



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1981 OF 2016

PAUL NGEI KISILU.....CLAIMANT

VERSUS

ASTRAZENECA PHARMACEUTICALS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit vide a Statement of Claim filed on 26th September, 2016. A notice of motion application filled together with the statement of claim under certificate of urgency, was dispensed with through dismissal for non-attendance of the Applicant and his counsel. The Claimant filled two more applications which were equally dispensed with and the matter set for hearing of the main suit.
2. In an amended statement of claim dated 20th March, 2017, the Claimant's prayers before this court are reinstatement, payment of gratuity, one-month salary in lieu of notice, 12 months' salary as compensation for wrongful and unfair dismissal, payment of an annual bonus for the year 2015, payment for the remainder of the contract period, exemplary damages for occupational stress, general damages for loss of reputation, a certificate of service and costs of the suit.
3. The Respondent put in a memorandum of defence dated 21st April, 2017 and filled in court on 27th April, 2017. In the defense, the Respondent wholly denies the Claimant's claim.
4. Both parties presented one witness each to support their case.
5. Parties filed submissions and in addition, the Respondent put in a reply to the Claimant's submissions.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent on 1st January, 1998 in the position of Accounts Manager through its local representative Zeneth Pharmaceuticals Limited. It is his case that the Respondent company changed names from Highchem Pharmaceuticals Limited in 2002 to Laborex Kenya in the year 2013 and later the Respondent current name AstraZeneca Limited in the year 2016.
7. The Claimant states that he signed a new contract with the Respondent on 1st September, 2016, after it was officially registered in Kenya and at the position of Office Manager.
8. The Claimant states that his total monthly remuneration was Kshs.705,287.07/=.
9. The Claimant states that his duties included Accounting, Procurement, Fleet Management, Security and Safety and Health and Environment, which duties, he states he performed with diligence and dedication.
10. The Claimant's further case is that the Respondent unfairly targeted, harassed, intimidated and threatened him with dismissal by introducing Performance Improvement Plans contrary to the objectives set at the beginning of the year. He asserts that the new targets were accompanied with new unrealistic timelines which set him up for possible failure.
11. The Claimant states that he received emails with unrealistic demands to make it appear like he was not doing his work.

12. The Claimant's case is that he was summoned to appear before a disciplinary enquiry on the 16th September, 2016 and that the charges leveled against him were similar to those leveled against another employee of the Respondent.

13. The Claimant's case is that he got a reprieve when the court issued orders barring the Respondent from intimidating, harassing, threatening to terminate him. The orders also temporarily stayed the Respondent's disciplinary enquiry against the Claimant, pending the hearing of the application under which the orders were granted. He further states that the orders were erroneously lifted when the application was dismissed for non-attendance.

14. The Claimant's case is that he was often appraised and no issues were raised touching on his performance and that he received a bonus and a letter of recognition for his good performance.

15. The Claimant's further case is that he was invited to attend a disciplinary hearing vide a letter dated 17/10/2016, but that he declined the invitation based on the fact that the matter was pending before court.

16. The Claimant states that he was dismissed on 1st November, 2016, when the case was in court and further that he did not appeal against the summary dismissal.

17. It is the Claimant's case that the purported disciplinary hearing was conducted contrary to the Human Resource Policies of the Respondent as the person who chaired the meeting was the complainant and further that he never received any warnings on the issues subject of his dismissal.

18. The Claimant states that he always took instructions from his line manager and that he did as instructed.

19. It is the Claimant's case that he was paid salary for the last month he was in the service of the Respondent, leave allowance as well as payment for his unutilized leave days.

20. It is the Claimant's case that he was a member of both the National Social Security Fund (NSSF) and the Respondent's Staff Provident Fund.

The Respondent's Case

21. The Respondent states that the Claimant's latest contract was one issued in September, 2016 as those before that were issued by other entities as the Respondent did not have a legal entity within Kenya.

22. The Respondent states that concerns were raised on the Claimant's performance as there were tasks that were pending which caused the Respondent to lose business.

23. It is the Respondent's case that the Claimant responded to the concerns and promised to have the tasks done within the stipulated timelines but which promise the Claimant did not keep.

24. The Respondent states that arising from the Claimant's poor performance, he was placed on a Performance Improvement Plan (PIP) which plan was to run between 14/9/2016 to 31/12/2016.

25. The Respondent states that the tasks that the Claimant failed to perform and which formed part of his duties include; forex reconciliation, installation and removal of car trackers, accounting for monies given to employees on travels and ensure it is accounted for through receipts or surrendered when the employees return from their trips amongst other responsibilities.

