



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1266 OF 2012

ISAAC OPICHO MUKHWANA.....CLAIMANT

VS

DIAKONIA SWEDEN.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Isaac Opicho Mukhwana against his former employer, Diakonia Sweden. The claim is documented by a Memorandum of Claim dated 23rd July 2012 and filed in court on 25th July 2012. The Respondent filed a Memorandum of Response and Counterclaim on 16th October 2012, to which the Claimant responded on 14th May 2014.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Country Manager, Stephen Ndichu Kinyanjui and Finance and Administration Manager, Patrick Mahonga Mtange.

The Claimant's Case

3. The Claimant was employed by the Respondent on 11th April 2011, in the position of Finance and Administration Officer under a project known as 'Developing Vocational Training for the Informal Economy in Somalia'. He was stationed in Garowe-Somalia.

4. The Claimant's employment contract was scheduled to run until 30th November 2012. He earned a monthly salary was USD 2,150.

5. On 2nd July 2012, the Claimant was summarily dismissed. He states that his dismissal was unlawful and unfair. He therefore claims the following:

- a) 3 months' salary in lieu of notice @ USD 2,150.....Kshs. 541,800
- b) 14 days per diem @ Kshs. 8,200 per day.....114,800
- c) Pension period 13 months.....195,572
- d) Unused 10 days R & R @ Kshs. 8,210 per day.....82,100
- e) Unused annual leave 17 days @ Kshs. 8,210 per day.....139,570
- f) Unpaid period of service for unexpired term.....978,220
- g) Severance pay for 13 months.....195,572

The Respondent's Case

6. In its Memorandum of Response and Counterclaim dated 4th October 2012 and filed in court on 16th October 2012, the Respondent admits having employed the Claimant. The Respondent adds that it was justified in summarily dismissing the Claimant after he misappropriated funds.

7. The Respondent states that the Claimant's fraudulent activities were not only in flagrant and fundamental breach of his employment

contract, but also constituted gross misconduct within the meaning of Section 44 (g) of the Employment Act, 2007, that justified his summary dismissal.

8. The Respondent avers that upon summary dismissal, an employee not only loses his right to notice but also any claim to terminal dues.

9. The Respondent further states that the Claimant's dismissal was lawful in the circumstances as the Claimant had fundamentally breached the employment contract by misappropriating funds amounting to USD 19,261.16.

10. The Respondent maintains that since the Claimant was summarily dismissed, he was not entitled to any benefits or dues and thus withholding the same cannot be construed as illegal.

11. By way of Counterclaim, the Respondent claims from the Claimant the sum of USD 19,261.16 (approx. Kshs. 1,637,198.60) being monies fraudulently appropriated by the Claimant.

Findings and Determination

12. There are three (3) issues for determination in this case:

- a) Whether the claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Dismissal

13. The Claimant was summarily dismissed by letter dated 2nd July 2012 stating as follows:

"Dear Isaac,

RE: SUMMARY DISMISSAL

It has come to our notice that funds amounting to USD\$ 19,261.16 is unaccounted for in our accounts and it has been established that you withdrew this amount from the bank and did not transfer these funds to the partners as expected; and further that you have transferred an amount of US\$ 13,590 to Nairobi on 16th and 19th July 2012.

Reference is made to Diakonia Handbook Chapter 9 Clause 3. Your action is deemed fraudulent and embezzlement of organisations funds and warrants instant dismissal from the organisation, with immediate effect. In addition, Diakonia demands that you refund the said USD\$ 19,261.16 immediately failing which necessary action will be preferred to recover the money.

*You are required to hereby surrender all organisation assets in your possession to your supervisor by **12.00 noon on 4th July 2012** failure to which action will be taken for holding organization assets illegally.*

Yours Sincerely,

(Signed)

LUZ BAASTRUP

ACTING REGIONALMANAGER"

14. This letter accuses the Claimant of embezzling the Respondent's funds to the tune of USD 19,261.16.

15. From the evidence on record, the loss of funds was first reported by way of email dated 2nd July 2012 from the Project Officer, Mohamed Dida to the Country Representative, Saida Hersi. In her response, Hersi asked Dida to prepare an incident report. Hersi copied her email to the Country Manager, Stephen Ndichu Kinyanjui among others.

16. Kinyanjui told the Court that that upon receipt of Hersi's email, he held a meeting with the Finance and Administration Manager, the Project Manager and the Deputy Regional Manager for Africa. The Country Office in Puntland was asked to ascertain the loss and on the same day, the Claimant was called to the Nairobi office to discuss matters relating to financial reporting as well as his Rest and Recuperation (R & R) arrangements. To this effect, an email was sent to the Claimant by his supervisor on the same day.

17. The Claimant responded to his supervisor's email the following day at 11.32 am indicating that he would go to the Nairobi Office in the afternoon of the same day. However at 2.12 pm, the Claimant sent another email indicating that there had been bad publicity against him and he would therefore not to go the office as earlier scheduled. Attached to this email was a resignation letter.

18. On 3rd July 2012, the Claimant wrote the following email to the Program Manager, Hassan Harun and the Country Manager, Stephen Ndichu Kinyanjui:

“In view of the bad publicity already generated without having heard me, i wish to tender my resignation from Diakonia employment. Kindly find attached my resignation letter. I’ll be surrendering the company laptop as soon as we have our formal meeting. I’d also wish to request that we schedule our meeting outside the office in view of the foregoing.

Kindly let me have your response.

Sincerely,

Isaac”

19. Kinyanjui testified that upon receiving the Claimant’s resignation letter, the Respondent’s management team met at 3.00 pm on 3rd July 2012 to discuss the resignation. A decision was made that the Claimant be summarily dismissed. The Claimant’s resignation was thus not accepted.

20. By an email dated 5th July 2012 at 11.51 pm, the Acting Regional Manager, Luz Baastrup responded to the Claimant’s email of 3rd July 2012 as follows:

“Dear Isaac,

Thank you for your mail. This is a Diakonia meeting and thus it will be held in the Diakonia office. Please understand that it is in your interest to come to the meeting. There is still time to stabilise the situation.

I trust that you will be professional, which we expect from all present and former Diakonia colleagues.

All the best,

Luz”

21. By a follow up email on the same day at 3.05 pm, Luz Baastrup asked the Claimant to go to the office the following day at 9 am to hand over and give his version of the incident at hand.

22. The Claimant wrote back on 5th July 2012 at 16.22 as follows:

“Dear Luz,

Thanks for your response. As i had indicated earlier, given the negative publicity already generated and the fact that you have send (sic) me your termination letter, I’d be very uncomfortable visiting DS offices. So another venue may be appropriate,

Isaac.”

23. By a further email dated 7th July 2012 to Luz Baastrup, the Claimant renewed his request for a meeting outside the Respondent’s office.

24. From this trail of emails, it is evident that the Claimant’s request for a meeting outside the Respondent’s office was not granted. There was therefore no formal meeting between the Claimant and the Respondent’s officers at which the issue of missing funds was discussed.

25. It is also important to note that many of these emails were written after the decision to dismiss the Claimant had been made. Indeed, it would appear that once the Respondent received the Claimant’s resignation letter, an instant decision was made to dismiss him.

26. The question then is whether the Respondent has established a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act, 2007. It is now well settled that the burden placed on an employer under Section 43 is to establish a reason that would cause a reasonable employer to terminate employment (see **International Planned Parenthood Federation v Pamela Ebot ArreyEffiom [2016] eKLR** and **Rashid Jeneby v Prime Bank Limited [2015] eKLR**)

27. In my view, an employer does not discharge the evidential burden under Section 43 of the Employment Act unless they show that clear charges leading to termination were placed before the employee for response.

28. Despite the flurry of emails exchanged between the Claimant and the Respondent in this case, no specific charges were ever served on the Claimant and no disciplinary meeting was held. The Claimant made several requests for a meeting outside the Respondent’s office and the Court found the Respondent’s refusal to grant the Claimant’s request unreasonable.

29. A report by the police in Puntland, Garowe dated 7th July 2012 exonerated senior officers of Diakonia, Amaal Bank and Dahabshil from culpability and heaped blame on the Claimant. The Court was however unable to discern the basis of the conclusions by the Puntland police.

30. The description in the incident report prepared by the Respondent's officers is as follows:

“On 9th June 2012, Isaac Mukhwana Opicho, the DVTIES Finance Officer, while the accountant of the project was on leave has prepared payments vouchers and four cheques totaling to USD 14,327.7. these payments were written on (sic) the names of host trainers in Galka'yo namely (Alfa Stationary, Galka'yo VTC, Hubaal tailoring, Gamudug VTC and Horyaal Computers). The cheques were supposed to send to (sic) to the host trainers via Amal Brokerage Bank in Garowe but instead of sending he withdrew the total amount on the four cheques on the 10th of June, 2012. He equally wrote another cheque of USD 4,933.45 on the 20th June, 2012 a day before he travelled to Nairobi in the name of another partner and withdrew the amount on the same day. This brings the total amount withdrawn to USD 19,261.15. We came to know this incident when the partners submitted their request to diakonia Garowe for the month of June, 2012.”

31. Under 'Attachments' the incident report cites vouchers used by the Claimant to send the money to Nairobi but no such vouchers were produced before the Court.

32. In the course of the trial significant differences in cheque numbers and values as cited in the police report and the incident report emerged. No explanation was given for these discrepancies and at the end of it the Court could not tell the exact amounts the Claimant was accused of having embezzled. The Court could also not understand why the Respondent failed to file reports from the beneficiaries of the cheques and the paying brokerage firm.

33. At best this was a poorly conducted investigation and the Respondent had no reason to hold the Claimant responsible for any loss. Even worse, the Claimant was condemned unheard.

34. The Court therefore finds and holds that the Claimant's dismissal was substantively and procedurally unfair and he is entitled to compensation.

Remedies

35. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in effecting the Claimant's dismissal.

36. I further award the Claimant three (3) months' salary in lieu of notice as per his contract of employment. In the absence of leaver records to the contrary, the claim for leave pay succeeds and is allowed.

37. No basis was laid for the claims for pension, severance pay and salary for the unexpired contract term which therefore fail and are dismissed.

38. The claims for per diem and unused rest and recuperation days were not proved and are dismissed.

The Respondent's Counterclaim

39. In its Counterclaim, the Respondent claims from the Claimant the sum of USD 19,261.16 (approx. Kshs. 1,637,198.60) being the amount said to have been embezzled by the Claimant.

40. In light of the finding that the Respondent failed to prove any such charge against the Claimant, the Counterclaim must fail.

Final Orders

41. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....USD 12,900
- b) 3 months' salary in lieu of notice.....USD 6,450
- c) Leave pay for 17 days (USD 2,150/30X17).....USD 1,218
- Total.....USD 20,558**

42. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

43. The Claimant will have the costs of the case.

44. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 17th DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Masila for the Claimant

Mr. Tebino for the Respondent