



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2149 OF 2012

(Before Hon. Justice Mathews N. Duma)

HUDSON KIDAHA KISIGWA.....CLAIMANT

=VERSUS=

ROMAGECO KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The suit is premised on an amended memorandum of claim filed on 21/4/2017. The Claimant seeks maximum compensation equivalent of 12 months salary for unlawful dismissal and payment of terminal benefits set out as follows:

- i) Arrears salary for April 2010 Kshs. 59,090.
- ii) Payment in lieu of one month notice Kshs. 59,090.
- iii) Payment in lieu of 19 days leave Kshs. 38,000 and
- iv) Unpaid commissions Kshs. 3,851, 140.38.
- v) Certificate of service.
- vi) Costs and interest.

2. The demand and notice of intention to sue was given but not responded to.

Facts of the case

3. Claimant was appointed as a salesman by a letter dated 7/12/05 effective 11/10/05. The Claimant served continuously until his employment was terminated on 1/5/2010. The Claimant knew of termination vide a notice published in the Daily Nation Newspaper.

4. It is the Claimant's case that the termination was actuated by the Claimant's initiation of a legitimate complaint regarding unlawful deductions on his salary by the Respondent over a period of time. The letter of complaint dated 4th and 5th October 2006 were produced to this effect. The deductions related to bounced cheques made by customers dishonored for reasons not attributable to the Claimant.

5. Furthermore, commissions due and owed by the Respondent to the Claimant continued to be unpaid for unexplained reasons contrary to **Section 19 of the Employment Act, 2007**. Payslips showing the deductions made were produced and marked "HKK4" for the month of February, September and November 2006; January, May, June, July, September, October, November and December 2007; January, September and October 2008 and November 2009.

6. Some of the dishonored cheques were made good directly to the respondent and no accounting was done to the Claimant in this respect resulting in the Claimant's inability to recover his deducted salaries.

7. The list of unpaid commissions are set out in paragraph 9 of the amended claim, and annex "HKK JQ"

8. At the time the Claimant's employment was terminated on 1/5/2012, he was sick, and on sick leave. Annexed and marked "HKK6) is a copy of a certificate of incapacity to work issued to the claimant.
9. The claimant was not notified of the intended termination. The Claimant was not issued with a show cause letter nor charged with any misconduct. No disciplinary hearing was conducted prior to the termination.
10. It is the Claimant's case that the termination violated Sections 41, 43 and 45 of the Employment Act, 2007 in all the above respects.
11. The Claimant was not given a certificate of service to enable him get alternative work. The Claimant's reputation was also maligned by his sacking vide a public newspaper, The Daily Nation.
12. The Claimant was not paid in lieu of leave days not taken and did not receive salary for April 2012.
13. The Respondent falsely instigated criminal charges against the Claimant in Criminal Case No. 1827 of 2010 at Makadara. The Claimant was arrested while still sick and was acquitted following a trial on charges of stealing by servant. The Claimant states that the charges were false and malicious.
14. The Claimant prays that the prayers in the suit be granted.
15. The Claimant testified under oath in support of the aforesaid particulars and relied on all the documents produced before court and marked as exhibits seriatim.

Response and counterclaim

16. The Respondent filed memorandum of Reply and counter-claim on 25th March 2015 in which it admits having employed the Claimant by a letter dated 7/12/2005 as a salesman effective 11/10/2005.
17. The respondent denied all the particulars of claim and states that by a memo dated 9/6/06, the Claimant was informed of a complaint regarding handling of company car in the manner he drove and maintained the cars.
18. Subsequently on 6/12/07, the Claimant was issued a warning letter with regard to an account of a customer named Samy Auto Service.
19. On 7/4/2009 the respondent discovered further irregularities on misuse of company car and Claimant was served with a memo of the same date on the matter.
20. The respondent therefore denies that the Claimant worked diligently and served the respondent with loyalty.
21. The Respondent admits that the Claimant was admitted to Nairobi Hospital on 15/4/2010 and was discharged on 21/4/2010. That the respondent granted the Claimant 14 days sick leave until 3rd May 2010.
22. The respondent states that the Claimant failed to report back to work upon expiry of the sick leave and the respondent decided to dismiss the Claimant from his employment by a notice in the Daily Nation Newspaper of 20/5/2010.
23. The respondent states that refusal to return to work upon expiry of sick leave was in breach of the Claimant's contract of employment and an act of misconduct which was a justifiable ground for summary dismissal.
24. That during the period of sick leave, the respondent discovered that the Claimant had collected monies from customers, but had failed to remit nor account for it. That the claimant had obtained goods from the respondent and converted same to his own use and had failed to account for the same. The respondent states that the summary dismissal was lawful and fair and the claim for compensation be dismissed.

i) Salary for month of April 2010.

The respondent admits that it did not pay the Claimant salary for April 2010 in the sum of Kshs. 59,090.00 adding that he was free to collect the same upon clearance which he had not done.

ii) Termination Notice

The respondent admits that it had informed the Claimant to collect Kshs. 59,090 net being one month salary in lieu of notice. The gross salary was Kshs. 59,990.

iii) Leave

The respondent admits owing the Claimant in respect of payment in lieu of 15 days untaken leave. The Respondent therefore denies the further 4 days leave claimed by the Claimant.

iv) Unpaid Commission for the Period 2006-2010

The respondent responded to this claim as follows:

- a) That it fully paid the Claimant commission for the year 2006, in the sum of Kshs. 307,323.00 in full. The Respondent produced a document marked "RC8" in support of this part.
- b) In respect of the 2007, the respondent states that the Claimant earned commission of Kshs. 740,316 and was paid in monthly arrears less Kshs. 67,886 recovered from the said commissions in respect of cash collected by the Claimant from customers and was not accounted for. Respondent produced a document marked 'RC9' in support of this payment.
- c) In 2008, the respondent states that the Claimant earned commissions in the sum of Kshs. 605,270 and same was paid to him in monthly arrears over 2008 and 2009 less Kshs. 11,287 in respect of money collected from customers and not accounted for by the Claimant. The respondent produced a document marked 'RC10' in support of its payment.
- d) In the year 2009, the respondent states that the Claimant earned commission in the sum of Kshs. 688,578 which was fully paid in monthly arrears over 2009 and 2010. Document marked 'RC11' was produced in support of this payment.
- e) The respondent admits that as at April 2010, a gross amount of Kshs. 124,593 in commissions was due and owing to the Claimant less statutory deductions. The same has not been paid to date.

25. The Respondent called one Rajendra Permer in support of its case as RW1. RW1 testified under oath. He stated that he had worked for the Respondent for a period of 14 years and he knew the Claimant well. That the Claimant did not perform his duties well in that he collected money from customers which he failed to account for and misused company car. That he had received two warning letters in this regard and a memo for failure to supply information on mileage and failure to report damage to the headlight.

26. That the Claimant delivered goods to Paws Africa Ltd, and SAKU enterprises, collected cash but did not remit the same.

27. That, this was the reason for the dismissal of the Claimant on 20/5/2010. That he got notice of dismissal in the Daily Nation Newspaper of the said date. RW1 stated that the Claimant was on sick leave at the time. That he had a neck problem. That the anomalies were discovered while he was on leave. That the Claimant was summarily dismissed. That the Respondent could not afford the Claimant a hearing since he was away. That the Claimant was offered terminal dues upon signing off at the company but the Claimant failed to collect the same.

28. RW1 added that deductions on amounts not remitted by the Claimant were recovered from his salary. That the deductions followed discussions with the Claimant. That these deductions were lawful. That the Claimant signed the payslips to accept the deductions. That the Claimant was paid commissions in arrears and it is reflected in his payslips every month. That the respondent does not owe the Claimant any commissions.

Counterclaim

29. The respondent counter claims a sum of Kshs. 382,774.60 being monies collected by the Claimant from customers and not collected. A table of the said unremitted amounts is set out under the counterclaim for the period 20/9/09 to 1/4/2010. It is also alleged without provision of any detail that the Claimant obtained goods under the pretext that the goods were intended for customers but he converted the same to his own use. The respondent prays that the counterclaim be awarded with costs.

