



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1575 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 5th December, 2018)

JOHN GICHURU NGUNJU.....CLAIMANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION LIMITED

T/A THE NAIROBI HOSPITAL.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed the Memorandum of Claim on 10/9/2014 through the firm of Nyaencha, Waichari & Company Advocates alleging unfair and unlawful termination of his employment by the Respondent and failure by the Respondent to follow due process in terminating his services.
2. The Claimant's case is that he was employed by the Respondent as a Chief Accountant vide a letter dated 16th July 2012. He avers that he served the Respondents diligently and with dedication till he was summarily dismissed vide a letter dated 14th August 2014.
3. The Claimant avers that before his dismissal the Respondent's Human Resource Manager had been acting maliciously against him by opposing a temporary staff he had recruited in the finance department to clear backlog. That she also had expressed verbally her hate for Consultants, the Claimant included.
4. He avers that the Human Resource Manager had also threatened him "for rubbing her the wrong way" when he refused to take up accommodation at Silver Springs Hotel. She had also referred to staff in Accounts Department as Mwakenya Group during the job evaluation workshops. He enumerated various instances in which the Human Resource Manager had been hostile to him.
5. He avers that on 2.8.2014 at about 10.25 hours the Finance Director summoned him and informed him that he was required to resign from work before close of business that day and threatened to have him sacked if he desisted. This day was a Saturday and business was ending at 1300 hours. The Claimant therefore had about 2 ½ hours to resign. The Claimant avers this had come as a shock and he requested to be given at least the weekend to think about it.
6. However, at 1 pm when he was leaving the office, he was handed a suspension letter by his boss. No reasons were given for the suspension.
7. On 12.8.2014, the Human Resource Officer called Paul Mucheru called the Claimant and told him that he had been instructed by the Human Resource Manager to call him to give him a final chance to resign from employment or be summarily dismissed. The Claimant told Paul that he would only resign if there were sufficient reasons for him to do so.
8. On 13.8.2014, the Claimant sought advice from his lawyer to explain what had transpired the previous day and request him to write to the hospital and seek clarification on the suspension. On 14.8.2014, the Claimant's lawyer wrote to the Respondent on this issue.
9. On 15/8/2014, the Respondent sent a messenger to his house at Imara Daima to drop a termination letter dated 14.8.2014 alleging failure to attend a meeting with the Finance Director.
10. The Claimant avers that he was unfairly and unjustly summarily dismissed for no reason and without being afforded an opportunity to defend himself against, if any, allegations against him.

