REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2487 OF 2017

EZEKIEL AMOLO.....CLAIMANT

VERSUS

SAHAM ASSURANCE COMPANY KENYA LTD.....RSEPONDENT

JUDGMENT

1. Introduction

This claim arises from the termination on 14th February 2017 of the Claimant's employment by the Respondent. The Claimant challenges the lawfulness of the termination on the ground that it was without valid grounds. In the statement of claim, the Claimant prays for the following reliefs:-

a) That the Respondent's summary dismissal of the Claimant was substantively and procedurally unfair and or wrongful.

b) That the Claimant be reinstated and or re-employed to his former position or a position equivalent to his previous position without loss of benefits and or break in the years of service.

c) Payment of back wages from the date of termination to the date of judgment and or until full payment.

d) Exemplary damages of Ksh. 5, 000,000/=.

e) Costs of the claim.

2. Brief Restatement of the Facts

The Claimant was employed by the Respondent on 11th February 1998 as a filing clerk. He later rose through the ranks to the position of an underwriting assistant.

The Claimant testified that sometime in January 2017, the Respondent asked its staff to attend a team building activity scheduled to run between 4th February 2017 and 5th February 2017. Apparently and as appears from the email dated 8th February 2017 appearing as document number 1 on the Respondent's list of documents (produced as exhibit 1 for the Respondent), notification about the event was relayed to the Claimant vide an email sent to the Claimant by the Respondent's Human Resource manager on 31st January 2017.

According to the Claimant, the email made attendance of the event mandatory a fact that did not go down well with him since this requirement infringed on his right to observe the Sabbath day which falls on Saturdays. Further, it was the Claimant's case that the event was scheduled on a Saturday and Sunday which are rest days. As a result, the Claimant elected against attending the event.

In cross examination, the Claimant stated that he had not notified the Respondent that he was a Seventh Day Adventist prior to the time he was asked to attend the team building event. He only brought this fact to the Respondent's attention and for the first time on 6 th February 2017 through his response to a notice to show cause issued by the Respondent why the Claimant should not be disciplined for failure to attend the team building activity. The response was produced as exhibit in evidence and appears as document number 4 (page 17) on the Claimant's list of documents.

The Claimant's case is that the Respondent's demand that the Claimant attends the training and team building event on a Saturday was in violation of his freedom of religion. Further and as appears from the Claimant's response to the Respondent's notice to show cause (see page

17 of the Claimant's list of documents), the Claimant did not honour the Respondent's invite for the event because he was *''not invited but threatened''* to attend the function.

As a result, the Claimant holds the position that the subsequent termination of his contract of service by the Respondent on the ground that the Claimant did not honour the event was unlawful. Against this evidence, the Claimant seeks the remedies set out above.

In response, the Respondent called one witness, its Human Resource manager. According to this witness, the all Respondent's employees including the Claimant were invited to attend a team building event on 4th and 5th February 2017. The witness confirmed the Claimant's assertion that the event was mandatory and that any person seeking not to attend it was only to be excused upon request to the Respondent's Human Resource office.

According to the Respondent's witness, all employees who were unable to attend the event for whatever reason and who sought to be excused from it were granted permission to be away. The witness testified that the Claimant did not turn up for the event. And neither did he seek permission to be absent on the ground of his need to attend the Sabbath or at all.

During examination in chief and cross examination, the Respondent's witness stated that the Respondent organization was unaware of the Claimant religious leaning prior to the events resulting in the Claimant's termination as this fact had not been drawn to the Respondent's attention by the Claimant during the duration of their employment relationship.

The Respondent's witness stated that as a result of the Claimant's failure to attend the team building activity, the Respondent required the Claimant to show cause why he should not be disciplined for failure to attend the event. The notification for the show cause appears at page 16 on the Claimant's list of documents and was produced as exhibit.

The Respondent's witness further asserted that the Claimant's response to the notice to show cause was rude and unsatisfactory. As a result, the Claimant was relieved of his duties. This was after he was subjected to an internal disciplinary session.

According to the Respondent's witness, the grounds for termination of the Claimant were failure by the Claimant to attend the team training session without permission and for using abusive language against his superiors while responding to the notice to show cause. In the view of this witness, the Claimant's conduct constituted insubordination.

3. Issues Identified for Determination

The parties did not formulate issues for determination at the pretrial stage. However, they did so in their final submissions. The issues can be slightly reframed without losing their substance as follows:-

a) Whether the demand by the Respondent that the Claimant attends the team building activity on 4th and 5th February was in violation of the Claimant's right to freedom of religion in the circumstances of this case.

b) Whether the Claimant's termination was unlawful or justified.

c) What remedies if at all is the Claimant entitled to.

