



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NUMBER 1877 OF 2015
BEN LAWRENCE WARIRA GATUNYU.....CLAIMANT
VERSUS
TUSKER MATTRESSES LIMITED.....RESPONDENT
JUDGMENT

1. The claimant averred that he was employed by the respondent in December, 2008 as a Shop Assistant at a monthly salary of Kshs 7,020 and a house allowance of Kshs 1,053. According to the claimant he continued discharging his duties at Nairobi Office and was later offered another position in addition to his current job as a shop assistant by the respondent in its Uganda Office as an HR Coordinator on 8th August, 2010.
2. The claimant further averred that during the period of employment with the respondent he raised with the General Human Resource various concerns including his relocation allowance, an appointment with a letter of secondment, letter of promotion, work permit, provision of fare to travel to Uganda, house allowance, medical allowance and insurance, provision of off days and annual leave.
3. According to him, after raising these issues the respondent issued him with another contract for Uganda services and that is how come he ended up with two running contracts. The claimant further averred that upon coming back after the unlawful termination of his Uganda contract he reported back to his Kenya duty station but the respondent did not bother to follow the Kenyan Laws and procedure in terminating his contract. Instead they used the letter of termination issued by the Uganda office to issue him with terminal dues thereby terminating his Kenya contract.
4. The claimant contended that he was accused of cover up, issuing threats and intimidation, professional misconduct and preferential treatment of a particular employee without provision of any evidence by the respondents on the allegations. He further contended that he was never called to defend himself at a disciplinary hearing which should have been constituted to deliberate on the matters.
5. The claimant further averred that the Nairobi office used the Uganda termination to pay his terminal dues which was in bad faith and malicious as he had two separate contracts running concurrently and independent of each other.
6. The respondent on its part averred that by an appointment letter dated 11th August, 2010 the claimant was appointed the HR Coordinator at the Respondent's Uganda office with effect from 1st August, 2010 and remained in such employment until 10th June, 2015 when his employment was terminated for gross

misconduct.

7. The respondent further averred That during the claimant's employment in Uganda, the respondent paid ex-gratia his salary under his previous employment as shop assistant in Kenya. According to the respondent the claimants employment as shop assistant effectively terminated upon his appointment to Uganda office as he could not be expected to be in both Kenya and Uganda at the same time.

8. According to the respondent, the grounds for termination of the Uganda contract applied to the Kenya contract as the employer was essentially the same and both contracts were terminable on account of misconduct on the part of the employee. The respondent further averred that the claimant's employment in Uganda was terminated on 10th June, 2015 after investigations and a disciplinary process established that the claimant while working as Human Resource Coordinator at the Uganda Office engaged in various unprofessional and inappropriate sexual relations with his subordinates which was tantamount to gross misconduct.

9. Concerning the mode of termination the respondent averred that its Uganda affiliate wrote to the claimant notifying him of the allegation against him and requiring that he appears for a disciplinary hearing on the 5th June, 2015. The disciplinary hearing was held in which the claimant was afforded a full opportunity to defend himself. At the trial only the claimant testified. The respondent called no witnesses but counsel filed submissions on behalf of the respondent.

10. In his oral testimony in court the claimant reiterated most of the averments in his statement of claim and further stated that he was appointed by the respondent on 30th December, 2008 as a shop assistant. He served for six months and was later transferred to Head Office as HR Assistant. He was never issued with a letter of appointment for the new position but his salary was increased. In August 2010 he was promoted to HR Coordinator and transferred to Uganda.

11. According to him, his contract in Kenya was never terminated and that he was never given any information on what would happen if the Uganda contract was terminated. He stayed in Uganda until May 2015. In May, 2015 an issue arose about sexual harassment. He forwarded the matter to the Country Manager and recused himself on the matter. According to him the Branch Manager accused him of sexual harassment. He proceeded on leave to allow for investigations.

12. When he returned he was handed a suspension letter. He was subsequently invited for disciplinary hearing on 25th June 2015. He attended and was taken through the procedure. Deliberations were made and on 10th June, 2015 he was served with a termination letter. He was thereafter asked to follow up with Nairobi over the termination. After three days he was served with a letter of terminal dues from Nairobi and another letter from Uganda computing his terminal dues. It was his evidence that he was never taken through any disciplinary hearing in Kenya.

13. Termination of employment contract requires that there be a valid reason for doing so and once a valid reason is established, the process of termination must be carried out through a fair procedure. This court has stated before that it must restrain itself from being perceived by reasonable managers as usurping their role and substituting its opinion of what constitutes a valid reason for dismissal with that of the management.

14. The management must be set free to discipline staff including termination of contracts of employment. The court's role is not to second guess management but to ensure that there existed at the time of dismissal or termination of service a valid or justifiable reason for which a reasonable employer would dismiss and further in carrying out the dismissal or termination of contract a fair procedure was followed.

15. From the evidence, the claimant was accused of among others of sexual harassment of a colleague in Uganda. He admits that he was suspended and later called to a disciplinary hearing. Deliberations were subsequently made and a decision arrived at to terminate his services. He does not seem to have a

problem with both the accusations against him and the disciplinary process prior to his dismissal. His only complaint seem to be that the termination of the Uganda contract did not automatically terminate his Kenya contract which according to him was running parallel to the Uganda one.

16. It is rather unusual that an employer can keep an employer on two salaries as is the case here but the court cannot question an agreement or arrangement between parties unless such agreement is unconscionable or contrary to law. Whereas the respondent's office in Uganda dismissed properly the claimant, it was incumbent on the Kenya Office even if for the same reasons to similarly dismiss the claimant. Failure to do so therefore deemed unfair. The court will therefore award the claimant as follows:

a. One month's salary in lieu of notice	30,970
b. Six months salary for unfair termination of services	<u>185,820</u>
Total	216,790
c. Costs of the suit	

17. (a) and (b) above shall be less terminal dues already paid to the claimant under the Kenyan contract and subject to statutory deduction.

18. It is so ordered.

Dated at Nairobi this 28th day of April 2017

Abuodha J. N.

Judge

Delivered this 16th day of June 2017

In the presence of:-

Mwaura for Njiru for the Claimant

Byamukusha for the Respondent.

Abuodha J. N.

Judge