



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 192 OF 2013

(Before Hon. Justice Mathews N. Nduma)

CHARLES MADEGWA ANANGWE.....CLAIMANT

VERSUS

CROWN BEVERAGES LIMITED.....RESPONDENT

J U D G M E N T

1. By a Memorandum of Claim dated 8th July 2013, the Claimant prays for general damages for unlawful loss of employment and declaration and payment of terminal benefits set out in the Memorandum of Claim.
2. The facts set out in the memorandum of Claim and confirmed in the sworn testimony of the Claimant are as follows:-
3. Claimant was employed by the Respondent in the position of accountant on 25th March, 2010 at a monthly salary of Kshs.22,000. The Claimant was subsequently promoted to the position of warehouse supervisor which he held until 8th May, 2013 when his employment was summarily dismissed. At the time of dismissal the Claimant earned a monthly salary of Kshs.51,925.
4. The Claimant was given a show cause letter on 18th March, 2013 to explain absence from work and doctoring of stock figures. Disciplinary hearing was held on 6th February, 2013 and Claimant was summarily dismissed on 8th February, 2013. The Claimant appealed the dismissal on 9th March, 2013. The appeal was heard and the Claimant was reinstated to his job on 18th March, 2013.
5. The Claimant received a warning letter instead.
6. On 18th March 2013, the Claimant was served with a 2nd show cause letter with fresh accusations of doctoring stock figures and absenteeism. The claimant responded to the show cause letter on 29th March, 2013. Disciplinary hearing was heard on 4th April, 2013. On 8th May 2013, the Claimant was summarily dismissed from work. The Claimant wrote a letter of demand to the Respondent via M/s. Obura Obwatinya & Co. Advocates.
7. The Claimant denied all allegations against him stating that they were false and actuated by malice. The Claimant prays that the court declares the summary dismissal to be unlawful and unfair and award the Claimant as prayed.
8. The Claimant was not paid in lieu of notice; was not paid in lieu of leave days not taken for 3 years and claims service gratuity calculated at 15 days from each completed year of service.
9. The Claimant purports to have done overtime without payment as set out in the Memorandum of Claim. He claims 8 days salary from May 2013. Furthermore the Claimant claims general damages for lost future earnings and defamation. The Claimant also seeks costs of the suit.

Response

10. The Respondent filed a reply to Memorandum of Claim on 13th August, 2013 in which it admits the employment and summary dismissal of the Claimant.
11. The Respondent averred that the Claimant fundamentally breached several clauses, terms and conditions of the contract of employment

included in the Employee's Guide which was part and parcel of the contract of employment.

12. The Respondent further stated that the dismissal of the Claimant was within and in accordance with the terms and conditions set out in the contract and provisions of Employment Act and the Rules of natural justice.

13. That the reason for dismissal was lawful and justified.

14. That the Claimant was paid all lawful dues upon dismissal.

15. The claim has no merit and it be dismissed.

Determination

16. The issues for determination are:-

(i) Whether the summary dismissal of the claimant was for a valid reason and whether the action followed a fair procedure.

(ii) What reliefs, if any the claimant is entitled to.

Issue 1

17. The Claimant testified under oath in support of the particulars of claim set out in the Memorandum of Claim. In summary the Claimant stated that he served the Respondent diligently and was maliciously target for dismissal twice on similar charges. That the Claimant sufficiently responded to the charges set out in the 1st show cause letter but was summarily dismissed. He filed an appeal and dismissal was set aside and he was reinstated to his job.

18. On the same date of reinstatement he faced similar charges in a 2nd show cause letter, even after receiving a warning from a similar set of accusations. That he responded adequately to the charges in writing and at a subsequent disciplinary hearing but was summarily dismissed.

19. The Claimant testified that there was no lawful, valid, reason to summarily dismiss him. That the officers concerned had vendetta and malice against him. That the false accusations defamed his character and claims damages in respect thereof. The Claimant adduced evidence in support of the claims for gratuity, overtime and arrear salary and prays to be awarded accordingly.

20. The Respondent failed to call any witness to rebut the testimony of the Claimant before court. The evidence by the Claimant remains uncontroverted and the Claimant has proved on a balance of probabilities that the Respondent had no valid reason to summarily dismiss the Claimant from employment. The Claimant has therefore satisfied the requirements of section 47(5) and 45 of the Employment Act as read with sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

21. The court finds that the summary dismissal of the Claimant was not for a valid reason, was not justified and was therefore in violation of section 43 and 41 of the Employment Act, 2007.

22. The Claimant is entitled to an award of compensation in terms of section 49(1) (c) as read with 49 (4) of the Employment Act but not to General Damages.

23. In this respect the Claimant had served the Respondent for 3 years in the same position and was unlawfully haounded out of employment unjustly. The Claimant wished to continue serving, was subjected to double jeopardy on same set of facts in respect of which he had been subjected to disciplinary action and given a written warning. The Claimant did not receive payment of terminal benefits upon summary dismissal, was not paid in lieu of notice and the dismissal was swift and cruel to his loss and damage. The Claimant did not contribute to his predicament their being no evidence before court to that effect. The court awards the Claimant the equivalent of six (6) months salary in compensation for unlawful dismissal. The Claimant is also awarded one month's salary in lieu of notice.

Terminal Benefits

Overtime

24. The Claimant did not demonstrate that he had during the tenure of employment protested and/or claimed to be paid overtime. This claim is an afterthought upon summary dismissal. The same is not merited and is dismissed.

Accrued Leave

25. The Claimant has proved that he was entitled to annual leave but was not granted same in the 3 years he served the Respondent. The Claimant is awarded Kshs.125,818.20 in lieu of three years leave not taken.

Service Gratuity

26. This claim has not been proved because there is no provision in the contract of employment for the payment of service gratuity. The Claimant did not prove that he had no pension and/or NSSF was not paid on his behalf so as to warrant an award of service gratuity. The

claim is dismissed.

Notice Pay

27. The Claimant is awarded Kshs.51,925 in lieu of one month notice. The contract of employment provided for one month notice and not three months claimed by the Claimant.

General damages for defamation and loss of future earnings.

28. These claims have no merit and are dismissed.

29. In the final analysis, judgment is entered in favour of the claimant as against the Respondent as follows:-

a) Equivalent of six (6) months salary in compensation to unlawful dismissal in the sum of Kshs.311,550.

b) Kshs.51,925 in lieu of one month notice.

c) Kshs.125,818.20 in lieu of three months untaken leave.

d) Kshs.13,846 in respect of eight (8) days arrear salary for May 2013.

Total award Kshs.503,139.

e) Costs of the suit.

f) The awards in (a) above is payable with interest at court rates from date of judgment whereas interest in respect of (b), (c), (d) and (e) above is to be calculated from date of filing suit till payment in full.

Judgment Dated, Signed and delivered this 14th day of February, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Odeny for Claimant

Mr. Onsongo for Respondent

Chrispo – Court Clerk