



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 52 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ZACHEUS OKOTH OKETCH.....CLAIMANT

VERSUS

SUSTAINABLE AID IN AFRICA INTERNATIONAL.....RESPONDENT

JUDGMENT

The Claimant Zacheus Okoth Oketch filed suit on 11th February 2015, against the Respondent *vide* a Memorandum of Claim seeking orders of damages for wrongful dismissal, withheld salary for the month of December, 2014, payment for the remainder of the contract, certificate of service and costs of the suit.

He avers that he was employed by the Respondent on 20th March, 2014, as a programme manager earning a gross salary of Kshs.180,000/= where he served with loyalty and diligence until 9th January 2015 when the Respondent terminated his services on the allegations of gross misconduct.

That the Respondent conducted an appraisal in respect of the Claimant for the period between May to September 2014 and compiled a report. Thereafter that the Respondent deducted Kshs.28,000/= from his December 2014 salary without justifiable cause on the premise that the Claimant did not raise the payment schedule for artisans.

The claimant contends that the Respondent unilaterally purported to revise and or review his term of contract from three years to one month in the guise that the institution was restructuring despite the fact that there was no provision in the employment contract that allowed for the revision of the employment contract and subsequently coerced the Claimant into signing the review of his contract.

That the Respondent's staff had a meeting on 22nd December, 2014, and it was agreed that the claimant would prepare a recommendation to the board regarding the improvement of performance on the technical mandate and the CEO will make a presentation to the Board on 24th December, 2014, that the Claimant duly prepared the recommendation and forwarded to the CEO who later claimed that it was the Claimant to make the presentation.

That the institution closed for December holidays on 22nd December 2014 and reopened on 6th January 2014, whereupon the Claimant was issued with a notice to show cause dated 24th December, requiring him to respond by 7th January 2015, which he did by email addressed to his immediate boss on the same date.

He avers that on 9th January 2015, he was served with a termination letter on unsubstantiated grounds of failing to show cause as required by the notice dated 24th December 2014, and for raising a fraudulent certificate, an issue which had never been subjected to investigations and/or hearing.

He contends that the Respondent's action of terminating his services and failure to pay his lawfully earned dues was actuated by malice and utmost bad faith owing to the fact that the Respondent failed to give plausible reasons for the termination. He prays for the claim to be allowed.

The Respondent filed a statement in response to the statement of claim admitting the employment relationship but denies that the claimant served the Respondent with loyalty and diligence as alleged in the statement of claim. The respondent alleges that owing to the unsatisfactory work on the part of the Claimant including his inability to submit output based work plan, the Board of the respondent extended his probation period for a further period of 6 months.

The respondent contends that the Claimant's services were terminated for gross misconduct and that the Kshs.28,000/= deducted from the Claimant's pay was justifiably done when the Claimant failed to account for the same on time in contravention of the respondent's policy and express instructions.

The Respondent also denies having unilaterally revised the Claimant's contract from 3 years to one month in the guise that the institution was restructuring and further denies having coerced the Claimant into signing the revised contract and states that the same was done by both parties voluntarily after account had been taken of all factors including the Claimant's performance.

The respondent also contends that at various meetings with staff and management, it was agreed that the convenors of various sub committees were to produce summary reports on agreed action for presentation to the board subcommittee on 24th December 2014 and the team leader specifically told the Claimant that he would make the presentation on behalf of the Technical and Quality Assurance Team of which the claimant was convenor. That the Claimant failed not only to prepare and submit summaries, but also to attend the meeting to present the same.

The Respondent further states that the claimant in utter dereliction of duty and betrayal of trust vested in him in the senior position of Programme Manager the Claimant falsely certified works to have been done which had not been done thereby jeopardising the projects and endangering the donor funding upon which the organisation depends by issuing false certificates for works done and pressing for payment to contractors known as Highway Emporium and Lucamo Enterprises when the said works had not been done.

The Respondent denies closing its offices for the December 2014 holidays and further denies ever receiving any response to the notice to show cause by email communication as alleged by the claimant. It also denies being indebted to the Claimant to the tune of Kshs.7,228,000 and states that the termination was lawful as all procedure was duly followed consequent upon the Claimant's misconduct. The respondent prays for the Claim to be dismissed with costs.

In his testimony the claimant reiterated the averments in the claim.

Claimant's Submissions

It is submitted that the respondents' code of conduct for employees gives an impression that the respondent did not afford the claimant a fair hearing. Further that the claimant was never informed by the respondent that he was entitled to be accompanied by a fellow employee if he was to be granted hearing. Thus the procedural requirement for termination was not followed as was held in the case of **Esther Wambui Karongo vs. Palbina Tours and Travel Limited (2014) eKLR**, where the court held that procedural requirements must be followed when carrying out a dismissal.

