



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1359 OF 2014

JAMES MULINGE CLAIMANT

VERSUS

FREIGHT WINGS LIMITED RESPONDENT

JUDGEMENT

The issues in dispute;

- a. Unfair, unlawful and wrongful summary dismissal;
- b. Discriminative employment policy and practices against the claimant;
- c. Unfair labour practices by the Respondent contrary to article 27 and 41 of the constitution; and
- d. Non-payment of terminal dues and benefits.

1. The claim was filed by the claimant against the respondent, a limited liability company in the business of clearing, forwarding and airfreight with a registered office situated at the Cargo village, Jomo Kenyatta International Airport, Nairobi.

The claim

2. In April 2004 the Claimant joined the Respondent employment as a casual employee and later became permanent in June 2006. The Claimant duties changed to receiving flowers from farms and supplying them to clearing agents for export. On 1st September 2007 the Claimant was issued with a three (3) months seasonal contract and promoted to documental department – kephis and inspection section. On 1st October 2008 the Claimant was issued with a letter of appointment on permanent basis as head of documentation department. Upon this appointment the Claimant joined the Respondent provident fund; upon a restructuring the Claimant was promoted to a Customs, Declaration and Documentation agent. This new position came with the responsibilities of endorsing export documents;

- i. EUR 1,
- ii. GSP
- iii. COMESA
- iv. EAC
- v. Certificate of origin – chambers of commerce
- vi. PHYTO-Kephis; and
- vii. Export Certificate- HCDA.

3. These duties required the Claimant to work out of the main office, and to different offices. The Respondent employed a rider to help in taking documents to various offices for endorsement and the

Claimant was to oversee and coordinate this work. Cases of urgency were referred to the claimant. For his duties the Claimant was allocated up to Kshs.500, 000.00 a month so as to meet his targets.

4. On 21st February 2014 the Claimant fell sick and went for treatment at the Respondent clinic. He was given 2 days sick off. The off was processed by the administrator manager. On 24th February the Claimant resumed work and proceeded to Times Towers [Kenya Revenue Authority offices] and upon return to the office, he was summoned by the human resource officer, Mr Osodo. The Claimant was issued with a final warning letter and informed that he was routinely out of office. The Claimant was concerned with the unprocedural issuance of the warning letter as he had been at work in different offices and Mr Osodo had not consulted with other officers on the matter and therefore the Air Freight human resource manager nullified the final warning letter.

5. On 28th March 2014, the Claimant developed a terrible cough, chest pain and blood stained cough while on duty. He went to the company nurse and was given a sick off to take laboratory tests and to get a HIV test. On 30th March 2014 the Claimant went to Aga Khan University Hospital where he did tests and was also referred for specialist tests and given a sick off. The Claimant submitted his test results to the Respondent nurse who went to the human resource office and then sent the Claimant to see Osodo. He informed the Claimant that he had tuberculosis (TB) and that he could not be allowed back to the office; he refused to give the Claimant time off to take further tests as directed; and withdrew company medical cards making it impossible for the Claimant to use the medical cover.

6. The Claimant applied for 5 days leave to attend to his medical check-up but Osodo insisted that he should resign due to his medical condition. On 7th April 2014 the Claimant resumed work and assigned work in town but Osodo insisted that he should resign. He was attending to the Claimant through the window and stated that the Claimant was going to infect others in the office.

7. On 11th April 2014 Osodo indicated that the Claimant had been involved in forgery of Kshs.3,850.00 and a show cause letter was issued. The Claimant submitted his responses and noted that all monies and documents issued to him for work were fully accounted for, but the Claimant was kept at the gate and told that his case was criminal and had to wait for the police. A letter of suspension was then issued to him but was not allowed in the Respondent premises.

8. On 16th April 2014 the Claimant resumed duty but was told to report back the following day. He was told to apply for his annual leave which the Claimant declined to sign but Osodo signed on his behalf. On 2nd May 2014 the Claimant went to the bank for his salary but there was nothing. On 5th May 2014 the Claimant went to the office to make enquiries and only realised then that the alleged forged amounts of kshs.3, 850.00 had been deducted from his salary and was paid the rest of his salary through petty cash. From this date the Claimant was made to report to Osodo daily but no work was allocated. He was made to remain seating outside the office under a tree. On 19th May 2014 the Claimant was issued with a clearance form indicating that he ceased being an employee of the Respondent on 30th April 2014. The administration manager ordered the Claimant back to work and withdrew the KRA receipts allegedly forged by the Claimant that Osodo was using against him. This decision was however revoked and the Claimant was dismissed on 19th May 2014. That this summary dismissal was unjustified and malicious.

9. The claim is also that the Respondent actions against the Claimant were malicious on the grounds that summary dismissal was not procedural. The Claimant was accused of 4 counts of unlawful conduct;

- a. that on 17th February 2014 he collected Kshs.3, 850.00 to endorse and chamberise documents but that these allegations were not true as the Claimant did not collect any monies on this date but there was a clearance for the same amount; that the documents allegedly endorsed and chamberised were so acted upon on 13th February 2014; and that a certificate of origin No.135556 was issued.
- b. That the Claimant collected money on 10th March 2014 of kshs.3, 850.00 but this was false on the reasons that there was no money collected on this date but rather clearance of a similar amount Kshs.3, 840.00 was made; the employees do not collect money without following set regulations

and must give an account; and that the Respondent has a system of book keeping to confirm shipments. Each cash advanced must be supported with documents of shipment; the petty cash voucher must be checked and the receiving officer must render an account back.

- c. That the Claimant received Kshs.4, 000.00 on 10th March 2014 to buy certificates for mango shipment and used the receipts to account for money collected on 10th March 2014 but that this allegations were malicious for the reasons that no money was collected on this date; mango shipments are from different company and the money the Claimant got from mango was a separate transaction.
- d. That the Claimant had a final warning letter but this was not correct.

10. The Claim is also that the summary dismissal was based on a forged amount which was deducted from his salary in April 2014. That the core of the summary dismissal was due to his medical condition as he had previously been entrusted with large amounts and was able to render an account and was of good performance of his duties for which he was promoted. That the summary dismissal was based on malice and not justified for the reasons that he previously went to Kisumu and Mombasa to clear goods and make transactions and with him carried large sums of money.

11. The claim is also that the Claimant was discriminated against as there was previous practice of the Respondent where employees who actually forged documents or used company funds for unauthorised transactions were treated differently. There was the case of **Cosmas Ligami** who failed to account for Kshs.82, 000.00 on 1st January 2014 and the Respondent opted to deduct the same from his salary but was not dismissed. There was the case of **Peter Kingoo** who was alleged to have forged kshs.9, 800.00 and the Respondent decided to deduct these monies from his salary and was not dismissed.

12. The claim is that the Claimant was unlawfully, unfairly and wrongly dismissed without a hearing or being given valid reasons. That the Claimant was discriminated against on the basis of his medical status. Before the summary dismissal the Claimant had an infection of TB for which he was ill-treated; he was forced to submit confidential report to the human resource office; he was forced to resign; and when he refused to he was summarily dismissed. The Claimant suffered loss and damage as a result of his summary dismissal and discriminatory treatment which is contrary to the Constitution and the law.

14. The claims are for salaries due until retirement with 20 years due all at kshs.4,438,320.00; compensation at 12 months all at Kshs.221,916.00; damages for loss of stable employment at kshs.3,000,000.00; damages for discrimination and unfair treatment all at Kshs.5,000,000.00; loss of earnings at kshs.1,000,000.00; and costs of the suit.

15. In support of his case, the Claimant testified that upon his employment by the respondent, he was assigned various duties, was promoted and his last such position was that of customs, declaration and documentation agent. He was thus required to work outside the office to process export documents, endorsements and chamberisation with the Chamber of Commerce and at the KRA offices.

16. The Claimant also testified that in March 2014, he became unwell with coughing whereby he was forced to go to the company clinic. He was given a day off to go to a hospital for further treatment and at Sunrise Medical Centre he was sent to take x-ray which were done at the Aga Khan hospital. The doctor at Aga Khan sent him to do laboratory tests and was advised on how to get treatment. He was sent to a chest specialist for a medical report, and was given sick off. All these records were submitted to the respondent. The Claimant took the off sheet to the nurse so as to get time off for further medical treatment, which time off had to be submitted to Osodo as the human resource officer. the nurse must have disclosed the claimant's condition as he was called by Osodo who told him that since he had TB and they were in an open office he could not be allowed to enter the office as he would infect other employees. The Claimant was therefore not able to submit the sick off sheet that he got from Aga Khan Hospital and opted to take 5 days leave. Osodo refused to talk to him and when he had to would only address him through the window. That when Osodo discovered the medical condition the Claimant was suffering from he stopped talking to him directly or would insist that he stands outside the window. The documents he submitted confirmed that he had TB and despite being told that the TB was not infectious, Osodo addressed him through a window.

17. The Claimant also testified that after taking his leave, he was assigned duties outside the office but when he returned, he was made to seat outside the office and Osodo told him to resign. He refused to resign upon which he was issued with a show cause letter on allegations that he had forged documents that he had used documents to claim for monies. these allegations were not true since the Respondent had accounts office which issued monies based on set requirements and one had to render an account before further disbursements. On 11th April 2014 the Claimant was suspended despite his responses to the show cause and was made to give his submissions through the window as Osodo would not allow him in his office. Osodo then told the claimant that what he had done were criminal act which warranted police arrest. The claimant took this as intimidation so as to resign due to his medical condition.

18. The Claimant was to resume work on 16th April 2014, but the suspension was extended for a day to 17th April 2014. He was given further leave which he refused to accept as he had not applied for it but Osodo signed for him. There were no reasons given as to why such leave had been given unsolicited. On 27th April 2014 the Claimant resumed duty but was kept outside the office without duty allocation. On 19th May 2014 he asked the human resource officer for an explanation as to why he had to remain outside the office and was issued with a clearance form which indicated that he had ceased being an employee of the Respondent on 30th April 2014. He was then issued with letter of summary dismissal on 19th May 2014. The April salary was also paid less the alleged forged sum of Kshs.3, 850.00 and the balance of summary was paid through petty cash.

19. The Claimant also testified that the summary dismissal affected him as this changed his life. He had children who depended on him, one child was a candidate taking national examinations and did not know what to do in school support. While he was at work he was sure to support his family without seeking any assistance. He served the Respondent diligently but now his reputation is damaged due to summary dismissal on accusations that were not true. The accusation of forgery is serious as he cannot get another job in the same sector. the Respondent recovered the alleged stolen cash from his salary and to further dismiss him was double punishment. The Claimant is not able to go back to JKIA to do his professional work due to the allegations levelled against him and his name has been tarnished.

20. On cross-examination, the Claimant stated that the Respondent was a consortium of companies and when he was issued with a show cause letter one accusation was with regard to getting work from a third party which was not correct as mango was part of the Respondent and he was not paid separately to do their work. For each transaction he had to undertake, there were supporting documents and cash received had to be accounted for and approved by the finance office. He gave the example of where cash for endorsement was required, a certificate of origin was required as an attachment; the cashier prepared a petty cash voucher and the receipt from chamber of commerce had to be returned for accounting purposes. The certificate of origin had a set serial number for a single transaction, and which had to be noted in the payment voucher. All documents from KRA there was a serial number and where there are copies, such had to bear the same serialisation. In this case, on 13th February 2014, the Claimant collected kshs.3, 850.00 from the cashier for endorsement and chamberisation and clearance and rendered an account for the same on 10th March 2014. On the same date, the 13th February 2014 a client mango gave him kshs.4, 000.00 which was cleared. The cash was given to Mr Kingoo with receipts for purchases being submitted by him. The receipts for 17th February 2014 were kept for records purposes and wrongly attached as for chamberisation and due to confusion with regard to accountings for 10th March 2014. In the reply to the show cause, the Claimant gave his detailed explanations as to how the confusion arose, this was not intended to cheat or steal. This explanation was found to be sufficient by the respondent.

21. The Claimant also testified in cross-examination that when he fell sick he went to the company clinic and was given time off to seek further treatment where he went to a private clinic, then to Aga khan hospital and upon tests he was found to have TB. He was given time off and when he submitted medical report to the nurse, she informed the Respondent human resource office. His time off was lawful as the administration manger was aware of his whereabouts and the final warning issued by Osodo was cancelled on this basis. The Claimant was forced to resign and when he declined he was made to seat outside the office. He had taken leave so as to attend to his treatment and the work environment was not conducive. That when he resumed work, Osodo continued to extend his leave without any explanation, he

would talk to him over the window and made him seat under the tree. His dismissal letter was malicious as this was issued when he refused to resign and due to his medical status and by the time the letter was issued, his salary had been stopped and effectively terminated from employment a month prior to the summary dismissal.

Defence

22. In defence, the Respondent state that they are a limited liability company in the horticultural industry and part of a group of companies, VP Group – Vegpro Kenya Limited, Kongoni River Farm Limited and Sian Exports Kenya Limited. There is a combined workforce of more than 8,500 employees under the VP Group. The group shares facilities.

23. The Respondent admit the Claimant was their employee and was part of the group staff provident fund and upon his appointment on permanent basis on 1st October 2008. At the time of exit, the Claimant was a Custom Declaration Clerk at a salary of kshs.18, 493.00 and with duties to process export shipment documents with relevant document bodies.

24. On Friday 21st February 2014 at 1.36pm the Respondent senior human resource officer, Osodo received an email from the administrative manager, Neha Parikh that one of their employees, the Claimant had not reported to work and there was no information on him.

25. On Monday 24th February 2014 the Claimant reported to work and was asked by Osodo to give an explanation to the administrative manager on his absence. His explanation was not satisfactory and a second (2nd) warning letter was issued, the first having been issued on 28th August 2013 due to absence from work.

26. On Thursday 10th April 2014, Osodo got a complaint from the administrative manager from a routine internal audit a query arose on vouchers that the Claimant had presented regarding shipment documents processed in February 2014. The Claimant had taken money on two different occasions but used the same set of documents to account for the two allocations. Voucher No.183695 dated 10th March 2014 was presented to forged shipping documents and cash was obtained fraudulently. The documents used in support of voucher No.183695 were similar to documents used in obtaining cash in voucher No.183578 dated 17th February 2014. The Claimant was unable to explain these audit questions and was issued with a show cause letter and upon his reply, it was found not satisfactory. His response was that the Kenya National Chamber of Commerce (Chamber of Commerce) were best to explain the matter put to him. Osodo took the decision to suspend the Claimant based on company policy on 11th April 2014. Under the policy the Claimant could only be on suspension for 30 days.

27. On 11th April 2014, Osodo called the Chamber of Commerce with regard to two receipts subject of audit question, receipt No.s 1170 and 2210 but was not able to get immediate assistance until 1st May 2014. As he waited for feedback, the Claimant suspension period lapsed and resumed work on 22nd April 2014 and Osodo took the decision to extend the same by 5 days. The Claimant was also given 5 days leave but the Chamber of Commerce had still not given feedback. The Claimant was given a further 7 days leave. All salaries were paid via the bank, however due to error in the pay roll system the claimant's salary was not posted and he was paid in cash. A sum of kshs.3, 850.00 was deducted from the Claimant salary to cover the audit questions for the unaccounted for funds.

28. The defence is also that the Respondent offers inpatient medical cover and all outpatient services are at their site clinic. All sick off are as advised from the clinic and not by the human resource office.

29. On 6th May 2014 Osodo got feedback from Chamber of Commerce and confirmed that receipt No.1170 was for the purchase of 11 pieces of Plant documents while receipt No.2270 was payment for chamberisation. The administration manager confirmed that there was no such chamberization at this time.

30. On 7th May 2014 the Claimant reported back to work, Osodo gave him the response from Chamber of Commerce and the report that there was no chamberisation as noted by the Claimant in his records. the Claimant confirmed that the chamberisation receipt No.2270 had been used for a third party mango shipper but he failed to explain why he used these documents to account for monies received from the respondent. The Claimant left his duties and only returned on 19th May 2014. Osodo explained to the Claimant the outcome of the investigations, disciplinary action reached and the summary dismissal letter was issued. On 19th May 2014 the Claimant submitted his clearance form and a certificate of service was issued to him. Final dues were computed as at 19th May 2014 and not 30th April 2014.

31. The Respondent has accounting procedures that the Claimant was aware of having worked for the Respondent for a long time. He failed to follow these procedures. There were other disciplinary cases, Cosmas Ligami failed to submit documents to account for Kshs.82, 000.00 but his case did not involve fraud and was therefore made to pay these monies. Peter Kingoo could not account for Kshs.9, 800.00 but there was no fraud and the monies were deducted from his salary.

32. The claimant's work involved limited cash handling for chamberisation of documents. Regular shipment payments would involve a maximum of kshs.24, 000.00 in a month and not Kshs.500, 000.00 as alleged.

33. On the allegations of discrimination against the Claimant on medical grounds the defence is that the Respondent being a member of the VP group of companies had a clinic on site, run by Green Cross Medical Centre under Dr. Kirit Bhan Patel, the medical centre had deployed staff at the Respondent clinic 24 hours. The Claimant visited the clinic several times in 2008 with different ailments. On 13th March 2014 the Claimant was at the clinic and the nurse sent him for further tests to rule out TB. On 17th March 2014 the Claimant was treated again and sent for tests. On 28th March 2014 the Claimant was attended to at the clinic and noting no improvement was advised to take tests at Mama Lucy Kibaki Hospital for investigations and give one sick off day. That the Claimant did not take any medical reports to the Respondent clinic as alleged on the basis that that clinic medical notes states that;

- On 21st February 2014 the Claimant was attended to at Sunrise medical Clinic where he was directed to take tests;
- On 20th March 2014 the Claimant was at Aga Khan clinic where he was advised to do tests;
- On 30th March 2014 the results requested at Aga Khan showed the Claimant had TB and was given 2 days off;
- On 31st March 2014 the Claimant was at work but did not submit any medical reports.

34. The defence is that the Respondent nurse did not visit the human resource office to disclose the Claimant medical status. The officer has no access to medical reports. There was no discrimination against the Claimant and all medical reports are kept confidential. There are over 2,500 employee with medical report that are kept confidential.

35. The claims set out are therefore bad in law, no cause of action is set out to warrant the remedies sought and the claim should be dismissed with costs. The issues in dispute set out have not been supported by any evidence and should be dismissed.

36. In evidence, the Respondent called Vitalis Owira Osodo who reiterated the defence by the Respondent and also testified that the Claimant was dismissed on the reasons that he collected Kshs.350.00 was collected using certificate No.0014051 and invoice No.4359 and the documents used to account for the transaction were also used in another accounting. Such documents had been obtained for another shipment for a third party, mango where the Claimant received kshs.4, 000.00. the Claimant had previous warning letters, he was given a chance to explain himself, was given time to go and explain to the administration manager so as to get the required details and his responses were found not to be satisfactory.

37. That the on 21st April 2014 when the Claimant states he was sick, he was absent from work. The Claimant was not discriminated against, the Respondent employees work from an open space office and he talked to the Claimant directly and not through a pigeon hole. As the senior human resource officer for the group, he had authority to dismiss the claimant. He had not known of the condition the Claimant suffered from and only saw the details in the memorandum of claim. Other employees who had missing monies were made to explain, they did not commit fraud and were therefore allowed to repay it. The Claimant admitted using the same documents to account for different transaction which amounted to fraud hence the dismissal. The dismissal was fair, lawful and there had been two previous warnings.

38. The Respondent second witness was Jane Oluchiri, a Nurse with VP group. The witness testified that on 13th March 2013 the Claimant was attended to by a clinical officer Caroline who made various observations. On 18th March 2014 the Claimant was again attended to by a Nurse Mutheu and was referred to Mama Lucy Hospital. On 30th March 2014 the Claimant was at the clinic where the witness attended to him. There were medial reports from Dr Kageni and had been given 2 days off. She saw the medial reports but the Claimant was required to keep them. She processed his sick off. The clinic does not run laboratory tests and the Claimant was sent to a different place. The sick off record was submitted to the human resource office. The Claimant was at the clinic on 3 occasions and all treatment records are kept confidential.

Submissions

39. Both parties filed their written submissions. The Claimant submitted that he was unfairly terminated from employment after working for 10 years. His summary dismissal was without any reason, there was no hearing and whatever matters he was required to respond to had been adequately addressed. There was therefore no substantive reasons for the summary dismissal. The summary dismissal letter was issued on 19th May 2014 noting that the Claimant employment had since terminated on 30th April 2014. The clearance form upon dismissal of the Claimant stated the reason for dismissal was resignation of the claimant. The Claimant did set out that he was diagnosed with TB which resulted in discrimination against him, he was made to remain out of his work place for long period without any justification and this explains the summary dismissal that had no basis.

