



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 2127 OF 2014

VINCENT OUSO OCHUODHO..... CLAIMANT

-VERSUS-

INTERCONTINENTAL HOTEL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 12.8.2004 as a Laundry Machine Operator and later became a Laundry Supervisor earning Kshs. 87,059 per month. In 2013 he was elected Shop Steward by the unionsable employees of the Respondent. On 3.10.2013 he was served with a show cause letter accusing him of gross misconduct. On 7.10.2013 he was suspended and 18.10.2013 he was accorded a hearing. On 25.10.2013, he was served with a termination letter dated 23.10.2013.

2. The Claimant was aggrieved by the said termination and brought this suit on 27.11.2014 alleging that the termination was wrongful and unlawful and sought the following reliefs:

- a. Reinstatement to his previous position/job without any loss of benefits.
- b. Salary arrears for the entire period the Claimant has been out of employment
- c. Special damages as set out in the claim and proved at the hearing.
- d. Maximum compensation of 12 months for wrongful dismissal.
- e. In the alternative, payment of all the lawful terminal dues comprising Notice pay, leave due allowance, salary for the days worked and Service pay.
- f. Costs of this suit with interest thereon.

3. The Respondent filed defence on 1.2.2016 admitting that it employed the Claimant as pleaded in his claim. However, it denied the alleged wrongful termination of the Claimant's contract of service and averred that the termination was substantively and procedurally fair. It therefore prayed for the suit to be dismissed with costs.

4. The suit went to full hearing where both parties gave evidence and hereafter filed written submissions.

EVIDENCE

5. The Claimant testified as CW1. He told the court that he worked for the Respondent as Laundry Machine Operator, Guest shop Attendant and later became Laundry Supervisor earning a gross pay of Kshs. 95,742.65. In 2012 he became Shop Steward and his relationship with the employer was good. However, on 3.10.2013 he was served with a show cause letter at 12 pm by the General Manager in the presence of the HR Manager. The letter accused him of visiting the UPA Insurance Office to demand a bribe and the complainant was UAP Insurance Company. He responded immediately denying the charges and thereafter called for a meeting of the Works Committee to brief them about the accusation.

6. On 7.10.2013, he received a suspension letter, for the same accusation, pending investigations. On 18.10.2013, he was called to an oral hearing and the Works Committee recommended for reinstatement because he never went to UAP and there was no evidence, that he met with UAPs. He denied even going to UAP Insurance to request for any gift or money. He further denied knowledge of any person in UAP.