Counsel refers to Section 43 and 45 of the Employment Act 2007 which require the Employer to demonstrate valid reason or reasons in justifying termination. He makes reference to the letter of termination which stated that the claimant had failed to respond to the show cause notice dated 24th December (insubordination) and raising fraudulent certificates, an issue which had never been subjected to investigations and or hearing. That insubordination was defined by of Mississippi Supreme Court in the case of **Sims v. the Board of Trustees Holly Springs Municipal Separate District School, 414 SO. 2d 431 [Miss. 1982]**, as " *a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.*"

That under the Employment Act 2007, both forms of insubordination are captured under Section 44 [4] [d] and [e]. The first form described in **Sims** is defined in Section 44[4] [e] to arise where "**an Employee knowingly fails, or refuses to obey lawful and proper command which it was within the scope of his duty to obey, issued by his Employer or a person placed in authority over him by the Employer.**" Verbal insubordination is described in our law under Section 44[4][d] to occur where an Employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer.

It is submitted that the allegation of insubordination was not proved before dismissal since the report the claimant is alleged to have failed to submit was sent to the CEO's email in good time.

As to whether the claimant is entitled to damages for wrongful dismissal, reference is made to **Industrial Court Cause Number 953 of 2011 between Patrick Njuguna Kamuki v. Del Monte Kenya Limited**. The Court in that case granted the employee Kshs.5,000,000 in exemplary damages as general damages in addition to statutory compensation and anticipatory salaries in light of the injury the Claimant had suffered and to purge the malicious and outrageous conduct.

As to whether the claimant was entitled to withheld salary for the month of December 2014, counsel referred to the High Court of Kenya in **Civil Case Number 3472 of 1994 between Geoffrey Muguna Mburugu v The Attorney General**, where the court upheld the duty of an employer to act fairly. In the same case, the court also ordered the claimant to be paid arrears of his salary, having concluded that he was unfairly dismissed.

As regards the issue whether the complainant is entitled to pay for the remainder of the contract, the claimant relied on the case of **Principal and B.O.G Machakos Teachers College v Wainbua Muange** in which the court stated as follows;

"It is settled law that the basic principle in assessing damages is that the employee must be put in the same position as if the employer had properly performed the contract.

Therefore, where an employee is dismissed summarily in breach of contract, the prima facie measure of damages is the sum which the employer would have had to pay in order to bring the contract to an end lawfully - that is to say, the sum payable in respect of the notice period or remainder of the term of the contract if it is a fixed term contract."

Respondent's Evidence

RW1 Alfred Okeyo the Chief Executive Officer of the Respondent testified on its behalf. He admitted that the Claimant was employed as a programme manager. That the Claimant was responsible to ensure the technical goals of the Respondent were delivered.

RW1 admitted deducting Kshs.28,000 from the Claimant's December 2014 pay being recovery of an advance the claimant had been given to pay some artisans but had not at the time of closing accounted for.

He further led evidence to the effect that the Claimant's services were terminated due to gross misconduct for failure to adhere to instructions from his superior. That the Respondent found it necessary to restructure operations and as a result called for consultations with its staff. That three teams were formed to come up with a restructuring proposal and the Claimant was heading one of the teams. The presentations were to be made on 24th December 2015 when only two teams made their presentations but the Claimant did not appear to make a presentation on behalf of his team. He testified that the Claimant was not diligent in performing his duties and cited instances where the claimant recommended payment for work not concluded.

That the Claimant was given an opportunity to show cause why he should not be dismissed for the aforementioned offences which he was to respond to by 7th January 2015, but he failed to do so. The decision to terminate him was then made and he was paid his December salary less unsurrendered imprest. He prayed that the suit be disallowed.

In cross examination RW1 when asked to specify any instance where the Claimant approved payment of work that had not been completed, he referred to Appendix 9 in the Statement of Response being certificates for work that was incomplete. He testified that he went to the ground and confirmed that the work certified had not been done and referred to Appendix 10 which is an undated report of the status on the ground.

RW1 denied ever receiving any letter dated 7th January 2015, but admitted to receiving a demand letter from the Claimant's advocates. That the Claimant was given an opportunity to respond to the accusations against him by letter but failed to do so. He admitted that the claimant was not invited to any disciplinary hearing.

Respondent's submissions

On the issue of whether the termination of the claimant's contract was justified it is submitted that under clause 8 of the claimant's employment contract, an employee may be dismissed summarily for gross misconduct, which encompasses acts of: insubordination, dereliction of duty, theft, fraudulent or dishonourable conduct and wilful disobedience of lawful orders or instructions given by any Respondent's officers placed in authority over the employee in question.

Further that Section 44(4)(e) of the Employment Act, whose applicability it is submitted is of significance to this particular matter arises where "***an employee knowingly fails, or refuses to obey lawful and proper command which it was within the scope of his duty to obey, issued by his Employer or a person placed in authority over him by the employer.***"

That insubordination and/or dereliction of duty is a valid ground for summary dismissal. It is submitted that the concept of insubordination was extensively discussed by the Industrial Court in *Dede Esi Annie Amanor-Wilks —v- Action Aid International (2014) eKLR* while citing with approval at paragraph 119 of the judgment, the *Mississippi Supreme Court in Simms -v- the Board of Trustees Holly Springs Municipal District School, 414 SO, 2d 431 (Miss. 1982)*, where it was described as "...intentional refusal to obey direct or implied order, reasonable in nature, and by or with proper authority".

