



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 558 OF 2014

KENNEDY MWENDWA KALALI.....CLAIMANT

VERSUS

CHEMSERVE CLEANING SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Kennedy Mwendwa Kalali against his former employer, Chemserve Cleaning Services Ltd. The Claimant's claim is contained in a Statement of Claim dated 4th April 2014 and filed in Court on even date. The Respondent filed a Statement of Defence and Counterclaim on 8th May 2014 to which the Claimant responded on 27th May 2014.

2. When the matter came up for hearing the Claimant testified on his own behalf and the Respondent called its Managing Director, Paul Mwangi Gitau. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that sometime in August 2006, the Respondent offered him the position of General Manager. His starting salary was Kshs. 100,000. He was also entitled to reimbursement of motor vehicle and entertainment expenses incurred on behalf of the Company as well as performance incentives based on achievement of set targets.

4. The Claimant accepted the Respondent's offer and started working on 17th August 2006. The Claimant's salary was later increased to Kshs. 142,000 and he was paid annual bonuses as follows:

a) FY 2007/2008- Kshs. 79,867

b) FY 2008/2009 – Kshs. 172,704

c) FY 2010/2011- Kshs. 76,600

5. On 4th September 2013, the Claimant submitted a resignation letter which the Respondent rejected and instead summarily dismissed him on 30th September 2013. The Claimant avers that the rejection of his resignation was malicious and was designed to give the Respondent an upper hand in the employment contract.

6. The Claimant states that the reasons given in the dismissal letter being operating a competitor

company, soliciting business from the Respondent's clients and mishandling the Respondents VAT account were false. It is the Claimant's case that his dismissal was unlawful and unfair.

7. While admitting having registered a similar business by the name *LogiServe Limited*, the Claimant states that this was done with the full knowledge of the Respondent's Directors who had offered to sell the business to him. The sale was however not concluded.

8. It is the Claimant's case that his dismissal was unfair and malicious as it included publication of defamatory statements about him. Further, he was not given an opportunity to be heard. The Claimant states that he had accumulated leave of 105 days.

9. The Claimant's claim is as follows:

- a) A declaration that the termination of his employment was unlawful and unfair
- b) Service pay for 7 completed years of service.....Kshs. 497,000
- c) 105 accrued leave days.....710,010
- d) 12 months' salary in compensation for unfair termination.....1,704,000
- e) Costs plus interest

10. The Claimant admits owing the Respondent the sum of Kshs. 107,375 as education sponsorship and 83,245.85 being uncollected payment.

The Respondent's Case

11. In its Statement of Defence and Counterclaim dated 8th May 2014 and filed in Court on even date the Respondent denies any knowledge of the Claimant's resignation notice dated 4th September 2013 as it was neither presented to nor received by the Board. The Respondent states that the Claimant tendered the resignation letter to preempt summary dismissal on grounds of poor performance, misconduct and neglect of duty.

12. The Respondent denies having sanctioned the incorporation of the Claimant's company, *LogiServe Limited* and cites Clause 10 of the Claimant's employment contract which barred him from engaging in any business which was materially in competition with the Respondent. The Respondent avers that the Claimant negligently performed his duties leading to massive losses in VAT amounting to Kshs. 17 Million as revealed by a subsequent audit.

13. The Respondent accuses the Claimant of deliberate manipulation of reports thus misleading the Board as to the actual status of the Company. The Claimant is also said to have misled the Respondent to pay his university fees.

14. The Respondent states that the Claimant clandestinely incorporated *LogiServe Limited* which had similar functions and particulars of physical address as the Respondent. The Respondent accuses the Claimant of carrying out fraudulent transactions in this regard.

15. The Respondent denies the Claimant's claim for leave pay and states that the Claimant took all his leave and was paid his leave allowances. Moreover under Clause 5 of the Claimant's employment contract untaken leave was liable to forfeiture.

16. The claim for service pay is contested on the ground that the Claimant was a contributing member of a registered Pension Fund in addition to the National Social Security Fund (NSSF).

17. By way of counterclaim, the Respondent claims the following

- a) Kshs. 318,519 as per audit report dated 1st November 2013
- b) Kshs. 83,245.85 being money collected by the Claimant and not remitted
- c) Kshs. 53,040 being unauthorised motor insurance for the Claimant's personal car
- d) General damages and loss of profits
- e) Costs plus interest

Findings and Determination

18. 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 counterclaim against the Claimant.

The Dismissal

19. On 30th September 2013 the Respondent wrote to the Claimant as follows:

"Dear Mr. Kalali,

SUMMARY DISMISSAL FROM EMPLOYMENT

This is to inform you that the Board of Directors met to discuss and review various issues arising from our last board meeting. The Board has consequently resolved that you be dismissed from employment summarily forthwith for the following reasons:

- 1. Operating a competitor company against clause 10 (conflict of interest) of your contract of employment and soliciting business from our clients;*
- 2. Gross misconduct under clause 13 of your contract of employment by the mishandling of the company's V.A.T account whereby taxes collected for forwarding to K.R.A were never forwarded in full and on time.*

Please arrange to hand over to Mr. Paul M. Gitao within this week as per clause 14 of the contract. Your final dues, if any, will be calculated as per your contract subject to deductions of any sums due to the company as will be calculated after an audit on your account.

Yours truly,

For Chemserve Cleaning Services Ltd

(Signed)

Kamau Kunyiha

Director

(Signed)

Mucaj Kunyiha

Director"

20. According to this letter, the Claimant was dismissed for operating a competitor company and mishandling the Respondent's VAT account. The Claimant denied both accusations. Regarding the

accusation that he had operated a competitor company the Claimant told the Court that he had registered a company by the name *LogiServe Limited* because there had been discussions on a possible sale of the Respondent's cleaning business to him.

21. According to the Claimant, registration of the company was a requirement by the proposed financier. The sale however fell through. The Claimant further testified that there was an understanding that he would take over some of the Respondent's employees on which basis he had posted their names on the company's website.

22. The Claimant also denied the accusation that he had mishandled the Respondent's VAT account stating that he had in fact reduced arrears accumulated prior to his employment.

23. Section 43 of the Employment Act, 2007 requires an employer to establish a valid reason for termination of the employment of an employee. Jurisprudence emerging from this Court is to the effect that the burden placed on an employer by this provision is to demonstrate a reason that would cause a reasonable employer to terminate employment (see *Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Ltd [2015 eKLR]*)

24. In inquiring into the employer's action, the Court does not therefore substitute the employer's decision with its own. If the reason communicated to the employee appears reasonable on the whole, the Court will interfere.

25. In the instant case, the Claimant admitted incorporating a company by the name *LogiServe Limited* but explained that he had done so against the backdrop of negotiations for sale of the Respondent's business to him. He even went ahead to post the names of some of the Respondent's employees on the website of his company.

26. Even assuming that there were ongoing negotiations between the Claimant and the Respondent for sale of the Respondent's business, the Court did not find any evidence that the Claimant was authorised by the Respondent to incorporate *LogiServe Limited*, while still under the Respondent's employment. Further, by posting the names of the Respondent's employees on the website of his company, the Claimant committed material misrepresentation.

27. The second reason stated in the dismissal letter being mishandling of the Respondent's VAT account was however not proved. Nonetheless on account of the first ground alone, the Court finds that the Respondent had a valid reason for terminating the Claimant's employment.

28. Having dispensed with the reason for the termination, the next question is whether in effecting the dismissal, the Respondent followed due procedure. The mandatory procedural fairness requirements are elaborately set out in Section 41 of the Employment Act.

29. From the evidence adduced before the Court, the Claimant was sent on compulsory leave and then dismissed soon thereafter. He was not taken through the mandatory disciplinary process set out under Section 41 of the Act and his dismissal was therefore procedurally unfair.

The Claimant's Remedies

30. In light of the foregoing I award the Claimant four (4) months' salary in compensation for unfair termination. In making this award I have taken into account the Claimant's length of service as well as his conduct prior to the dismissal. I have also taken into account the Respondent's conduct in the dismissal transaction. I further award the Claimant two (2) months' salary in lieu of notice as per his employment contract.

31. Regarding the claim for leave pay, the Claimant did not provide any written approval to accumulate leave beyond the forty five (45) days provided under Clause 5 of his employment contract. I will therefore allow the claim for leave pay for 45 days only. The claim for service pay was abandoned in the

course of the trial.

The Respondent's Counterclaim

32. In its Counterclaim dated 8th May 2014 the Respondent claims the following from the Claimant:

- a) Kshs. 318,519 as per audit report dated 1st November 2013
- b) Kshs. 83,245.85 being money collected by the Claimant and not remitted
- c) Kshs. 53,040 being unauthorised motor insurance for the Claimant's personal car
- d) General damages and loss of profits

33. In his Statement of Claim dated 4th April 2014, the Claimant admits owing the Respondent the sum of Kshs. 107,375 in education sponsorship and 83,245.85 being uncollected payment. The Respondent did not adduce any evidence to support the rest of the Counterclaim which therefore fails and is dismissed.

34. Finally I enter judgment in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation.....Kshs. 570,000.00
- b) 2 month's salary in lieu of notice.....285,000.00
- c) 45 days' leave pay (142,500/30x45).....213,750.00
- Total.....1,068,750.00
- Less amount admitted by the Claimant.....(190,620.85)
- Amount payable to the Claimant.....878,129.00**

35. This amount which is subject to statutory deductions will attract interest at court rates from the date of judgment until payment in full.

36. The Claimant will have the costs of this case.

37. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 5TH DAY OF MAY 2017

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JUDGE

Appearance:

Mrs. Kuria for the Claimant

Mr. Ongicho for the Respondent