



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2598 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th October, 2019)

COLLINS OTIENO RANDIKI.....CLAIMANT

VERSUS

MEDILINK LAB & SURGICALS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant, Collins Otieno Randiki filed a Memorandum of Claim on 19/12/2016 for wrongful dismissal against the Respondent, Medilink Lab & Surgicals Limited.

2. He avers that he was at all times employed by the Respondent as a Marketing Executive engaged on a two-years renewable contract from 07/07/2015, earning a monthly salary of Kshs. 25,000/= and that he is not a member of a Trade Union.

3. That he had been in continuous employment of the Respondent for approximately 1 ½ years before his services were unfairly terminated and that the final dues offered by the Respondent are far below the bare minimum as set out in law.

4. That on or about 31/10/2016, the Respondent through a letter suspended his contract of service by sending him on two week suspension and that it convened an irregular disciplinary hearing at its offices in Nairobi on 14/11/2016 which was skewed and/or flawed since the outcome was premeditated.

5. That immediately the Respondent received his written and detailed response to the issues on 14/11/2016, it proceeded to terminate his services on the same date on account of unsatisfactory performance and that it did not provide valid reason or any evidence as against him to wit. He contends that his dismissal letter had five charges as follows:-

Charge One: *failure to admit that a major NGO stopped giving the company quotation after he failed on his part to respond as per instructions and despite numerous verbal warning to handle the organization diligently.*

Charge Two: *making decisions to decant a highly inflammable without any consultation knowing well that the company does not repack, or manufacture such products and thereby exposing himself and other staff to great danger.*

Charge Three: *causing the company to lose Kshs. 20,000/= when he received instructions from his junior to ignore a calculation error in the quotation documents.*

Charge Four: *colluding with the company driver to embezzle funds from the company by instructing the driver to inflate petrol bills and sharing the excess cash.*

Charge Five: *making decisions without consultation in contravention of the company policies despite several warnings.*

6. He avers that the said termination was improper while giving his reasons under *paragraph 22 of the Claim* and states that the Respondent deliberately failed and/or refused to release his duly earned commission of Kshs. 34,042/= tabulated at *paragraph 24 of the Claim*. He prays to this court for orders against the Respondent for:-

a) A declaration that the Claimant's employment services with the Respondent were terminated wrongfully and unfairly.

b) Damages of Twelve months' salary (12 x 30,000) of Kshs. 360,000/=.

c) Commission earned and owing amounting to Kshs. 34,042/=.

d) Award of service pay for each completed year of service from the date of employment.

e) The Claimant prays for costs of this claim.

f) Any other further relief that the Honourable Court may deem fit and just to grant.

7. The Claimant also filed a Witness Statement stating that when the manager of importation (veterinary equipment) was sacked on 7th August 2015, the management subsequently called him for a meeting where it was resolved that apart from his duties he would also be in charge of importation.

8. That an increment of Kshs. 5,000/= was then added to his salary and he thus earned Kshs. 30,000/=. That in January 2016, he brought in a different cadre of clients from the accustomed corporate clients, who in the course of time requested for commission on products offered by the company and which the management approved.

9. That he would work out the contracts and forward the account of the said clients to the management for their input and approval in respect of the profit to the company and that the normal commission the company used to give was between 10% and 15%.

10. That in July 2016, the said clients requested for a 25% commission which was consented to by the directors led by Mr. Wandaka but when he forwarded the same to the directors, he was shocked to be informed that he had created the said 25% commission.

11. That they asked him to do an apology letter which he did but was rejected for not being done in a language they wanted and that he withdrew the apology and redid it as per their demand. That the letter was accepted and he was given a warning letter before being given a suspension letter in October 2016 that was in form of a memo.

12. That while going through his emails on 02/11/2016, he came across an email copied to him by a director named Hellen to a client (ILRI) to the effect that he no longer worked at the Respondent Company and that his position had already been filled.

13. That on 12/11/2016 when he handed in his response to the suspension, Hellen formally declined to acknowledge receipt of the same and informed him to report back to work on 14/11/2016 instead of 15/11/2016 when his suspension was to end.

14. That on the said 14/11/2016 he reported and sat at the reception before going into a meeting with the directors who requested for time to go through his response. That he hung around town until 3.30pm when he went back as requested and was informed by Mr. Wandaka that a decision to dismiss him had already been made because he had caused the company to lose business and clients.

15. The Respondent filed its Memorandum of Defence on 08/02/2017 admitting to have employed the Claimant and averring that the termination of the Claimant's employment was entirely due to his own gross misconduct.

16. That the Claimant received its calculations for final dues on 14/11/2016 with no objections and that his suspension was justified in light of the letter dated 01/08/2016 where in accepting his apology, it warned him to avoid similar conduct in future. That the date of the disciplinary hearing was pre-arranged being the end of the two weeks suspension upon which the Claimant appeared and that since he had not replied within the 14 days and with the management having no response, it had no option but to terminate his services.

17. It reiterates its reasons for terminating his services at *paragraph 11 of its Defence* and avers that the Claimant has received several warnings and reprimands in a bid to have him reform but its business was being affected by his misconduct. That it is a stranger to the claim for commission as the same was not applicable to the Claimant's contract of employment and it prays that the Claimant's claim and/or prayers sought be dismissed with costs to the Respondent.

18. The Claimant then filed his Reply to the Defence on 24/02/2017 averring that he complied with the term of his suspension letter since he forwarded his response on 12/11/2016 at 11.00am which was well within the two weeks.

19. He annexes documents marked **COR 6 – COR 9** as evidence against the Respondent's averments at paragraph 11 of the Defence. That the apology letters attached by the Respondent were drafted by management who forced him to sign or lose his job and he annexes the initial apology letter to Mrs. Hellen Wangeci marked **COR 10**. He prays that the Memorandum of Defence is dismissed and Judgment entered as prayed in the Memorandum of Claim.