Counsel for the Respondent submitted that the Respondent's testimony was uncontroverted that the Claimant's contract of service was fairly terminated on grounds of gross misconduct emanating from insubordination and/or dereliction of duty and falsely certifying works to have been done which factually had not been completed, thereby jeopardizing the projects and endangering the donor funding upon which the organization depends. That the beneficiaries of the said false certified works were Highway Emporium and Lucamo Enterprises.

It is submitted that the Claimant was issued with the notice to show cause vide letter dated 24th December 2014 by the Respondent as required under the employment contract and the provisions of the Employment Act, 2007 but the Claimant deliberately failed and/or ignored to respond to the same. That it is upon failure to heed the demands of the said notice that the termination of the Claimant ensued. Counsel urges the Court to dismiss the Claim with costs.

Determination

The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the orders sought.

It is the claimant's submissions that the termination of his employment was unfair as he was never given a fair hearing, that his right to be informed of his entitlement to be accompanied by a fellow employee to the hearing was also breached.

The evidence of the respondent is that the claimant did not respond to the show cause letter on 7th January 2015 as he had promised. The claimant produced a letter dated 7th January 2015 at Appendix 5 of the claimant's bundle of documents but did not explain how and when it was served upon the respondent even though this was denied in paragraph 10 of the statement of response.

Section 43(2) of the Employment Act provides that –

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Among documents produced by the respondent are minutes of meetings attended by the claimant in which it was agreed that there would be a meeting of the SANA Board Task Force before staff break for festive period at which the team leaders, among them the claimant would make presentations.

At the SANA staff meeting held on 12th December 2014 at which the claimant was present, the following were the discussions –

“The areas of concern were discussed and Key Result Areas (KRAs) identified. As a way forward, three teams were formed to deliberate on the concerns/KRAs with leadership as follows:

Team 1: SANA Financial Sustainability - headed by Fred Owuor

Team 2: SANA Technical and Quality Assurance Team - headed by Zacheus Okoth

Team 3: SANA Human Resource - headed by James Mutuku

The staff recommendations as derived from the team consultations would be prepared by the respective teams and presented the same to SANA Board Task Force that would subsequently submit the same to the Full SANA Board for consideration and approval. The above meetings would take place before staff break for festive period.

The exact dates for the meetings would be communicated to staff by management.”

Again at the meeting held on 16th December 2014 attended by 16 persons among them the claimant, the following was agreed upon under the title ‘Action’

“The convenors for the three key result area (HR, Financial Sustainability and Technical) to produce summary reports on agreed action for presentations to Board Subcommittee on 24th December 2014. The latter will then adapt the report for presentation to the Full Board meeting on 30th December 2014.

In preparing the summaries, the respective convenors (JM - HR, Fred Owuor – Financial Sustainability, and Zacheus – Technical) should incorporate a brief narrative to contextualize the recommendations focusing on;

- Key concerns*
- Different options considered*

The Team Leader informed staff of another staff meeting to be before Christmas Break.”

From the foregoing, I find that the claimant was aware about a meeting to be held before the break, that he was to make a presentation to the meeting and that he did not attend the meeting held on 24th December 2014 or prepare the presentation, even though he acknowledged attending the meeting held on 22nd December 2014 at which the date was fixed for the meeting held on 24th December 2014.

I find there was justification in taking disciplinary action against the claimant under Section 43 of the Employment Act taking into account the circumstances thereof. The claimant was a new employee who had served for only about 7 months, had his probation extended following delay in submission of his output based work plan and finally, his failure to prepare and present a report to the board meeting on 24th December 2014.

I however find that the claimant was not given a hearing as envisaged under Section 41 of the Employment Act making the termination procedurally unfair.

The claimant prayed for damages for wrongful dismissal. Taking into account the fact that the claimant had only worked for about 8 months at the time of termination of his employment and the fact that he was the author of the termination of his employment, I do not find it reasonable to award the claimant any compensation. I have further taken into account the provisions of Section 45(3) which provides that –

An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

The claimant further prayed for salary withheld in the month of December 2014 in the sum of Kshs.28,000. The claimant admitted taking an imprest for the said amount and did not deny that he did not account for the money he took for payment of artisans. He further did not deny receiving a memo to staff dated 2nd December 2014 addressed to all staff from the Finance Manager. Paragraph (g) of the circular reads –

(g) Any imprest not accounted for will be recovered from any available staff dues including salary and gratuity without prior consultation.”

Having not accounted for the imprest, the claimant cannot complain about the recovery.

The claimant further prayed for pay for the remainder of the contract. As admitted by the claimant during cross-examination, he was aware that all programme staff contracts would end on 31st January 2015.

I therefore award the claimant salary to the end of January 2015.

Each party will bear its costs.

DATED AND SIGNED AT NAIROBI ON THIS 12TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 6TH DAY OF DECEMBER 2018

MATHEWS NDERI NDUMA

JUDGE