7. He further testified that on 23.10.2013 he was served with termination letter citing the same reasons raised by the show cause letter. However, he maintained that the same was not true. He contended that the CBA provided for suspension of 14 days but he was suspended for 17 days. In his view the employer acted maliciously. He, therefore prayed for the reliefs sought in his suit.
8. On Cross-examination, he contended that as a Union official, he was always targeted by the Management. He contended further that on 3.10.2013, the HR Manager convened a meeting for the Works Committee but it was interrupted by four union employees from the HR department. He blamed the HR Manager for the interruptions because the employees came from the HR department.
9. The Claimant admitted that a few days before 3.10.2013, UAP was invited to the Respondent and made presentations on medical cover for the staff. However, he denied that he thereafter went to UAP to demand bribe on behalf of any person. He contended that he was not given adequate time to respond to the show cause letter. He confirmed that he has been to the UAP several times for personal matters but he could not remember whether he went to UAP Insurance offices on 27.9.2013 at 12.19 pm. He denied that he was in the CCTV videos projected in court by the Respondent.
10. He admitted that he saw the email from UAP Insurance accusing him of going to its office to claim bribe so that tender for medical cover can be given to it. However, he denied ever meeting Fred Ruoro on 27.9.2013 and contended that he did not even know him. In his view, the person who visited the UPA offices was an impersonator. He admitted that on 18.10.2013, he was accorded an oral hearing in the company of the whole Works Committee, which recommended for his reinstatement. However, after the hearing, the disciplinary committee decided that his employment be terminated and he be paid salary in lieu of notice. He admitted that he was paid the dues set out in the termination letter including Kshs. 185,028 and a further Kshs. 115,390.18.
11. On re-examination he contended that he was not given the investigators report before attending the disciplinary hearing nor was the report produced during the hearing. He further contended that the video clips produced in court were not shown to him during the disciplinary hearing.
12. Mr. John Muraguri, Respondent's Security Officer testified as RW1. He told the court that he investigated the allegations made against the Claimant by UAP Insurance and prepared a report which he signed on 15.10.2013. He did the investigations on instructions from the General Manager Mr.Karl Halaa and the investigations concerned allegations that the Claimant visited UAP insurance offices along Bishops Road Nairobi.
13. He further testified that he summoned the Claimant to his office to record statement and he went with the Chairman and the Secretary of the Works Committee. He further obtained CCTV clips for 27.9.2013 from UAP insurance. He also visited UPA offices and meet with Mr. Fred Ruoro, Business Development Officer, Mr Nzioki, General Manager, Ms. Ann Mutie Legal Counsel and Mr. Erick Kisaka, Risk Manager.
14. He stated that Mr. Ruoro who gave him the CCTV clips and told him that Claimant visited him in his office on the 4th floor demanding commission for insurance cover. RW1 identified the Claimant in the CCTV clips as the man in jacket accompanied by another man in blue jeans. He maintained that the Claimant visited the UAP Insurance offices as per the CCTV clips. He contended that he had worked with the Claimant for 14 years and as such he was able to positively identify him in the CCTV clips.
15. On cross-examination RW1 contended that he worked as a police officer for 8 years in the rank of a Corporal having trained as an investigator at various institutions. He admitted that he never signed the visitors book when he visited UAP for investigations because he had prior appointment. He also did not sign any Register at the UAP offices.
16. He admitted that the first and second CCTV slips do not show the respective floor but the third clip is for 4th floor. He further admitted that he never made the clips but contended that he was given the same by the UAP's Risk Manager Mr.Kisak. He admitted that the clips do not show the name of the building and he never recorded his meetings with the said UPA insurance officials nor did he record any statement from them. However, he contended that there were emails received from UPA insurance accusing the Claimant. He further testified that the Claimant denied in his statement that he never visited UAP Insurance even in his private capacity. He stated that the CCTV clips show that they were obtained from UAP insurance and they indicated the dates, time and floor.
17. Mr. Stephen Mutuma Kiagura, Senior Director HR Africa, testified as RW2. He confirmed that the Claimant was the Laundry Supervisor and also the Shop Seward. He stated that he met the Claimant daily both informally and formally at the Works Committee.
18. On 3.10.2013, he invited the Claimant to meet him alone for a personal matter, but the Claimant brought the whole Works Committee. The said Committee meeting was not officially convened but he allowed it to continue. However, some unionizable staff for the HR department stormed the meeting alleging that they were not represented at the meeting. However, he ordered the intruders to leave and the meeting went on till 12 noon.
19. RW2 further testified that after the said meeting, he called the Claimant to the General Manager's office to verify whether he visited UAP Insurance offices as per the complaint received and he admitted verbally that he visited the company office to commend them for the wonderful presentation. However, when he was given a show case letter after confirming that he had visited the company, he changed the story and denied ever visiting the UAP Insurance offices even on a person capacity. As a result he suspended the Claimant pending investigations.
20. On 8.10.2013, he wrote a letter to the Claimant to see the security officer to explain the matters leading to his suspension. Thereafter he received the Claimant's statement plus email dated 16.10.2013 from Susan Nganga Group Risk Manager UAP Insurance by which she gave CCTV footage to RW1. The DVD attached an Electronic Evidence Certificate pursuant to section 106B of the Evidence Act issued by UAP Security Officer Mr. Stanley Kinuthia.

21. Rw2 further testified that after receiving the investigations request, the Claimant was invited to a disciplinary hearing 18.10.2013 where he was accompanied by the whole Works Committee. Referring to paragraph 5, page 67 of the Claimant's documents, the Works Committee identified the Claimant in the CCTV clips but not the second person. He contended that the Claimant refused to be asked about things he did while off duty.

22. RW2 further testified that the reason for terminating the Claimant's employment was stated in the suspension letter. He admitted that the UAP Insurance was not invited to the disciplinary hearing because it was an internal matter and also because there was enough evidence. He contended that the Claimant breached clauses in the Code of Ethics. As regards the suspension, he contended that it was from 7.10.2013 to 23.10.2013 representing one extra day which was through mutual agreement vide the extension dated 22.10.2013 on page 52 of the Claimant's documents.

23. He further testified that the case was escalated to the Joint Industrials Council (JIC) under the CBA and the termination was upheld. He contended that the Respondent acted fairly by not dismissing the Claimant but only gave him a normal termination with benefits. He contended that the minutes dated 25.10.2013 is the true reflection of what happened in the disciplinary hearing.

