



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 678 OF 2019**

**HUMPREY CRISTER MUSULUMA LWAMBA.....CLAIMANT**

**VERSUS**

**ROCHE KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant on 11/10/2019 against the respondent, the claimant seeking General damages for unfair dismissal and defamation of character and good professional name.
2. That the respondent be compelled to issue an official apology to the claimant; that the claimant be paid salary for 16 unserved years to retirement date at 60 years and costs and interest.
3. C.W.1, the claimant testified under oath that he was appointed as the Regional Sales Manager Roche Kenya Limited, a Pharmaceutical and Diagnostics company on 2/4/2015, responsible for five countries including Kenya; Ethiopia, Sudan Eritrea and Somalia. That he commenced work on 1<sup>st</sup> May, 2015 and worked diligently and to the best of his ability.
4. That during the period he served, the company's profit margins increased tremendously as evidenced by the sales records, for example in Ethiopia.
5. That in the year 2018, the company won a huge tender worth 300 million South African Rand = 2.5 billion Kenya Shillings which the claimant oversaw the success of as the Regional Sales Manager.
6. That this was the largest ever single project to have been won by the company and subsequently the largest sales to be realized by the company in Africa.
7. In August, 2018, **ROCHE Group Chief Executive Officer Mr. Severin Schwan** visited Kenya to Launch a collaborative project between Roche and the Kenya Medical Research Institute (**KEMRI**). That during the visit, the Chief Executive Officer hosted a town hall question and answer session with the **ROCHE Kenya Limited** Members of staff at the Royal Tulip Hotel in Kilimani.
8. During the event, the claimant was introduced to the Chief Executive officer by the South African General Manager of **ROCHE DIABETES CARE**, Ms Mary Atkinson who informed the Chief Executive Officer that the claimant was working on a huge business opportunity in Ethiopia and was hopeful for its success. That it was then that the Chief Executive Officer informed the claimant that should he be successful in that endeavor, he should inform him by email.
9. That upon succeeding in the tender application process, the claimant prudently communicated the good news about the win in Ethiopia to the Chief Executive Officer in Switzerland.
10. It was after that email communication that the South African General Manager Mr. Duncan Mackay reprimanded the claimant by email alleging that the claimant had disregarded the chain of command and undermined his leadership. Mackay further claimed that the action by the claimant had made things very difficult for them and that he could no longer trust him **"since I believed I now had a direct line to the Chief Executive Officer"**. He then stated that he would discuss further action with the head of sales Mr. Peter Eickhaus on the matter. The Human Resource was copied this email.
11. That no communication was ever made to the claimant thereafter. Due to the said success the company received a commercial excellence award for global commercial excellence in 2018 in Zurich Switzerland during the annual Diagnostics business meeting in February, 2019. That all this happened under the role of the claimant as the Regional Sales Manager.

12. Ironically, the claimant was summoned and issued with a letter dated 25<sup>th</sup> February, 2019 citing allegations of misconduct.
13. The claimant was directed to make a verbal presentation to show cause why he should not be suspended as an employee of **ROCHE KENYA LIMITED**.
14. That the company upon a purported investigation sent the claimant a letter of contemplated termination of contract and that the claimant should respond to the same.
15. The claimant responded to the show cause notice with a written response dated 6/5/2019 and presented same to a meeting vide a video conference on the same date in Nairobi.
16. In the said meeting, the claimant demanded that he be subjected to a disciplinary hearing process as per the company policies and laws in Kenya and that he gets to cross-examine the alleged company witness who had implicated him in misconduct.
17. On 13/5/2019, the company declined the request to hold a disciplinary hearing in another video conference. The respondent proceeded to terminate the employment of the claimant and requested the claimant to appeal the decision.
18. On 19/5/2019, the claimant appealed the decision, insisting that he be subjected to a fair disciplinary hearing process in Kenya.
19. On 23/5/2019, the claimant received a letter dismissing the appeal and on 29/5/2019, the claimant received a letter of termination of employment.
20. The claimant testified that the action by the respondent was actuated by malice and vendetta arising from the claimant's success in Ethiopia and the subsequent global award recognition. Roche Kenya received an award due to of the success attributed to the claimant.
21. The claimant prays that he be awarded as prayed for the injuries occasioned him, his career, his name, his family as a result of the unlawful and unfair termination of employment and defamation of character as a career professional.
22. The claimant was subjected to very close cross-examination by Mr. Kuyo, Advocate for the Respondent in which he reiterated his narrative of victimization and vendetta, arising from the direct communication he made to the Global Chief Executive Officer of Roche in Switzerland and the subsequent Global award in recognition of the achievements made by Roche Kenya, under the stewardship of the claimant.
23. The respondent called Mr. Frank Roeffler, the present manager Roche Kenya. R.W.1 relied on a witness statement recorded on 8/11/2019 and list of documents filed on 11/11/2019 as his evidence in Chief.
24. R.W.1 testified that the respondent is a wholly owned subsidiary of F. Hoffmann -La Roche AG, a Swiss multinational health care company that operates worldwide and has for over 100 years been in business worldwide including Kenya and South Africa.
25. That the claimant was employed by the respondent on 2<sup>nd</sup> April, 2015. That at the time, the respondent did not have much involvement as the understanding between the Respondent, Roche Diagnostics (Pty) Limited which is the Diagnostics Management Center South Africa would run the recruitment.
26. That the above understanding meant that the claimant's position fell within the ambit and structure of the Diagnostics Management Centre South Africa, even though the contract of employment was between the claimant and the Respondent (**Roche Kenya Limited**).
27. That the claimant was aware at all material times that his position fell under the structure and oversight of Roche South Africa which recruited him.
28. That the claimant was governed by the Policies, procedures and standard operating procedures applicable to employees of the Diagnostics Management Centre South Africa. Accordingly, the policy and procedure applicable to the claimant in respect of misconduct, poor work performance and incapacity due to ill health was that dated May, 2013.
29. That on or around 10<sup>th</sup> January, 2019, the Diagnostics Management Centre South Africa received emails from its distributor in Ethiopia, Retina Pharmaceuticals ("**Retina**") in which several allegations of misconduct were made against the claimant. The same related to the claimant placing himself in a position of conflict of interest by exerting undue pressure to Retina to have one of his colleagues and/or friend, **Mr. Mekonnen Merawe** to be employed and given shares in Retina.
30. That after the complaint was made by Retina, the claimant alleged that Retina's employees **Ashebir Guremessa** and **Mr. Feyisse Challa Waka** were employed by the Ethiopian Public Health Institute (**EPHI**) during the tender process which led to the awarding of the tender to the Diagnostics Management Center South Africa.
31. The claimant also alleged that Ethiopian Public Health Institute (**EPHI**) provided advice to the Ministry in relation to certain aspects of the tender, the two employees may have somehow been involved and thereby resulting in a conflict of interest.
32. That Roche South Africa viewed these allegations seriously and the claimant was notified by a letter dated 25/2/2019 that his suspension was contemplated and was called upon to show cause.

33. The claimant responded by a letter dated 26/2/2019 and he voluntarily proposed to step aside in Ethiopia pending the outcome of investigations and he undertook to cooperate with the investigations. A decision was taken not to suspend him at that stage.
34. The respondent engaged two law firms to conduct investigations in respect of the allegations made against the claimant by Retina and those made by the claimant against Retina.
35. Investigation report was made in which it was concluded that the claimant exerted and/or attempted to exert undue pressure upon Retina to employ Mr. Merawe and to have him accorded a stake in Retina's shareholding in exchange for smooth business relations with the respondent.
36. That the claimant unduly sought to have Mr. Merawe be engaged as a sub-contractor by Retina for the service maintenance of its agreement with the Roche South Africa.
37. That the claimant irregularly sought to bring on board Mr. Merawe as a supplier of pure water units to Retina purportedly as local partners in Ethiopia of Evoqua Water Technology.
38. That the claimant sought to conduct official business through personal email address rather than through the official email address issued to the claimant.
39. That the conduct by the claimant resulted in a conflict of interest and the claimant was found to have acted in breach of his duty of good faith owed to the respondent and Roche South Africa.
40. That the claimant made false representation concerning a complaint of a conflict of interest from Ethiopian Public Health Institute (**EPHI**) regarding employees of Retina.
41. That the claimant included Mr. Merawe as a recipient of information via email regarding a tender that involved Retina and the respondent only.
42. That the claimant deliberately disregarded instructions to prepare a letter to Pharmaceuticals Fund and Supply Agency to seek support for Retina's forex applications and instead wrote a letter requesting customs importation priority.
43. That the claimant derailed Retina's ability to perform its contractual responsibilities by failing to be supportive of Retina's business.
44. That the claimant conspired with Mr. Merawe to reap economic advantage from the performance by Roche, South Africa of its Bid obligations; and generally engaged in unprofessional and/or unethical conduct in his dealings with Retina.
45. R.W.1 testified that by a letter dated 26/4/2019, the claimant was notified of the aforesaid findings and was informed that termination of his employment was contemplated and was given opportunity to make representation on the matter.
46. The claimant was informed that due to the multi-jurisdictional nature of the complaint as it involved Kenya, Ethiopia and South Africa, it would not be possible to convene a formal disciplinary enquiry but he would be provided the opportunity to make written and oral representation on the allegations virtually.
47. That by a letter dated 6/5/2019, the claimant submitted his written representation and responded to each allegation contained in both investigation reports.
48. On 6/5/2019, the claimant was given opportunity to make additional representations verbally. The claimant however, merely presented the information contained in his written submissions.
49. That the claimant requested to cross-examine witnesses which opportunity was not available to him considering the circumstances of the case.
50. That the claimant was given a fair hearing and opportunity to make written and verbal representations.
51. That the respondent found the claimant guilty of serious misconduct due to the extensive allegations made against him which he was not able to respond to satisfactorily.
52. The respondent decided to summarily dismiss the claimant by a letter dated 13<sup>th</sup> May, 2019.
53. The claimant appealed the decision by a letter dated 19/5/2019. The respondent considered the appeal and through letters dated 23/5/2019 and 29/5/2019 the respondent upheld the decision to terminate the employment of the claimant.
54. That the claimant was paid his final dues and issued a certificate of service.
55. That the termination was lawful and fair and the suit be dismissed with costs.

#### Determination

56. The parties filed their respective written submissions and list of authorities. The issues that fall for determination are:

**i. Whether the respondent had a valid reason to terminate the *employment of the claimant*.**

**ii. Whether the respondent followed a fair procedure in terminating the employment of the claimant.**

**iii. Whether the claimant is entitled to the reliefs sought.**

57. Termination of employment in Kenya is governed by the provisions of Part V of the Employment Act, 2007. The pertinent provision include Sections 36, 41, 43, 44, 45, 46 and 47 of the Employment Act, 2007.

58. Section 36 obligates an employer to provide the employee with notice of termination and in default pay in lieu of notice.

59. Section 41 on the other hand obligates the employer to provide an employee with the opportunity to make representations in respect of allegations of misconduct that may lead to termination of the employment. The employer ought to provide an employee with opportunity to make written representations and attend a disciplinary hearing with a colleague or representative of choice in which the employee makes oral representation as to why the employment ought not to be terminated.

60. In terms of Section 43(1) and (2) thereof, the onus is on the employer to demonstrate that it had a valid reason to terminate the employment of the employee and that it provided the employee with a fair hearing before arriving at the decision to terminate the employment of the claimant.

61. Reasons that entitle an employer to summarily dismiss an employee as happened in this case are well enumerated under Section 44 of the Employment Act, 2007. In the present case, the Human Resource policy of Roche south Africa, also provided matters that would lead to the dismissal of the claimant and according to R.W.1, this was in the knowledge of the claimant since he was recruited by Roche South Africa and these matters were elaborated in his contract of employment.

62. The matters relied upon by the respondent to summarily dismiss the claimant were well articulated by R.W.1 in his testimony before Court. The Court also got opportunity to hear the explanation given by the claimant to the specific charges made against him. Before Court, the claimant dealt more on the issue of malice and vendetta against him by Mr. Mackay, Chief Executive officer Roche South Africa, which according to the claimant commenced when the claimant communicated directly with the Global Chief Executive Officer of Roche in Switzerland and Mr. Mackay expressed his dismay that the claimant had by-passed him in that direct communication to the Global Chief Executive officer.

63. According to the claimant, the charges made against him were without basis and were just perpetration of vendetta and malice by Mr. Mackay against him as a result of the excellent performance by Roche Kenya under the watch of the claimant in the year 2018, resulting in a Global award being made to Roche Kenya and therefore the claimant in Switzerland in the year 2019.

64. It is indeed common cause that Roche, Kenya had made an excellent performance under the watch of the claimant in the year 2018.

65. This is however, besides the point since the basis of the summary dismissal of the claimant was on specific allegations of conflict of interest by making demands on a supplier of Roche South Africa, namely, Retina as a *Quid pro quo* for the support by the claimant regarding its performance and continued relationship with Roche South Africa and the Respondent.

66. It is the Court's finding that the respondent discharged its onus placed on it under Section 43(1) and (2) as read with Section 47(5) of the Employment Act, that it had valid reasons to summarily dismiss the claimant.

67. The claimant failed to exonerate himself from the raft of very serious allegations made against him as set out in the testimony by R.W.1.

68. The Court also finds that the respondent adhered to the provisions of Section 41 of the Employment Act, and its own Human Resource Policy in giving opportunity to the claimant to make written representations regarding charges made against him prior to his suspension and prior to the holding of a virtual hearing given the circumstances of the case before making a final decision to summarily dismiss the claimant from his employment.

69. The claimant on the other hand failed to demonstrate that the summary dismissal was wrongful and was actuated by malice and vendetta. To the contrary, considering all the circumstances of the case, the respondent was justified to summarily dismiss the claimant.

70. The claimant was paid all terminal benefits due to him and was granted a Certificate of Service upon dismissal.

71. The remedies sought by the claimant are therefore not merited, the Court being satisfied that the claimant did not suffer unwarranted damage due to the lawful dismissal which by itself cannot be equated to professional defamation as alleged by the claimant or at all. The decision by the respondent resulted from the claimant's own undoing.

72. Accordingly, the suit lacks merit and is dismissed in its entirety.

73. Each party to bear their own costs of the suit considering the relative positions of the parties in this matter and the service the claimant had rendered the respondent prior to the matters that led to his summary dismissal.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Amondi & Company Advocates for the claimant

Coulson Harney, LLP Advocates for the Respondent

Ekale – Court Assistant