



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 797 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

EMMANUEL KASANDI MUJUKANE.....1ST CLAIMANT

BENRAD NYAGA MBOGO..... 2ND CLAIMANT

VERSUS

COSMOS LIMITED.....RESPONDENT

JUDGMENT

The Claimants, Emmanuel Kasandi Mujukane and Bernard Nyaga Mbogo filed this suit on 14th May, 2014 claiming general damages for breach of contract and loss of employment and payment of terminal dues against the Respondent, Cosmos Limited. The Claimants aver that they were employed by the Respondent as Delivery Personnel vide letters of appointment dated 1st April, 1998 and 1st November 2003 respectively, that their positions were later confirmed at a then salary of Kshs.4,000/= and Kshs.7,437/= respectively. They worked continuously until their employment was terminated on 25th September 2013 and 30th September 2013 respectively after being wrongly accused of theft. That the real culprit was arrested and charged.

That at the time of termination, they were earning a monthly sum of Kshs.29,825/= and Kshs.29,684/= respectively. They both claim general and exemplary damages for reason that the allegations against them were untrue and constituted injurious falsehoods. The Claimants further aver that their employment was terminated without notice and was unlawful and contrary to the rules of natural justice. They pray that this Court award them their accrued terminal dues, general damages for breach of contract, exemplary damages for character assassination, costs of the suit and interest.

The Respondent filed its Statement of Response dated 30th October 2018 admitting that it employed the Claimants. It averred that their contracts of employment were terminated for valid reasons being that:

- a. They were suspended from duty on 22nd August 2013 after being arrested together with others on suspicion of theft of certain pharmaceutical drugs and related products belonging to PSI Kenya.
- b. They were not formally charged in court but they unequivocally admitted knowing one Mary Mwendia Mwaniki, the main suspect ultimately accused of the theft.
- c. They admitted during the disciplinary proceedings that they had agreed to assist the said Mary Mwendia Mwaniki sell the drugs and products at a fee.
- d. The Respondents reasonably believed that the Claimants knew or should have known that the products were stolen yet agreed to share in the proceeds of the sale with her.
- e. The Respondents also noted that the Claimants agreed to sell the drugs without considering they could be harmful to the society.
- f. The Claimants did not also have any authorization or certificate from the government to handle such drugs, which constituted gross misconduct.
- g. The Claimants denied that they sold the drugs during office hours but since they were involved in deliveries of the said drugs, the

Respondents reasonably believe that they did it during office

hours.

h. The foregoing constituted breach of the implied loyalty and fidelity and as such, the Claimants fundamentally breached their obligations arising from the contract which rendered them liable to serious disciplinary action including summary dismissal.

i. The Respondent however opted not to summarily dismiss them and decided to terminate their services normally.

That it followed fair procedure by suspending the Claimants from duty pending investigations and subsequently giving them an opportunity to be heard in the presence of union representatives after which the decision to terminate was explained to them. The respondent attached the *Notices to Show Cause letters, Minutes of their disciplinary hearings* and their *Termination Letters* at **Appendix II to Appendix IX**.

The respondent further avers that the Claimants were paid all terminal dues constituting of notice pay and gratuity as shown at **Appendix X to XII** for the 1st Claimant and **Appendix XV to XVIII** for the 2nd Claimant. That they each signed Discharge Certificates on 1st October 2014 acknowledging payment and confirming they had no further claims against the Respondent. That their terminal dues were paid on 30th September 2014 because they did not clear until then.

Evidence

As the hearing, counsel for the claimants informed the court that the claimants were only seeking 12 months' salary as compensation for both Claimants who had confirmed that all other prayers were settled. In response, the Respondent's counsel stated they would concentrate on the issue of compensation.

CW1, the 1st Claimant stated that *Clause 3 of the contract* provided that he would have to observe ethics and maintain respect of the company at all times. He admitted that he agreed to assist Mary Mwendia who had a Chemist, to sell family planning drugs at a fee outside his working hours. He also stated that he signed the minutes of his disciplinary hearing held on 10th September 2013. He stated he was not aware there was lost medicine from PS1 and that he had no reason to doubt the authenticity of the drugs from Mary Mwendia. That there was no competition with his job in selling the said drugs. He conceded that he did not have a government certificate and was not licenced to sell the drugs. He stated that he did not seek permission to do a side job from the respondent. He stated that his appointment letter did not state he could not sell medicine. He further stated that he was never given an opportunity to defend himself. He stated that he did not agree with the grounds of termination and that the termination of his employment was unfair.

CW2, the 2nd Claimant stated that Mary Mwendia whom he knew very well approached him to assist her sell drugs through a mr. Patrick Kamau. That he told her he could not sell the drugs but would introduce her to someone else and so Mary paid him for delivery of the drugs during his free time and not for selling. He admitted that he was called to a disciplinary hearing and signed the minutes. In re-examination he stated he was never charged for selling drugs but was a witness.

RW1, DEEMASH HARJI testified that the reasons the Claimants' employment was terminated was that they were arrested for selling stolen drugs and breaching fundamental obligations. That by selling the drugs for a fee, they were competing with their employer which is conflict of interest. That when the Claimants were arrested within the Respondent's premises, the Respondent was not sure whether they had been taken as suspects. He testified that the Claimants' work involved delivery of company drugs using the company's delivery vehicles. Under cross-examination, he agreed that neither the grounds of termination nor minutes of the disciplinary meeting mentioned the sale of drugs during office hours or to a competitor. He stated that the Claimants were guilty of gross-misconduct. He stated that the claimants were not given warning letters and that a warning was not an appropriate penalty in the case.

Claimant's Submissions

The Claimants submit that they were exonerated and even became witnesses for the State in the stolen drugs case and that they have never been charged for any alleged theft. That it therefore follows the Respondent terminated their services unfairly since the allegations of theft appear in their termination letters as the reason for their dismissal from employment. They submit that the provisions of **Section 41 of the Employment Act** was not followed with regard to the process leading to termination of their employment as there was no complaints directed at them, no proper notice to show cause was delivered to them and they were never given adequate opportunity to defend themselves. That the Respondent further contravened the procedure outlined in the duly executed and registered **CBA at Clause 13**, annexed to the Memorandum of Claim as **Appendix IV**. That the said disciplinary process was undertaken during an arbitration meeting which they thought would resolve whatever misunderstanding they had with the Respondent and not result in their termination.

They submit they are entitled to 12 months' salary as compensation since the Respondent failed to properly comply with the law in terminating their employment. That compensation is a discretionary remedy which can be awarded to the maximum sum by the court where it finds that termination was unlawful and/or wrongful. That the Respondent's acts of wrongfully terminating their employment rendered their employment superfluous and impliedly constituted redundancy as under **Section 2 of the Employment Act**.

The Claimants relied on the case of **Tom Ndadema & Another v Club Click, Industrial Court Cause No. 1591 of 2010** where Rika J. ordered that the claimants be paid their dues on account of no hearing having been shown to have taken place as demanded by Sections 41 and 45 of the Act and that the termination was not in accordance with justice and equity and was unfair for which compensation is payable. The Claimants submit that their evidence has not been controverted by any evidence from the Respondent and that they have managed to prove on a balance of probability that they are entitled to the claims they seek in the Memorandum of Claim.

Respondent's Submissions

The Respondent submits that the Claimants' employment contracts which are attached as Appendix 1 in the Memorandum of Claim provide at Clauses 3 and 4 as follows:

“You will be working in our company whose responsibility is greater than any other trade or business activity, where ethics, good manufacturing practice and Kenya Pharmacy and Poisons Law have to be observed, in addition to the other laws prevailing in Kenya. While performing your duties you are required to maintain the respectability of the name of the Company at all times.”

That the Claimants were Delivery Personnel whose assignments placed them outside the office and would thus easily get involved in criminal activities. That it reasonably believed they were involved in the sale of drugs during office hours. The Respondent submits that it is a requirement of the law that an employee should not be engaged in 'on-the-side' job without the express consent of an employer and that it therefore had valid and just reasons to terminate the claimants' employment. That **Lord Woolf MR** described the duty of fidelity owed by every employee to his employer in the case of **Attorney General vs. Blake [1998] 2 WLR 805** that:

“The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed 'consent of his employer'. Therefore the duty of fidelity requires the employer to have regard to the interests of the employer.”

