



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 248 OF 2016

(Formerly Kisii HCC No. 235 of 2010)

(Before Hon. Lady Justice Maureen Onyango)

ELIJAH MOGURA OBWORO.....PLAINTIFF

Versus

KISII BOTTLERS LIMITED.....DEFENDANT

JUDGEMENT

This case was originally filed as KISII HIGH COURT CIVIL SUIT NO. 235 of 2010. The file was transferred to this court after hearing had been concluded and submissions filed by the parties. This court heard parties only in respect of highlighting of written submissions and prepared the Judgement. This was with the consent of the parties.

By a plaint dated 24th August 2010 and amended on 30th August 2010 the Plaintiff seeks the following orders -

- a) An order that the summary dismissal letter dated 28th June,2010 is unjustified and unlawful.
- b) Damages for wrongful dismissal calculated at the rate of Kshs.85,359 per month commencing 1st July, 2010 for the remaining period of employment up to retirement.
- c) General and exemplary damages for defamation.
- d) Cost of this suit.
- e) Any other relief that this Honourable Court may deem fit and just to grant.

The Defendant filed a defence dated 15th September denying the allegations in the plaint. The Plaintiff filed a reply to defence on 30th September, 2010 joining issues with the Defendants statement of defence.

The case was heard and finalised by Wakiaga J. at Kisii High Court. At the hearing both parties called one witness each. The Plaintiff testified on his behalf while the Defendant's witness was JOHN BASHWETI, its Human Resource Manager. The parties thereafter filed and highlighted written submissions.

The Plaintiff was represented by Mr. Mose Nyambega instructed by Mose Nyambega & Company Advocates. The Defendant was represented by Mrs. Karimi instructed by Simba & Simba Advocates.

Plaintiff's Case

The Plaintiff testified that he was first employed by the Defendant on 14th June, 1999 as a casual earning Shs.900 per month. In 1990 he was employed as an accounts clerk at a salary of Shs.1,500. His appointment was confirmed in 1993. He earned several promotions over the years until 1997 when he was promoted to the position of Accounts Supervisor and assigned special duties as purchasing officer, the position he held until 2010. His last salary was a basic pay of Shs.61,556, house allowance of Shs.11,553 and responsibility allowance of Shs.12,260 making a gross of shs.81,329.

The Plaintiff testified that he worked under 3 Managing Directors, the last of whom reported on 10th February, 2010. The Plaintiff testified that immediately after he reported the new Managing Director summoned the Human Resource Manager and the Finance Manager to his office and informed them that he did not want to work with the Plaintiff. The Finance Manager thereafter called the Plaintiff and explained to him that it was going to be uncomfortable to work with the new Managing Director so he should resign. The Plaintiff testified that he did not resign but he decided to proceed on annual leave. He testified that his position was advertised internally while he was on leave on 26th April, 2010. He was informed about it by his colleagues who also printed a copy of the advertisement and sent to him.

The Plaintiff testified that when his leave expired he was issued with a letter of notice to show cause dated 23rd April, 2010. He responded to the show cause letter the same day. He was thereafter suspended from work on half salary on 27th April, 2010. The charges against him were two. The first was sourcing of a complete differential for motor vehicle registration No.KAK 835V Isuzu FVR 23 by private arrangement. The second charge was that he used a non-existent company to quote for welding of a cracked differential for motor vehicle KAK 835V and fitting an exhaust pipe on Company Pick Up registration No.KAX 855V. The letter accused him of dishonesty, questionable and doubtful integrity contrary to Clause 32 of the Company's Code of Conduct.

The Plaintiff denied any wrongdoing. He testified that the purchases he made for the motor vehicles were on instructions of the Operations Manager who authorised the purchases and the same were approved by the Finance Manager. The Plaintiff explained that when buying an item the user department raises request and the purchasing department sources for the item from pre-qualified suppliers in the Defendant's system. He testified that he sourced for 3 quotations from pre-qualified suppliers and purchased from the lowest quotation. The plaintiff testified that the purchase was however not made as it was stopped by the incoming Managing Director.

The Plaintiff was summarily dismissed by ,letter dated 28th June, 2010. The Plaintiff testified that he appeared before the disciplinary committee which recommended that he should be issued with a warning letter but the disciplinary committee was disbanded and he was instead summarily dismissed on grounds of gross misconduct.

The Plaintiff testified that the Managing Director also reported to the CID that the Plaintiff had threatened him.

The Plaintiff testified that the Managing Director whose name is Vincent Obanga got rid of him in order to give his job to a sister to the Managing Director whose name is Loise Obanga.

The Plaintiff testified that he worked for 20 years with a clean record. He testified that the summary dismissal affected him and he is unable to get a job, that his friends deserted him and that he wanted to contest for a position of Member of County Assembly but could not because of the dismissal letter which stated that the grounds of his dismissal was fraud. He testified that he would like to be compensated for salary he would have earned to retirement age.

Under Cross examination the Plaintiff stated that he had never seen the Human Resource Policy or the Company Code of Conduct. He stated that he attended the disciplinary committee hearing alone and gave his presentation. He stated that his dismissal letter was delivered to him by a messenger in a sealed envelope, that his dismissal was discussed all over by staff members and disclosed to people outside Kisii

Bottlers. He stated that his friend by the name Peter Maina heard people discussing about him. He stated that normally the board approved dismissals.

Defendant's Case

DW1 JOHN BASHWETI testified that the Plaintiff was a purchasing officer whose duties included sourcing of spares and putting in place all procedures in the store. The Plaintiff was also in charge of stores clerks. The Plaintiff was responsible for getting quotations and had quotation documents in his custody. He testified that the Plaintiff was dismissed for lack of integrity. He testified that quotations were supposed to be on hard copies and not on email. He testified that the plaintiff did not follow procedure and was vetting quotations alone. He testified that the Plaintiff got quotations on email and that some quotations looked as if they were doctored. DW 1 testified that the Plaintiff was taken through disciplinary process before he was summarily dismissed. The Plaintiff appealed but the appeal was not successful.

DW1 testified that the Plaintiff was paid pension of Kshs.529,106 which he acknowledged.

Under cross examination DW1 admitted that prequalification of welding services is done every year, that he was not in the team doing the pre-qualification, that the plaintiff, the Finance Manager and the Operations Manager were responsible for procurement. He stated that Mr. Nyale the Finance Manager requested for the procurement, the Chief Accountant checked and the General Manager Mr. Oponga approved. He stated that the other people involved in the procurement with the Plaintiff were not dismissed, that the blame was on the person who requested for the service, and that he was not involved in the disciplinary process. He stated that Mr. Nyale the Finance Manager stated he did not realise he was making a mistake. He stated that Mr. Wamalwa the Operations Manager also stated he was not aware he was making a mistake. DW1 stated that he did not produce a copy of the disciplinary committee minutes as he was not aware the same would be required by the court.

DW1 stated that the Plaintiff was replaced by Loice Obanga who previously worked as a clerk before being promoted and that she was a sister to the Managing Director. DW1 stated that the Plaintiff did not have any other disciplinary case.

Submissions

In the written submissions filed on behalf of the Plaintiff it is submitted that the termination of the Plaintiff's employment was unfair, unlawful and illegal. That the termination was contrary to the Employment Act and fair administrative action. It was submitted that the Defendant did not comply with section 41 of the Employment Act as the Plaintiff was never given a hearing at all. It was further submitted that the Plaintiff was not guilty of misconduct as he did not commit any impropriety at all as the goods he is alleged to have procured were from pre-qualified suppliers and the Plaintiff did not flout any procurement procedures. It was further submitted that the defendant did not lose any money, that the procurement was approved by his superiors yet none of the superiors was subjected to any disciplinary process. It is submitted that the officers who approved the procurement were not called as witnesses.

