



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 342 OF 2016

(Before Hon. Justice Mathews N. Nduma)

GEORGE OGUTU NYAMBORY.....CLAIMANT

VERSUS

IFFCO KENYA LIMITED..... RESPONDENT

JUDGMENT

1. The claimant prays for a declaration that termination of his employment was wrongful and unfair and payment of terminal benefits set out in the memorandum of claim dated 11th November 2016 and filed on 17th November 2016.
2. CW1 testified that he was employed by the respondent on 15th July 2013 as a Junior Sales Manager at a gross monthly salary of USD 1,700. That the claimant's docket covered East Africa, including Eastern Congo and Southern Sudan.
3. On 21st February 2015, the claimant was summoned on short notice to a meeting with Mr. Gannav Jagi and Mr. Nishithi Mehta the Business Head of Africa and Regional head of the respondent at Southern Sun Hotel in Nairobi.
4. The claimant was accused of having "associates in Tanzania and India" and that he was suspected of being involved in side business against the company policy.
5. The claimant explained a social media message linking the claimant to the alleged involvement. That the two officers had a pre-determined mind and they asked the claimant to immediately surrender company property.
6. On 3rd December 2015, the claimant received a mail from Mr. Jaggi claiming that the claimant had walked out on them during the meeting on 2nd December 2015 and that the claimant had absconded from duty.
7. On 5th December 2015, the claimant received a mail from the Manager Human Resources Africa, accusing the claimant of insubordination and absconding from duty.
8. On 4th December 2015, claimant had received a mail from the Administration and Finance Manager Mr. Aliya Dharanishi asking the claimant to handover remaining items including staff identity card, medical insurance cards and petty cash in the sum of Kshs. 71,323.
9. On 15th December 2015, the claimant received letter of termination from Manager Human Resources Africa.
10. The claimant prays the court to find that the termination was for no valid reason and no proper procedure was followed by the respondent. That at the time, the claimant earned USD. 1,921 per month.
11. The claimant prays for other reliefs set out in the statement of claim.

Defence

12. The respondent filed a defence and counter claim to the suit on 7th February 2017 in which all the particulars of claim are denied and the respondent counter claims one month salary in lieu of notice from the claimant in the sum of USD 1,921 for having resigned employment without notice contrary to the provisions of the contract of employment.

13. RW1, Mr. Mishith Mehta, the Regional Sales Manager of the Respondent testified that the claimant was employed by the respondent as Junior Sales Manager on 15th July 2013 until he resigned the position without notice on 2nd December 2015.

14. That on or about October 2015, RW1 received a WhatsApp communication from the claimant contents of which suggested that the claimant was in communication and carrying on business deals in conflict with the interests of the respondent. That the email was intended for the competitor but it was mistakenly sent to RW1. RW1 produced copy of the email marked exhibit '2'.

15. RW1 testified that they started investigations and were able to confirm from Airtel Kenya, provider that the claimant used company property to call the said competitors on several occasions. The detailed statement of phones made was produced as exhibit '3'. That RW1 and Mr. Gannav Jaggi summoned the claimant to a disciplinary hearing to explain himself on the matter. That the claimant became aggressive and stormed out of the meeting after handing over his laptop and sim cards which had been requested from him for purposes of conducting further investigations on the charges leveled against the claimant.

16. The claimant did not turn up for work the following day despite numerous calls and email to him to report to work with a view of settling the issue amicably. The correspondence was produced and marked exhibit '4'.

17. The claimant was invited to a further disciplinary hearing by an email dated 7th December 2015 but the claimant declined to attend the same.

18. The claimant wrote an email dated 7th December 2015 marked exhibit '6' which RW1 states confirm that the claimant absconded work.

19. RW1 stated that his concerted effort to get the claimant to return bore no fruit. RW1 stated that the respondent was left with no choice but to terminate the employment of the claimant on 15th December 2015. RW1 added that the termination was lawful and procedural.

20. That the claimant was paid all his terminal dues as per exhibit '9' including a certificate of service. RW1 prays the suit be dismissed with costs.

Determination

21. The issues for determination are:

- a) Whether the employment of the claimant was for a valid reason following a fair procedure.
- b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

22. The claimant testified that he was summoned to a meeting by his superiors at short notice and asked to explain correspondence which showed that he had a side business with competitors to the respondent. The claimant testified that he tried to explain the email in vain because the representatives of the respondent had already made up their minds on the matter.

23. RW1 on the other hand states that the claimant when asked to explain the email and handover his sim card to them for further check on previous correspondence between the claimant and the said competitors, the claimant became aggressive, and stormed out of the meeting. RW1 added that attempts to get the claimant to further meetings on the matter were futile. The claimant then wrote a demand letter to the respondents upon a letter of termination being issued to the claimant on 15th December 2015, reason being that the claimant had absconded duty for three weeks without lawful cause.

24. The claimant was paid Kshs. 276,553.56 being salary for two days worked in December 2015, Resettlement allowance in the sum of Kshs. 166,971 and in lieu of leave days not taken in the sum of Kshs. 98,810.24.

25. The court is satisfied that the claimant had communication with competitors of his employer which suggested that he was involved in side business that conflicted with the interest of his employer. The court is satisfied that the claimant was properly summoned to explain the email that had gotten to his employer by accident. The court is satisfied from exhibits produced by RW1 that the claimant was engaged in regular communication with business rivals of his employer using company property. The court is satisfied that the claimant failed to honour further summons to attend further disciplinary hearings with a view to resolve the matter.

26. The court is equally satisfied that indeed, the claimant was paid his final dues despite that he had refused to return to work when summoned vide email, WhatsApp and phone to come back.

27. The claimant was given opportunity to explain himself. Accordingly, the respondent had a valid reason to terminate the employment of the claimant and the respondent followed a fair procedure in terminating the employment of the claimant.

28. The court is satisfied that the claimant was paid in lieu of leave days not taken upon termination. The claimant was paid in respect of resettlement and is therefore not entitled to any further payment for relocation. Equally, the claimant is not entitled to payment in lieu of leave days not taken nor is he entitled to any severance pay since he was not retrenched from employment.

29. The claimant having left employment and the respondent opted to pay him terminal benefits, the claimant is not entitled to any payment

in lieu of notice nor is the respondent entitled to any counter claim in lieu of one month notice, having forfeited that option in the letter of termination and offer of terminal benefits which were duly paid to the claimant.

30. Accordingly, both the entire claim and the counter claim lack merit and are dismissed. Each party to pay their own costs of the suit.

Judgment Dated, Signed and delivered this 24th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Maloba for Claimant

Mr. Ochieng for Respondent

Chrispo – Court Clerk