



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
ELRC NO. 62 OF 2014
(Initially HCCC No. 433 of 2003)

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

EDWARD LISAMULA MILIMU.....CLAIMANT

VERSUS

FAROUK BISBAS.....1ST RESPONDENT

BOBBY WADDEL.....2ND RESPONDENT

LUTHERAN WORKD FEDERATION.....3RD RESPONDENT

JUDGMENT

1. The Claimant herein initially filed this Claim as HCCC No. 433 of 2003 at the High Court of Kenya at Nairobi. By consent of the parties on 19.1.2014, this claim was transferred to this Court for hearing and disposal and finally registered as Cause No. 62 of 2014.
2. The Claimant's case is that he was employed by the 3rd Respondent and was based at Kakuma Refugee Camp. He stated that the 1st and 2nd Respondent were the Chief of Security and Country Director of the 3rd Respondent respectively.
3. He gave his sworn evidence in Court and stated that he was employed by the 3rd Respondent at Kakuma Refugee camp which was being run by the UNHCR and managed by the 3rd Respondent. He indicated that he was in charge of the camp.
4. He told the Court that on 13/6/2002 he proceeded for his short leave called (R & R) Rest and Recuperation from Kakuma to Nairobi. While at home, he received a telephone call asking him not to go back to Kakuma but to go to Nairobi and see their Country Director.
5. He came to their Nairobi office and found the 2nd Respondent. The 2nd Respondent told him to wait for short time and within no period he was called in the office of the 2nd Respondent who handed him a summary dismissal letter. The letter contained reasons for dismissal as follows:-

“

Dear Sir,

Summary Dismissal

I have to advise you that following extensive investigations carried out into allegations that you have engaged or attempted to engage in unnatural offences namely having or attempting to have carnal knowledge of various persons against the order of nature and/or committing acts of gross indecency, it has been decided to terminate your services forthwith in accordance with Section 17(g) of the Employment Act Cap 226 Laws of Kenya. The Section provides as follows: -

a) If an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial deferment of his employer or his employer's property....”.

6. Various other incidences were enumerated in this letter. The Claimant contends that he did not agree with reasons given in the dismissal letter and sought audience with the Director.
7. The Claimant avers that he was later arrested on 30/7/2002 by CID officers and charged with 4 counts similar to those mentioned in his dismissal letter. He went through the criminal trial and was convicted. He appealed and the High Court ordered a retrial on the grounds that the prosecution had been conducted by a Police Prosecutor and not a qualified person.
8. The Claimant avers that in this case he contends that he was wrongfully dismissed. He stated that he was serving on contract – one year renewable and had worked for 6 months upto June 2002. He had 6 months to go. His salary was 118,796/= per month.
9. He avers that he was also owed leave equivalent to 162,000/=. He claims a total of 1,274,368/= and damages for defamation. He contends that the allegations against him were false and were circulated to nationally and internationally, as he was an International Aid Worker.

10. He avers that due to the action of the Respondent, he was painted as the most immoral, untrustworthy and unnatural person and was isolated by his peers and other organisations and could not get any other employment.

11. He also stated that his prosecution was not fair and he seeks damages for wrongful prosecution initiated by the 3rd Respondent.

12. In cross-examination, the CW1 stated that the Respondent had made allegations that he was involved in a sexual liaison with an Ethiopian male contrary to the law of nature. That there was also an allegation that he attempted to rape a male working with World Vision Kenya. He stated that these allegations were not true. He admitted that he was charged in Court and convicted but the conviction was set aside because the trial was conducted by an unqualified prosecutor.

13. The Claimant also indicated that his contract contained various terms and conditions upon which he could be dismissed and Article 9 of the Terms and conditions (Page 28 of the Respondent's bundle) indicated the disciplinary process to be followed.

14. The Claimant admitted that before the dismissal he had various meetings with the Country Director and Camp Manager between April and May 2002 and allegations about him had been made before these meetings. He stated that there were 4 people in the meetings and he signed the record of the meetings which is from pages 142 to 160 of the Respondent's records.

15. He also stated that page 159 of the Respondent's record states that one JRs refugees visited his home when he was sick to do a massage.

16. He also admitted that he had a sexual/love relationship with a Congolese woman at the camp but that the relation had since ceased. He also admitted that he did not know G knew of the relationship though the information had gone up to UNHCR and that such relationships were not allowed in the course of his employment. He stated that this did not amount to taking advantage of people in extremely vulnerable situations. He admitted that this was against his contract of service and Section 17 of Employment Act Cap 226.

17. He also admitted that he could not be paid anything if he commits or is suspected to have committed an offence against his employer.

18. The Respondents filed their Defence and Amended Defence in this matter on 28/10/2010. They aver that there is a criminal case pending against the Claimant being criminal case No. 2034/2002 between the Claimant and the State and not between the Claimant and the Respondents. They aver that the case has never been resolved.

19. They also admit that the Claimant was employed by them as stated but aver that the claimant was dismissed because of gross misconduct including sexual exploitation and abuse of refugees and other humanitarian employees of World Vision.

20. He referred Court to page 156 of the Respondent's bundle, which relates to a meeting between the Claimant and Bobby 2nd Respondent herein on 14/5/2002 on allegations of improper sexual advances and page 160 of the said documents, the signatures of the Claimant and other 3 are appended. He stated that it was the 3rd Respondent's Policy not to have officers of the organization visited by refugees when sick (page 159) and it was also indicated that the Claimant had a relationship, with a Congolese woman and he did not know she was married.

21. The RW1 stated that it was not proper for employees of the 3rd Respondent to have friendship with members of the refugee community as the refugees were considered as people of concern or clients and the relationship had no monetary or sexual relationship. This was because the refugees were vulnerable people.

22. The RW1 stated that the relationship the Claimant had with the Congolese woman was improper and even involved giving her some money.

23. RW1 indicated that investigations were conducted against the Claimant and he participated in the same and even signed the minutes. RW1 also gave evidence to the effect that the 3rd Respondent had a working relationship with UNHCR and the 3rd Respondent was the main implementing Partner and in charge of the refugee camp. In this relationship sexual harassment was forbidden and so was Article 9.3.1.10 of the General terms and conditions of employment of the Claimant which forbade inappropriate behaviour which is injurious to the standing of the 3rd Respondent.

24. Under the Respondent's Policy, RW1 stated that Article 9.4 related to gross misconduct and Article 9.4.2 stated that gross misconduct would automatically lead to dismissal and that the Claimant was dismissed due to gross misconduct of sexual abuse and exploitation of refugees and raping of refugees. He indicated that many victims of the exploitation came up as indicated in the notebook annexed.

25. The Respondent asked this Court to dismiss this case accordingly.

26. In cross-examination, the RW1 indicated that the cases of misconduct warranted warnings but not cases of gross misconduct. He also avers that this matter was reported to the police and the Claimant was arrested on 31.7.2002.

27. The parties herein filed their respective submissions. The Claimant submits that the Claimant never breached any statutory provisions or conditions and terms of his employment with the 3rd Respondent to justify summary dismissal.

28. They also submit that under Section 17(g) of Employment Act Cap 226 (repealed) the Claimant should have committed a criminal offence or there must have existed sufficient grounds to suspect that such criminal offence was committed to warrant summary dismissal.

29. The Claimant also submitted that some of the documents the Respondent sought to rely on were inadmissible especially various affidavits at pages 36-42 which were not tendered or explanation given. Others are the documents at page 62 to 141 of the Respondent's bundle which

relate to judgement and evidence given in the criminal case No.2034/2002. The Claimant avers that they are a nullity because the High Court declared the trial a nullity.

30. On issues of arrest, confinement and prosecution, the Claimant submits that these were actuated by acts of the Respondent. The Claimant therefore prays for the grant of prayers sought including damages, special damages, unexpired terms of contract, leave days, severance pay and damages for defamation as prayed.

31. He also seek damages for arrest, confinement and his prosecution and 13th month salary as per Article 7.9.1 and 10.2 of the Respondent's Manual. He also seek for costs and interest.

32. The Respondent on the other hand submitted that the Claimant was dismissed for proper reasons. They cited Article 9.4 of Respondent's bundle and 9.41 which deals with gross misconduct and 9.4.1.2 included any action that brings the organisation into disrepute.

33. The Respondent also submitted that under a repealed law, an employer could terminate the employment of an employee by giving the requisite notice and without assigning any reason for the termination.

34. They also cited **John Kungu Kiarie vs Kenya Commercial Bank (K) Limited 2018 (eKLR)** where the Learned Judge made a similar holding.

35. The Respondents therefore submit that dismissal of the Claimant was justified and therefore prayers sought should not be granted.

36. I have examined all the evidence and submissions of the parties herein. The issues for this Court's determination are as follows:-

1. Whether there were valid reasons to warrant summary dismissal of the Claimant.

2. Whether the Claimant was accorded a fair hearing before dismissal.

3. Whether the dismissal of the Claimant was justified in the circumstances.

4. Whether the Claimant is entitled to the prayers sought.

37. On the 1st issue, the summary dismissal letter issued to the Claimant dated 13.6.02 indicated that he was dismissed due to engaging in unnatural offences, namely having or attempting to have carnal knowledge of various persons against the order of nature and/or committing acts of gross indecency as such he had committed acts of gross misconduct under Section 17(g) of Employment Act Cap 226 Laws of Kenya.

38. Section 17(g) of Employment Act Cap 226 (now repealed) Laws of Kenya states as follows:-

"If any employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property".

39. Section 17(g) above relates to commission of a criminal offence or sufficient grounds exist that a criminal offence has been committed against or to the substantial detriment of the employer or his employer's proper.

40. In the case of the Claimant he was actually arrested and charged with a criminal offence in relation to criminal acts of a sexual nature. He was convicted by the lower Court but the High Court did set aside the conviction not on merit but because the prosecution had been conducted by a Police Prosecutor. The standard expected in criminal proceedings to prove commission of an offence is beyond reasonable doubt. In the suit before me, the standard is below reasonable doubt.

41. The Claimant submitted that the criminal proceedings are not valid or admissible before Court because the conviction was set aside. I do not agree with that submission by the Claimant.

42. Section 35 of the Evidence Act states as follows:-

1) "In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:-

a) if the maker of the statement either:-

i) had personal knowledge of the matters dealt with by the statement; or

ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

43. Further Section 36(1) of Evidence Act states as follows:-

"In estimating the weight, if any, to be attached to a statement rendered admissible by section 35 of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the

facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts”.

44. The essence of the above provisions is that evidence given in criminal proceedings is admissible evidence.
45. In Milimani Commercial & Admiralty Division CC 423/2009 Hon. J. Havelock allowed admission of proceedings and judgement given in a criminal case as evidence in the instant civil case.
46. In the current case, the Claimant was indeed charged before a criminal Court in criminal case No. 2032/2002. He was found guilty of the offence of indecent practices. The witnesses gave evidence in the trial Court and the proceedings have been produced before this Court.
47. The Claimant appealed to the High Court on the conviction and sentence on the ground that the whole trial was a nullity. The High Court (J. Fred Ochieng) indeed found the validity of the whole trial anullity as it was conducted by a Police Prosecutor as opposed to a qualified Prosecutor. The proceedings are however a correct record of what transpired and are therefore admissible.
48. The findings in the criminal case may not of themselves influence this Court’s findings but the proceedings are still key and they point to the fact that the Claimant indeed engaged in indecent acts. The Claimant himself admitted to engaging to sexual relationship with some refugee who was a female from the Congolese Community.
49. The Claimant was dismissed for engaging in a criminal offence or being suspected to have committed a criminal offence as per Section 17(g) of the Employment Act Cap 226 (now repealed).
50. The fact that the Claimant was indeed charged with the criminal offence is proof of the fact that he had been “suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer’s property” as the complainants were from the refugee community which was directly under the supervision of the 3rd Respondent.
51. In the Respondent’s own Human Resource Manual, Article 9.4.1 provided that gross misconduct included a breach of discipline of such magnitude as to warrant instant dismissal. Examples of this include:-
- “9.4.1.2 – Any action that brings the organization into dispute,*
- 9.4.1.20 – Behaviour that leads to inability to perform duties allocated and specified in the job description,”*
52. The Claimant admitted that as an employee he was not expected to have any sexual relationship with the refugees. He admitted having a love relationship with a Congolese woman and as such this was an act that could have lead him have conflict of interest when dealing with such a refugee and could therefore not perform his duties allocated to him or specified in the job description as per 9.4.1.10 above and also brought a conflict between 3rd Respondent and UNHCR as per the documents produced as per 9.4.1.2 above.
53. It is therefore my finding that there were valid reasons to warrant summary dismissal of the Claimant.
54. On the issue of due process, under the repealed Employment Act a disciplinary hearing was not mandatory as long as due notice had been given. However, the Respondent engaged the Claimant on the complaints raised against him and had many sittings on the same. The minutes of such sittings were even singed by the Claimant. It is therefore my finding that the Claimant was accorded due process before his summary dismissal.
55. On the issue of remedies sought, I have found the Claimant’s dismissal was with valid reasons and with due process. It therefore follows that the Claimant’s prayers for damages arising from what he terms as unlawful and wrongful dismissal cannot be granted.
56. Prayers for damages for malicious prosecution cannot also be granted as the prosecution was actuated by proper reasons and was in any case carried out by the police and not the Respondents herein.
57. My finding is that the entire claim is without merit and I therefore dismiss it accordingly with costs to the Respondents.

Dated and delivered in open Court this **20th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Andere for Claimant – Present

Respondent - Absent