These issues shall be addressed sequentially in the judgment.

a) Whether the demand by the Respondent that the Claimant attends the team building activity on 4th and 5th February 2017 was in violation of the Claimant's right to freedom of religion in the circumstances of this case.

Article 32 of the Constitution of Kenya 2010 recognizes and protects every individual's freedom of religion and conscience. Protection of the right of worship under the Constitution has been previously recognized by this court in a couple of decisions. In ***Prisca Kemboi & 2 others v Kenya Post Office Savings Bank [2014] eKLR*** for instance, the court observed that this right must be respected by employers and can only suffer limitation in the context of the parameters set out under article 24 of the Constitution. It is therefore without doubt that the Respondent in this matter was under a constitutional obligation to recognize, respect and protect the Claimant's right to observe the Sabbath day.

However, the question in this cause is whether the Respondent's actions in requiring the Claimant to attend a team building activity on a Saturday violated this right in the context of the circumstance of the case. To answer this question, it is necessary to evaluate the evidence on record on the matter.

It is not disputed by the Claimant that prior to his disclosure to the Respondent through his response to the notice to show cause issued on 6th February 2017 that he professed the Seventh Day Adventist faith, the Claimant had not disclosed this fact to the Respondent. This truism was confirmed by the Respondent's witness as well.

Although the team building activity was expressed to have been mandatory, the Respondent's witness stated in evidence that those who could not attend were excused upon request. Although these requests were not reduced into writing, the evidence tendered by the Respondent's witness shows that some six individuals orally requested for and were granted this exemption. The court did not find any reason to disbelieve this evidence as presented by the Respondent.

From the evidence tendered, it is apparent that even after the Respondent issued the Claimant with a notification of the team building activity, the Claimant, unlike the other co-employees who sought to be excused from attendance for a number of reasons, did not notify the

Respondent that he will be prevented from attending the activity on religious grounds. Neither did he request to be exempted from it. In his cross examination, the Claimant conceded these facts.

Coupled with the fact that the Respondent was unaware that the Claimant was a Seventh Day Adventist, how then was the Respondent expected to have known the Claimant's religious preferences and taken steps to accommodate them? In the absence of the Claimant making disclosure of these preferences to the Respondent and seeking exemption from the team building activity, it would be unreasonable to presume that the Respondent must have been aware that the Claimant was a Seventh Day Adventist but nevertheless insisted on the Claimant attending the event in violation of the Claimant's freedom of religion and conscience.

It is therefore the view of this court and I so hold that in order for the Respondent to have been expected to take steps to protect the right of the Claimant to practice his religion, the Respondent's attention ought to have been drawn to this need by the Claimant. Absent disclosure by the Claimant to the Respondent of this material fact, I decline to hold that the mere requirement by the Respondent that the Claimant attends a team building activity on a Saturday resulted in a violation of the Claimant's freedom of religion especially in view of the Claimant's failure to seek exemption from the event.

b) Whether the Claimant's termination was unlawful or justified.

The Claimant asks the court to declare his termination as unlawful. The basis for this prayer as has been alluded to above is that in so far as the termination was premised on the failure by the Claimant to attend the impugned team building activity and the perceived abusive language adopted by the Claimant in his response to the Notice to Show Cause, it had no legitimate basis in law.

To be able to address this issue, it is necessary to evaluate the evidence on record to determine whether the Respondent was entitled to proceed under section 44 of the Employment Act to terminate the services of the Claimant as it did. This section deals with grounds upon which an employer is entitled to summarily terminate the services of an employee. The relevant provisions raised by the Respondent under the section are subparagraphs (a) and (e) which identify use of abusive language at work and refusal to take lawful and proper commands from the employer or a person placed in a position of authority over the employee as proper grounds for summary termination.

Did the Claimant use abusive language against his employer or persons in authority over him?

In response to the Notice to Show Cause against him, the Claimant expressed his displeasure at the employer's use of the word ''mandatory'' in relation to the Claimant's duty to attend the training session. In his evidence, the Claimant thought that this was rude of the employer.

The Claimant went ahead to state that he will respond to the employer in equal measure through use of rude language. He then wrote the following words to the Respondent in capital letter: ''***PLEASE NOTE TO BE USING THE LANGUAGE THAT HAS SOME RESPECT AND NOT THREATS AS I HAVE SEEN YOU USING AND REPEATING AGAIN AND AGAIN.***'' It is this use of capital letters in the response to the Notice to Show Cause and the declaration that the Claimant will retort to using rude language that the Respondent's witness pointed to in his evidence as use of abusive language by the Claimant.