26. The Respondent states that due to the gaps in the Claimant's performance, he was issued a show cause letter whose main charge was gross negligence of duty, which letter was served directly on the Claimant.

27. The Respondent further states that the show cause letter in addition to stating the charges levelled against the Claimant, also notified him of the hearing of his disciplinary case on the 26th September, 2016. The Respondent's case is that the hearing did not take off on the 26/9/2016 as the Claimant had called in sick, resulting in the rescheduling of the hearing to 19/10/2016.

28. It is the Respondent's further case that on the 19/10/2016, the disciplinary hearing was again postponed and that the Claimant was informed of the postponement and the next hearing date which was 21/10/2016.

29. The Respondent states that the disciplinary hearing proceeded on the 21/10/2016 in the absence of the Claimant. It further states that the charges against the Claimant were confirmed resulting in his summary dismissal and that the Claimant was informed of the outcome as well as his right of appeal against the decision of the disciplinary committee.

30. The Respondent states that at the time the disciplinary hearing took place, the orders issued earlier had been vacated by virtue of the dismissal of the application under which the orders were granted. It is the Respondent's assertion that there were no orders barring it from proceeding with the disciplinary process.

31. It is the Respondent's case that payment of bonuses is depended on the performance of both the Company business and an individual employee and further that such payment is not an entitlement that an employee can claim.

32. The Respondent states that the Claimant was issued with a clearance certificate which indicated his last day of work and accrued leave pay. The Respondent's further case is that the Claimant acknowledged receipt of all the items listed in the clearance certificate including the payment.

33. The Claimant testified in support of his case. The Respondent presented one Irene Kaimuru, their Human Resource Business Partner for Sub-Saharan Africa who testified on her behalf.

The Claimant's Submissions

34. It is submitted for the Claimant that the Respondent frustrated the court process by proceeding to summarily dismiss the Claimant fully aware of the pendency of this suit and an application for orders staying the disciplinary proceedings.

35. It is submitted that the Claimant had a distinguished career with the Respondent that begun in the year 1998 all through to the year 2016, when he was wrongfully dismissed. It is submitted that although the Claimant signed a new contract with the Respondent on 14th September, 2016, the new contract expressly stated that the Claimant's previous years of service will be retained and recognized.

36. It is further submitted for the Claimant that he diligently performed his duties and at no time did he involve himself in gross misconduct to warrant summary dismissal as alleged by the Respondent. It is submitted that the Claimant was never issued any warning be it verbal or written. It is further submitted that the Claimant was recognized for the good work he did at the Respondent company which performance earned him awards in form of bonuses and recognition certificates.

37. It is submitted that the dismissal of the Claimant was fundamentally flawed hence unfair, unjust and unlawful as the Respondent did not have valid reasons for the dismissal. It is further submitted that the Claimant's dismissal violated Sections 41, 43 and 45 of the Employment Act, 2007. It is submitted that the Claimant is entitled to the remedies as per his amended statement of claim.

The Respondent's Submissions

38. It is submitted for the Respondent that the Claimant was dismissed for just cause and that proper procedure was followed prior to the summary dismissal. It is submitted that the Claimant does not present a meritorious case for either reinstatement or wrongful dismissal.

39. The Respondent submitted that the dismissal of the Claimant was a reasonable response in the circumstances and that it fell squarely on what a reasonable employer would have done in the circumstances. They sought to rely on the holding in the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona (2015) eKLR* to support this position.

40. The Respondent submitted that that the Claimant has the legal burden to show that the Respondent reasons for dismissal were unfair and/or invalid. They sought to rely on the decision in the case of *David Githinji Kibuge v New Kenya Co-operative Creameries Ltd (2019) eKLR* to buttress this position.

41. The Respondent submits that the Claimant's claim for reinstatement is time barred by dint of Section 12(3) of the Employment and Labour Relations Court Act, which allows reinstatement within 3 years of dismissal/termination. They sought to rely on the case of *Sotik Tea Estates Limited v Kenya Plantations and Agricultural Workers Union (2017) eKLR*.

Issues for determination

42. The court identified the following as issues for determination in this matter:

i. Whether the Summary Dismissal of the Claimant was unfair, unjust and unlawful

ii. Whether the Claimant is entitled to the reliefs sought

iii. Who bears the costs of the suit.