11. He therefore seeks prayers as per his claim being compensation for unfair termination, 3 months' salary in lieu of notice, 14 days salary earned in August 2014 outstanding leave days for 10 days as at August 2014, general and exemplary damages, medical claim, letter of service, costs and interest.
12. The Claimant also presented oral evidence before Court. He indicated that prior to his suspension from duty, he was never served with any Memo of 2.5.2014 as alleged. The suspension letter and the said Memo are even dated the same day.
13. He also denied receiving a show cause letter at page 10 of the Respondent's documents written by John Gachoki – the Finance Director. In the said letter, it was alleged he led to loose of 92 million Kshs between 1.1.2013 and 30.4.2014. He denies receiving this notice.
14. In cross-examination, he stated that the memo of 19.5.2014 at page 8 of Respondent's documents was responded to. He denied receiving the memo at page 10 as he was already suspended. He avers he did not respond to the email on page 11 because he received the dismissal on 15/8/2014 at 9 am. He denies receiving any notification for any hearing. He avers in the dismissal letter he was asked to pick a cheque of 186,000/= in September 2014 and he declined to pick it as he wanted to exonerate himself.
15. The Respondent on their part filed their Memorandum of Reply on 4/11/2014 through the firm of Wamae and Allen Advocates. They aver that the Memorandum of Claim offends Rule 14(1) of the Industrial Court (Procedure) Rules 2010, which states that Pleadings shall be divided into paragraphs numbered consequently, which is unlike the Memorandum of Claim herein.
16. They admit employing the Claimant herein on 16.7.2012 as a Chief Accountant. They however aver that in the course of his duties, the Claimant never performed his duties with diligence and dedication and reported to work late, failed to notify the Finance Director on fraudulent transactions, failed to disclose information privy to him of the fraudulent transactions failed to explain how Comfort Kinuu got access to Ruth Ngunjiri's documents. That he also engaged in fraudulent activities resulting in the loss of over Kshs.92,000,000/= between 1st January 2013 and 30th April 2014.
17. They aver that he also recruited a casual staff for a second time without following due procedure and also failed to attend a disciplinary meeting on 14th August 2014 when he had indicated that he would attend.
18. In view of these, the Respondents aver that the Claimant was properly dismissed on 14.8.2014.
19. The Respondents aver that they had served him with a show cause letter on 19.5.2014 and finally suspended him on 2.8.2014. They aver that on 13.8.2014 they asked him to show cause why disciplinary action should not be taken against him over the loss of 92,000/=. He did not attend the disciplinary meeting held on 14th August 2014 and that is why he was summary dismissed.
20. The Respondent's position is that the dismissal was lawful.
21. The Respondent also filed a counter claim but it is apparent that no filing fees was ever paid and so the counter claim remains unfiled though it is on the Court file.
22. The Respondent called 1 witness their Human Resource Business Partner. She stated that the Claimant was terminated for failing to attend a meeting with Finance Director, which amounts to insubordination.
23. In cross-examination, the witness stated that the meeting was to discuss the show cause letter of 13/4/2014. He was called for this meeting on 14.8.2014. The meeting was to be at 2 pm. She stated that the invite was via a telephone conversation between one Paul Mucheru and the Claimant.
24. On the show cause letter of 13/8/2014, she stated that it was taken to his house but he did not sign for it. She admitted they have a delivery book and at the time, the Claimant was on suspension.
25. The Parties filed their respective submissions herein.
26. The Claimant submitted that he was summarily dismissed without being accorded a hearing whatsoever. He stated that the central document to his dismissal is the Respondent's memo dated 13th August 2014 which the Respondent allege was served upon him but which the Claimant has in his evidence in Court orally and documentary insisted that he was never served with or shown or made aware of at the Notice requiring him to attend a disciplinary hearing.
27. He further stated that the Respondent's relevant workmates knew his place of residency; his email address and if necessary would serve him with urgent notices or mails but they served him with the summary dismissal letter but not the notice to show cause.
28. The Claimant submitted that the Respondent's witness evidence was that the Claimant was aware of the notice to show cause foretasted and failed to attend the meeting and hence was dismissed summarily for insubordination. The Claimant submitted that the evidence by the Respondent is uncorroborated. They aver that the moment the Claimant states that he was not served with the notice the burden of proof shifted to the Respondent to provide evidence of service of the notice upon the Claimant.
29. The Claimant further submitted that the Respondent did not prove the reason for his dismissal. They cited Section 43 of the E.A which states as follows;-

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of [section 45](#).

(2) 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.

30. They aver that the reason provided for summary dismissal from the letter dated 14th August 2014 was that:-

“Reference is made to your failure to attend the meeting with the finance Director on 14th August 2014 despite having confirmed that you could do so. Your actions contravene the Employment Act 2007 and you are hereby summarily dismissed with immediate effect.”

31. The Claimants submit that these reasons were against the Kenyan Constitution Article 41 and 47 which provides as follows:-

41. Labour relations

(1) Every person has the right to fair labour practice

47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

32. The Claimant cited **Republic V Chief Justice of Kenya and 6 Others ex parte ole Keiuwa (2010) 1 KLR 428**, where the Court was of the view held in general **Medical Council –Vs Sparckman (1943) 2 ALL ER 337** that:-

“If indeed the principles of natural justice are violated in respect of any decision, it’s indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential of justice. The decision must be declared to be no decision”.

33. They submitted that where procedure is flawed the Court should find that termination was unfair as it was held in **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR**. *These were violations of the procedural guarantees given to Employees in cases of termination of employment, under Section 41 and 45 of the Employment Act 2007... Procedure was flawed, and termination on this second count, unfair.*

34. The Claimant asked this Court to grant prayers sought in his claim.

35. The Respondents on their part submitted that they had valid reasons to dismiss the Claimant in that he failed to attend the scheduled meeting with the Finance Director. The Respondent avers that it sent a Memo on 13th August 2014 to the Claimant to show cause why disciplinary action should not be taken against him. The said Memo was hand delivered to his address but the Claimant did not sign the delivery book, just as he did not sign the delivery book for the dismissal letter.