In cross examination, the Claimant denied that he intended to use uncivil language against the Respondent's witness. On the contrary, he said that his intention was to caution the Respondent's witness against issuing ultimatums to employees by using words such as ''mandatory'' in his communications. He denied that the use of capital letters in a section of his response to the Notice to Show Cause was intended to be rude.

The court has carefully examined the response to the Notice to Show Cause. Apart from the declaration that the Claimant will respond to the Respondent in equal measure, there is nothing in the response that is patently rude or abusive of the employer. Further, the use of capital letters may not necessarily denote rudeness. It could be that the Claimant was only underscoring the significance of that part of the communication to the Respondent. The ground that the Claimant was rude and abusive to his superior as the basis for summary dismissal therefore fails.

Did the Claimant fail to take a lawful command from his employer or a person placed in authority over him?

In order to ensure that her work instructions are properly implemented, an employer is by law entitled to issue directions and commands to an employee so long as the said commands are lawful and connected to the tenets of the employment contract. This is in recognition of the fact that as an agent of the employer, an employee is merely executing a delegated mandate in relation to the employment contract and in respect of which she must receive directions from the principal/employer on regular basis.

It is in recognition of this that employment law obligates employees to receive and implement lawful commands from their employers relating to the employees' work. Thus, it will constitute an act of repudiation of the contract of employment if an employee willfully declines to implement the employer's lawful command in the circumstances. In my respectful view, it is in this context that the provisions of section 44 (e) of the Employment Act ought to be understood.

In his evidence, the Respondent's witness stated that the Claimant failed to honour the invite to attend a team building activity organized by the Respondent despite the Respondent indicating that the activity was a mandatory and critical training event. This, the Claimant did without even informing the Respondent that he will not be attending the event. The Respondent's witness testified that as a result, the Respondent suffered loss in making accommodation and subsistence arrangements for the Claimant which were not utilized.

The Claimant in cross examination conceded that although he received the invite for the training, he did not attend it. And neither did he take steps to inform the employer beforehand that he will not be in attendance.

It is not in dispute that the Claimant is a Seventh Day Adventist. He is therefore entitled to observe the Sabbath on Saturdays. Had the Respondent been aware of the Claimant's faith but nevertheless insisted on the Claimant attending a work related activity on a Saturday in total disregard of the Claimant's religious beliefs that would certainly be improper. However, where the Respondent was unaware of the fact that the Claimant was a Seventh Day Adventist, it would be lawful for the Respondent to issue a command requiring the Claimant to attend a training and team building activity on any working day. And this would include a Saturday in view of the fact that the law contemplates only one rest day in a week of seven days. The duty to accord the Claimant an off on Saturdays on religious grounds will crystallize once the Respondent is made aware of this fact.

Although the Claimant suggested that Saturdays and Sundays were non work days, there was no evidence that the parties had negotiated to improve on the minimum rest days provided by law from one to two. On the contrary, clause 4 of the Collective Bargaining Agreement dated 21st November 2016 and introduced in evidence by the Claimant as document number 1 on his list of documents shows that the parties had negotiated for a 6 days' work session per week. The court is therefore unable to hold that both Saturday and Sunday were excluded from the work days applicable to the Respondent's institution.

As observed above, absent proof that the Respondent was aware of the Claimant's religious persuasion requiring him to observe Sabbath on a Saturday, the Respondent would lawfully require the Claimant to be on duty or engage in other work related activities such as team building and the Claimant would be expected to implement such command so long as it is lawful and connected to his work. Deliberate failure by the Claimant to implement such command without first seeking exemption from the employer will therefore be in defiance of the Respondent's lawful command and constitute gross misconduct.

Both the Claimant and the Respondent agree that the activity in question in this case was connected to the contract of service of the Claimant and none has suggested that it was unlawful. Both parties agree that the Respondent invited the Claimant for the activity. Both parties agree that the Claimant failed to attend the activity. It is also not disputed by either party that prior to the decision not to attend the activity by the Claimant he did not ask the Respondent for exemption or even at the very least acknowledge the communication by the Respondent regarding the event. In his response to the notice to show cause (see page 17 of the Claimant's list of documents), the Claimant wrote as follows:-

> *''I was not invited but threatened and still the same language is being used. If you wanted me to attend the function then reasonable and better language should have been used instead of threats and ultimatums.''*

This is clear evidence of defiant refusal to follow a lawful order. If an employee defies a request to be further trained on execution of his work mandate how else can this be understood except in the context of repudiation of the very contract of employment between such employee and the employer?

In view of the foregoing, this court finds that the Claimant's decision not to attend the training activity without notifying the Respondent why he took such decision was refusal to obey a lawful command by the employer within the meaning of section 44 of the Employment Act. The fact that this was a one off act as asserted makes it no less of a serious transgression of the employment contract. Suffice it to say that section 44 of the Employment Act does not require that such acts be more than one for them to qualify as gross misconduct.

