



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1104 OF 2014**

**BONIFACE MUTULILI MUEMA.....CLAIMANT**

**VERSUS**

**BEIERSDORF EAST AFRICA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent until 11.1.2012 when he was arrested and charged court with the offence of stealing from the respondent. He was released on bond and allegedly reported back to work on 14.2.2012 but his manager informed him to remain on suspension until completion of the Criminal case. The case continued until 7.3.2014 when it was withdrawn and the claimant reported back to work on 10.3.2014 but he was turned away by the management. He therefore brought this suit claiming the following:

(i) Salary for the period of suspension between January 2012 to March 2014 being 27 months Kshs.28,972 being the gross salary of Kshs.33,000/=

less Statutory deductions in of PAYE, NSSF & NHIF .....Kshs.782,244/=

(ii) One month's salary in lieu of notice.....Kshs. 28,972/=

(iii) Compensatory damages for the unfair and unlawful constructive summary dismissal at 12 months gross

Salary of Kshs.33,000 x 12 .....Kshs.396,000/=

**TOTAL      Kshs.1,207,216/=**

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2. The respondent filed defence at 21.7.2014 admitting that the claimant was arrested and charged with stealing but denied but denied that he was put on suspension pending trial. On the contrary, she averred that the claimant was dismissed summarily on 23.1.2012 after she lost trust and confidence in him due to the misconduct that led to his arrest and arraignment to court. She therefore prayed for the suit to be dismissed with costs.

3. On 26.1.2010 parties recorded consent that partially settled the suit by agreeing on the issue of salary in lieu of notice and compensation for unfair termination and left outstanding the issue of salary arrears for the suspension period and damages for unlawful and false arrest and malicious prosecution. When the suit came up for hearing on 9.10.2018, the claimant's counsel chose to pursue the claim for salary arrears and costs of the suit and abandoned the tortious claim. The claimant testified as Cw1 and the respondent her HR Manager who testified as Rw1. Thereafter both parties filed written submissions.

**Claimant's Case**

4. Cw1 testified that he was employed by the respondent until 13.1.2012 when he and another guard were called to a meeting by the Supply Chain Manager and told them that they had stolen property. He then called police who arrested them and charged them in Court. Thereafter he was released on bond and reported to work on 17.1.2012 but the HR Manager Ms. Edith Karisa told him to wait for the outcome of the criminal case before reporting back.

5. Cw1 further testified that the case proceeded until March 2014 when it ended in his favour sought for reinstatement through his lawyer's letter dated 12.3.2014. That the respondent responded through her lawyers describing him as a stranger to her yet he had worked for her from 1990.

6. Cw1 further testified that when he reported back on 17.1.2012, the HR Manager told him he could get a cheque from the Pension Scheme to assist him get some money. He contended that he was entitled to half salary while under suspension but it was not paid.

7. On cross examination Cw1 admitted that his last day of work 11.1.2012 and when he reported back on 17.1.2012, he was told to go on suspension pending the outcome of the criminal case. He further admitted that he never challenged the suspension in Court but he complied with order by the HR Manager. He also admitted that he received a pension cheque for Kshs.247,888 after he pleaded with the employer for money because he needed money for his child who was a candidate. He maintained his claim for the salary for the suspension period.

### **Defence case**

8. Rw1 testified that he was appointed HR manager on 5.2.2016 after Mr. Karisa resigned. He further contended that he perused the claimants personal file and noted that he was dismissed on 23.1.2012 according to the letter he found in his file. He produced copy of the dismissal letter as Exhibit D1. He also produced certificate of service and pension payment as Exhibit D2 and 3 respectively. He admitted that the dismissal letter was not acknowledged by signing. He further admitted that the respondent denied employment relationship in her response to the demand letter and stated that by that time the claimant had been dismissed and paid his pension.

### **Analysis and Determination**

9. There is no dispute that the claimant worked for the respondent until 11.1.2012 when he was arrested and thereafter charged with theft. There is further no dispute that the criminal case was withdrawn on 7.3.2014 and sought to report back to work but he was rejected and described as a stranger to the respondent. The issues for determination are:

- a. Whether the claimant was suspended or summarily dismissed in January 2012.
- b. Whether he is entitled to the salary between January 2012 and March 2014 when his trial for theft charges ended.

### **Dismissed or suspended in January 2012**

10. Rw1 produced a dismissal letter, certificate of service and evidence of payment of pension all dated January 2012. The production of the said exhibits was not objected to by the claimant. It is therefore defence case that the claimant was never suspended on 17.1.2012 pending the outcome of his criminal case but he was summarily dismissed for misconduct.

11. The claimant has on the other hand contended the he reported back to work on 17.1.2012 after securing release on bond but the HR Manager Mr. Karisa suspended him pending the outcome of the criminal case. He produced no written evidence of the said suspension or called any witness to support the alleged suspension. I therefore find the alleged suspension pending trial not proved on a balance of probability.

12. The foregoing finding is fortified first by the sharp contradiction between evidence by Cw1 and his pleadings on the alleged date of reporting to work after being arrested. In his evidence, he alleged that he reported back on 17.1.2012 and got suspended but in paragraph 9 of the claim, he pleaded that he reported back on 14.2.2012 and got the suspension. Secondly, the claimant admitted that after the arrest and arraignment in court he was paid his pension meaning that indeed his employment had come to an end. Finally, vide the consent settlement on salary in lieu of notice and compensation for unfair dismissal, the claimant admitted that he was dismissed and not suspended. Consequently, I return that the clamant was not suspended pending trail but he was dismissed for the misconduct that led to his arrest and arraignment to court.

### **Salary during period of trial**

13. In view of the foregoing finding that the claimant was dismissed and not suspended pending trial, I find and hold that he was not entitled to the salary during the period of his trial because by then he had been dismissed.

### **Conclusion and Disposition**

14. I have found that the claimant was summarily dismissed on 23.1.2012 as per the summary dismissal letter produced as Exhibit D.1. I have further found that he is not entitled to any salary after the said dismissal. In view of the consent to pay the claimant one month's salary in lieu of notice and 9 months salary as compensation for unfair dismissal, I enter judgment for him against the respondent as follows:-

- a. Notice ..... Kshs. 33,000
- b. Compensation..... Kshs.297,000

**Kshs.330,000**

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The said sum will attract interest at court rates from 26.1.2016 when the consent settlement was adopted by the court. The award shall be paid subject to statutory dues. Finally I award him costs of the suit.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019**

**ONESMUS N. MAKAU**

**JUDGE**