



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2188 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)

PETER NJOROGHE CHEGE.....CLAIMANT

VERSUS

KOPPERT BIOLOGICAL SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the instant Claim on 9th December, 2015 seeking damages for wrongful dismissal/termination from his employment by the Respondent and its failure and/or refusal to pay terminal dues and other monies owed to the Claimant.
2. The Claimant states that he was employed by the Respondent, a limited liability company in the capacity of a Technical Sales Representative with effect from 5th June, 2014, earning a gross monthly salary of Kshs. 65,000/-.
3. The Claimant averred that his employment was subject to a Probationary period of three (3) months which he successfully completed and was confirmed in the same capacity. He further averred that upon his confirmation his salary was enhanced to Kshs. 75,000/-.
4. The Claimant contended that he performed his duties diligently and to the Respondent's satisfaction until 6th July, 2015 when the Respondent's General Manager without any notice, fair hearing or justifiable ground summarily terminated his services. He further contended that no letter of termination was issued to him.
5. Aggrieved by the decision to unfairly and unlawfully terminate his employment the Claimant filed the instant Claim seeking the following reliefs:-

a. An Order for payment of the Claimant's terminal dues and damages totaling to Kshs. 1,065,000/- comprising of the following:

i. Salary for July 2015	Kshs.15,000/-
ii. 1 month salary in lieu of notice	Kshs.75,000/-
iii. Accumulated leave days	Kshs.75,000/-
iv. Compensation for loss of employment	
<u>equivalent to 12 months' salary</u>	<u>Kshs. 900,000/-</u>
TOTAL	Kshs. 1,065,000/-

b. A certificate of service pursuant to Section 51 of the Employment Act.

c. An Order for the Respondent to pay costs of this suit plus interest thereon.

6. The Respondent in its Reply to the Memorandum of Response and Counter Claim dated 12th January, 2016 and filed in Court on 19th January, 2016 in which it admits having engaged the Claimant in the manner alleged in his Memorandum of Claim.

7. The Respondent however denied that the Claimant performed his duties diligently maintaining that in January, 2015 the Claimant was making false and fraudulent Claims from the Company which actions the Respondent termed as gross violation of the Claimant's employment Contract.

8. The Respondent further confirmed that the Claimant admitted to the same through his letter dated 12th January, 2015. The Respondent further averred that in July 2015 it discovered further false and fraudulent financial claims and through its management held verbal discussions on 6th July, 2015. It was further agreed that the discussions on the Claimant's behaviour were to be further addressed in a meeting on 7th July, 2015

9. The Respondent averred that the Claimant without any lawful reason and/or permission failed to attend to his duties on the 7th July, 2015 indicating that he was not feeling well. The Respondent further averred that no certificate of illness from any recognized medical facility was availed by the Claimant to confirm this position.

10. The Respondent further maintained that the Claimant even in his absence continued using the Company number one month after exiting to its detriment forcing the Respondent to notify its clients and the general public that the Claimant was no longer its employee via a newspaper advertisement published in the Daily Nation of 20th August, 2015.

11. The Respondent avers that the Claimant's termination was legal as provided under the Employment Act, 2007 and therefore urged this Honourable Court to dismiss the Claim in its entirety.

12. The Respondent further urged this Court to enter Judgment in its favour in terms of the following reliefs:

1. The Respondent prays for the specific damages totaling to Kshs. 232,218/- tabulated below:-

a. One month's salary in lieu of notice Kshs.75,000/-

b. Phone bills paid on Airtel number 0733 210416

for July and August 2015 Kshs. 7,219.04/-

c. Money paid for illegally acquired and misrepresented by the Claimant Kshs. 111,375/-

d. Costs of advertisement in the Daily Nation

for 20/8/2015 Kshs. 38,624/-

TOTAL Kshs. 232, 218/-

2. General damages for breach of contract, business inconvenience and reputational damage to the Respondent's image.

3. Interest on 1 and 2 above.

4. Costs of this suit.

13. In his Response to the Respondent's Reply and Counter Claim, the Claimant denied deserting lawful duty or engaging in fraudulent conduct as alleged by the Respondent. he further maintained that the report made to the police on 6th January, 2016 was made with ulterior motive and was only meant to harass the him following service of summons on this matter to the Respondents.

14. The Claimant further maintained that the use of the Company mobile phone was for purposes of responding to queries from the Respondent's clients and therefore not for personal gain as averred by the Claimant.

15. The Claimant therefore urged this Honourable Court to dismiss the Respondent's Counter Claim with costs to the Claimant as the same is void of merit.

Evidence

16. The matter was thereafter fixed for hearing on 4/3/2019, 10/12/2019 and 5/2/2020 with the Claimant calling two (2) witnesses to testify on his behalf and the Respondent calling one (1) witness to testify on its behalf.

Claimant's Case

17. The Claimant, CW1 adopted his witness statement dated 27th July, 2016 and filed in Court on 23rd August, 2016 as his evidence in chief.

In his statement, CW1 reiterated the averments made in his Memorandum of Claim.

18. CW1 further testified he was called for a routine meeting by the Respondent in January, 2015 on review of the year 2014 performance and how to process in the year 2015. CW1 maintained that the said meeting was not a disciplinary hearing.

19. CW1 further testified that he was not accorded a hearing or even issued with a notice to show cause letter prior to his termination. He testified that his termination was verbal on 6/7/2015.

