



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE 991 OF 2014

JOHNSON NGUGI.....CLAIMANT

VERSUS

EAST AFRICA BREWERIES.....RESPONDENT

JUDGEMENT

1. The claimant was initially employed as a Customer Relations Representative for a period of 4 months. He was later by a letter dated 15th January, 2010 offered employment as a Customer Relationship Representative with effect from 1st January, 2010. According to the claimant his monthly salary was Kshs 155,643.07 together with a variable sum of Kshs 46,608.25 per month depending on the sales target met.
2. A customer relations representative as per the claimant was a job whose nature was such that he was constantly in the field attending particular outlets he was assigned to.
3. In February 2014 the respondent undertook to carry out restructuring and total overhaul of the organization which was necessitated by financial difficulties. The respondent with this in mind undertook a massive termination process with a number of employees preferring to resign rather than be terminated. This process was aimed at employees who had worked with the company for a period of at least 4 years or more the claimant falling in this category.
4. On 19th February the claimant received a show cause letter from the respondent requesting him to respond to allegations of deliberate absconding from work without good cause or prior authorization and give explanation regarding his whereabouts in January, 2014. He duly responded and gave reasons for his whereabouts in January, 2014.
5. The respondent was not content with the claimant's explanations and prepared to answer scheduled a disciplinary hearing for 25th February, 2014. At the hearing he was called upon once more to explain his whereabouts in January 2014 which he did, however the respondent started asking about his whereabouts in December, 2013 which was not the subject of the show cause letter. According to him he had no prior knowledge that he would be questioned about inconsistencies regarding his work in the month of December, 2013 hence was not prepared to answer the same. On 5th March, 2014 he received a termination letter offering him one month's salary in lieu of notice.
6. The respondent on its part pleaded that the claimant's contract was governed by the terms set out in the employment letter and other Human Resource policies of the respondent. It was a term of the contract that the claimant's salary was based on performance and the claimant's participation in the sales reward plan. In the course and scope of his employment, the respondent assigned the claimant a personal digital assistant (PDA) device together with a motor vehicle which was fitted with a tracking device for purposes of monitoring sales, distribution and performance in the area which comprised of the claimant's marketing jurisdiction.
7. On 5th March, 2011 the claimant lost the respondent's property namely the PDA device and blackberry assigned to him to aid in the discharge of his duties. On 18th January, 2012 the claimant in breach of his contractual obligations failed to execute his duties as customer relations representative by failing to submit M & E summaries for all his activities within thirty days as required in spite of deadlines being extended to accommodate him. This resulted in him being issued with a warning letter.
8. On 17th December, 2013 the claimant was involved in an accident where he was arrested and charged for reckless driving while using the respondent's car. The said arrest resulted in loss of work time and loss of respondent's property namely the PDA. A disciplinary meeting was held on 19th December, 2013 and claimant issued with a final warning letter.
9. The respondent further pleaded that in the ordinary course of its business it usually conducts routine sales call back checks and audits which entail picking and reviewing sample outlet call reports for a specific period recorded was the Customer Relations Representative (CRR) PDA devices which are compared with motor vehicle movement reports generated by motor vehicle movement tracking system for

the same period for respective CRR's.

10. On 10th February, 2014 the respondent conducted such review and audit and randomly picked the outlet call reports as recorded in the claimant's PDA device for the month of January 2014 and compared the same with the vehicle movement report and the review revealed inconsistencies related to claimant's callage patterns and vehicle movement as there were several incidents where the claimant made several calls in markets while the motor vehicle assigned to him was in a different location.

11. The inconsistencies raised serious questions of integrity and absconding work on the part of the claimant which was in breach of Business code of Conduct. The above resulted in the claimant being issued with a notice to show cause on 19th February, 2014. By an email dated 21st February, 2014 he responded to the show cause letter and in view of his failure to render any reasonable explanation for gross misconduct on his part the respondent convened a disciplinary hearing on 25th February, 2014.