The Plaintiff relied on the case of KOKI MUIA v SAMSUNG ELECTRONICS EAST AFRICA LIMITED [2015]eKLR where the court held that the summary dismissal was unfair because the Plaintiff was never subjected to a disciplinary hearing.

The Plaintiff further relied on the case of MARY CHEMWENO KIPTUI v KENYA PIPELINE COMPANY LIMITED [2014] eKLR where the court stated that section 41 of the Employment Act is couched in mandatory terms and where an employer fails to follow the mandatory provisions whatever the outcome of the process is bound to be unfair.

It was further submitted that the Plaintiff's job was advertised online while he was on suspension and the false allegations against him spread among the staff of the defendant. It was further submitted that the Plaintiff was shunned by peers, colleagues and society in general, that he was ostracised and injured in

reputation, that he lost business and personal goodwill, was shattered, lost opportunities from which he has not recovered. It was submitted that he is thus entitled to damages for defamation.

For the Defendant it was submitted that the summary dismissal of the Plaintiff was justified as he was guilty of gross misconduct under section 44(4)(c) which provides that an employer is justified in dismissing an employee who wilfully neglects to perform work which it is his duty to perform or carelessly and improperly performs any work which from its nature, was his duty to have performed carefully and properly. The Defendant submitted that the Plaintiff was bound by the terms and conditions contained in the staff regulations and the defendant's code of conduct is such regulation, that the code of conduct provides that -

"Any employee who is dishonest and with doubtful integrity while performing company duties shall be guilty of gross misconduct."

It was submitted that the Plaintiff admitted under cross examination that he did not call 3 quotations.

It was further submitted for the Defendant that the Plaintiff did not prove that there was defamation as he did not prove that there was any defamation as he did not prove the ingredients of defamation.

The Defendant further submitted that the Plaintiff was issued with a show cause letter and thereafter called for a disciplinary hearing, that the plaintiff admitted to being taken through a formal disciplinary hearing.

Determination

I have considered the pleadings and the recorded proceedings. I have also considered the written submissions by the parties.

Section 47(5) of the Employment Act provides that -

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Section 45 (2) of the Act provides that -

(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.

In the present case the Plaintiff alleges that he was unfairly terminated and defamed by the Defendant.

The issues for determination are therefore -

1. Whether summary dismissal of the Plaintiff was unfair.
2. Whether the Plaintiff was defamed by the Defendant.

3. Whether the Plaintiff is entitled to the remedies sought.

Section 41 of the Employment Act provides for procedural fairness in termination of employment relationship while section 43 provides for validity of reason for termination. Section 41 provides as follows -

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

In the present case it is the plaintiff's position that the disciplinary hearing accorded him by the Defendant did not meet the requirements of section 41 of the Act. He stated that he attended the hearing alone and he was given a warning but the disciplinary committee was disbanded and he was instead summarily dismissed.

The Defendant on the other hand contends that the Plaintiff admitted to having been accorded a hearing and the dismissal was therefore procedural. DW1 however stated that he did not find it necessary to submit copies of the proceedings of the disciplinary hearing proceedings. He did not deny the plaintiff's allegation that the disciplinary committee recommended that he be warned. The Defendant's human resource policy does not explain the manner in which the disciplinary committee conducts its proceedings. The same is not compliant with section 12 of the Act. The only way the court can assess the compliance thereof with the law would be through a perusal of the minutes of the disciplinary proceedings. Without the proceedings, the court cannot confirm if the plaintiff was informed of his right to be accompanied by a union official or fellow employee, or whether he was given an opportunity to defend his case. No copy of the letter inviting the plaintiff to the disciplinary hearing was produced or mentioned. DW1 stated that he was not part of the decision making panel. This leaves the evidence of the plaintiff uncontested.

Under section 10(7) the burden of proof shifts to an employer where the employer fails to produce any prescribed records.