It submits that courts have held that the test for valid reasons under **Section 43(2) of the Act** is whether the employer at the time of terminating the employee's services genuinely believed there was a reason to justify the termination. It cites the case of **Lawrence Nyamichaba Ondari v National Hospital Insurance Fund [2018] eKLR** where the court stated that:

“The court must in all cases refrain from over analysing the reasons for which an employee's services have been terminated for there exists a danger of the court substituting its opinion on what it considers to be valid reasons for termination of service with that of the management. The test as provided under section 43(2) of the Act is whether the employer at the time of terminating the employee's services genuinely believed that there existed reasons to justify a termination. The standard of proof is of course on a balance of probabilities.

...As observed earlier, it was not for the court to audit the truth of reasons for termination of employment. All the court needs to ensure is that the reason put forward for dismissal or termination are reasons which the employer reasonably believed to exist and are reasons for which a reasonable employer would terminate the services of an employee. In this particular case the court is persuaded that there existed reasonable grounds for terminating the claimant's contract of employment.”

That the Claimants have not particularised the breach of Clause 13 of the CBA while it has on its part extensively demonstrated how fair procedure was followed. It submits that the Claimants needed not be charged for them to be subjected to disciplinary action and it cites the case of **Ismail Hassan Abdullahi v Kenya Ports Authority [2013] eKLR** where the Court held that:

“In my view the purposes of a disciplinary process is to inquire into allegations relating to the breach of obligations as between an employer and an employee with a view to terminating the employment contract while the criminal process has its own different purposes and objectives, and its own momentum.

The legal principles applicable in a criminal process are different from the legal principles applicable in a disciplinary process. Mutual trust and confidence is one such principle which is crucial in an employment relationship but which is not a principle which would be considered in a criminal process.

In the one the outcome could be separation between employee and employer and in the other conviction and sentence by an independent and impartial court. In a disciplinary process it is the employer who is in charge while in a criminal trial it is the Republic and the judiciary. Therefore the outcome of a disciplinary process need not depend on the outcome of a criminal process.”

The Respondent submits that even though it had valid grounds to summarily dismiss the Claimants, it opted for a more lenient penalty of a normal termination by paying the Claimants notice pay as shown in their termination letters. That the Claimants were fairly terminated while following the applicable procedure pursuant to **Section 41, 43 and 45 of the Employment Act** and that the arbitration meeting was in form and substance a disciplinary hearing. That in the case of **Kenya Plantation and Agricultural Workers Union v Unilever Tea Kenya [2017] eKLR**, the court dismissed the claimant's claim for lack of a concrete case of unlawful termination of employment. It submits that the Claimants in the present case have also failed to present a concrete case of unlawful termination.

It is submitted by the Respondent that the Claimants' submissions are misleading as they were not declared redundant and in any event, they did not plead redundancy in their claim. That the court should thus not consider such information introduced in submissions. That the Claimants also failed to disclose in their pleadings that it had paid them all their dues and only withdrew the claims for notice pay and gratuity after the Respondent had filed an application to set aside judgment. It submits that this court should thus find their testimonies and evidence not credible.

Analysis and Determination

The issues for determination is whether the Claimants were wrongfully terminated from employment by the Respondent and whether the Claimants are entitled to the reliefs sought.

Section 41(1) of the Employment Act provides that:

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

In the case of **Samsung Electronics East Africa Ltd v K M [2017] eKLR** the Court observed that whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair and that the right to fair hearing is a right that the legislature secured under Section 41 of the Employment Act.

Under **Section 43 of the Employment Act**, the burden of proving that the reasons for terminating an employee constitute justifiable or lawful grounds for dismissal lies with the employer and that where the employer fails to do so, the termination shall be deemed unfair within the meaning of **Section 45 of the Employment Act**.

From the evidence on record, the Respondent has demonstrated it followed due procedure by producing the Notices to Show Cause letters, Minutes of the Claimants' disciplinary hearings and their Termination Letters. Both Claimants also admitted in their testimonies that they attended disciplinary hearings in the presence of union representatives and even signed the minutes. To that extent, procedural fairness was accorded to them as under **Section 41 of the Act**. Secondly, the Respondent has justified the grounds for terminating the Claimants' employment as under **Section 47(5) of the Act** by explaining that the Claimants breached their employment contracts by engaging in a business that was in competition with the Respondent. Compensation is only payable to an employee where the court finds the termination unfair. In this case, the termination of the claimants was not unfair. The Claimants are therefore not entitled to compensation or any damages.

The claims are accordingly dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE