



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 231 OF 2016

(Before Hon. Justice Mathews N. Nduma)

EDWARD OMONDI.....CLAIMANT

VERSUS

LVCT HEALTH.....RESPONDENT

JUDGMENT

1. The suit was filed on 8th August 2016, seeking the following reliefs:

- (a) A declaration that the claimant's summary dismissal was unlawful and unfair.
- (b) Payment of arrear salary for January 2016 in the sum of Kshs. 43,485.
- (c) Payment of three months salary in lieu of notice in the sum of Kshs. 130,455.
- (d) Payment of LVCT Sacco shares in the sum of Kshs. 73,000.
- (e) Maximum compensation for unlawful and unfair dismissal.

2. The suit is defended by a statement of defence filed on 15th September 2016.

Facts of the Claim

3. The claimant testified that he was employed as a hospitality officer by the respondent on 15th August 2006 and worked continuously until 25th January 2016, when he was summarily dismissed without notice, notice to show cause or any disciplinary hearing. That this followed loss of official motorbike from the usual parking on 13th January 2016. That he had reported the loss at Kisumu Central Police Station as OB82/13/01/2016 and recorded a statement. That he has found another job since then.

4. At the time of dismissal, the claimant earned Kshs. 43,485 per month. The claimant produced pay slip for January 2016, which indicates that he was paid Kshs. 43,485 in lieu of notice and received a gross pay of Kshs. 86,970 upon termination.

5. The claimant wrote a letter of demand vide Muma and Kanjama Advocates dated 4th April 2016. The said letter was responded to on 4th April 2016 in which the respondent stated that the claimant was dismissed for gross misconduct for stealing the Employer's motor cycle and that he was presently on police cash bail and had received two warning letters earlier. These letters were produced by the claimant.

6. The letter of termination produced by the claimant dated 22nd January 2016 shows however that the claimant's employment was terminated for two reasons being:

- (a) Unsatisfactory work performance for which he had received previous warning letters with no improvement.
- (b) Continued misuse and eventual mysterious loss of organization's motorbike on 13th January 2016 without proper explanation.

7. The claimant was to be paid one month salary in lieu of notice in terms of his last contract, and salary for January 2016. The claimant's last working day according to the letter of termination was 25th January 2016. This letter was also produced by the claimant.

8. The claimant also produced a warning letter dated 8th April 2014, in which the claimant was accused of falsifying receipts, details of which had been known to him and that the quality of work by the claimant and attitude had deteriorated. The claimant was required to show cause why further disciplinary action should not be taken against him by 10th April 2014.

9. On 19th December 2014, the claimant also got a 2nd warning letter which letter refers to undisclosed offences discussed with the claimant by his supervisor.

10. The Claimant provided a response to the allegations made against him at page 21 of the memorandum of claim. The claimant apologized for alleged insubordination by being rude to his supervisor. He said that was not intended. The claimant sought opportunity to explain verbally the misunderstanding between himself and his supervisor so as to smoothen their relationship in future. The alleged rude response to the supervisor was produced by the claimant at page 22 of the memorandum of claim.

11. The contract of employment of the claimant dated 6th November 2014, was for a two year period to end on 1st October 2016. The contract did not have a termination clause but made reference to terms and conditions contained in the Human Resource Manual currently in force.

12. The claimant produced the Human Resource Manual in which the disciplinary code is contained in Article 18 thereof. The document does not provide termination notice. It provides an elaborate procedure for dealing with various categories of misconduct termed minor and major.

13. RW1, Miriam Atieno Angir testified for the respondent that she worked as Human Resource and Administration officer in Kisumu but was currently based at head office Nairobi. That RW1 was conversant with the claimant's case. That the claimant had issues of lost motor bike. That there was a designated parking area. That the claimant had taken the motor bike home a day before the motor bike went missing. The matter was reported to the police. The case was still pending. The organization forgave the claimant for loss of the motor bike.

14. The 2nd reason for termination was unsatisfactory work performance and insubordination. RW1 was his supervisor. RW1 received several complaints that the claimant did not follow instructions. RW1 followed up the matter with the claimant. RW1 wrote emails to the claimant and verbally spoke to the claimant on the issues raised. The claimant did not improve. That there were three incidences that required a warning. These were given and eventually, the employment of the claimant was terminated. The claimant was paid in lieu of one month notice and salary for the month of January 2016. RW1 stated that the respondent did not owe the claimant any other dues. The claimant was paid Kshs. 30,415 by the SACCO which was a separate entity from the respondent. The SACCO did not owe the claimant any further payments. The claimant was a member of ICEA lion retirement benefit scheme. The claimant contribute 50% of his salary and the employer contributed 15%. The claimant's total contribution was Kshs. 413,174.55. The claimant was paid his contribution and the employer's contribution shall be paid upon the claimant reaching retirement age.

15. RW1 produced minutes of disciplinary hearing held on 13th January 2016. That the termination followed a decision taken by the disciplinary committee. The claimant attended the hearing. RW1 produced emails and warnings written to the claimant contained in a list of documents filed on 23rd August 2017.

16. RW1 was closely cross examined by advocate Adegó for the claimant. RW1 stated that two meetings were held with the claimant on 12th January 2016 and 13th January 2016. That claimant had been questioned about going home with the motor bike. That on 12th January 2016, the claimant went home with the motor bike and on 13th January 2016, the motor bike got lost. The disciplinary hearing was held on the same day. The minutes of the hearing are dated 13th January 2016. There were no minutes for 12th January 2016. That was just a discussion. The claimant was called by RW1, vide telephone to attend the disciplinary hearing. There was no written notice to attend. Richard Oburu, a driver was a witness called by the employer to the disciplinary hearing. The claimant asked the witness questions. The witness testified on poor work performance by the claimant. Witness was a driver. The claimant also questioned RW1. The claimant did not call any witness. The disciplinary hearing took place before the matter was reported to the police. The claimant did not appeal against the decision to terminate his employment. RW1 stated that the claimant had received three warning letters which were produced as exhibits. RW1 conceded that the last warning given did not indicate that it was a final warning.

Determination

17. The issues for determination are:

(a) Whether the termination of the employment of the claimant was for a valid reason and was done following a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

18. The court shall deal with issues (a) and (b) together. The court has carefully considered the evidence by the claimant and that by RW1 and has arrived at a considered decision that the reasons provided by the respondent in the letter of termination of employment of the claimant were valid reasons. There is sufficient evidence that the claimant was the last person seen with the employer's motor bike, assigned to him. The claimant had gone home with the motor bike on 12th January 2016 and the motor bike disappeared on 13th January 2016. The claimant did not satisfy the employer and the court that he had returned the motor bike to the work place on 13th January 2016.

19. The court has perused the emails between the claimant and RW1 and the warning letters given to the claimant by RW1 prior to the termination of employment. The court is satisfied that the claimant's work performance was wanting. That RW1 had discussed the matter severally with the claimant, especially regarding complaint made by other employees against the claimant. The written response made to RW1 by the claimant was not appropriate and the claimant did not demonstrate to the employer nor to the court that he had improved in the

areas that had been discussed with him.

20. The court is satisfied that the claimant attended a disciplinary hearing in which he got adequate opportunity to explain himself. The claimant was given a fair hearing in the court's considered view and it is the conclusion of the court that the termination of the employment of the claimant was for a valid reason(s) and the decision to terminate the employment was arrived at following a fair procedure.

21. The court is also satisfied that the claimant was paid salary for all days worked. The claimant was paid one month salary in lieu of notice. The claimant also was paid the contributions he had made to the SACCO even though this was a different entity from the respondent. The court is also satisfied that the claimant had partly received his pension benefits and was to receive the rest upon attaining the retirement age as per the ICEA lion retirement benefits scheme.

22. Consequently, the suit lacks merit and is dismissed in its entirety.

23. This suit was ill advised, but in consideration of the service given to the respondent by the claimant over a period of about ten (10) years, the court deems it appropriate for the parties to meet their own costs of the suit.

Judgment Dated, Signed and delivered this 30th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Adego for claimant

Mr. Achillah T. O for Respondent

Chrispo – Court Clerk