36. They aver that further to the foregoing, the Respondent also followed up with a telephone call to confirm that the Claimant will be available for the meeting with the Finance Director. That when called on 12th August 2014, the Claimant advised that he would not be available for the meeting with the Finance Director and the same was rescheduled for 14th August 2014 at 2.00 pm. The Claimant called the Respondent on 14th August 2014 stating that he will not attend the meeting without offering any reason for the same.

37. The Respondent aver that the email aforesaid dated 14th August 2014 from the Respondent’s Finance Director to the Claimant did not elicit any rebuttal from the Claimant contradicting the averments therein and therefore the contents of the email are deemed to be true.

38. The Respondent further aver that the Claimant admitted during his cross-examination, that he failed to attend the said meeting as he had sought legal advice from his Advocates. They therefore submit that, it is evident that they gave the Claimant adequate notice of a hearing as is required. The Claimant cannot therefore claim not to have been accorded a fair hearing by the Respondent when he failed to show up for the hearing as invited.

39. The Respondent aver that the Claimant flouted the provisions of Employment Act at Section 44(4) (e) which provides as follows:-

“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.....

(e) an employee knowingly fails, or refuses, to obey a 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 his employer.”

40. The Respondent therefore submit that they were justified in dismissing the Claimant and ask this Court to dismiss this case accordingly.

41. I have examined all the averments and submissions of both parties. The issues for determination are as follows:-

1. Whether the dismissal of the Claimant was unfair and unjustified?

2. Whether the Claimant was entitled to the prayers sought?

42. On issue no 1 above The Claimants dismissal letter show that he was dismissed for failing to attend a meeting with the Finance Director. The document the Respondent rely on to support their contention is their memo dated 13th August 2014 which the Respondent allege was served upon the Claimant. The Claimant has in his evidence in Court orally and documentary insisted that he was never served or shown or made aware of at the Notice requiring him to attend a disciplinary hearing.

43. The Respondent insisted that their Finance Director had also called the Claimant on phone to schedule this meeting but he refused to attend at the last moment. The interesting bit is that the Finance Department Director's Personal Assistant allegedly spoke to the Claimant and the Claimant allegedly confirmed his attendance of the disciplinary meeting set for 14th August 2014. This evidence is coming from a 3rd party, not the assistant himself. The more accurate and believable mode of evidence is by the said Assistant coming to Court and stating so either through oral evidence or sworn affidavit.

44. It is further stated that the Respondent's relevant workmates knew his place of residency; his email address and if necessary would serve him with urgent notices or mails. He was served with the summary dismissal letter but not the notice to show cause.

45. The Respondent's witness evidence was that the Claimant was aware of the notice to show cause aforesaid and failed to attend the meeting and hence was dismissed summarily for insubordination. The Finance Director who talked to the Claimant never testified. No call data was also availed to prove the alleged conversation.

46. There must be a delivery book that hand delivered mails are recorded therein. This was not produced as evidence or indeed part evidence of delivery.

47. The only inference this Court can make is that there was no such call and there was service of the show cause letter.

48. Section 45 (2) of the Employment Act states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

49. There is apparently no valid reason to warrant the dismissal and there is also no proof that the Claimant was accorded a fair hearing before his dismissal as envisaged under Section 41 of the Employment Act. It is therefore my finding that the Claimant's dismissal was unfair and unjustified and I declare it so.

50. On the second issue, the Claimant in his Memorandum of Claim dated 9th September 2013 sought judgment against the Respondent for:-

(i) Kshs. 5,070,848.40 being damages for unfair termination

(ii) Kshs. 1, 267,712. 10 being three months' salary in lieu of notice for all the years worked.

(iii) Kshs. 190,838.40 being 14 days salary in the month of August 2014

(iv) Outstanding leave days being Kshs. 162,527.20

(v) General and exemplary damages

(vi) Medical costs at Kshs. 500,000.00 for 12 months claimed

(vii) Letter of service

(viii) Costs and

(ix) Interest on (ii) and (iii) at the Court rate until payment in full.

51. It is my finding that the Claimant is entitled to notice pay which was 3 months salary as per his letter of appointment=3 x 422,570=1,267,712.

52. I also award the Claimant Kshs. 190,838.40 being 14 days salary for the month of August 2014 and outstanding 10 leave days being Kshs. 162,527.20.

53. The Claimant is also awarded 8 months' salary as compensation for the unlawful and unfair termination=8 x 422,570=3,380,560

TOTAL AWARDED= Kshs.5,001,637.6

54. The Claimant is also entitled to issuance of a certificate of service.

55. 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 5th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance