



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 313 OF 2013

PATRICK WAMBUA IKUSYA.....CLAIMANT

VERSUS

AFRICAN COTTON INDUSTRIES LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 12.3.2013 alleging that he had been unlawfully and summarily dismissed from service by the respondent on 28.1.2013. He prayed for three months' salary in lieu of notice, 50 accrued leave days plus Damages for unlawful termination, totaling to Kshs.683,333.33.

2. The respondents filed defence and counterclaim on 17.4.2013 alleging that she seconded the claimant to her distributors to undertake sales and marketing responsibilities of her products but he failed to meet the set targets of Kshs.2,500,000 per month except in May 2012. In addition, the respondent averred that the claimant gave false information to customers during a promotion conducted in May 2012 and further misappropriated or failed to account for sales proceeds totaling to Kshs.224,009. It is the defence case that the claimant persisted in his poor performance despite numerous calls for his improvement and as a result, she terminated his contract on 28.1.2013 on account of poor performance and misconduct and counterclaimed for the Kshs.224,009 sales proceeds collected by him from Amana Supermarket and Sammu Investments.

3. The claimant filed reply to the defence and answer to the counterclaim on 30.4.2013 denying the alleged poor performance and misappropriation of any sales proceeds collected from customers. He further denied the alleged lack of diligence in performing his work and or giving false information to customers. The suit was heard on 22.11.2016 and 13.2.2018 when the claimant testified as CW1 while the respondent called her HR Manager Mr. Gideon Waweru and her Credit Controller Musuleve Shamsh as Rw1. Thereafter the parties filed written submissions which I have carefully considered herein.

Claimant's Case

4. The claimant testified that he was employed by the respondent On 22.4.2009 as a Territory Sales in Charge earning Kshs.30,000 which was later increased to Kshs.42,000. On 28.1.2013, he received message summoning him to the office on 29.1.2013. On arrival to the office he found his colleagues and he was told that his job had been terminated but he was not given any letter to that effect. He was further told to hand over the company vehicle which he did but he was not called to do clearance.

5. He further testified that the termination he was never given any chance to defend himself and he was not paid his dues. He prayed for leave accruing from 2000 to 2013, one moth salary in lieu of notice.

6. On cross examination he contended that he was ordinarily not receiving cash from wholesalers and maintained that the wholesalers were paying by cheque. He however admitted that a few customers paid cash which he promptly submitted to the company. He denied that he was called to discuss his personal performance and maintained that he was called with the other Sales men as a team. He further maintained that his sales were good and he had received any warning of low sales. He admitted that Patrick Ndichu & Sons was his customer who always paid by cheque and denied that she paid him any cash. He denied ever being told by the Sales Agent, about the cash allegedly paid by Patrick Ndichu & Sons. He admitted that he received the letter dated 8.9.2012 on sales target but maintained that he met the set targets. He further

denied receipt of the termination letter dated 28.1.2013.

Defence case

7. Rw1 testified that the claimant was employed by the respondent in April 2009 and he was in charge of Sales & Marketing and reconciliation of accounts between distributors and the respondent.

He further testified that by the letter dated 8.9.2012, the claimant's sales target was set at Kshs.2,500,000 per month but he only met the said target only in 4 months including May 2012. He also stated that apart from the poor performance, the claimant failed to account for Kshs,224,009 made up of Kshs.214,009 received from Sammu Enterprises and Kshs.10,000 from Amana Supermarket.

8. Rw1 explained that in 2012 the claimant was informed of his underperformance by the Sales Manager and on 28.1.2013 he was called by the latter to discuss his underperformance and the failure to account for the Kshs.224,009 received from customers. Rw1 confirmed that he was not present at the said meeting but he contended that after the meeting he was instructed to draft a termination letter. He concluded by stating that he also prepared the final dues for the claimant but never went to do clearance and collect his terminal dues.

9. On cross examination, Rw1 admitted that the claimant was employed before him. He further admitted that the claimant was **not served** with any warning letter or invited to a hearing in company of another employee before the termination of his employment. He also stated that the claimant was served with termination letter by the Sales Manager Mr. Waller Mutegi but he refused to receive and left the company. He admitted that no report was made to the police and the claimant was never charged with any criminal offence. He however maintained that the claimant was not meeting his performance targets despite being served with formal communication on the underperformance. He further maintained that there were documents to prove that Kshs.224,009 was not accounted for. He denied knowledge that the claimant was denied access to the company by security.

10. Rw2 has also served the respondent as Credit Controller for 7 years. She confirmed that the claimant was employed by the respondent as a Salesman assigned to assist distributors to sell to small shops and also to collect the sales Proceeds and hand over to the distributors. Some of the distributors included Sammu Enterprises and Amana who complained that the claimant collected Kshs.214,009 and Kshs.10,000 respectively and failed to hand over to them. She referred to a statement of accounts showing that the claimant had not accounted for Kshs.54,836.33 and contended that the claimant never went for clearance from him as the Credit Controller.

11. On cross examination, Rw2 contended that the claimant met with the Sales Manager on 28.1.2013 but she could not tell what transpired because she was not in attendance. She also could not tell whether the claimant was served with warning letter of notice before termination and contended that she was not his supervisor. She could further not tell whether the claimant was barred from accessing the company to do clearance but she maintained that Kshs.54,000 as to be recovered from terminal dues after clearance but the claimant failed to go for the clearance. She however contended that there were documents to prove that Sammu complained about Kshs.214,009 not accounted for.

Analysis and Determination

12. After careful consideration of the pleadings, evidence and submissions, I found no dispute in the fact that the claimant was employed by the respondent until 29.1.2013 when he was terminated without prior notice. The issues for determination herein are:

- (a) Whether the termination of the claimant's employment contract was unfair;
- (b) Whether the reliefs sought by the suit and the counterclaim should be granted.

Unlawful termination

13. Under section 45 (1) of the Employment Act the employer is barred for terminating his employee unfairly. Under subsection (2), termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure.

Reasons for the termination

14. In this case, the reason for the termination cited in the termination letter dated 28.1.2013, was under-performance contrary to clause 12.1 (d) of his appointment letter. Later the respondent alleged in his defence and counterclaim that the claimant failed to remit Kshs.224,009 received from his sales of goods collected from Sammu investments and Amana Supermarket.

15. The claimant has denied the said underperformance and the alleged non-remittance of Kshs.224,009 and contended that he was never served with any warning, received any complaint about his performance from his employer or given any chance to defend himself for any wrong doing before the termination. He further contended that he was never a party to the targets set unilaterally by the respondent. The respondent has, however, contended that the claimant was under performing his duties by not meeting his monthly sales targets of Kshs.2,500,000 as set out by the letter dated 8.9.2012. She further maintained that the claimant failed to account for the said Kshs.224,009.

16. After careful consideration of the evidence and submissions presented, it clear that in the period 2011 and 2012, the claimant's monthly sales ranged between Kshs.750,598 and Kshs.3,137,384. It is also clear that there was no set target for his monthly sales agreed between him and the employer. It, however, appears that, the respondent was not pleased with the claimant's fluctuating monthly sales and by the letter dated 8.9.2012 she addressed the claimant as follows:

“Dear Patrick,

RE: SALES TARGET FOR THE MONTH OF SEPTEMBER 2012

Please be informed that your sales target for the Nairobi 1 Distribution Region for the period 1st to 30th September 2012 has been set at Kshs.2,500,000.

On attaining this target, you will be entitled to a bonus of Kshs.75,000 payable with the month of October 2012 salary.

In addition you will be entitled for a commission of .075% commission on sales over and above the set target, this will however be subject to collection of all the payables and anything unpaid by customers within your region will not be commissionable.

Please note that this applies for the month of September 2012 only.

The company is working on a bonus policy for the succeeding months which will be communicated to you.

Please ensure optimal supplies to your customers to avoid overstocking-(this will be monitored). All the best!

Yours faithfully...”

17. The evidence by the claimant that he was not a party to the target setting has not been contested by the respondent's witnesses. In addition, the letter dated 8.9.2012 set out the monthly sales targets for the claimant only for the month of September 2012 and not for any period before or after that month. Consequently, the said letter cannot be used as a basis for terminating the claimants on account of underperformance.

18. As observed herein above, the sales data produced by the respondent is sufficient evidence to demonstrate that the claimant had problem of performance and all what the respondent needed to do was to place under performance improvement plan on mutually agreed monthly sales targets. It is only after the claimant failed to meet the agreed target that the respondent could terminate him by observing due process. In view of the failure by the respondent to prove that the parties herein mutually set performance targets and that the claimant failed to meet the agreed targets, I find and hold that the alleged underperformance has not been proved on a balance of probability.

19. As regards the alleged misappropriation or failure to account for of Kshs.224,009, no evidence was adduced by the defence witnesses to prove the same. All what the defence witnesses stated was that there is documents to prove that the claimant collected Kshs.214,009 in respect of goods delivered from Sammu Enterprises and Kshs.10,000 from Amana Supermarket. They however never produced the alleged documents as exhibits. In addition, the said customers never made any claim against the claimant or gave any evidence to support the alleged misconduct. Consequently, I find and hold that the alleged misappropriation was not proved on a balance of probability.

Procedure followed.

20. In addition to the foregoing default, the respondent has not adduced any evidence to prove that they followed a fair procedure before dismissing the claimant from service. As already observed herein above the claimant was not placed under any performance improvement plan or given any hearing before the termination. Under section 41 of the Act, before employer terminates the services of his employee on account of misconduct, poor performance or physical incapacity, he must first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is contemplated and

thereafter, invite the employee and his chosen companion to air their representations for consideration before the termination is decided.

21. Having found that the respondents have not discharge the burden of proving substantive and procedural fairness as provided under section 41, 43, 45 & 47 of the Act, I proceed to hold that the termination of the claimant's contract by the respondents vide the letter dated 11.2.2011 was unfair.

Reliefs

22. Under section 49 of the Act, I award the claimant Kshs.42,000 being one month salary in lieu of notice as offered by the termination letter, plus Kshs.336, 000 being 8 months gross pay as compensation for unfair summary dismissal. In awarding the said compensation, I have considered that the claimant served for 4 years without any warning or other disciplinary record. I have also considered the fact that he was not paid any gratuity or severance pay.

23. The claim for 50 leave days is allowed as prayed since it is not opposed and it was admitted by the respondent vide the termination letter. Consequently, $50/26 \times \text{Kshs.}42000 = \text{Kshs.}80,769.25$ but I award Kshs.68,333.33 which the sum pleaded.

Counterclaim

24. In view of my finding herein above that the customers whose money was allegedly misappropriated did not lay any claim or tender any evidence herein, and in the absence of any evidence by the respondent to show that she was defrauded any money by the claimant, the counterclaim is dismissed.

Disposition

25. For the reason that the claimant was unfairly terminated, I enter Judgment for him in the sum of Kshs.446,333.35 plus costs and interest from the date hereof. The award will be subjected to any relevant statutory deductions.

Dated and Signed at Nairobi this 4th day of July, 2018.

ONESMUS MAKAU

JUDGE

Delivered in Open Court at Nairobi this 13th day of July, 2018.

HELLEN WASILWA

JUDGE