There was suggestion by the Claimant that he was not subjected to the progressive disciplinary process contemplated under article 6 of the Collective Bargaining Agreement (see document 1 on the Claimant's list of documents). However, the Respondent's witness pointed out that the progressive disciplinary procedure that involves issuance of warnings before termination only applies to less serious transgressions. That for transgressions falling within the purview of gross misconduct, the Respondent can summarily dismiss an employee under article 10 of the Collective Bargaining Agreement (see document 1 on the Claimant's list of documents). The court has considered the relevant provisions of the Collective Bargaining Agreement and is persuaded by the position taken by the Respondent on this issue.

The Respondent produced evidence showing that the Claimant was subjected to an internal disciplinary process. He was served with the Notice to Show Cause on 6th February 2017. The show Cause detailed the accusations leveled against the Claimant. It appears at page 16 on the Claimant's list of documents. The Claimant responded to the Notice to Show Cause on the same date (see page 17 of the Claimant's documents).

The Respondent's witness also produced the email to the Claimant dated 8th February 2017 inviting the Claimant to a disciplinary hearing on 10th February 2017. The email informed the Claimant of his right to be accompanied by any other employee of his choice to the session. This email appears as document 1 on the Respondent's list of documents.

The Claimant produced minutes of the disciplinary session held on 10th February 2017 (see page 18 of the Claimant's list of documents). The minutes show that the Claimant, two shop stewards, the Respondent's Company Secretary and Human Resource manager were in attendance. They were signed by all the attendees of the meeting.

The Respondent then wrote to the Claimant on 14th February 2017 terminating his services. The letter appears at page 20 of the Claimant's list of documents. The letter provides the reasons for the decision to terminate the Claimant: unexplained and unexcused failure to attend a team building activity; and use of uncivil language.

In his evidence during cross examination, the Claimant conceded that he was invited to and attended the internal disciplinary session where he got the opportunity to respond to the charges leveled against him by the Respondent. It is also evident from the documents produced that the Claimant appealed against the dismissal but the decision of the Respondent was upheld. This is evident from the letters dated 21.2.2017 by Banking Insurance and Finance Union (Kenya), 21.2.2017 by Saham and 29.3.2017 by Saham (see documents numbers 2,3 and 4 on the Respondent's list of documents).

Evidence was also adduced indicating that the parties as well submitted to an external dispute resolution process when the matter was referred to a conciliator appointed by the Ministry of Labour (see documents 5 and 6 on the Respondent's list of documents which are the same as those at pages 24 to 26 in the Claimant's list of documents). From the conciliator's report above, the conciliator held that the Claimant had been accorded a fair hearing.

The Claimant in his submissions describes the above internal disciplinary process as a sham. This assertion is grounded on the fact that the Human Resource officer of the Respondent (Respondent's witness 1) attended the session. As this officer had issued the instructions to attend the team building event and also the Notice to Show Cause email, the Claimant contended that his attendance at the disciplinary session resulted in a scenario of the accuser being a judge in his/her cause.

The court disagrees with this proposition. Besides the fact that the Respondent's witness is not one and the same with the Respondent, it is clear that the disciplinary session had more than this individual attending.

The Claimant's submissions also suggest that although the only question for the Notice to Show Cause was the Claimant's failure to attend the team building activity, the invitation for the disciplinary session appeared to have added a fresh charge of use of abusive language. And that as a result, the process should be faulted.

However, nothing turns on this. As demonstrated earlier, the court rejected the Respondent's assertion that the Claimant used abusive language in his response to the Notice to Show Cause. Only the charge of willful disobedience of a lawful command which was maintained from inception was found to have been validly established.

The court therefore finds, in concurrence with the submissions by the Respondent's counsel, that the Respondent has proved within the tenets of section 45 of the Employment Act that there was a valid substantive ground to terminate the Claimant within the meaning of section 44 of the Employment Act and that the Respondent also observed the procedural strictures meant to ensure the fairness of the process leading to the Claimant's termination.

c) **What remedies if at all is the Claimant entitled to?**

Having arrived at the conclusion that the Claimant's claim is unmerited, the court finds that the Claimant is not entitled to the prayers and reliefs sought in the Claim or at all. As a result, the Claimant's claim against the Respondent is dismissed with costs to the Respondent.

4. Summary of the Award

a) The termination of the Claimant by the Respondent was valid both on substantive and procedural grounds.

b) The Claimant's suit against the Respondent is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF SEPTEMBER, 2021

B O M MANANI

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.

B O M MANANI

JUDGE