Evidence

20. CW1, the Claimant testified and adopted his witness statement as his evidence in court and produced documents dated 15/12/2016 as evidence in this case. That he was not given any opportunity to explain himself before he was terminated and in cross-examination, he stated he had no evidence to prove he had been paid commission before. That there were about 7 months to expiry of his contract being 07/07/2017 and that he was given one month pay in lieu of notice and leave due in form of a cheque for the final dues.

21. RW1, John Wandaka testified that the Claimant's salary was Kshs. 30,000/= per month and that he was terminated on 16/11/2016. That they noted the Claimant was working contrary to company policy and produced commissions without consulting management and that they had a policy that no commission was payable.

22. That they also noticed he was exaggerating fuel consumption and misused the vehicle when he travelled and that he was incompetent and did not meet deadlines for tenders given under his duties. That the Claimant was to return by 13/11/2016 but came back on 14/11/2016 and had not responded and that in the response he presented on the said day, he was not remorseful but blamed other people for the mistakes.

23. That his response was not satisfactory that is why they issued him with a termination and gave him reasons and that they also gave him a certificate of service. That the Claimant was paid service pay for 1 year and in cross examination he stated that the Claimant was not requested to bring a witness and came alone.

24. He confirmed that they terminated him on the same day of the meeting and reiterated that the company does not issue commissions but issues discounts to customers.

Claimant's Submissions

25. The Claimant submits that his termination of employment was unfair, unlawful and in contravention of the provisions of employment laws being **Sections 41 and 45 of the Employment Act**.

26. This is because the reasons for termination were not explained to him, he was not heard or his representations considered and that the Respondent has failed to prove it terminated his employment in accordance with fair procedure.

27. That no minutes of a hearing have been adduced in this case as none took place and he relies on the case of **John Rioba Mugo -v- Riley Falcon Security Services Limited [2016] eKLR** where the Court suggested that a sure way of enabling the court determine whether a disciplinary hearing was fair was through the production of minutes of disciplinary hearings. That devoid of procedural fairness, he urges this Court to find and declare that his employment was terminated wrongfully and unfairly.

28. That as envisaged under **Section 74(1) of the Employment Act**, there was a warning system that had to be invoked before termination and that he deserved a first and second warning as provided for under the **Regulation of Wages [General] Order**. Further, that his mistakes or errors could not be construed as gross misconduct.

29. He submits that he is therefore entitled to the reliefs as prayed which are justified under **Sections 49 and 50 of the Employment Act** and that as pertaining service pay he relies on **Section 35(5) of the Act**. That the claim for unpaid salaries, wages and claims owing should be allowed in line with Section 49(4) (i) and damages of 12 months' salary as sufficient compensation in line with Section 49(1) (c). That **Section 27 of the Civil Procedure Act** gives Courts the unfettered discretion to determine the costs and he beseeches the Court to find and hold in his favour and award costs of this suit to him.

Respondent's Submissions

30. The Respondent submits that the Claimant was made aware of the allegations facing him as he has admitted in *paragraph 22 of the Claim* and that the same were well outlined in the termination letter. That the grounds for the termination satisfy the requirement of **Section 43 of the Employment Act** and he cites the case of **John Kisaka Masoni v Nzoia Sugar Co. Limited [2016] eKLR**. That it also relies on the case of **George Okello Munyolo v Unilever Kenya Limited [2019] eKLR** in submitting that indeed the procedural aspect of termination was followed.

31. It submits that the claim for damages is inapplicable as the termination letter was followed by the payment of Kshs. 48,661/= which was duly received by the Claimant as final dues via Cheque No. 003960 dated 14/11/2016.

32. That the Court has stated before that general damages cannot be awarded in a case of wrongful or lawful termination of employment and that for the claim for commission, the same was not provided for in the Claimant's contract which he also admitted during his cross-examination and should thus not be entertained. That the prayer for 12 months' salary compensation is wrong and unjust as he had 7 months remaining in his contract at the time of termination.

33. I have examined all the evidence and submissions of the parties.

34. From the termination letter dated 14/11/2016, the Claimant was terminated due to poor performance leading to loss of customers. Before this termination, the Claimant had written an apology letter dated 27/7/2016 and was issued with a warning letter dated 1/8/2016.

35. On 31/10/2016, there was also another letter in which Respondent wrote to him raising concern on his poor performance and he was placed on a 2 week suspension and asked to respond.

36. It is not clear if he responded but on 14.11.2016 he was terminated on account of poor performance.

37. From the communication between Claimant and Respondent, there were concerns on the Claimant's performance some of which were put to him and he was asked to respond. He even apologised for the same.

38. It is apparent therefore that the Claimant had been performing below expectation and therefore the Respondent had valid reasons to terminate his services as per Section 43 of Employment Act 2007.

39. The Respondent however did not observe the rule of natural justice. Section 41 of Employment Act 2007 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".

40. Though the Claimant may have performed poorly, he was still entitled to a disciplinary hearing and this never took place.

41. In accordance with Section 45(2) of Employment Act 2007, the termination of the Claimant was therefore unfair and unjustified for want of due process which 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".

42. In view of the unfair termination, I find for Claimant and I award him as follows:-

1. 1 Months' salary in lieu of notice = 30,000/=

2. 8 months' salary as compensation for the unfair termination = 30,000 x 8 = 240,000/=

3. Service pay equivalent to 15 days salary for 1 year served = $\frac{1}{2} \times 30,000 \times 1 = 15,000/=$

Total = 285,000/=

Less statutory deductions

4. The Respondent will 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 30th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nadida holding brief Alosa for Claimant – Present

Respondent – Absent