



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CASE NO. 285 OF 2014

PHILIP NJUGUNA.....CLAIMANT

VERSUS

MEDICAL RELIEF INTERNATIONAL (MERLIN).....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking to recover for the dismissal for failing to adhere to Respondent's policies and procedures. The Claimant averred that he was employed as a Finance Compliance Manager in the Respondent's Nyanza region based at Kisii. He was summarily dismissed on 20th September 2011. He averred that he was suspended without any basis, and was denied the details of any wrongdoing before being subjected to the disciplinary process. He asserts he was given a very short notice of 24 hours before the hearing and not given a copy of the audit report giving rise to the allegations of misconduct. He averred that the reasons for dismissal were not in accordance with the provisions of Sections 41 and 44 of the Employment Act. He thus general and exemplary damages for unlawful dismissal, compensation of Kshs. 3,474,303/-, interest on the sums, costs of the suit and any other relief the court may grant.

2. The Respondent averred in its defence that the dismissal was procedurally fair and in accordance with the applicable provisions of the law and the Claimant's contractual terms of employment. The Respondent denied that the Claimant's dismissal was illegal and averred that the claim was an afterthought, false, misleading and misadvised. The Respondent averred that the Claimant was employed on a fixed term contract and the contract provided that his services could be terminated without notice if he deliberately failed to follow the Respondent's policies and procedures. The Respondent engaged auditors after questions of plausible breaches of its financial policies arose. The audit at the Respondent's Kisii office revealed that there was non compliance with procurement regulations and contractual obligations, there was lack of proof of service delivery of various machines, payments made at inflated prices, weak internal controls on payment of cheques, lack of internal controls over purchased items resulting in the decision to suspend the Claimant and undertake further investigations. The Respondent averred that there was no obligation in law to avail a copy of the audit report to the Claimant. He was called to attend a disciplinary hearing on 9th September 2011 to show cause why he should not be summarily dismissed. The Respondent averred that the Claimant was given an opportunity to defend himself and the Respondent took time to consider the Claimant's representations made at the said hearing and the suspension was extended pending the conclusion of the process. Thereafter a decision was made to dismiss the Claimant on grounds of misconduct with effect from 20th September 2011. The Respondent averred the dismissal was justified in the circumstances and was consistent with the terms of employment and the applicable provisions of the law. The Respondent thus sought the dismissal of the Claimant's suit.

3. The Claimant and the Respondent's witness George Wafula Wamdabwa testified. The Claimant stated that he was a compliance manager at the Respondent and his main task was to work with all the Respondent's partners to ensure that all the rules are complied with and projects accordingly executed. He was not a finance officer and thus did not handle or process money. He was aware the visitors who came calling had come to fish for information as he was advised by the auditor from Nairobi. He went out to the field and did not return as he went on to Nairobi after the field visits and that is when he was notified of the suspension. He stated that he was not given any report after the audit and that the show cause had three issues he was to respond to. He testified that he was not well prepared and that he appeared the next day despite not being comfortable. He admitted that he had received a salary advance and that there was nothing wrong with that. He stated that there was approval by Mr. Kamau the head of projects for the expenditure that was incurred. He testified that he was not asked to respond to the issues in the audit report when audit was conducted. He stated that the audit was meant to destroy his career. On cross examination he stated that he understood the terms of contract and that he was bound by the manual though it was not provided to him. He testified that he was issued with the suspension on account of the investigation. He stated that he was not notified prior to the audit that it was to be conducted. He admitted that he did not seek another day for hearing of the disciplinary case. He said that the guidelines were that he was to comply with internal regulations. In re-exam he testified that the exact regulation he had breached was not given and there was no reference to the audit report in the show cause.

4. The Respondent's witness testified that one of his responsibilities was to advertise and that one of the documents relied on for the advert is the full job description. He stated that the Claimant must have gone for the job after he saw the job description. He testified that the Claimant was taken through induction. It was standard procedure to take one through induction, job description, process and the role one is to play. He

said it would be strange for an employee to work for 9 months then say he was not know what he was meant to do. He stated that the employee manual was standard. He stated that the Claimant was terminated for failure to comply with procedures. In cross-examination he stated that when he joined in 2012 the Claimant had already left. He testified that that Dr. Cyprian Kamau who was the Claimant's boss was dismissed at the same time as the Claimant. He stated that there was no specific clause referenced in the letter. He said the audit report would have shown the consultation of the Claimant if he was consulted. He stated the proceedings were not annexed. Regarding the hearing, he testified that the Claimant had 3 issues to answer and he was dismissed for failing to comply with the financial procedures. In re-exam he stated that an employee was not required to sign a job description and that the finance compliance manual was for finance to operate. He said the audit was not about the Claimant and that it was about procedures.

5. The parties were to file submissions and as at the time of penning the judgment only the Respondent's submissions were on file. The Respondent submitted that it had discharged its burden of proof in accordance with Section 43(2) of the Employment Act which provided that for the dismissal to be lawful the employer must have a valid reason for the dismissal. It was submitted that the reason for the termination was the matters the employer genuinely believed to exist at the time when the contract was terminated. Reliance was placed on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** for the argument that in adjudicating on the reasonableness of the employer's decision, the court is not entitled to substitute its own decision for that of the employer particularly where the employer has exercised its discretion properly and in the best interest of the company. The Respondent also cited the case of **Nazareno Kariuki v Feed The Children Kenya [2013] eKLR** where the court made reference to Halisbury's Laws of England, 4th Edition vol. 16 at page 482 where it stated that

In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair

The Respondent relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** for the argument that proper procedure was followed in the dismissal. The Respondent asserts that the Claimant did not prove the claims against it and cited the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** where Nduma J. held that Section 43 and 47(5) of the Employment Act must be construed such as not to nullify the conventional and accepted law on the burden of proof. The plaintiff must adduce *prima facie* evidence that tends to show that the employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating the employment. The Respondent submitted that evidence that is at variance with the party's pleadings is an affront to the well established principles of law. The case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR** which restated the ruling of the Supreme Court in the case of **Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR** with approval, was cited for the aforesaid proposition. The Respondent submitted that the Claimant is not entitled to any of the reliefs he had sought citing the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR**. On general and exemplary damages, the Respondent asserts that these are capped by Section 49 of the Employment Act. The cases of **Abraham Gumba v Kenya Medical Supplies Limited [2014] eKLR** **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya Anidan K [2013] eKLR** and **Godfrey Julius Ndumba Mbogori & Another v Nairobi City County [2018] eKLR** were cited for this argument.

6. I have considered the pleadings, testimony and submissions filed together with the authorities cited and the law in coming to this decision. The Claimant was dismissed for failing to adhere to the procedures of the Respondent. The summary dismissal was captured in the letter dated 20th September 2011. In the letter the reason for dismissal was set out. It also noted that he was given an opportunity to defend himself and the explanation he gave was found wanting. In his pleadings he faulted the Respondent for not availing the audit report to him. He was given a show cause letter and upon being notified on 8th September 2011 to attend the disciplinary hearing on 9th September 2011, he did not seek to defer it. He attended and in his own words attended despite not being comfortable attending the disciplinary hearing. He was heard by a panel which on deliberation determined that he should be summarily dismissed. He sought payment of his salary for the period between September 2011 and December 2011 which was the balance of his contract as well as 12 month's salary as compensation and damages both general and exemplary.

7. There can be no general and exemplary damages for unlawful dismissal from work. Compensation for any loss for the dismissal in the present day dispensation is per Section 49 of the Employment Act and there is no provision for general and exemplary damages. In the case of **Abraham Gumba v Kenya Medical Supplies Authority (supra)** the learned judge stated as follows:-

This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping. The Industrial Court [Procedure] Rules 2010 expressly state that the Court should not award exemplary or punitive costs in employment cases, and this Court would like to believe this is intention even in the area of damages.

This is not to say that the Court cannot grant damages beyond the 12 months' capping for instance where the employment wrong cuts across Constitutional, Contractual and Statutory violations of the Employee's rights under the various regimes. Rather than grant different sums under the different regimes, the Court could make one coalesced award of damages, which may exceed the statutory capping, without being overly above that capping.

8. The fact there was hearing before the dismissal and the implicit admission that the Claimant was not singled out for unfair treatment means his Constitutional rights were not infringed. In this case his termination followed a hearing and in as far as Section 41 of the Employment Act goes he was accorded a fair shake and was not arbitrarily dismissed. His claim therefore for the unlawful dismissal was not proved as the employer had a valid reason to terminate which was the failure to adhere to the procedures in force. I dismiss the suit but order that each party bears their own costs.

It is so ordered.

Dated at Nyeri this 20th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 22nd day of February 2019

Radido Stephen

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar