



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 434 OF 2012

CHRIS M MUTUA.....CLAIMANT

VERSUS

NEW K C C LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2020)

JUDGMENT

The memorandum of claim was filed on 16.03.2012 through E.M Obonyo & Company Advocates. The claimant prayed for:

- 1) That the applicant's termination of his employment by the respondent on 11.08.2009 was unlawful, bad in law and arbitrary.
- 2) The respondent to pay general and special damages set out in the memorandum of claim.
- 3) The respondent to pay costs of the suit.

At termination the claimant alleges he worked as Acting Export Manager at monthly pay of Kshs. 185, 000.00. He claimed:

- a) Unpaid acting allowance Kshs.72, 558.00.
- b) Underpayment September 2008 to August 2009 Kshs. 870, 696.00.
- c) Salary for 11 days worked in August 2009 Kshs. 30, 697.00,
- d) One-month salary in lieu of the notice Kshs. 72, 558.00.
- e) Maximum damages under Employment Act, 2007 Kshs. 72, 558 x 12 = Kshs. 870, 696, 00,
- f) Total claim Kshs. 1, 844, 647.00.
- g) He claims half salary unpaid during suspension 11.08.2009 to May 2011.

The claimant's case is as follows:

- a) The respondent employed him as a data entry clerk in August 2006. He was promoted to a Data Analyst. In September 2008 he was promoted to Acting Export Manager.
- b) He was suspended by letter dated 11.08.2009 on account of seeking and getting approvals from the Stores Manager un-procedurally; selling goods on 04.08.2008 using the name of JM United Traders of Dar-es-Salaam when Johnson of JM United had confirmed on phone that neither him nor his partner Said Jones had placed any orders and their last order was for July 2009; and defrauding the company by using an export customer's account to sell to unknown customer. The suspension letter invited him to show-cause why disciplinary action should not be taken against him. He was to reply by 17.08.2009 failing disciplinary action would be taken.

c) The claimant has not been informed about outcome of the internal investigations.

d) He says he has not been given a chance to defend himself against the allegations in the letter of 11.08.2009.

The memorandum of response was filed on 31.05.2012 through Kipkenda & Company Advocates. The respondent admits that it employed the claimant but was on fixed term contracts as a data analyst and the last contract was for one year effective 01.12.2008 at Kshs. 19, 942.00 per month. He was never promoted to Acting Export Manager effective September 2008 as alleged. It was discovered that the claimant sold products to export customers un-procedurally hence the suspension letter. Further the claimant failed to tender his written response by 10.08.2009 and a suspension letter dated 11.08.2009 issued. He was required to show-cause by 17.08.2009 but never did respond. The matter was under police investigation as per exhibited charges against him on alleged forgery contrary to section 357 of the Penal Code. He was charged in **criminal case no. 3735 of 2009 Republic Versus Stephen Mbaluka Mutie**. The claimant was informed of his dismissal by the letter dated 29.12.2009 and he was to be paid final dues less liabilities to the respondent. The respondent therefore prayed that the suit be dismissed with costs.

The dismissal letter dated 29.12.2009 states that the claimant had failed to reply the respondent's letter dated 11.08.2009.

The Court has considered the material on record including the parties' pleadings, documents, oral evidence and final submissions. The Court makes findings as follows:

1) There is no dispute that parties were in a contract of employment. However, the claimant has failed to provide evidence that he was appointed Acting Export Manager as pleaded. Thus the Court finds that claims of acting allowance and underpayment in that regard will fail.

2) The claimant was given the letter of suspension dated 11.08.2009 but failed to respond. The evidence is that after that the respondent dismissed the claimant. The Court finds that the respondent was entitled to consider the claimant culpable as alleged against him once he failed to respond as was required. The Court finds that the respondent has established that as at the time of termination the respondent had a valid reason to terminate the claimant's employment per section 43 of the Employment Act. Whether the claimant received the termination letter or not, the evidence is that he was terminated and the reason has been shown to have been genuine.

3) The Court finds that the claimant has therefore failed to establish and justify his claims and prayers. They will fail with costs.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

Signed, dated and delivered by the court at **Nairobi** by video-link this **Friday 23rd October, 2020**.

BYRAM ONGAYA

JUDGE