20. CW1 maintained that he was terminated and that he did not abscond duties as alleged by the Respondent. He therefore urged this Honourable Court to allow his Claim as pleaded.

21. On Cross-examination CW1 stated that he was informed by his colleagues that there was a notice given to the security to the effect that he should not be allowed into the Respondent's premises and could therefore not serve the sick sheet to the Respondent.

22. CW1 further confirmed making calls using the Respondent's official number and insisted that the calls were to the Respondent's customers and not personal calls.

Respondent's Case

23. RW1, Charles Macharia, the Respondent's General Manager sought and was allowed to have his Witness Statement filed in Court on 1st September, 2016 adopted as his evidence in chief. In his Statement RW1 reiterated the averments made in the Response to the Memorandum of Claim and Counterclaim filed in this matter.

24. He further testified that the Claimant absconded lawful duties and continued using the official number occasioning the Respondent losses. He further testified that the Respondent was forced to pay for goods picked by the Claimant even after leaving the Respondent's employment, thus forming the basis of the Counter Claim. RW1 urged this Honourable Court to dismiss the Claim and instead allow the Respondent's Counter Claim in terms of the reliefs sought therein.

25. On cross-examination, RW1 confirmed that the Claimant had previously made a confession of gross misconduct and was issued with a 1st warning. He further confirmed that on 6/7/2015 he had a verbal discussion with the Claimant.

26. RW1 further confirmed that the Claimant ceased being an employee of the Respondent when he deserted lawful duty. He further maintained that the Claimant is not entitled to the reliefs he seeks in his Memorandum of Claim.

27. On re-examination, RW1 testified that following the meeting between himself and the Claimant on 6/7/2015 the Claimant did not report to work on 7/7/2015. RW1 maintained that the Respondent is entitled to its Counter Claim and urged this Honourable Court to allow the same as prayed.

28. Parties thereafter filed written submissions to the Claim.

Submissions by the parties

29. The Claimant submitted that his services were unlawfully, unfairly and un-procedurally terminated by the Respondent herein on 6/7/2015. The Claimant further averred that he considered himself terminated following the meeting of 6/7/2015.

30. The Claimant further submitted that his verbal dismissal was without valid, just and fair reason and that he was not accorded a hearing prior to his termination and is therefore unfair, null and void ab initio.

31. The Claimant further submitted that the contention by the Respondent that he deserted lawful duty is not supported by any evidence and should be disregarded by this Court. He further contended that the Respondent cannot hide behind this contention to justify its failure to accord him a disciplinary hearing. To buttress this argument the Claimant cited and relied on the case of **David Nyanjui Mburu Vs Sunmatt Limited (2017) Eklr.**

32. The Claimant maintained that the Respondent has failed to prove its counterclaim and therefore urged this Honourable Court to dismiss the same with costs to the Claimant.

33. The Claimant further maintained that he is entitled to the reliefs sought in his Memorandum of Claim and urged this Honourable Court to allow his Claim in terms of the reliefs sought therein.

34. There are no submissions on record filed on behalf of the Respondent herein.

35. I have examined all the evidence and submissions of the Parties. The Claimant avers that he was orally terminated on 6/7/2015. The Respondent on the other hand avers that the Claimant absconded duty on 6/7/2015.

36. In support of the contention that he was terminated on 6/9/2015, the Claimant produced Appendix 2 which is a newspaper cutting of 20/8/2015 indicating that the Claimant had ceased to be the Respondent's employee on 6/7/2015.

37. The Respondent aver that the Claimant absconded duty on 6/7/2015 but there is no indication that they wrote him a notice to show cause why he should not be dismissed for absconding duty.

38. Infact on 9/7/2015, the Claimant had written a text to the Respondent indicating that he could not make it to work for he was feeling unwell. There is no follow up on this.

39. The Claimant avers that he was denied access to the Respondent's premises when he attempted to come back to work.

40. Indeed, the only way this could be disputed is if the Respondent had actually sought the Claimant and issued him with a notice to show cause and also invite him to a disciplinary hearing for absconding duty. No such events occurred.

41. In their response to the demand letter send to them, the Respondents admit dismissing the Claimant on 6/7/2015.

42. Since the Respondent have failed to produce evidence as to the reasons for the dismissal and also since no disciplinary hearing was ever conducted against the Claimant, it is my finding that the Claimant was unlawfully and unfairly dismissed as provided under Section 45 (2) of Employment Act 2007 which provides as follows:-

2. "A termination of employment by an employer is unfair if the employer fails to prove:

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure".

43. As to the Counter Claim, the Respondent proved that the Claimant continued to use their airtel mobile number after this dismissal and incurred expenses worth 7,219/=. The Counter Claimant is thus proved to this extend.

44. The other parts of the Counter Claim have not been supported by any evidence. The RW1 even indicated in examination that he did not have any evidence of the goods the Claimant took from clients.

45. As for the remedies, sought by the Claimant, I find for the Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 75,000/=

2. Salary for 6 days worked in July 2015 = $6/30 \times 75,000 = 15,000/=$

3. Leave for one year = 75,000/=

4. 8 months' salary as compensation for unlawful and unfair termination = $8 \times 75,000 = 600,000/=$

TOTAL = 765,000/=

Less statutory deductions

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Burungu for Claimant – Present

Oyiengo for Respondent – Present