



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1970 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th May, 2019)

SIMON TITUS YANDI.....CLAIMANT

-VERSUS-

DIRECTLINE ASSURANCE COMPANY LIMITED...RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim on 5/11/2014 alleging wrongful dismissal and refusal to pay his outstanding dues, allowances and terminal benefits by the Respondents.
2. The Claimant's case is that he was employed by the Respondents on 9/9/2009 vide a contract dated 12/9/2009 as an Accident and Police Liaison Officer at the Respondent's Nairobi Region Office at a salary of 30,000/=.
3. The Claimant avers that he served with dedication and was well rated in his performance earning promotions and pay rises. The Claimant avers that on 26/9/2011, he was promoted to Ag. Regional Manager Investigations a position he served in for 8 months but continued to earn a salary of 70,000/= per month until the time of his dismissal.
4. The Claimant avers that he had entered into a new contract with the Respondent on 1st February 2013 which contract was to run from 7th February 2013 to 6th February 2016. He avers that this contract was prematurely terminated upon his dismissal on 12th November 2013.
5. It is the Claimant's case that on 8th November 2013, he was summoned by the Respondent's Human Resource Manager and asked to explain allegations that he was printing and using business cards in the field bearing the name of the Respondent. The Human Resource Manager informed the Claimant that this amounted to misconduct.
6. The Claimant then requested that he should be taken to the Managing Director or to a disciplinary panel so he could defend himself before a decision could be made on any disciplinary action taken. This request was not heeded to and his request to be heard by the Managing Director was denied and he was then dismissed.
7. The Claimant avers that he was condemned unheard regarding accusations concerning the issuance of business cards. He contends that the Respondent's action was unlawful as a result of which he suffered loss and damage and claims compensation against the Respondent as follows:-
 - 1) *"Loss of warnings for 26 months*
 - 2) *Damages for breach of contracts*
 - 3) *Costs and interest"*
8. In cross-examination, the Claimant admitted that he made his own business cards at his cost, which he was allowed to have as a Senior Investigator.
9. He avers that the card had his own email address and no office email. He contends that there was no complaint made against his conduct to the company. He contends that the only issue against him was about the business cards and he explained himself.

10. The Claimant called one witness CW2 who indicated that he worked with the Claimant in Mombasa in 2013 when Claimant was Regional Manager. He avers that by then business cards were not being issued by the company and some of them used to print out their own cards. He avers that the card contained their telephone numbers, email address and company name.
11. The Respondent on their part denied this claim and relied on their Statement of Response filed on 5/2/2015. The Respondents admitted the employment relationship with the Claimant but aver that the Claimant's performance was below per and that is why he was not confirmed to the position of Regional Manager, Coast Province.
12. The Respondent aver that on 8/11/2013, the Claimant was given a show cause letter requiring him to explain why he was using unofficial business cards without authority or lawful cause.
13. The Claimant indeed explained himself by a letter dated the same day and was thereafter dismissed vide a letter dated 12.11.2013.
14. The Respondents contend that the Claimant was guilty of gross misconduct for he designed and printed his own unofficial cards without authority or lawful cause contrary to the Respondent's Policy. That he also misrepresented the Respondent by distributing the said unauthorized cards to the Respondent's stakeholders and clientele and this sabotaged the Respondent's business by colluding with third parties to facilitate lodging of false claims against the Respondent through *inter alia* falsification of hospital records.
15. That he also damaged the Respondent's working relations with the Naivasha District Hospital.
16. The Respondent aver that they received a complaint letter dated 14.10.2013 from the Medical Superintendent of Naivasha District Hospital indicating that the Claimant was colluding with crooks to falsify hospital records for purposes of facilitating false claims against the Respondent.
17. They aver that they carried out their own investigations and recommended to the Human Resource Manager that Claimant was guilty of misconduct and thereafter gave him a show cause letter to respond. He was thereafter dismissed from duty on 12.11.2013.
18. The Respondent called 3 witnesses who gave evidence as per their Statement of Defence.
19. In cross-examination, the RW1 indicated that she did not know if complaints from the medical Superintendent were brought to the Claimant's attention. However, she averred that reason for dismissal concerned the business cards.
20. RW2 when cross-examined indicated that he worked with Claimant and that Claimant was not to have business cards and that Tirop denied issuing instructions to Claimant to have his own cards.
21. RW3 indicated that the Company Policy involving business cards is that the Company only issues cards to Regional Investigation Manager. In cross-examination, he said he did not have a copy of the Policy documents.
22. The Parties filed their respective submissions. The Claimant submitted he was unfairly terminated as the reasons for his termination being poor performance and issue of cards was not proved and remained vague. He explained he was not given an opportunity to defend himself. He asked this Court to allow his Claim as prayed.
23. The Respondents on their part submitted that he Claimant was dismissed for proper reasons and upon following due process and is therefore not entitled to remedies sought.
24. I have examined all the evidence and submissions of the parties. Issues for determination are as follows:-
1. ***Whether there were valid reasons to warrant dismissal of the Claimant.***
 2. ***Whether Claimant was accorded an opportunity to be heard before his dismissal.***
 3. ***Whether the Claimant is entitled to the remedies sought.***
25. On the first issue, the Claimant was dismissed for the reasons that he misrepresented the company by using business cards not issued by the company.
26. The Claimant was given a show cause letter on this issue and he responded that he was allowed to print his own card by Mr. Mugure. He also explained that the fact that he could not print his own cards was not communicated to him.
27. RW3 indicated that it was against Company Policy for Claimant to have his own cards. The Company Policy was not presented to Court and further there was no indication that the Claimant was informed about this.
28. The Claimant was thereafter terminated and the termination letter included additional reasons not priory brought to Claimant's attention i.e. jeopardizing flow of information from Naivasha District Hospital and Naivasha Traffic Base.
29. There was no evidence adduced in Court about the issue of the Medical Superintendent and no witness was called to shed light on these allegations.

30. Section 43 of Employment Act 2007 indicates as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

31. It is therefore the duty of the Respondent to prove these allegations against the claimant which they failed by not calling any witnesses who had complained against the Claimant from Naivasha District Hospital.

32. The Policy document on issuance of business cards was also not presented to Court and there is no evidence that the Claimant was aware of the said Policy directions. I therefore find that the Respondent have not established that they had reasons to terminate the Claimant.

33. On issuance of fair hearing, the hearing procedure envisaged is provided for under Section 41 of Employment Act 2007 which states as follows:-

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".

34. Indeed this procedure was omitted by the Respondents because the Claimant was never given a chance to explain himself through an oral hearing as envisaged. I therefore find that the Claimant was condemned unheard.

35. Having found that there were no valid reasons to terminate the claimant and that due process was not followed, I find the termination of the Claimant unfair and unjustified as provided for under Section 45(2) of Employment 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

36. On issuance of remedies, the Claimant sought payment of his salary for the unexpired term of the contract. But for the unfair action of the Respondent, the Claimant would have earned this salary. I therefore allow the claim and award Claimant salary for the unexpired period of the contract = 70,000 x 26 months = 1,820,000/=.

37. I also award Claimant 6 months' salary as compensation for the unlawful termination = 6 x 70,000 = 420,000/=.

TOTAL awarded = 2,240,000/= less statutory deductions

38. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 27th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mutua for Claimant – Present

Bowry holding brief for Mwamburi for Respondent