



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 467 OF 2013

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

FRANCIS OMBORI OGISE.....CLAIMANT

VERSUS

REGAL PHARMACEUTICALS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim through the firm of Ongoto & Company seeking damages for unlawful termination of his services. He avers that he was employed by the Respondent on 5th February, 2001, working diligently and committedly until 6th November, 2012, when the Respondent unlawfully terminated his services without reason and without paying him his terminal dues. He prays for pay in lieu of notice, annual leave, house allowance, retirement/gratuity benefits, contract payment, compensation for loss of career, certificate of service and general damages for unlawful dismissal.

2. The Respondent filed a Reply Statement of Claim wherein they admit the employment relationship but deny that the claim arises out of unlawful or unfair termination. That he was engaged as a store attendant for a term of 11.5 months starting from 3rd January, 2012 to 14th December, 2012.

3. That the Claimant violated his employment contract and policies of the organization when he absconded from work/went on leave off work without permission from his superiors. That he was availed an opportunity to explain his actions but he failed to do so satisfactorily.

4. They aver that the Claimant was summarily dismissed from the employment and he is therefore not entitled to notice compensation, damages, severance pay or any other benefits outlined in the Statement of Claim. They pray for the Claim to be dismissed with costs.

Evidence

5. The Claimant in evidence stated that he was engaged on contract terms doing final packing work earning a basic salary of Kshs. 9,985 and house allowance of 20% of the basic salary. That he had just come back from leave when he was asked to explain what he had done one day prior to his leave, which he did in writing.

6. On 22.5.2012, he was transferred again to liquid parking where he started developing chest problems. That he informed Human Resource about the issue on 18th October, 2012, who advised him to see his doctor to advise that he could not work in the department he had been moved to.

7. That he went to see a doctor on 5th November, 2012, at 1pm, who advised him to pick his report on 6th November, 2012. When he returned to work he was sent to the Human Resource office where he was asked to explain his whereabouts at 1pm which he explained but he was summarily dismissed on the ground of absconding duty. That there was no hearing prior to termination and he was not paid his terminal dues.

8. The Respondent put up one witness one Joan Ndungu who led evidence that the Claimant had been engaged by the Respondent on a fixed term contract of 11.5 months from 3.1.2012 to 14.12.2012. That it was a term of employment that the employee could be transferred to any other section of the Company in the same capacity without further remuneration. Consequently, the Claimant was transferred to the liquid packing department as an attendant.

9. That it was a term of the contract that the employment and a provision of the CBA that an employee could be terminated summarily for gross misconduct, that annual leave had been approved by procuring a signed copy of the leave application form, and emergency leave for 1

day.

10. She stated that on 5th November, 2012, the Claimant was absent from duty without prior approval between hours of 1-5pm. Further, that the Claimant filled an annual leave application form submitted to his Head of Department who inquired of the reason for the leave which were not give but he informed the shop steward that he was away from the office without permission.

11. That in a meeting on 6th November, 2012, in the presence of the Claimant, the shop steward, the charge hand in the department, the Head of Department, the Administrative Executive and the Head of Human Resource, following the deliberations therein it was resolved that the Claimant's actions constituted gross misconduct and as such his employment was terminated summarily. The Claimant was thereafter issued with a summary dismissal letter dated 6th November, 2012.

Submissions

12. The Claimant in submissions submits that the legal requirements for termination of employment as set out in Section 43 of the Employment Act were not adhered to and thus the dismissal was unfair and unlawful. In addition, Section 41 and 45 of the Employment Act were not adhered to and that the Court should uphold so. They cite the case of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where it was held:-

“For a termination to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

13. The Respondent on the other hand submit that the Claimant proceeded for leave without authority contrary to Section 44 of the Employment Act and the Respondent leave policy which was ground enough for a summary dismissal. In their view, the dismissal was justified as envisaged under Section 45 of the Employment Act.

14. Further that the Respondent complied with the requirements of fair procedure as the Claimant was called for a disciplinary hearing in the presence of the shop steward, in which meeting he was given opportunity to make his representations.

15. As to the remedies sought, it is submitted that the Claimant is not entitled for compensation for pay in lieu of notice as his was a summary dismissal on account of gross misconduct which fact was proven in Court. That the Claimant had exhausted all his leave days as evidenced by the leave forms adduced in evidence and as such, the claim does not lie.

16. That the Claim for house allowance is defeated for the reason that the pay slips in evidence itemize house allowance as part of his salary.

17. They submit that the Claimant is entitled to gratuity as he had not attained the age of 55 years as specified in the CBA attached to the Claimant's documents. That contract payment is not payable as the Claimant's termination was on account of gross misconduct. That compensation for loss of career is not based on law and should not be allowed. That the claim should be dismissed with costs.

18. That the Claim for house allowance is defeated for the reason that the pay slips in evidence itemize house allowance as part of his salary.

19. They submit that the Claimant is entitled to gratuity as he had not attained the age of 55 years as specified in the CBA attached to the Claimant's documents. That contract payment is not payable as the Claimant's termination was on account of gross misconduct. That compensation for loss of career is not based on law and should not be allowed. That the claim should be dismissed with costs.

20. I have examined all the evidence and submissions of the parties. I note that Respondents contend that the Claimant was dismissed for absconding duty on the 5.11.2012. They aver that on 6.11.2012, the Claimant was taken through a disciplinary hearing and found guilty and was thus dismissed.

21. The Claimant testified that he had not absconded duty but was on short leave from 1 pm to 5 pm on 5/11/2012. He produced his leave application form, which indicated that his leave was approved by David Mosoti standing in for the supervisor.

22. The Claimant's case is that after he came back to work on 6/11/2012, he was summoned to a meeting and explained what had happened and was summary dismissed on the same day.

23. The Claimant was a member of the Kenya Chemical & Allied Workers Union - the Union. The Collective Bargaining Agreement between the Union and the Respondent was produced in Court as Appendix TIK.3. Clause 18 of the Collective Bargaining Agreement deals with summary dismissal and gives absenteeism as one of the grounds for summary dismissal. I note that the Claimant was absent on 5/11/2012 for about 5 hours but his leave was approved by a supervisor. The issue of absenteeism does not therefore arise.

24. I therefore make a finding that the reason of dismissing Claimant was not valid. In the circumstances, I find the Claimant's summary dismissal unfair and unjustified.

25. I find for the Claimant in terms of remedies and I award him as follows:-

1. 2 months salary in lieu of notice as per the Collective Bargaining Agreement = 12,144.05 x 2 = 24,289.

2. Gratuity at 20 days salary for each completed year of service as per Clause 27 of the Collective Bargaining Agreement = $20/30 \times 12,144 \times 11 = 89,060/=$.

TOTAL = 113,349/=.

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgement.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Rakoro holding brief Ongolo for Claimant – Present

Miss Kiilu for Respondent – present