24. On cross-examination he contended that the CBA provides for joint consultative meeting. He reiterated that on 3.10.2013 he served the Claimant with a show cause letter and they agreed on the time frame for responding and he responded the same day. He explained that the delay in serving the letter was caused by the delay in concluding the Works Committee meeting. He admitted that he never met the Claimant with UAP officer but he only called the Claimant to explain why he visited the said offices. According to him the Claimant had no right to visit the UAP offices on behalf of the Respondent without authority.

25. He maintained that Mr. Fred Ruoro provided evidence to prove that the Claimant visited UPA offices to solicit for a bribe. However, he admitted that there was no voice records of the Claimant asking for a bribe or commission. He contended that the security team did a full investigation and he gave the Claimant a copy of the investigations report on 23.10.2013 before the termination. He admitted that the termination was based on the investigations report.

26. On re-examination he reiterated that he received a complaint from UAP insurance that the Claimant went to their offices as worker's representative to solicit for a commission on the medical cover. He maintained that the Claimant admitted that he visited UAP insurance office to complement them for a good presentation but after serving him with a show cause letter, he denied ever visiting the UAP offices. He contended that they agreed that the claimant could respond to the show cause letter by 6.30 p.m. but responded by 2.30 p.m.

27. RW2 reiterated that during the hearing, he showed the Claimant the evidence of his visit to the UAP offices but avoided questions by the disciplinary committee.

SUBMISSIONS

28. The Claimant submitted that the reasons for the dismissal was not valid because the complainant from UAP Insurance was never called to give evidence during the disciplinary hearing and in this court. In addition, he contended that the emails used as evidence to dismiss him had a disclaimer at the bottom whereby UAP Insurance disowned the same. In his view therefore the termination was not substantively fair.

29. As regards the procedure followed, the Claimant contended that he was not served with the investigations report before the hearing to enable him prepare his effective defence and instead the report was served to him together with the termination letter. In addition he submitted that he sought information to enable him respond to the charges but the same was denied. He also submitted that the failure by the Respondent to avail his accuser at the hearing denied him a fair hearing contrary to section 41 of the Employment Act and Article 4 of the Constitution. Therefore, he prayed for the reliefs set out in his pleadings.

30. The Respondent submitted that the termination of the Claimant's employment was procedurally fair because he was given a chance to defend himself through a show cause letter and later in a disciplinary hearing on 18.10.2013 in the presence of Works Committee. He relied on **Patrick Abuya v. Institute of Certified Public Accountants of Kenya [2015]eKLR and John Joel Muchuna & 8 Others vs. Kenya Revenue Authority [2015]eKLR** where the court held that in disciplinary hearings, the employer is not required to conduct a mini court.

31. In the instant case, the Respondent maintained that the complainant wrote emails accusing the Claimant of visiting the UAP insurance office to solicit for bribes and the said emails were shown to the Claimant.

32. The Respondent further submitted that after the termination, the matter was escalated to the JIC pursuant to the terms of the CBA and after deliberations, the JIC upheld the termination.

33. As regards substantive fairness, the Respondent submitted that the reason for the termination was valid. It contended that Mr. Fred Ruoro from UAP insurance called RW2 complaining that the Claimant visited him at UAP insurance office with an agent of Kodak Insurance Agency. That upon request, the complaint was reduced into writing and emailed to the RW2 on 30.9.2013 and thereafter the complainant clarified by another email that the Claimant wanted the said Agency appointed because he knew it and it was also because it would pay him a commission. Further, the clause also indicated that as a representative of the union in the tender committee he had in the past influenced who got the tender for medical cover.

34. The Respondent contended that as at the time of the said visit, it was evaluating bids for tenders from various companies including UAP insurance and submitted that the Claimant's conduct was an attempt to rig the bidding process. It contended that the emails used as evidence against the Claimant were authentic and that the disclaimer cited by the Claimant was a standard disclaimer. It further submitted that the Claimant was positively identified by the defence witness as one of the persons in the CCTV clips. It further submitted that the clips were authenticated by a Certificate issued under section 106 of the Evidence Act. Finally, it submitted that the Claimant has not given any reason as to why Mr. Ruoro would falsely accused him of visiting his office at UAP.

35. From The foregoing matters the Respondent urged the court to find that the Claimant is not entitled to the reliefs sought in the claim and proceed to dismiss the suit with costs.

