



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 295 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 16<sup>th</sup> September, 2020)

**DAVID OTIENO OGADA.....CLAIMANT**

**VERSUS**

**BIDCO AFRICA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant was employed by the Respondent on 21/3/2006 as a soap maker in the soap department. However, his services were terminated on 17/7/2014 on account of gross misconduct. Aggrieved by the circumstances of the termination, the Claimant instituted this claim on 29/2/2016 seeking the following reliefs:-

***a. A declaration that the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefits of Kshs. 245,399.00 as tabulated below:-***

***i. Full payment of one month's salary in lieu of notice of Kshs. 10,288.00.***

***ii. Unpaid annual leave of Kshs. 68,455.00.***

***iii. Compensation for unfair loss of job amounting to Kshs. 123,456.00.***

***iv. Refund of union dues paid by the Claimant of Kshs. 43,200.00.***

***b. A declaration that the Claimant is entitled to a certificate of service.***

***c. Costs of the claim plus interest thereon.***

**The Claimant's Case**

2. The Claimant avers that the termination of his employment was unlawful, premature, unprocedural, without a just cause and in complete disregard to the rules of natural justice. He further avers that the Respondent relied on unfounded and fabricated information without giving him the opportunity to be heard. It is his case that at the time of termination, he was earning a consolidated monthly salary of Kshs. 10,288.00.

3. He avers that he was not paid salary in lieu of notice or service pay that had accrued to him under the Employment Act. Additionally, the Respondent did not refund the union dues he paid between 2009 and 2014. The Petitioner avers that the Respondent refused to issue him with a Certificate of Service.

4. During trial, the Claimant testified as CW1 and adopted his witness statement as his evidence. He told this Court that he was a businessman stationed at Kisumu. It was his testimony that he was earning a salary of Kshs. 21,020.00 as outlined in his pay slips and not as indicated in his claim. He also stated that he had worked for the Respondent for 20 years.

5. It was his testimony that he was never charged with any count of soliciting for bribes as the matter was resolved and he refunded a sum of KShs. 25,000.00 instead of Kshs. 11,030.00.

6. On cross examination, he admitted to taking money from some people but stated that the same was refunded. He conceded that his claim indicated that he was earning Kshs. 10,288.00 but contended that the same was an error.

7. He admitted to being paid pension and his July salary but asserted that he was not paid his service pay.

8. On re-examination he maintained that his salary was Kshs. 21,026.00 and not Kshs. 10,288.00. He reiterated that he had admitted his mistake and further stated that he was not paid as he had expected.

### **The Respondent's Case**

9. Respondent avers that in April 2014, the Claimant was accused of obtaining a cumulative bribe of Kshs. 11,030.00, by misrepresenting himself as a Bidco recruitment officer. The Respondent avers that the impersonation maligned its image and was a violation of its policies hence constituted a gross misconduct which led to the termination of the Claimant's employment after the investigations carried out on 17<sup>th</sup> and 22<sup>nd</sup> July 2014.

10. It is averred that the Claimant was asked to show cause why disciplinary action should not be taken against him. He responded through a written statement, accepted the allegations raised against him and even confessed to taking Kshs. 5,000.00 from one Fidelis Omwenga Ouko, an employee of Bidco.

11. The Respondent avers that the Claimant is not entitled to payment in lieu of notice or compensation for loss of his job because he was summarily dismissed on the grounds of gross misconduct. Further, he is not entitled to an award of unpaid annual leave as he was paid all his dues on 12<sup>th</sup> August 2014 vide cheque number 213580, inclusive of untaken leave days.

12. It is averred that the Claimant is not entitled to a refund of union dues, as the same was deducted pursuant to section 48 (2) of the Labour Relations Act and contends that the refund should be claimed from the union. It is further averred that the Claimant was issued with a Certificate of Service on 10/6/2016 and on 20/9/2014, he was issued with cheque number 000257 as his pension payment.

13. Zipporah Waruguru and the Respondent's Human Resource Officer testified as RW1 and adopted her witness statement as her evidence and which is basically a reiteration of the contents of the response as outlined herein above.

14. During cross examination, she conceded that the Claimant's employment was terminated on 17/7/2014 and that at the time of his termination, his salary was Kshs. 21,000.00.

15. It was her testimony that the Claimant was not issued with a notice to show cause or subjected to disciplinary proceedings but contended that there had been a hearing. She denied having knowledge that the Claimant had been pressured to admit the mistake. She contended that the issue of the police was an external matter but conceded that they never followed up the matter.

16. She stated that the Claimant was paid pension, his July salary and payment in lieu of leave.

17. The witness was re-examined. She confirmed that the Claimant was not issued with any notice. She brought to the attention of this Court a statement by the Claimant where he admitted to the allegations against him.

18. After the close of the Respondent's case, parties were directed to file their written submissions with only the Respondent filing the same.

### **The Respondent's Submissions**

19. The Respondent submits that it was justified to summarily dismiss the Claimant on account of his own admission of obtaining money on false pretences, a fact he also admitted to during his testimony. It is the Respondent's position that the summary dismissal was in line with Section 44 (4) (g) of the Employment Act and Part IV and V of its Rules and Regulations which was signed by the Claimant.

20. The Respondent relies on the cases of **Kenya Plantation & Agricultural Workers Union vs. Unilever Tea Kenya Limited [2016] eKLR** and **Samuel Ochieng Lango vs. Maya Duty Free Limited [2019] eKLR** where the Claimants' summary dismissal were found to be lawful having been found guilty and admitting to the misconduct, respectively.

21. The Respondent admits that the Claimant was given an opportunity to respond to the allegations raised. However, it is submitted that since the Claimant admitted to the allegations, there was no need of conducting a hearing. It is its position that the Claimant was the author of his summary dismissal.

22. It is the Respondent's submissions that the Claimant signed a letter accepting his further dues with no further claim whatsoever and relies on the case **Simon Karuga Waweru vs. Twiga Stationers Limited [Supra]**. It is also the Respondent's submissions that the Claimant is not entitled to compensation for unfair loss of job and payment in lieu of notice because the termination of his employment was lawful and fair.

23. It is submitted that the Claimant is not entitled to the unpaid annual leave sought as he was paid all his dues inclusive of untaken leave days. The Respondent submits that claim for refund of union dues is untenable as the same was deducted pursuant to Section 48 (2) of the Labour Relations Act.

24. The Respondent also submits that the said claim was never brought to its attention. Finally, the Respondent submits that the Claimant was issued with a Certificate of Service on 10/6/2016.

25. I have examined the evidence and submissions of the Parties herein. The Respondent avers that the Claimant was terminated for gross misconduct whereby he was accused of soliciting for a bribe from some employees of the Respondent.

26. The Claimant in his evidence admitted to this fact but added that he had refunded the money in question and even paid more.

27. In the circumstances of the case, the Respondent had valid reasons in dismissing the Claimant from employment as envisaged under Section 43 of the Employment Act 2007 which provides as follows:-

**1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".**

28. The Respondent further indicated that there was no need to take the Claimant through a formal disciplinary process because he was issued with a show cause letter for which he replied admitting the misconduct.

29. In fact the letter in response is produced at page 7 of the Respondent's documents in which he admitted he was arrested by police and paid back the money taken and more 25,000/= though he had been given 5,000/= by the complainant who had withdrawn the case.

30. It is indeed true that the Claimant had admitted committing the offence in black and white. The disciplinary hearing that the Claimant expected would have added little value to his case given the admission of misconduct in writing.

31. It is therefore my finding that the Claimant was dismissed due to valid reasons and after admission in writing of the same and therefore the dismissal was justified and fair.

32. In view of this finding, I find the claim against the Respondent lacked merit. I dismiss this Claim accordingly save for the prayer that he be issued a certificate of service.

33. There will be no order of costs.

**Dated and delivered in Chambers via zoom this 16<sup>th</sup> day of September, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyabisi for Claimant – Present

Sandra Khavayi holding brief Omondi for Respondent – present