Determination

30. The issues for determination are summarized as follows:

- i) Whether the employment of the Claimant was lawfully and fairly terminated.
- ii) Whether the Claimant is entitled to the various terminal benefits set out in the suit and compensation for termination of employment.
- iii) Whether the Respondent is entitled to the counter claim.

31. Upon careful consideration of the testimony by the Claimant and that by RW1, and taking into consideration the various admissions of fact by the respondent, it is apparent that the Claimant's employment was terminated vide a notice in the Daily Nation Newspaper on 20th May 2010. The Claimant had been taken ill and admitted at the Nairobi Hospital on 15/4/2010 and was discharged on 21/4/2010. The Claimant was granted 14 days sick leave from 21/4/2010 until 3rd May 2010.

32. The Claimant had a neck injury and was still receiving physiotherapy as at 21/4/2010 and was therefore unable to return to work immediately.

33. According to RW1, anomalies on the accounting of monies collected from customers were discovered whilst he was on sick leave and the respondent decided to summarily dismiss the Claimant for that reason. RW1 added that the Claimant had previous two warnings on mis-use of company car which also justified the summary dismissal.

34. The Claimant produced documents to show that he had made complaints about unjustified deductions from his salary and commissions due and owing to him. The Claimant stated that he did not fail to remit any monies collected. That a few customer cheques had bounced and

the Respondent instead of recovering the money from the customers took shortcuts to recover the money from his salary. That he had a good record at work and he believed that the false accusations and termination of employment was a result of his complaint and claim to be paid his commissions unfairly deducted.

35. From the commissions admittedly paid by the respondent between the years 2006 to 2010, it is clear that the Claimant performed well as a sales person. There is no way the respondent would have paid commission on sales for four (4) consecutive years if the Claimant was not remitting monies collected by customers. It is common knowledge that there is a provision for bad debts especially on sales on credit and sales on cheque payments. The company policy must adequately address these but not resort to unlawful deduction of employee salaries, where a few cheques bounced. It is also admitted by the respondent that it did not pay commissions due and payable to the Claimant timeously. The same were instead paid in arrears over a period of many months. There was no letter of demand made to the Claimant in respect of any unremitted cash upto the time of his summary dismissal.

36. The respondent admits it still owed salary and terminal benefits and commissions to the Claimant up to the time it summarily dismissed him.

37. It beggars believe that instead of giving the claimant notice to show cause in respect of any alleged unremitted funds and misappropriation of company goods, the respondent decided to dismiss the Claimant who was still sickly through the newspaper. The respondent went further to prefer criminal charges against the Claimant but the Claimant was acquitted for lack of any evidence in support of theft by servant.

38. The court is satisfied that the Claimant performed very well as a sales person hence earned large commissions on sales.

39. That until he got sick, he had not been charged with failure to remit monies from customers and was not accused of the same until he was summarily dismissed in absence.

40. The Respondent clearly violated the provisions of Section 41 of the Employment Act in that it did not provide opportunity to the Claimant to explain himself on allegations made against him in court after the dismissal.

41. It is the court's considered view and finding that the respondent had no valid reason to summarily dismiss the Claimant and the dismissal by a newspaper notice violated sections 41, 43 and 45 of the Employment Act. This was clearly an unfair labour practice which in addition is a violation of Article 41 of the Constitution of Kenya 2010.

42. To make matters worse, the Claimant was not paid his salary for days worked, in lieu of leave nor was he paid in lieu of notice upon dismissal. The Claimant, sick at the time did not also receive his certificate of service to help him get alternative job. The charges laid against him in a criminal court on which he was acquitted and provided bad publicity in the most widely circulated newspaper added insult to injury. Clearly this was calculated to end the career of the Claimant on unfounded allegations as the court has already found.

43. The court finds therefore that the Claimant is entitled to compensation in terms of **Section 49 (1) (c)** as read with **Subsection 49 (4)** for the unlawful and unfair summary dismissal.

