul had made and racial discrimination was indeed a farfetched claimant's allegation. The respondent's pleadings and submissions are upheld in that regard and as submitted, the respondent has discharged the burden in section 5 (7) of the Act that the alleged discrimination did not take place. Further, the Court finds that the alleged defamation was not established and the evidence was that the claimant's professional reputation had not been destroyed by reason of the termination because he already had obtained alternative employment as at the time of the hearing of the suit. As submitted for the respondent there was no publication to a third party that the claimant was a person of questionable character because all along, it was an internal disciplinary process. In any event, the reason for termination being valid, defamation cannot begin to emerge at all.

To answer the 5th issue, the Court returns that in view of the findings on the 2nd to 4th issues earlier in this judgment, the claimant is not entitled to any of the remedies as prayed for except as was offered by the respondent in the termination letter being as follows:

- a. Salary up to 14.06.2019 (already paid per June 2019 payslip and as submitted for the respondent).
- b. One-month notice payment Kshs. 150, 000.00. The amount due for salary was Kshs. 120,000.00 and already per June 2019 payslip.
- c. 13.5 leave days earned but not taken was already paid per the June 2019 payslip.

The claim for pay for 24 years pending retirement is indeed shocking because as submitted for the respondent parties were in a two-years' fixed term contract. Further the respondent has not established a thing attributable to the respondent which denied him employment opportunity thereafter and, the claimant testified that he was already employed elsewhere. The claim for payment for unexpired 13 months unexpired contractual term will collapse as unjustified.

The claimant is entitled to a certificate of service per section 51 of the Act. In that consideration each party will bear own costs of the suit.

In conclusion the suit is hereby determined and judgment entered for:

1. The respondent to deliver the certificate of service by 15.02.2022.
2. Each party to bear own costs of the suit.

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

BYRAM ONGAYA

JUDGE