12. Following the disciplinary hearing the claimant was on 4th March, 2014 invited to discuss the results of the disciplinary hearing with him. The disciplinary proceedings concluded that the claimant had failed to render any reasonable or satisfactory explanation for his misconduct and that a decision had been reached to terminate his services. He was therefore on 5th March, 2014 issued with a termination letter.

13. The claimant in his oral evidence confirmed that he was summoned to a disciplinary hearing by the respondent and accused of absconding duties for a few hours in January. He responded to the accusations. According to him, in the course of his duties he had a vehicle fitted with a tracker and personal digital assistant which was to be used in planning for the day. It was his evidence that there was a problem with his vehicle tracker for instance on 16th January, 2014 when he was at a meeting in upperhill the tracker showed his vehicle was in Mombasa. He stated that the PDA had a GPS and could show location and that the PDA and the vehicle had to be in the same place. He was the one to feed the information in the PDA.

14. He further stated that he had been subjected to a disciplinary hearing before when he lost a PDA and issued with a final warning. He admitted that there was variance between the PDA and the tracker.

15. The respondent's witness Ms Linet Gitobu stated that she was the Human Resource Manager for the respondent and that the customer relations representative job was to present the respondent's products to the market. It included visiting outlets to see the products were visible and resolving queries. According to her, the claimant was terminated because on two days in January, 2014 his tracking device and PDA did not tally. It was therefore felt he falsified the records. The PDA report generated indicated general area of Kangemi in Westlands while the vehicle tracker report indicated Industrial Area. The conclusion was that the claimant did not visit the outlets.

16. The respondent wrote to the claimant indicating the inconsistencies and asked him to show cause why disciplinary action should not be taken. It was further her evidence that the claimant attended the disciplinary hearing. The meeting concluded that the claimant's integrity was put to question since he had falsified the company's records. A decision was made to terminate his service.

17. In cross-examination she stated that if the PDA was fully an employee was supposed to report to the lime manager and use a BCP- from which was a manual form. It was further her evidence that if the vehicle is taken for service an employer would leave with the PDA. In such a case the PDA and vehicle tracker would not tally.

18. The claimant herein claimed that his vehicle tracker was faulty hence the inconsistency between the tracker and PDA reports. This issue he raised in the show cause letter. However he never provided evidence of any earlier report about the faulty tracking device. The court is therefore not persuaded that there was any such fault. Employment relationship is based on trust and once that trust is eroded the relationship may not continue smoothly.

19. Absence from duty without lawful cause is a ground for summary dismissal. The claimant falsified the PDA records to show he was at work in the designated territory in Kangemi yet the vehicle tracker indicated he was along Mombasa road. This was an act that attacked the claimant's integrity and constituted a valid ground for the termination of his service. In his pleadings the claimant alleged that the respondent was undergoing restructuring which was necessitated by financial difficulties the respondent was going through.

20. In the process, according to the claimant, the respondent undertook a massive termination process with a number of employees preferring to resign rather than be terminated. The process according to the claimant, was aimed at employees like him who had served for a period of at least four years. Despite the fact that the claimant pleaded these serious allegations, he never provided any evidence of massive termination or resignation by other people from the respondent's employment.

21. In essence the claimant was imputing malice in his termination yet failed to prove it. In a claim for termination of service, the burden of proof that a termination was unfair or for invalid reasons is on the employee. In this particular case the court is of the view that the claimant has failed to discharge this evidentiary burden.

22. On the issue of the procedure followed prior to the termination of service, the court is of the view that the procedure was fair and in accordance with the requirements of the Employment Act.

23. In conclusion the court finds and holds that the claim is without merit and the same is hereby dismissed with costs.

24. It is ordered.

Dated at Nairobi this 28th day of June, 2019

Abuodha J. N.

Judge

Delivered this 28th day of June, 2019

Hellen Wasilwa

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.