



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 902 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PROTUS EVANS MASINDE.....CLAIMANT

VERSUS

HARLEYS LIMITED.....RESPONDENT

JUDGMENT

The Claimant filed a Memorandum of Claim on 14th June, 2013 alleging that the Respondent summarily dismissed him from service for false reasons. He seeks the following prayers;

1. Salary for November and December 2012 Kshs.130,000
2. Leave allowance 21 days Kshs.45,500
3. Mileage (November and December 2012) Kshs.70,000
4. Phone Allowance (November, December 2012) Kshs.5,000
5. One month's salary in lieu of notice Kshs.65,000
6. Certificate of service
7. General Damages to be assessed by the Court
8. Costs of the cause

The Respondent filed its Response to the Memorandum of Claim on 7th November, 2013. It confirms that the Claimant was employed as a Surgical Sales Representative but alleges he failed to fulfil his obligations under the contract. That instead, the Claimant engaged in massive fraudulent activities that occasioned the loss of Kshs.3,236,831.50.

It avers that it summarily dismissed the Claimant for gross misconduct including stealing stock, failing to remit cash after making cash sales and collecting the same from its customers.

The Respondent opted not to call any witness and relied on its pleadings and submissions.

Claimant's Case

The Claimant testified as CW1. He relied on his Witness Statement dated 18th October, 2019 as his evidence in chief. He testified that he was employed in 2010 and that he diligently worked for the Respondent. He testified that he carried the Respondent's products to various hospitals across the country and that prior to the dismissal letter dated 31st November, 2012, no allegations were made against him.

Upon cross-examination, he testified that he neither responded to the allegations made against him on the missing amounts nor did he seek to be furnished with evidence of the allegations. He further testified that he did not appeal against his dismissal as he was not **given an opportunity to appeal**.

He claims the salary for December 2012 being salary in lieu of notice. He further claims that he is entitled to the allowances sought in his claim. It was his testimony that he is not aware that the Respondent reported the loss of money and items to the police. According to him, he is innocent and he was waiting for his arrest which never happened.

On re-examination, he testified that the letter dated 30th November, 2012 did not require his response. He stated that he returned the Respondent's property which included a car.

Claimant's Submissions

The Claimant submitted that termination must be in accordance with section 41 of the Employment Act. He further submitted that the **Court in CMC Aviation Limited v Mohammed Noor [2015] eKLR** held that an employee must be taken through the mandatory process outlined under Section 41 of the Act.

He submitted that the Respondent did not seek his response to the allegation of the missing stock or running a company with similar interests to those of the Respondent. It was therefore his submission that the termination was without a lawful or justifiable reason.

He argued that the Respondent did not furnish him or this Court with evidence in support of the allegations against him thus he was dismissed without any justifiable reason. He urged the Court to find that his employment was unfairly and unlawfully terminated without compliance with the procedure under Sections 41, 43, 44 and 45 of the Employment Act. He relied on Section 49(1)(c) of the Employment Act and urged the Court to award him 12 months' salary as compensation for the Respondent's disregard of procedural fairness.

He submitted that by printing his name and photograph in the local dailies on 20th December, 2012 the Respondent portrayed him to right thinking members of the public as a thief or a person who engaged in illegal activities. He submitted that this damaged his reputation thereby jeopardising his future employment prospects.

He submitted that the Court of Appeal in **Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR** awarded the Kshs.3 million as damages for defamation. He urged the Court to award him a sum of Kshs.3.5 million as damages for defamation.

With regard to costs, he submitted that costs should follow the event and relied on the decision in **Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR**. He submitted that since he has proved his case the court in exercising its jurisdiction under Section 12(4) of the Employment and Labour Relations Court Act should award him costs.

Respondent's Submissions

The Respondent submitted that Section 44(4)(f) and (g) of the Employment Act confirms that the Claimant's termination was in conformity with the law. It submitted that the Claimant was afforded an opportunity to defend himself when the police were involved to investigate the matter but the Claimant chose not to honour the summons issued by the police and disappeared when a warrant of arrest was issued against him.

On defamation, it submitted that the Claimant neither pleaded nor produced any evidence to prove defamation as required by law. It submitted that there is no allegation of defamation in the claim and that if the Claimant had a cause of action the same ought to have been filed in a civil court.

It submitted that the advert impugned by the Claimant was to notify its clients and prospective clients that the Claimant was no longer an employee of the Respondent. It submitted that the Claimant has not demonstrated any negative effects of the said publication and that the notice ought to be holistically construed and not misconstrued as the Claimant has done.

It submitted that the Claimant is not entitled to the reliefs sought as he had on various occasions engaged in illegal activities that amount to gross misconduct. As such summary dismissal issued against him was in accordance with Section 44(4)(f) and (g) of the Employment Act. It argued that the claim was filed in bad faith and in breach of the Claimant's employment contract. It submitted that costs should follow the event.

Claimant's Rejoinder

In his response to the Respondent's submission, the Claimant submitted that at page 2 of his Memorandum of Claim, he had pleaded defamation. It is therefore the reason he prayed for general damages to be assessed by this Court.

He submitted that he has succeeded in establishing defamation against the Respondent since his evidence remained uncontroverted. He argued that the fact that he failed to call independent witnesses should not negate the fact that he was defamed because the newspaper was of nationwide circulation. He relied on the case of **Kenneth Okoki Dindi v Standard Limited [2015] eKLR** cited in the case of **Radio Africa Limited t/a the Star Newspaper v Moses Bifwoli Makari Kimungui [2020] eKLR**.

He submitted that the newspaper article was maliciously published in the absence of any conviction or evidence. He submitted that any reasonable person who read the article would have arrived at a conclusion that he was a thief and should not be trusted in employment. He urged the Court to award damages for defamation.

Determination

The issues for determination are:

1. Whether the Claimant was wrongfully dismissed.
2. Whether the Claimant was defamed.
3. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was wrongfully dismissed

The Claimant was summarily dismissed vide the letter dated 30th November, 2012 which stated:

“ ...

Dear Proteus,

RE: Summary dismissal

This is to place on your record that the management has decided to terminate your services with immediate effect from 30th November 2012.

This is as a result of:

1. *Missing of stock in your custody.*
2. *Unpaid cash sales though cash has been collected from the customer.*
3. *Running a parallel company while working for Harlyes Limited.*

In view of this, the Management is therefore left with no other alternative other than to relieve you of your services.

Return all company property under your custody before leaving the premises. You are not entitled to any dues.

Yours faithfully,

MISCHA GROMEN

HEAD OF H.R.

...”

The Claimant in his Witness Statement stated that the allegations made against him were untrue and unsubstantiated as no goods were over declared lost while in his custody. Further, that he accounted for all the money he collected. The Respondent did not call any witness thus the Claimant's evidence remained uncontroverted. It submitted that Section 44(4)(f) and (g) of the Employment Act confirms that the Claimant's summary dismissal was in conformity with the law. It did not prove any of the allegations stated in the summary dismissal letter dated 30th November, 2012. Therefore, the Respondent did not discharge its burden under Section 47(5) of the Act to justify the grounds of the summary dismissal thus there was no valid reason for the dismissal under Section 45(2) of the Act.

On procedural fairness as required under Section 41 of the Employment Act, the Respondent submitted that the Claimant was afforded an opportunity to defend himself when the police were involved to investigate the matter. Section 41 of the Employment Act provides:

(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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection

(1), make.

Section 41 of the Employment Act does not contemplate that a hearing for summary dismissal is to be conducted by the police. As held in various cases, disciplinary proceedings are distinct from criminal proceedings. Notwithstanding the involvement of the police, the Respondent was required to conduct a disciplinary hearing but it did not do so.

The Court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** held:

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/ dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination...”

I therefore find that the Claimant’s dismissal was unfair.

Whether the Claimant is entitled to reliefs sought

The Claimant sought salary for the months of November and December 2012. It was his testimony that he sought his December 2012 salary as his salary in lieu of notice. The Claimant was dismissed in November 2012 thus he did not work during the month of December 2012. As a result, he is not entitled to salary for the month December 2012. The Respondent did not prove that it paid the Claimant his salary for the month of November thus the Claimant is entitled to the sum of Kshs.65,000. The Claimant is also entitled to mileage and phone allowance for the month of November 2012 being Kshs.35,000 and Kshs.2,500 respectively as he was on duty during that month.

The Claimant is also entitled to 21 days leave pay as the Respondent did not controvert this claim.

The Claimant is entitled to one month’s salary in lieu of notice in the sum of Kshs.65,000 as provided under Section 36 of the Employment Act.

The Claimant sought general damages and in his submissions submitted that he is entitled to 12 months’ compensation under Section 49(1) (c) of the Employment Act and damages for defamation. The claim for 12 months’ compensation was not pleaded but was introduced in his submissions under the prayer for general damages. Submissions do not constitute pleadings and a party is bound by its pleadings. Hence, this claim fails as issues and prayers can only be set out in pleadings and not submissions. In **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR** the Court of Appeal held:

*“We now come to the award of Ksh.3,000,000 being general damages in lieu of reinstatement. It is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice. (See **Alfred Githinji vs. Mumias Sugar Company Ltd Civil Appeal No 194 of 1991**).”*

With respect to damages for defamation, the Respondent submitted that this claim was not pleaded. The Claimant stated in his supplementary submissions that he had pleaded the defamation under paragraph (iii) of the Memorandum Claim. This paragraph only states that the Respondent went ahead and printed the Claimant’s name in the local dailies on 20th December, 2012 declaring him unfit to transact thus portraying him as a thief therefore damaging his reputation to potential employees.

The Court of Appeal in **Musikari Kombo v Royal Media Services Limited [2018] eKLR** held:

“It follows that a claimant in a defamation suit ought to principally establish in no particular order:

- i. The existence of a defamatory statement;*
- ii. The defendant has published or caused the publication of the defamatory statement;*
- iii. The publication refers to the claimant.”*

I do not find that the Claimant was defamed in the notice published on 20th December, 2020 because the notice did not make any reference to him having stolen. The notice only stated that he was not authorized to transact any business on behalf of the Respondent and that the Respondent would not be liable for any transaction entered into with the Claimant. Having been a person authorised to collect funds on behalf of the Respondent, I find that it was reasonable of the Respondent to caution the customers from dealing with the claimant. Further, the claimant did not specifically plead the defamatory words stated in the notice neither did he claim for damages with respect to the defamation. In **Veronica Wambui v Michael Wanjohi Mathenge [2015] eKLR** the Court held:

“I find that in jurisdictions similar to ours, there is general unanimity that alleged defamatory words must be pleaded in the original language they were uttered...The importance of the actual words uttered or published in pleadings has always been a recurrent reminder, since in libel or slander; the words used are the material facts and must therefore be set out in the statement of claim.”

The claim for defamation therefore fails, for reason that it was not specifically pleaded and also because it was not proved. I therefore award the claimant only the following –

1. Salary for November 2012	Kshs.65,000.00
2. Allowances for November 2012	Kshs.37,500.00
3. Gross pay in lieu of notice	Kshs.102,500.00
4. Pay in lieu of 21 days leave	<u>Kshs.52,500.00</u>
Total	<u>Kshs.257,500.00</u>

The respondent to issue the claimant with a Certificate of Service as stipulated under Section 51 of the Employment Act.

The Claimant is awarded costs of the suit and interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE