



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 112 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 18th June, 2018)

MAXWELL AGUTU MAIGO.....CLAIMANT

VERSUS

KENYA NATIONAL TRADING

CORPORATION LIMITED.....RESPONDENT

JUDGEMENT

1. The Claim before Court was filed by the Claimant herein on 30/1/2015 through the firm of M/S Wainganjo Wachira & Company Advocates contending wrongful and unlawful dismissal of his services by the Respondents and failure by the Respondent to pay him his terminal benefits.
2. The Claimant's case is that he was employed by the Respondents on or about 25/11/2011 as a Sales and Marketing Manager initially for a 3 years contract at a salary of 120,000/= and a gratuity of 31% of his gross salary as per (MAMI).
3. The Claimant was later confirmed to the position of Sales and Marketing Manager on permanent and pensionable terms of employment. His salary then rose to 180,000/= per month and he was also included in a pension scheme where 7.5 % his monthly pay was paid into the scheme and his employer also paid 7.5% of his salary in the same scheme.
4. The Claimant has averred that his responsibilities included developing the company's relationship with identified customers, promoting the Company's products and services to its customers and providing customer service support.
5. The Claimant contends that he performed his duties diligently and faithfully and contributed to the success of the Respondent's company.
6. He contends that sometimes in July 2014 a report was prepared by Internal Audit Manager James Mwangi (NAM 4). Following this report, the Ag Managing Director wrote the Claimant a Memo dated 25.7.2014 requiring the Claimant to address the audit queries raised (Appendix MAM 5).
7. The Claimant avers that he started investigating the issues raised. There was exchange of email and communication by memo between the Claimant and the Supply and Logistics Coordinator (Appendix MAM 6).
8. The Claimant avers that on or about the 31st October 2014, the Ag Managing Director of the Respondent Company without any colour of right, unfairly, wrongly and unlawfully in total breach of the employment contract suspended the Claimant duty as per the letter (MAM 3). He was also asked to show cause why he should not be dismissed from duty.
9. He tendered his response on 25/11/2014 wherein he indicated that there was no negligence on his part and he did not in any way act in a way which caused Respondent's Company to suffer loss.
10. The Claimant was thereafter invited to a disciplinary hearing before the Respondent Board, which was held on 17/12/2014. The Claimant went through the hearing process which he avers was flawed and was thereafter summarily dismissed from duty with effect from 13.1.2015.
11. The Respondents filed there Statement of Response on 3.6.2015 through the firm of Mohammed and Kinyanjui Advocates. They admit

that the Claimant was confirmed in employment and his salary was 180,000/= per month.

12. They also aver that the Claimant was suspended from duty as a culmination of several instances of breach of trust, misconduct and willful negligence in the performance of his duties. They also contend that the Claimant failed to keenly manage and supervise the Sales and Marketing Department which was his key function.

13. They also aver that as a result of the aforementioned failure by the Claimant, the Respondent carried out various internal audits carried out on 4th April 2013, 23rd May 2013, 30th May 2013 and 21st July 2014 which established that the Claimant had irregularly, unprocedurally and in breach of the Respondent's Policies and procedures surreptitiously and/or in cohorts with members of his department undertaken actions on omissions that led to the Respondent losing Kshs.3,393,254/= among other items.

14. The Respondents aver that they issued the Claimant with a Notice to show cause which he responded to and which revealed that the Claimant submitted statements which had been falsified and the invalidity of the statements were a clear indication of irregularity and fraud and leading the Respondent requiring the Claimant to address the audit queries regarding account No. K198 and RN172.

15. The Respondent therefore avers that the Claimant's dismissal was not wrongful but was lawful, valid and justified. They aver that following his dismissal, the terminal dues of the Claimant were correctly calculated which came to 458,416.56. They deny that the Claimant is entitled to payment of 2,356,562 as itemized.

16. The Respondent aver that the Claimant owes them 2,117,774,57 as itemized in paragraph 20 of their Response. They also aver that the Claimant was dishonest and participated, in a company, with others, was negligent and in breach of trust which led to Respondent to incur the loss aforementioned.

17. The particulars of the negligence, dishonesty, conspiracy, breach of trust and misconduct and as listed as follows:-

i. Irregular delegation of LPO signing to junior members of the Claimant's department resulting to missions and loss to the corporation.

ii. Failing to act on information received from Bamburi Company on the irregular instructions.

iii. Omissions and actions by the Claimant leading to loss of Kshs.3,392,954/=in the sale of the corporation cement through the Claimant's Department.

iv. Loss of the corporation two (2) laptops entrusted to the Claimant.

v. Breaching the Respondent's policies and procedures on sales and procurement.

18. The Respondents have denied any wrongdoing in relation to the Claimant and seek that the Claimant's case be dismissed with costs.

19. The Claimant gave his oral evidence. In cross-examination he admitted he had once received a warning letter from the Respondent. He also indicated that his Assistant can authorize payment without authorization from him

20. In relation to the account where the mistake is said to occurred, he told the Court that he supplied documents to audit department through email dated 24.7.2014 with 6 attachments. He avers that custodian of LPOs were not utilized or requisitioned by his department and the account used was not then an active account. He stated it had never been brought to his attention that anyone he delegated power to misused those powers. He also stated that he was never given copies of LPOs used to lift cement from Bamburi.

21. The Respondent also called 2 witnesses who gave oral evidence. RW1 gave evidence and stated that he carried out an audit on the account K198 and discovered that the Sales and Marketing Department authorized lifting of cement through one Philemon Mutai who made a call to this effect. Mutuai was Supply and Logistics Coordinator under the Claimant.

22. In cross-examination RW1 told Court that Account 198K was credited with 3.4 million. That all documents provided were signed by Philemon Mutai and the series of LPOs was not assigned to the Claimant. He also said the said LPOs were assigned to the Claimant's Department but had no evidence to prove this. He avers that they questioned the driver of KBR 205 U who said that he was given the same by Philemon Mutai who told him to deliver the cement to Umoja.

23. He also told Court that Mutai was a Supply and Logistics Coordinator whose immediate boss was Joyce Chepkemboi – Supply Chain Manager.

24. The RW2 told Court that the Claimant was taken through a fair disciplinary process and thereafter dismissed for irregular delegation of signing of LPOs and also outsourced transport.

25. In cross-examination, the RW1 said the PLO in question was signed by Joyce Chepkemboi. The witness admitted that the Claimant had pending leave days and was not paid for it. She also stated that in October to January 2013, Claimant received his salary but had no evidence of the same. She admitted that the Claimant was not paid his gratuity on the contract for 1 year.

26. The parties also filed their respective submissions. I have examined all evidence on record from both parties and their respective submissions. The issues for determination are as follows:-

1. Whether there were valid reasons to dismiss the Claimant.

2. Whether due process was followed.

3. Whether the Claimant is entitled to remedies sought.

27. On the first issue, the Respondent have indicated that the Claimant was guilty of negligence in that he irregularly, delegated signing of LPOs to his juniors and also outsourced transport. The further reason for dismissal in the dismissal letter indicate that he failed to act on the SMS alert received from Bamburi with information on loading instructions.

28. RW2 when giving evidence indicated that the LPOs which led to the loss were not assigned to the Claimant but to his department. The witness however indicated that there was no evidence that the LPOs were assigned to the Claimant's department.

29. RW1 also told Court that all documents provided were signed by one Philemon Mutai who was Supply and Logistics Coordinator. The RW1 had indicated that the said Philemon was in Claimant's Department. RW2 however indicated that he was in Supply chain and his boss was one Joyce Chepkemboi who was Supply Chain Manager.

30. On issue of outsourcing of trucks, the same RW2 also to Court that the lorry driver of KBR 205 U was questioned and he said was told by Philemon Mutai to deliver cement to Umoja. There was no evidence that the Claimant was involved in the outsourcing of this truck.

31. What comes out of the evidence of the Respondents does not point a finger at the claimant. The Claimant has denied any involvement in dealing with the cement in question. There is no indication that he signed the questionable LPOs nor any officer in his department. There is also no indication that the trucks used to transport the cement were outsourced by him.

32. There was also an accusation that he failed to respond to an SMS alert from Bamburi on the lifting of cement. This 'SMS' was not explicitly explained as to where it originated from and how it was delivered to the Claimant. There was no evidence in relation to the said SMS.

33. Section 43(2) of Employment Act 2007 states as follows:-

“(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”.

34. The requirement that there must be valid reasons before termination are clear. There is no indication in the foregoing evidence and case that the reasons used to dismiss the Claimant were valid.

35. Even under Section 44(6) of employment Act 2007 negligence of duty being relied upon to dismiss the Claimant must be valid. The burden of proving this reason lies upon the Respondent as provided under Section 47(5) of Employment Act which states as follows:-

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”.

36. I find that the Respondent failed to discharge this burden from their evidence and therefore my finding is that there were no valid reason to warrant dismissal of the Claimant on grounds stated in the letter of dismissal.

37. On the 2nd issue, the Claimant was duly informed of a disciplinary hearing for which he was invited to appear and defend himself against accusations levelled against him. The minutes of the said disciplinary hearing were presented before Court and there is evidence that the Claimant was given an opportunity to defend himself. It is therefore my finding that the Claimant was accorded due process as provided 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”.

38. The Respondents loosely stated that Claimant owed them some moneys. They however failed to lead evidence to prove this case. They also failed to make a counter claim for the same and therefore their claim remained not proved and prayers were not made for the amounts pleaded against the Claimant. There is therefore no finding against the Claimant on moneys pleaded by the Respondents as being owed by the Claimant.

39. Under Section 45(2) of Employment Act:-

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.

40. Thus for there to be fair dismissal, or termination, both valid reasons and fair hearing must be proved by the employer. I have already made a find that there were no valid reasons to warrant dismissal of the Claimant. I therefore find the dismissal of the Claimant was unfair and unjustified and I declare it so.

41. On remedies sought, the Claimant sought remedies including reinstatement.

42. The Claimant was dismissed in January 2015 and under Section 12 of Employment Act, reinstatement as a remedy can only be granted within 3 years from the time of dismissal. 3 years having since lapsed this remedy cannot be granted at this point. I however find for Claimant on other remedies sought and I award him as follows:-

1. 3 months' salary in lieu of notice = $180,000 \times 3 = 540,000/=$ as per the contract dated 17/7/2012.

2. Accumulated leave days admitted by the Respondent in the dismissal letter = 581,940/=.

3. Unpaid salary for October 2014 to 13th January 2015 = 432,940/=.

4. Unpaid gratuity admitted by RW2 = 446,400/=.

5. 8 months' salary as damages for unlawful termination = $8 \times 180,000 = 1,440,000/=$.

TOTAL = 3,141,280/=.

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

Dated and delivered in open Court this 18th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochiwa holding brief for Karanja for Respondent

Clamant – Present