ISSUES FOR DETERMINATION

36. Having considered the pleadings, evidence and submissions, there is no dispute that the Claimant was employed by the Respondent until 3.10.2013 when his services were terminated for gross misconduct. There is also no dispute that after the termination the Claimant was paid the terminal dues set out in the termination letter. The issues for determination are:

- a. Whether the reason for the termination was valid and fair.
- b. Whether the termination was in accordance with a fair procedure.
- c. Whether the claimant is entitled to the reliefs sought.

REASONS FOR TERMINATION

37. The reasons for the termination according to the letter dated 23.10.2013 is that the Claimant visited the UAP insurance office on 27.9.2013 in the company of a gentleman from Kodak Insurance Agency to solicit a commission for delivering the Respondents staff medical scheme to UAP insurance; that the commission was to be delivered through the said Agency; and that the Claimant held himself out as an influential person capable of influencing the tender award because he was a member of the Respondent's tender committee and the union representative.

38. According to the Respondent the foregoing amounted to gross misconduct because the Claimant breached the Code of Conduct. In its view the right action against the Claimant was summary dismissal but it treated him with leniency by giving him a normal termination with benefits. The evidence relied upon against the Claimant included emails from UAP insurance and CCTV clips.

39. The Claimant denied the alleged offence and defended his freedom of movement. He contended that he has visited UAP premises severally for private matters and not to demand bribes, or commission as alleged. He dismissed the evidence tendered by the Respondent as worthless including the CCTV clips which he maintained that court does not capture him or the identity of the premises. He further maintained that his accuser never gave evidence either during the disciplinary hearing or herein and as such the offence was not established.

40. I have carefully considered the evidence and submissions by both parties. The evidence relied on by the Respondent to dismiss the Claimant was the emails by Mr. Ruoro and CCTV clips. It is common knowledge that neither Mr. Ruoro who complained against the Claimant nor any other officer from UAP insurance testified before this court or during the disciplinary hearing.

41. As regards the CCTV clips produced, although RW1 and RW2 positively identified the Claimant in the said clips the said evidence is not relevant in proving that the Claimant visited the UAP Insurance offices because the clips do not give identity of the premises/building in which the Claimant had gone.

42. However, the court is persuaded by the email from Mr. Ruoro to the RW2 that the Claimant visited UAP on 27.9.2013 and the purpose of the visit was to request UAP to appoint Kodak Insurance Agency as the intermediary for medical scheme with the intention of getting a commission. The Claimant did not deny knowledge of Kodak Insurance Agency and did not give any reason why Mr. Ruoro would accuse him falsely.

43. It is, therefore, my holding that the Respondent has proved on a balance of probability that the reason for terminating the Claimant's contract of service was valid because he breached the Code of Ethics and Business Conduct which require that employees should avoid conflict of interest or receiving of gifts from suppliers and business partners. Consequently, I find that the employer has proved that the termination met the threshold of substantive fairness required under section 43 and 45 of the Employment Act.

PROCEDURE FOLLOWED

44. Under section 41 of the Act, before employer terminated services of an employee on ground of misconduct, he must accord the employee a hearing in the presence of another employee or union shop floor representative of his choice. In this case, the Claimant was served with a show cause letter and responded in writing. Thereafter he was invited to an investigatory hearing before Security Officer (RW1) and he voluntarily recorded a statement. Again, he was invited to a disciplinary hearing and he attended with the entire Works Committee and defended himself. Finally, the case was referred to JIC after the termination and the termination was upheld.

45. Section 41 of the Employment Act provides that:-

“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 shop floor union representative of his choice present during this explanation.

Notwithstanding any other provisions 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 subsection (1), make.

46. Having considered the evidence and submissions by both parties on the issue of procedure, it is my holding that the Respondent has proved that the termination was done in accordance with affair procedure as required under section 41 and 45 of the Act.

RELIEFS

47. In view of the finding that the reason for the termination was valid and that a fair procedure was followed, I decline to order reinstatement of the Claimant or to award compensation for wrongful dismissal. In any event, the time within which to order reinstatement being 3 years, has since lapsed from 23.102013 when the separation occurred.

48. The Claim for salary from the time of separation till retirement age is dismissed for lack of legal basis. Likewise, the claim for special loss and damages totalling to Kshs. 1,550,875.49 is dismissed for lack of legal basis and evidence. The alternative prayer of payment of notice pay, leave, salary for the days worked and service is dismissed because the Claimant admitted that he was paid the same after the termination. In the end, I dismiss the suit for lack of merits. Each party to bear own costs.

Dated, signed and delivered at Nairobi this 22nd Day of January, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE