



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 35 OF 2016

CHARLES OKECH ODHIAMBO.....CLAIMANT

VERSUS

CONCERN WORLDWIDE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 21st July, 2017)

JUDGMENT

The claimant filed the statement of claim on 18.02.2016 through Abwuor & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal is wrongful, unfair, arbitrary and contrary to the provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010.
- b) Compensation and damages for wrongful dismissal together with punitive and exemplary damages for the same.
- c) Salary in lieu of notice, costs of the suit and interest at court rates.

The response to the claim was filed on 12.04.2016 through John Mburu and Company Advocates. The respondent prayed that the claimant's suit against the respondent be dismissed with costs.

By the letter dated 23.06.2015 the respondent employed the claimant as the area co-ordinator, Marsabit effective 01.08.2015. The claimant was employed at a gross monthly salary of Kshs. 334, 487.00 inclusive 15% housing allowance and as per the respondent's Grade 10B step 1 pay structure.

The claimant's case was that he was to remain in employment subject to one month termination notice or dismissal on account of established gross misconduct. He was the representative of the respondent's country director in Marsabit being the respondent's top officer deployed in Marsabit.

The claimant testified that on 31.10.2015 was a Saturday and he was on duty working on certain drought emergency response. There had been some rumours about financial mismanagement going round at the respondent's Marsabit office. Thus, on that date at about 03.30 pm the claimant held a meeting with some of his staff members who happened to be present and the issues about the said rumours were discussed. In the process of the discussions, things appear to have come to a boiling point and the claimant testified that he raised his hand to hit one of his staff known as Agnes. However, other staff restrained the claimant and he did not hit the said Agnes. It was the claimant's testimony that the said Agnes did not complain or report a case of assault against the claimant and the matter ended there. The claimant's evidence was that the matter was resolved amicably and there were no police or medical reports in that regard.

On 02.11.2015 the claimant was summoned to the respondent's head office at Nairobi because, as the country director informed the claimant, an issue involving the claimant was being investigated. On 03.11.2015 the claimant met the respondent's country director and the claimant was asked to explain the events of 31.10.2015 and the claimant did so in writing.

In the meantime, the respondent had dispatched the human resource and administration co-ordinator one Gladys Kalemi Mutunga to Marsabit to investigate the case. The said Gladys summoned the claimant on 06.11.2015 and the claimant signed confirming the record of the incident report. Later at about 3.30pm the claimant and Gladys went to the respondent's country director's office and a letter of summary dismissal was delivered to the claimant. The claimant was dismissed with immediate effect on account of breaching the respondent's policies. It was stated that the claimant's conduct had amounted to bullying defined under clause 9.2 of the respondent's human resource manual as repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. It was stated that the behaviour by the claimant also amounted to violence as per clause 9.3 of the manual which was defined to include incidents where persons are abused, threatened or assaulted in circumstances related to their work. The letter stated that the dismissal was well within the provisions of sections 44(3) and 45(2) of the Employment Act, 2007 and that the claimant's conduct was clearly gross misconduct under section 44(d) of the Act.

The claimant appealed against the dismissal but he received no reply.

In his conclusive evidence the claimant told the court thus, **“There are areas I went wrong. I admitted my voice went up. I was angry. I was about to do a bad thing. I restrained. I feel dismissal was excessive punishment.”**

The court has considered the material on record.

The **1st issue** for determination is whether the summary dismissal was unfair. As was held in **Shankar Saklani –Versus- DHL Global Forwarding (K) Limited [2012]eKLR** a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract. In the instant case, the claimant has confirmed that the country director summoned him and informed him about the allegations that were subject of the investigation and as was levelled against the claimant. The claimant replied and the matters were discussed. The court has taken the events leading to the claimant's termination cumulatively and returns that the respondent complied with the requirements of section 41 of the Employment Act, 2007 on notice and hearing. At all material time, the claimant knew the allegations and further was given a chance to exculpate orally and in writing. The court returns that due process was not contravened in the case.

The second consideration is whether the reason for termination was valid. The claimant by his own evidence at the disciplinary hearing and before the court has admitted about his inappropriate conduct which occasioned his termination. The court returns that as at termination the respondent has established that there existed a valid reason to terminate the claimant's employment as set out in the letter of summary dismissal. The court returns that the reason for termination was valid as envisaged in section 43 of the Employment Act, 2007 and as enumerated in the letter of termination.

Thus, to answer the **1st issue** for determination, the court returns that the termination of the claimant's employment by way of the letter of summary dismissal was not unfair.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the finding that the termination was not unfair and returns that all the prayers made for the claimant will crumble as unjustified.

The court has considered the claimant's remorsefulness as per his conclusive evidence quoted in this judgment and considers that each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 21st July, 2017**.

BYRAM ONGAYA

JUDGE