40. The Claimant also submitted that he was discriminated against by the Respondent on his medial status and this led to his summary dismissal. That upon reporting to the clinic for treatment, the nurse reported to the human resource office, he was made to submit medial report and upon realisation that he had TB, he was made to seat outside the Respondent human resource office and attended to through a window. The Claimant was then made to take leave days that he had not applied for, he was then suspended and the same extended to the point of his summary dismissal. That this was discrimination against him due to his medical condition. The Claimant also admitted that he mistakenly used documents to account to disbursements given, upon such realisation he sought to address the same but was not given the chance. That other staff who made similar mistakes were made to refund monies not accounted for, but were never dismissed. To therefore set out the Claimant and subject him to a salary deduction and then a dismissal was double punishment and discrimination against him.

41. The Claimant has relied on the **cases GMV versus Bank of Africa Kenya Ltd [2013] eklr; Peter Ndungu & 5 others versus Kenya Power and Lighting Co. Ltd, Cause No.1149 of 2011, David Muhoro versus Ol Pejeta Ranching Company [2014] eklr.**

42. The Respondent on their part submitted that the Respondent acted within the law in dealing with the claimant. The Claimant was unable to account for monies disbursed to him for work, he was issued with a show case letter but failed to give a satisfactory response. He was suspended to allow for investigations, he was on ½ pay as the Respondent waited for the chamber of Commerce to give details of receipts. The defences given by the Claimant did not properly account for monies advanced, there was fraud which led to summary dismissal. The conduct of the Claimant was not above board and he was given a hearing.

43. The Respondent also submitted that the Claimant did not discriminate against the Claimant due to his health status, he was treated at the clinic and referred to hospital but failed to file back the medical reports. The grounds for dismissal are based on fraud and the evidence with regard to discrimination against the Claimant only meant to show the Respondent in bad light.

44. Upon dismissal the Claimant was paid all his dues. The Respondent lost property due to the actions of the Claimant and disciplinary action was taken. There were previous warnings and summary dismissal was lawfully applied. The Respondent has relied on the case of **Silas Muturi versus Haggai Multi Cargo Handling Services [2013] eKLR**.

Determination

Whether the summary dismissal was unfair, unlawful or wrongful;

Whether the Respondent applied discriminatory employment policy and practices against the Claimant contrary to article 27 and 41 of the constitution;

Whether the Claimant was paid all his terminal dues and benefits; and

Whether there are any remedies.

45. The Claimant was issued with a letter dated 19th May 2014 for his summary dismissal. The summary dismissal was with regard to 4 reasons and grounds being that on 17th February 2014 he collected Kshs.3,850.00 from the Respondent for endorsement for shipment of various goods and was issued with certificate of origin No.1170; that on 10th March 2014 he collected kshs.3,850.00 from the Respondent for endorsement and when accounting for the same used documents for the transaction of 17th February 2014 together with a different certificate of origin No.2210 used for mango shipment; that the Claimant had received kshs.4,000.00 from Mango to buy documents for the shipment and was issued with certificate of origin No.2210 and used the same to account for monies received from the respondent; and the Claimant had been issued a final warning letter for being absent on 24th February 2014.

46. The Respondent justified the summary dismissal pursuant to section 44(4) (g) of the Employment Act. The Claimant has challenged the reasons for his termination and the lawfulness of the same as not being valid.

47. Upon dismissal, the Claimant was issued with a clearance letter dated 19th May 2014 copied to all departments by the human resource office. This I take was to help the Claimant exit and to ensure that all properties belonging to the Respondent were accounted for and his terminal dues were computed based on the exit. The Respondent therefore directed;

The above [claimant] ceased to be in our employment with effect from 30th April 2014. Kindly provide detailed information including costs to enable us process his/her dues.

Reason for separation

[Marked] separation

...

47. The Respondent witness Osodo testified that it was an error to state that the Claimant was dismissed on 30th April 2014 as this should have been 19th May 2014. However, upon discovery of the error as alleged, this senior officer of the Respondent and responsible for human resource function does not issue a follow up memo to correct the error to all departments. Also, he stated that there was an error in marking that the Claimant 'resigned' and rather it was supposed to be 'dismissal'. There is also no follow up letter to amend and or correct these supposed errors that go into the record of the Claimant and

were used by all departments to clear him for the payment of his terminal dues. The clearance form does reflect the extent to which the Respondent wanted the Claimant to leave his employment. Earlier he had been asked to resign which he declined, and by noting in the clearance form that the Claimant had indeed exited upon resignation on 30th April 2014, such I find to have been the true case.

48. The Respondent made effort to justify the summary dismissal of the Claimant under the provisions of Section 44(4) (g) of the Employment Act thus;

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

48. Mr Osodo testified that the failure by the Claimant to account for monies advanced to him for endorsement of shipment of goods and his use of a third party documents to account for the same, caused the Respondent a loss of Kshs.3, 850.00; that this was fraud amounting to a criminal offence that should have caused the Claimant to be arrested. That the summary dismissal being premised on section 44(4) (g) of the Employment Act was justified as there existed reasonable and sufficient grounds of the Claimant having committed a criminal offence.

49. I take it then that the events culminating to the dismissal of the Claimant started on 17th February 2014 when he collected Kshs.3, 850.00 from the cashier for endorsement of shipment to Ethiopia. There are subsequent events that led to the issuance of a show cause letter on 11th April 2014 setting out that there were monies advanced to him on 17th February 2014 and on 10th March 2014. In his explanation, the Claimant states;

I did not take money from the cashier on both dates as indicated above. I only took the money to account from the cashier on 13th February 2014 as per attached. [Attached is petty cash voucher dated 13th February 2014 for Kshs.3, 850.00 for endorsement of plant documents].

The money was accounted for as indicated (clearance) on the voucher dated 17/2/14.

I do not understand how it remained with cashier after clearance until it was again cleared on 10/3/14.

...

50. Upon reply to the show cause on 11th April 2014, on the same date the Claimant was suspended on similar grounds as well as that he *managed to get receipts from the Kenya national Chamber of commerce and industry for the two sets of documents*. The Claimant was accused of forgery and therefore was suspended to allow for further investigations and to report back on 16th April 2014. Such suspension was extended to 17th April 2014. The Claimant was directed to report back on 27th April 2014 for hearing. A leave application form was filed for him and signed for by the human resource office on 22nd April 2014. At this point the Claimant had 18.33 days of leave and were thus unilaterally reduced to 13.33 as he had not applied for his leave.

51. Of interest is a letter filed by the Claimant and dated 14th May 2014. Such is also attached by the Respondent as annexure 14 to the statement of defence. This letter shares crucial details;

- On 13th February 2014 he collected Kshs.3,580.00 for endorsements and cleared it on 10th March 2014;
- On the same date 13th February 2014, mango client gave him Kshs.4,000.00 to buy certificates and presented the receipt on 17th February 2014;
- That the receipt given to accounts on 17th February 2014 was for record purposes ‘..But was wrongly attached as for chamberization.’

52. The Claimant further offers in his letter that;

Due to this confusion, the clearance receipt given to accounts on 10.3.14 had the same attachments.

Understand this as a mistaken attachment which due to the confusion even the signatures did not detect and not forgery.

53. The next thing to happen to the Claimant was the issuance of his letter of dismissal. Despite the above outlined explanation upon suspension, the Claimant was summarily dismissed.

54. There are fundamental rights that an employee placed in circumstances such as the Claimant was as at 14th May 2014 enjoyed. Despite the grave allegations against him, he had been suspended to allow further investigations. Upon his responses thus on 14th May 2014, he was entitled to the results of the investigations against him and once that was issued, he was entitled to a hearing. The matters that the Claimant faced would have well been explained by a financial report as to what losses the Respondent incurred as a result of the Claimant activities. Explanations at a hearing would have given him a chance to sufficiently explain himself so as to avoid the harsh sanction of a summary dismissal which then came too early before he could be heard. the nature of the Respondent Company should have an audit report to explain the losses said to have been incurred to the alleged fraud and forgery of the claimant. to therefore rely on mattered explained in reply to the show cause and then fail to give the Claimant a hearing as contemplated under section 41 of the Employment Act is an outright circumvention of mandatory procedures set out in law.

55. Beyond these findings section 44(4) of the Employment Act does not give an employer such as the Respondent a blanket right to dismiss an employee at will. These provisions comes with a duty set out under section 41(2) of the Employment Act. However grave the circumstances of the claimant's misconduct he was entitled to be heard before he was dismissed. such a hearing should have factored the following;

(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

56. The right to be heard is the cornerstone of and for fair labour relations. Where the circumstances do not allow a hearing before summary dismissal, the duty is upon the employer to set such out. In this case Osodo was emphatic that he enjoyed the right to dismiss any employee in his capacity as the senior human resource officer of the respondent. Such mandate was however not established. The Respondent throughout the proceedings and exchange of pleadings does not set out what policy manual regulated disciplinary matters at the Respondent entity. Such is a requirement under section 5(8) of the Employment Act read together with section 12 thus;

12. (1) A statement under section 10 shall—

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

57. Without such a policy, known to employees in circumstances where the Respondent confirms that they enjoy a workforce of over 5,000 employee, the Respondent is left seriously exposed to claims such as this one. The arbitrary acts of one officer, Osodo in addressing the case of the Claimant from the issuance of the show cause letter, the suspension, extensions and grant of unilateral leave to facilitate his investigations which are not shared with the Claimant is a serious lapse and the resulting summary dismissal wrongful. Any decision arising from such a flawed process, the failure to consider any responses that the Claimant had made in an impartial manner as set out under section 41(2) of the

Employment Act, rendered the summary dismissal a nullity. Such cannot find any justification in any known legal system, employment practices or procedures. Had the Claimant been given a hearing upon conclusion of any investigations that the Respondent officers were undertaking against him, his defence well considered would have exonerated him. In the end, the summary dismissal should never have been. The entire process was eschewed against the Claimant and resulted in a wrongful dismissal.

58. Discrimination against any employee is specifically outlawed under the Constitution at article 27 and under the Employment Act at section 5 read together with section 47. Article 27 of the Constitution at subsection 4 provides that;

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. [Emphasis added].

59. Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) particularly on health status. The Constitution further directs the enactment of specific legislation, other measures and policies to ensure the full realisation of this right and to ensure that where there is a violation, the same is addressed. In employment and labour relations, the Employment Act at section 5 provides that;

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

60. The protection of employee against any form of discrimination at the work place is therefore a matter taken very seriously as when alleged, the burden placed upon an employer is enormous. The employer must prove that the discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the outlawed grounds thus;

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in this section.

61. In this case therefore, section 47 (5) of the Employer requires 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.

62. This however does not shift the burden of proof in cases of discrimination against an employee from the employer to the employee. Section 5 must be seen on its own but in contest of the right to non-discrimination as protected that an employer must show does not exist at the work place. With regard to section 47 of the Act therefore, an employer challenged to have engaged in a discriminatory practice must set out the reasons for taking certain actions against the subject employee. Where such actions are shown not to have any justification, weighed against the protected grounds, then there exists discrimination against such an employee, which is prohibited and must be addressed.

63. Where the purpose of the Respondent clinic staff by sending the Claimant to seek medical tests for his condition was to ensure that he was treated, logic demands that such an assessment was based on an initial need for such treatment. Whether the Claimant went to mama Lucy Kibaki Hospital, Aga Khan Clinic or Sunrise Clinic is not material. Wherever the Claimant was attended to, the duty was to return all information back to the clinic for purposes of getting his off days or time off for further medical attention,

which time off was to facilitate the human resource office is accounting for such time of work. The evidence of Jane Onchiri in this regard leave a lot to be desired. She testified that all medical records were kept confidential. However, such confidential reports are part of the defence filed herein, annexure 19A, 19B, and 19C. Such give personal and confidential details of the Claimant and indeed the contents thereof form the bulk of Osodo's witness statement at paragraph 18. The nature of personal disclosures in medical records submitted to the clinic of the nature that this was to a medical practitioner, a Nurse, who was to hold the same confidential or code the same so as to protect the confidentiality due to the Claimant is not there. Indeed, the evidence of Jane Onchiri is based on matters observed by other clinical officers/nurse – Caroline Mwongeli and James Mulinge. I find these disclosures contrary to the ethical standards governing such medical practitioners and with such open disclosures, the fears and allegations by the Claimant are well founded that these clinic staff disclosed his medical status to the human resource officer/s hence the apparent frustrations, back and forth, time off on flimsy reasons that have no justification. Such is to engage in unfair labour practices and acts discriminatory of the claimant.

64. The Claimant has set out a two-tier claim for discrimination against him and unfair labour practices against him contrary to articles 27 and 41 of the constitution. It is not denied that on 28th March 2014 the Claimant became unwell while at work and was attended to at the Respondent clinic. He was advised to take further tests and give time off to attend to his health. Such illness and time off is confirmed by the Nurse and the records filed. Osodo also testified that time off due to sickness was processed through the clinic and as such, with the medical notes from the clinic herein shared, the human resource were made aware of the Claimant ailment that required further management that was not available at the Respondent clinic.

65. From the sick off given on 30th March 2014 triggered a series of events. The defence was that the Nurse did not submit any sick off for the Claimant and the 30th being on a Sunday, such was not possible as the human resource office would be closed. However, it was the defence that the clinic was open 24 hours. In any event without a policy document as to how time off due to sickness or illness, the provisions of section 30 of the Employment Act apply. Where the Claimant became ill and was not able to attend work, all what he was required to do, when absent due to illness, inform the Respondent within reasonable time and where not possible to do so, send a third party. Once able to resume work, the Claimant was to file his medical certificate. Without the laid down procedures as to how such confidential medical records were to be shared, I take it then the clinic staff had the responsibility, once they knew the condition the Claimant suffered from to cause him to be allocated sufficient time for him to attend to the demands of his condition that required urgent management. Such management and treatment was not available at the clinic and had to go to other health facilities. The requirement then to return the medical tests became of no useful purposes. The continued demand by the clinic staff and the Respondent human resource office that such test results be submitted has to be looked at in the context of the claimant's evidence. That he was ill-treated once the human resource officer knew about his health status and made to undergo inhuman and degrading treatment. What the Respondent resulted into doing is telling –

- By 30th March 2014 the Respondent officers were aware that the Claimant was suffering from TB. This is evidence from the evidence of the Nurse and chronology of events set out by the Respondent at annexure 21;
- Despite such illnesses and time off, the Claimant reported to work on 31st March 2014;
- On 1st to 5th April the Claimant took leave to attend to his illness;
- On 8th April 2014 there were audit questions to transactions relating to 17th February 2014 and 10th March 2014; such had not been raised until then.

66. From this point, Osodo took over investigations, disciplinary process and final dismissal of the claimant. As set out above, there is no policy manual or details as to what procedures applied in facilitating this process. The audit report and the directions from the audit team to the human resource office to commence investigations and disciplinary action against the Claimant is not available. What then followed is important to outline;

- On 11th April 2014 the Claimant was issued with a show cause letter;

- On 11th April 2014 he filed his responses;
- On 11th April 2014 the Claimant was suspended from duty;
- On 22nd April 2014 the Claimant was given 5 days of leave;
- On 28th April 2014 leave was extended by 7 days;
- On 30th April salaries were due but the Claimant was not paid through the bank;
- The Claimant was paid by voucher apparently the system had failed and had error and he was left out but in his salary, a sum of kshs.3,850.00 was deducted so as to balance the audit and he had not accounted for this amount;
- On 7th May 2014 the Respondent at paragraph 30 of the Defence avers that the Claimant was given a hearing but the details are not set out;
- On 14th May 2014 the Claimant sent a letter to Osodo as outlined above, but it is not clarified as to whether the Claimant was given a hearing following his responses and the emerging clarification in his letter; and
- On 19th May 2014 the letter of summary dismissal was issued.

67. The above chronology is clear evidence, that the claimant, due to his illness, was subjected to a process by Osodo that clearly placed him separate and aside from other employees. The moment his health condition became apparent from records shared by the clinic staff, Osodo was able to know the Claimant had TB and matters that should have otherwise been resolved in February with regard to voucher payments and accounted for were introduced so as to commence the circus that was choreographed to justify the summary dismissal. This is apparent from the fact that a show cause issued to an employee is a critical step for an employer to establish any misconduct, such should only arise upon proper investigations and in some cases a suspension to allow investigations as held in **Frederick Odongo Owegi versus CFC Life Assurance Ltd [2014] eKLR** and also reiterated in a similar case of **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012** and the Court held;

Ordinarily in work relations, where an employee commits acts of misconduct, such an employee may be suspended to allow the employer to carry out investigations. Such investigations are meant to give the employer a chance in the absence of the subject employee to interrogate and establish if there are grounds that warrant a show cause notice against the employee that warrant a response. Until such a process is concluded, the employee remains without a concluded case against him that warrant a defence. Once the investigation is complete, the employee must be recalled from the suspension to answer to any allegations leading to the process of hearing where the employee is to give his defence. Once hearing is concluded, a sanction follows.

68. To therefore proceed and circumvent due process, issue show cause letter before investigations, is a process that I find was set up with the single purpose to frustrate the claimant; keep him out of the work place; and eventually lead to the wrongful dismissal. Such I find to be extreme measures against an employee who had served the Respondent for a long period; he had evidence of ill health; and had he been taken through a fair hearing, the previous warnings issued to him put into account, the reasons given for summary dismissal thus considered set on a wrong template ended up being an abuse to justify an apparent discriminatory practice against the Claimant.

69. At the time of summary dismissal on the set out grounds, the Claimant had been deducted the sum of Kshs.3,850.00 allegedly not accounted for, forged or sourced through fraud. At this point therefore to proceed and use the same material, information and facts for summary dismissal was double punishment on the claimant. as admitted by both parties, there was the case of Cosmas Ligami and Peter Kingoo who had failed to render proper accounts and were made to repay the unaccounted for monies. To therefore make the Claimant pay for monies allegedly not properly accounted for, then dismiss him was to treat him unfairly, such I find to be unfair labour practices and discriminatory against the Claimant contrary to constitutional safeguard pursuant to article 41 and 27 of the constitution. Should practices are outlawed. Where violated such as in the case of the claimant, damages are payable.

Remedies

70. Before going into this head, I wish to reiterate the finding in **David wanjau Muhoro versus Ol Pejeta Ranching Co. Ltd** case at paragraph 185 thus;

... Employers should not withhold employee's salaries as a form of disciplinary sanction. It adds on to the gravity of the procedural irregularity, when the employee's salary is used as a weapon against him. How was the Claimant expected to defend himself effectively at the disciplinary hearing without an income?

71. The above resonates herein. The Claimant April 2014 salary was not posted to his bank account. This was paid by voucher less what was said he had failed to account for properly. At this time the Claimant was down with a chronic condition making his health require attention. He needed his job and the salaries that go with it and the medical cover and facilities offered by the respondent. The Claimant was most vulnerable. I therefore find the clearance form stating that the Claimant had been terminated as at 30th April 2014 to be a correct position. The issuance of the summary dismissal is simply an afterthought fixed to cover-up an otherwise extreme case of discrimination against the claimant. Had this not been the case, the Respondent had all the time, facilities and latitude to issue memo changing the alleged errors.

72. The claim is for 20 years salary for time remaining before the Claimant retirement. On the finding that this was a case for wrongful dismissal, the Court shall not award herein and shall rely on remedies for wrongful and unfair dismissal set out under section 49 of the Employment Act and noting that the Claimant has also claimed for compensation.

73. Compensation is due on the finding that the Claimant was wrongfully and unfair dismissed. Maximum compensation is due at 12 months gross salary. The gross salary at the time of termination was Kshs.18, 493.00 and the award is hereby assessed at kshs.221, 916.00.

74. The Claimant specifically pleaded for the payment for damages for discrimination against him and for unfair labour practices. Upon the finding that there was a violation of article 27 and 41 of the constitution, damages are due. The Claimant was dismissed at his prime, he was aged 40 years at the time and has since not been able to secure new employment. The damages awarded have put into account the trauma and losses incurred as a result of the wrongful dismissal that was part of a series of discriminatory and unfair labour practices against the claimant. Noting the circumstances of his case, damages are hereby assessed and awarded at Kshs.5, 000,000.00.

75. The Claimant is seeking exemplary and punitive damages. The Court does not consider the award for such damages appropriate on the fact of the findings above and award for damages under a different head. Such is an enough award in the circumstances of this case save that this being a case of wrongful dismissal, the Claimant is entitled to notice pay. This though not claimed is legally due based on the Court findings. Kshs.18, 493.00.

76. Costs are claimed. Costs are awarded by this Court under its discretionary powers set out under section 12 of the Employment and Labour Relations Court Act. It is appropriate to award costs upon the finding above particularly with regard to the unfair dismissal.

In the penultimate, judgement is hereby entered for the Claimant against the Respondent and hereby ordered;

- a. **A declaration that the Claimant was wrongly and unfairly dismissed;**
- b. **A declaration that the Claimant was discriminated against and the Respondent engaged in unfair labour practices against the claimant;**
- c. **Compensation is awarded at kshs.221,916.00;**
- d. **Damages awarded at kshs.5,000,000.00;**
- e. **Notice pay at Kshs.18,493.00; and**

f. Costs of the suit.

Orders accordingly.

Delivered in open court at Nairobi and signed this 16th day of February 2016.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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