44. In the Court of Appeal of Kisumu, **Civil Appeal No. 72 of 2014**, Maraga, Musinga and Gatembu JJA rendered themselves thus while disagreeing with the finding by Ojwang J, as he then was, in **Salim Mungeini vs Kenya Revenue Authority [2008] eKLR** -

“Compensation under Section 49 of the Act is not confined to the wages which an employee would have earned had the employee been given the period of notice to which he was entitled, it may include that and more, having regard as we have said to the peculiar circumstances of each case.”

45. In the case of **D.K Njagi Marete vs Teachers Service Commission Industrial Court- Nairobi Cause No. 379 (N) of 2009 [2013] eKLR**, Rika J. awarded the Claimant the equivalent of twelve months salary in compensation for the unlawful and unfair termination of employment.

46. The present case has peculiar aggravating circumstances including being falsely accused of theft and summarily dismissed vide a newspaper; failure to give the Claimant certificate of service nor pay termination benefits to his account upon termination; the sick employee was not accorded any manner of decorum in summarily dismissing him.

47. The facts of the case clearly contradict, the picture painted of the Claimant by the Respondent.

48. The Claimant suffered immense loss and damage as a result of the dismissal without notice while sick.

49. The Claimant being a salesman drove a company car for long journeys and it is not farfetched to associate the neck injury he suffered from his occupation. He deserved sympathy rather than the heavy reprimand he suffered at the hands of his employer.

50. This is a proper case to award the Claimant the maximum twelve (12) months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. 719,880.

Terminal benefits

51. The Claimant has proved on a balance of probabilities that he is owed by the respondent and is awarded

a) Salary for the month of April in the sum of Kshs. 59,090.

b) One month salary in lieu of notice Kshs. 59,090.

c) 15 days salary in lieu of leave Kshs. 29,545.

Commissions

52. With regard to commissions earned and not paid the Claimant testified under oath that he was owed the sums set out in the amended memorandum of claim. RW1 failed to adequately rebut this evidence and in several respect contradicted the pleadings, by the respondent. In the pleadings, the respondent admits having not paid some commission to the Claimant in the sum of Kshs. 124,593 yet RW1 told the court that all commissions were duly paid to the Claimant. In the pleadings, the Respondent alleges to have summary dismissed the Claimant for absconding work, yet RW1 told the court the Claimant was dismissed for misappropriating company goods, failure to remit collected cash and for mis-use of company car.

53. The court finds RW1 unreliable witness and his testimony therefore not credit worthy.

54. The court finds that the Claimant has proved on a balance of probabilities that he was not paid commissions in the sum of Kshs. 3,851,140.38. Indeed the complaint by the Claimant regarding these non-payments contributed to the victimization by the respondent. The court awards the Claimant the sum of Kshs. 3,851,140.38 being unpaid commissions.

Counter Claim

55. The Claim for monies collected by the Claimant and not remitted is misconceived and an abuse of court process. No tangible evidence has been adduced to prove the counter claim. In any event, the Claimant adduced cogent evidence in rebuttal of the counter claim, the same is dismissed for want of proof.

56. In the final analysis judgment is entered in favor of the Claimant as against the Respondent as follows:

i) Unpaid commissions **Kshs. 3,851,140.38**

ii) Twelve months salary in compensation

for unlawful and unfair dismissal **Kshs. 709,080.**

iii) April 2010 salary **Kshs. 59,090.**

iv) One month salary in lieu of notice **Kshs. 59,090.**

v) 15 days salary in lieu of leave **Kshs. 29,545.**

Total award **Kshs.4,707,945.38.**

vi) The award is payable with interest at court rates from date of filing suit except item (ii) above which attracts same interest from the date of judgment till payment in full.

vii) Respondent to meet the costs of the suit.

Dated and Signed in Kisumu this 20th day of July, 2018.

Mathews N. Nduma

Judge

Delivered and Signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances:

Ameli Inyangu for Claimant

Nyachoti Advocate for Respondent