Whether the Summary Dismissal of the Claimant was unfair, unjust and unlawful

43. To make a determination of whether or not a dismissal is wrongful hence unfair, the court is guided by the provisions of Sections 41, 43, 45 and 47(5) of the Employment Act, 2007. These provisions relate to both the procedure adopted by the employer prior to the dismissal, as well whether there exists substantive justification in terms of valid and fair reasons for that dismissal.

44. The Claimant in this matter was summarily dismissed. Summary dismissal is defined as dismissal without notice or with less notice than that prescribed in the employee's employment contract or statute and premised on gross misconduct. The Claimant herein was said to have been dismissed on ground of gross negligence of duty.

45. The first question in determining fairness or lack thereof, is the issue of procedure. In cases of summary dismissal such as this one, the right to be heard is unassailable and absolute.

46. The Claimant confirmed having received a notice to show cause on the 16th September, 2016, which notice invited him for a disciplinary hearing scheduled for the 26th of September, 2016. The notice is said to have listed the grounds forming the basis of the disciplinary hearing.

47. The evidence before this court is that the hearing did not proceed for reason of a court order barring the said hearing. The process was however restarted when the orders mentioned herein were discharged for none-attendance of the Claimant and his Counsel. The Claimant declined to attend the hearing based on the fact that the issues subject of the disciplinary process was pending before court. The Respondent proceeded with the hearing *ex parte* and resolved to dismiss the Claimant, which resolution took effect on 1st November, 2016.

48. The question for this court, is whether this was fair procedure. The court returns that for reason that the Claimant was aware of the date, time, venue of the hearing and that he was fully informed of the charges against him and lastly, that the orders barring the hearing had been lifted, the procedure was fair.

49. The court finds and holds that the Respondent procedures prior to the dismissal of the Claimant, met the fairness test stipulated under Section 41 of the Employment Act.

50. On the second limb that is substantive justification, the question for the court to determine is whether the Respondent had reason to dismiss the Claimant and whether the reasons are valid and fair. The Respondent relied on the holding in the case of ***CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona (2015) eKLR*** to buttress their assertion that it had reasons to dismiss the Claimant. The Respondent cites failure to carry out forex reconciliation, installation and removal of car trackers, accounting for monies given to employees on travels and ensure it is accounted for through receipts or surrendered when the employees return from their trips, amongst other responsibilities, as the reasons it dismissed the Claimant.

51. The Claimant told this court, that the Respondent's Policy on sanctions, required that employees are given at least two warnings prior to a decision to dismiss. The Claimant was evidently never given any warning prior to his dismissal.

52. The Respondent submitted and which submission the Claimant confirmed, that he was put on a Performance Improvement Plan (PIP), that was to run between 14th September, 2016 to 31st December, 2106.

53. The court was further told that the Claimant was issued a show cause letter dated 16th September, 2016, just two days after being put on the PIP. The Claimant told this court, that the reason he was put on the PIP was to set him up for failure, as the said PIP set him targets that were unachievable. The Claimant's evidence is that previous performance appraisals did not point to poor performance on his part to warrant being put on PIP.

54. A performance Improvement Plan, is a tool for progressive and consistent monitoring of an employee's performance once found to be below expectation. It is a corrective tool and not a veil or conduit to dismiss an employee. No proper basis was demonstrated for subjecting the Claimant to the PIP and it is no wonder that disciplinary proceedings were set in motion two days later, resulting in the dismissal of the Claimant. In the case of ***Caroline Wanjiru Luzze v Nestle Equatorial Africa Region Limited (2016) eKLR*** the court held that an employer who begins a PIP cannot legitimately abandon it midstream just because an employee objects to some segments of it.

55. Further, it is telling that the Respondent hurriedly concluded the disciplinary process, even when they knew that the said process was subject of a court case that was yet to be concluded. This does not show good faith on the part of the Respondent, notwithstanding that the interim orders barring the proceedings were lifted, as the discharge of the orders was premised on a technicality that the Respondent was fully aware of.

56. To my mind, the manner in which the Respondent arrived at the decision to dismiss the Claimant, fell short of the reasonable responses which a reasonable employer would have adopted. The Respondent's rush to dismiss the Claimant is unreasonable and it then follows that his dismissal is lacking in substantive justification hence unfair. (***See CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona (2015) eKLR***)

57. The Court finds and holds that the dismissal of the Claimant though procedurally fair, failed the substantive justification test and is hereby declared wrongful, unlawful and unfair.

Whether the Claimant is entitled to the reliefs sought

58. The Claimant seeks the following reliefs:

a. **Reinstatement**

b. **A declaration that his dismissal is wrongful and unfair and that he be paid his terminal dues in full**

c. **Gratuity**

d. **Payment in lieu of notice**

e. **Compensation for wrongful and unfair dismissal**

f. **Annual bonus**

g. **Payment for the remainder of the term of service**

h. **Exemplary damages**

i. **General damages**

j. **Costs of the suit and interest at court rates.**

Reinstatement

59. The Claimant was dismissed on 1st November, 2016. Section 12(3) of the Employment and Labour Relations Court Act, allows this court to make an order for reinstatement within three (3) years of the employee's dismissal. Further Section 49 (4) (c) demands that when deciding whether to recommend the remedies therein, the court ought to take into account the practicability of recommending reinstatement or re-engagement. In the instant case, reinstatement is not just impractical but the court lacks jurisdiction for reason that the Claimant has been out of the employ of the Respondent for more than three years. (*See Sotik Tea Estates Limited v Kenya Plantations and Agricultural Workers Union (2017) eKLR*). The prayer for reinstatement fails and is dismissed.

Gratuity

60. The Claimant told this court that he contributed to the NSSF and that he was a member of the Respondent Provident Fund. The Claimant's contract produced before this court does not provide for payment of a gratuity. I find and hold that the Claimant is not entitled to gratuity. This was the position adopted by the court in the case of *Michael Obudho Amondi v United Millers (2016) eKLR* where it held:

“ ... there is no statutory provision for payment of gratuity or retirement benefits to the Claimant. There is also no contractual obligation on the part of the Respondent to pay the Claimant gratuity as the Claimant's contract of employment does not provide for the same.”

Payment in lieu of notice

61. The Claimant admitted being paid terminal dues upon his dismissal. In his claim, the Claimant stated that he was paid terminal dues which included salary up to 1st November, 2016, being his last day of work with the Respondent and unutilized leave days. There was not mention of payment for notice period and no evidence of such payment has been adduced before this court. For this reason, the Claimant's claim for payment in lieu of notice is merited and is awarded a one month's salary being payment in lieu of notice.

62. For clarity, although the Claimant told this court that his gross salary at the time of dismissal was Kshs.705,287.07/=, no evidence was tendered to support this claim. The pay slips that the Claimant produced in evidence before this court, indicated his monthly gross salary as Kshs. 513,287.07/=

Compensation for wrongful and unfair dismissal

63. The dismissal of the Claimant has been declared wrongful and unfair. By this declaration, the Claimant is entitled to compensation per Section 49 and 50 of the Employment Act, 2007.

64. In making an award for compensation, the court is guided by the provisions of Section 49 of the Employment Act, 2007, In the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR* the Court held that in determining whether to make an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment Act.

65. The Claimant was in the service of the Respondent for a whopping 18 years. His age today has advanced and the opportunities available to him for securing comparable employment have dwindled. The Claimant indicated during the hearing that he had reasonable expectation that he would work for the Respondent until his retirement at 60 years if not for the dismissal.

66. Informed by the foregoing reasons, I find and hold that the Claimant has proved a case for maximum compensation and is awarded 12 months salary in compensation for wrongful and unfair dismissal.

Annual bonus, Payment for the remainder of the term of service, Exemplary damages and General damages

67. Payment of bonuses as the Respondent rightly submitted, is depended on the performance of the Respondent's business and the performance of the individual employees. This pay is not an entitlement for none employees and the Claimant has not shown that there are bonuses that were outstanding and owed to him before his dismissal. The Claim is dismissed.

68. There was no guarantee that the Claimant would serve the Respondent to retirement. For this reason, the claim for payment for the remainder of his term, fails and is dismissed.

69. Having made an award for compensation for unfair dismissal, the claims for exemplary damages and general damages, which in any event are unknown to Section 49 of the Employment Act, fail and are dismissed.

70. It is trite law that costs follow the event. The Claimant is awarded costs of the suit.

71. In conclusion, Judgment is entered for the Claimant against the Respondent in the following terms:

i. **A declaration that the dismissal of the Claimant is wrongful and unfair.**

ii. **Payment of 12 months' salary equivalent in compensation for unfair dismissal at Kshs. 6,159,444.84/=**

iii. **One-month salary in lieu of notice at Kshs. 513,287.07/=**

iv. **Costs of the suit and interest at court rate until payment in full**

72. Orders Accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Sichangi h/b for Mr. Ashiruma for the Claimant

Mr. Kahura h/b for Ms. Onyango for the Claimant

Ms. Christine Omollo - C/A