In the instant case, I find that the Defendant failed to prove that the plaintiff was accorded a hearing in terms of the provisions of section 41 of the Act.

With reference to proof of reasons for dismissal, I must again find in favour of the Plaintiff as none of the persons who participated in the disciplinary hearing of the Plaintiff's case, or in the investigations of the impropriety that he was accused of, was called to testify. It is also a material fact that was not disputed by the Defendant that the Finance Manager, the Operations Manager and Chief Accountant all to whom were involved in the procurement that the Plaintiff is accused of not handling in accordance with procurement regulations were never disciplined. It is further a fact that is not denied that the Managing Director's sister was promoted to take over the Plaintiff's position while he was on suspension before he was summarily dismissed. Thus the Plaintiff's contention that the Managing Director planned to dismiss him in order for his sister to take over the Plaintiff's position, which DW1 stated he could not comment on, cannot be overlooked.

All these circumstances raise serious doubt on the validity of the reasons for dismissal of the plaintiff with the result that I find that there was no valid reason for summary the dismissal of the Plaintiff.

Remedies

The Plaintiff prayed for damages for wrongful dismissal in the sum of shs.85,359 per month from 1st July 2010 to date of retirement.

The law does not provide for payment of salary after the date of termination. As I stated in the case of JOHN OCHIENG ODIE v KENYA NATIONAL EXAMINATIONS COUNCIL [2015]eKLR, an employee is not rendered an invalid by termination of his employment to warrant payment of salary to date of retirement nor is there a guarantee that an employee would work for the employer to the date of retirement were it not for the termination.

What the law provides for is in section 49(1) and (2) of the Act. This is salary which the employee would be entitled to but for the termination, and damages up to a maximum of 12 months consolidated salary.

In the present case the plaintiff would be entitled to pay in lieu of notice, salary withheld during suspension and compensation for unfair termination.

There is no evidence that the Plaintiff was paid any terminal benefits upon dismissal. During the hearing DW1 stated that the Plaintiff did not take leave from the time of his appointment as procurement officer and he is therefore also entitled to any leave earned and not taken.

From the evidence on record it is not clear how many leave days the plaintiff is entitled to, the length of notice and the amount withheld during his suspension.

The Plaintiff further sought damages for defamation. As ably argued for the Defendant in the written submissions, the plaintiff did not call any witness to confirm his allegations of defamation nor did he prove that the Defendant published any defamatory words. Official communication from an employer to an employee cannot form the basis of a defamation claim. It is privileged communication.

I find that there was no proof of defamation by the plaintiff and dismiss the said claim.

On the issue of damages for unfair termination, I award the Plaintiff maximum compensation of 12 months gross salary taking into account his length of service of more than 20 years and the circumstances under which he was terminated.

Before I conclude I wish to mention the issue of jurisdiction that the parties made very detailed submissions on. My opinion is that this case having been transferred from Kisii High Court on account of jurisdiction, the issue was adequately addressed in that court and a determination made to transfer the case to this court. Being a court of equal status, this court cannot reopen the issue for further determination of this court. If any party was dissatisfied with the decision of the High Court at Kisii such party should have filed an appeal. None has been filed so far and in my opinion this remains a moot matter only of academic value as far as this case is concerned. I will not say more about it.

Conclusion

In conclusion, I find that the summary dismissal of the plaintiff by the defendant was unfair in terms of section 45(2) of the Employment Act. I therefore award the plaintiff the following -

1. One month salary in lieu of notice or longer notice if his terms of service provided for longer notice.
2. Refund of all salary withheld during suspension.
3. Any leave earned but not taken.
4. Compensation in the sum of Shs.1,024,368.

5. I further award the Plaintiff costs and interests from date of judgement.

The parties will agree on items 1, 2 and 3 above and mention the case within 30 days for purposes of final judgment.

Dated and signed and delivered this 23rd day of February, 2017

MAUREEN ONYANGO

JUDGE