



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.346 OF 2017

(Before D.K.N.Marete)

TIMOTHY NDIRITU MURIITHI.....CLAIMANT

VERSUS

CANNON ASSURANCE LIMITED.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 28th September, 2017. The issues in dispute are herein stated as;

- *Wrongful dismissal*
- *Suspension for alleged Gross Misconduct despite giving an explanation*
- *Unfair termination*
- *Remedies for wrongful dismissal and unfair termination.*

The Respondent in a Statement of Response to Claim dated 2nd November, 2017 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that he was employed by the respondent on 1st December, 2013 as Underwriting Assistant –Nyeri Office. This was confirmed vide a letter dated 28th June, 2014.

The Claimant's further case is that on 15th September, 2014, he received a letter from respondent sending him a compulsory leave for insubordination. On 30th September, 2014, he appeared before the disciplinary committee of the Respondent at the head office in Nairobi.

The Claimant's other case is that after the disciplinary hearing, he was issued with a letter of termination dated 30th September, 2014.

The Claimant further brings out a case of irregularity in the procedure of his termination in that at the disciplinary hearing, he was confronted with issues which he had not been forewarned.

Again, the Respondent's distractive nature is demonstrated by her adverse advertisement on the daily press besmirching his good name.

The claimant's further maintains that his dismissal and the actions by the Respondent were discriminatory, unfair, unlawful and wrongful. By rendering the Claimant jobless and further going ahead to advertise the same in the newspapers was meant to punish the claimant by ensuring that he does not get another job elsewhere. The Claimant's constitutional rights to fair labour practises protected under Article 41 of the Constitution of Kenya, 2010 was violated and or contravened as a result of which she has suffered loss and damage.

His ultimate case comes out thus;

20. *In all the circumstances, taking into account;*

a) her (sic) age, and

b) other relevant factors

The claimant was entitled to be treated fairly and justly by the Respondent. Contrary to the claimant's legitimate expectations, the Respondent has treated him in a cruel, inhuman or degrading manner in violation of laws of Kenya.

21. *The dismissal of the Claimant from the Respondent's employment was malicious, in bad faith and was done with the sole purpose of humiliating the claimant and to ensure that the claimant continues to suffer.*

He claims thus;

a) PAYMENT IN LIEU OF NOTICE.

1 month salary = Kshs.35,000.00

b) DAMAGES FOR BREACH OF CONTRACT

AND UNLAWFUL TERMINATION.

Monthly salary Kshs.35,000x 12 months =Kshs.420,000.00

c) UN PAID SALARY FOR SEPTEMBER 2014

Monthly salary Kshs.35,000 =kshs.35,000.00

d) END OF YEAR BONUS FOR 2014

One month salary =Kshs.35,000.00

e) LEAVE DAYS NOT TAKEN 20 DAYS

Kshs.35000/30 days*20 days =Kshs.23,333.00

f) UNPAID HOLIDAYS

11 days x 2 years= 22 days x Kshs.1166.67 =Kshs.25,666.67

g) REFUND FOR PETTY CASH =Kshs.5,799

TOTAL CLAIM =Kshs.579,132.00

He prays thus;

i) Payment in lieu of notice Kshs.35,000.00 as computed at paragraph 22 (a).

ii) Damages for breach of contract and unlawful termination Kshs.420,000.00 as computed at paragraph 22 (b).

iii) Unpaid salary for September 2014 Kshs.35,000.000 as computed at paragraph 22 (c).

iv) End of year bonus Kshs.35,000.00 as computed at paragraph 22 (d).

v) Unpaid leave days Kshs.23,333.00 as computed at paragraph 22 (e)

vi) Unpaid Holidays Kshs.25,667.67 as computed at paragraph 22 (f)

vii) Refund for petty cash Kshs.5,799 as calculated at paragraph 22 (g)

viii) An order for the respondent to pay the claimant his terminal benefits and compensatory damages totalling to Kshs.579,132.00 within 30 days from the date of judgment.

ix) A declaration that the claimant was unlawfully dismissed from his employment.

x) That a certificate of service be issued to the claimant by the respondent within 30 days from the date of judgment.

xi) Costs of this application plus interest thereon at court rate from the date of filing this suit.

The Respondent's case is that as underwriter, the Claimant was supposed to report to the Underwriting Manager who doubled as his supervisor. His duties included;

i) To process correctly information on accepted risks in to the system and produce requisite documents i.e Debit/credit notes, policy documents and Endorsements whilst noting to observe both accuracy and timeliness.

ii) To provide premium quotation on request under guidance of the supervisor.

iii) Under the guidance of the supervisor, to prepare and maintain proper updates on the client files, keeping all proper documentation ad immediate update of transactions and activities in the policy files in accordance with the Company's underwriting policies.

iv) To act and carry out all other duties allocated by the supervisor and/or manager.

The Respondent's further case is that;

7. In the course of the Claimant's employ, there were complaints that the claimant had breached the company's underwriting policies and engaged in acts of insubordination and blatant disobedience which acts amounted to misconduct contrary to the employment contract, the Company's Human Resource and the Employment Act of 2007. The particulars of misconduct, disobedience and insubordination are particularised as hereunder;

a. Failing to debit premiums that had been paid by customers.

b. Misappropriation of premiums paid by making payments for a client's cover using premiums paid by a different client which acts raised complaints from the clients.

c. Blatant insubordination and wilful refusal to carryout lawful instructions issued by the Manager, which work was within the Claimant's lawful and proper roles and duties with the Respondent.

d. Unapologetically unleashing violent threats, abusive and insulting language towards the Manager, an officer placed in authority over him.

8. Following these serious complaints, the Claimant was given a chance to explain his actions by way of notice to show cause dated 15th September, 2014. The Claimant in an email dated 9th September, 2014 admitted that he was underperforming and gave reasons that he had too much work on his table and thus was unable to complete tasks.

The matter came to court variously until 20th January, 2021 when it was heard *inter partes*.

The issues for determination therefore are;

1. Was the termination of the employment of the Claimant wrongful, unfair and unlawful?
2. Is the Claimant entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the termination of the employment of the Claimant was wrongful, unfair and unlawful. The Claimant did not furnish any written submissions in support of his case.

The Respondent in her written submissions dated 21st April, 2021 narrates the respective cases of the parties.

She further submits and emphasizes her reliance on section 43 and 47 of the Employment Act, 2007 as espoused in the authority of **Amos Kitavi Kivite v Kenya Revenue Authority (2020) eKLR** and **Pamela Nelima Lutta v Mumias Sugar Co.Ltd (2017)eKLR** where the court held that there are two elements of fair termination of employment that must be satisfied by the employer; valid reason and fair procedure.

It is the Respondents case that the termination of the employment of the Claimant was lawful and for the following reasons;

- Wilful neglect of duties;
- Use of abusive language to a person in authority;
- Failure to obey a lawful and proper command.

These were communicated to the Claimant beforehand and he was subjected to proper disciplinary process in which he was involved and participated.

Further, the Respondent submits as follows;

21. The claimant during cross-examination, admitted to the particulars of misconduct, disobedience to write reports to his Supervisor and/or insubordination which evidence was led as hereunder;

a. Failing to debit premiums that had been paid by customers. (Page 9 of Respondent's Documents)

b. Misappropriation of premiums paid by making payments for a client's cover using premiums paid by a different client which acts raised complaints from the clients.

c. Blatant insubordination and wilful refusal to carryout lawful instructions issued by the Manager, which work was within the Claimant's lawful and proper roles and duties with the Respondent. (Page 9 of the Respondent's Documents).

e. Unapologetically unleashing violent threats, abusive and insulting language towards the Manager, an officer placed in authority over him. (Page 9 of the Respondent's Documents).

A case of unlawful termination of employment therefore does not arise.

A look at the respective cases of the parties brings out a case in favour of the Respondent. Her case overwhelms that of the Claimant. She demonstrates a clear situation where the termination of the employment pursued all legal procedure in so doing. At all times, the Claimant was alerted of the reasons for disciplinary process and allowed time to answer and walk through the process. He even admitted to default in his actions and utterances. This therefore comes out as a case of lawful termination of employment and I hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2021.

D.K.NJAGI MARETE

JUDGE

Appearances

1. No appearance for the Claimant.
2. Mr. Macharia instructed by Muthoga Gaturu & Company Advocates for the Respondent.