



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

CAUSE NO. 1441 OF 2012

BERNARD OUMJA ANYANGA.....CLAIMANT

VERSUS

FAST EDDIE'S (K) LIMITED.....RESPONDENT

Mr. Kiprono for the Claimant

Mr. Odhiambo for the Respondent

JUDGMENT

1. The Claimant seeks compensation for wrongful and unlawful dismissal from employment and payment of various terminal benefits set out under paragraph 16 of the statement of Claim dated 24th July 2012 and filed on 25th July 2012.
2. The Respondent filed memorandum of defence in which it denies the Claims as set out in the statement of claim and counter claims Kshs.501,668.70 owed to the Respondent as a result of the Claimant's fraudulent activities and/or willful neglect.
3. In particular the Respondent claims Kshs.72,938.00 in respect of goods taken from the Respondent by the Claimant in his own name;
4. Kshs.44,080.00 in respect of goods taken by the Claimant and delivered for Baptist Mission on 8th November 2009, which goods were not paid for due to failure by the Claimant to raise an invoice for two years;
5. Kshs.134,242.00 in respect of shocks delivered to Faud Omar and the Claimant collected the payment in cash but failed to account for it;
6. Kshs.110,908 in respect of goods sold to Auto docs, GarGar Construction, Hokkido Kenindia and Wells Fargo but the purchase price was not accounted for by the Claimant; and
7. Kshs.139,500 in respect of a car held by the Claimant for thirty one (31) days without lawful authority from the Respondent at the rate of Kshs.4,500 per day.
8. The Claimant testified in support of his case. His testimony in brief was that he was employed by the Respondent as Assistant Director Corporate Sales in August 2003 but did not get a letter of appointment. He worked continuously until the 10th April 2012, when his employment was terminated.
9. The Claimant was charged with three offences as follows;

using his position to get preferential discounts for On and Off Road Accessories Company Limited on 5th January 2011 invoice No. 7808;

taking Saturdays off for work without permission; and

being a share-holder in a company that is a direct competitor of the Respondent and denying that fact. The Company being On and Off Road Accessories Company Limited.

10. The Claimant was called to a disciplinary hearing vide a letter dated 30th October 2011. The matters were resolved and the Claimant was to continue working on certain conditions agreed at that meeting and set out in a letter dated 17th November 2011.
11. The Claimant was subsequently alleged not to have complied with the conditions set out for his continued working and his employment was terminated without any further recourse. No new disciplinary process was conducted nor was the Claimant asked to show cause, a second time.
12. The Claimant admits being a share-holder off On and Off Road Accessories Company Limited. The Claimant stated that the company was a customer of the Respondent but not a competitor. The Claimant said that he was a silent share-holder and was not involved in management of the company. The company was managed by one Raphael Odongo.
13. The Claimant said he was not owed leave days by the Respondent and that he was registered with NSSF and NHIF and the Respondent remitted Contributions to the Fund. The Claimant seeks Kshs.315,990.50 being unpaid commission tabulated at Kshs.163,347.50 for January 2012; Kshs.72,147.00 for February 2012; Kshs.69,600.00 for March 2012 and Kshs.10,890.00 for April 2012.
14. The Claimant's name was placed in the media upon termination to notify the public that he was no longer an employee of the Respondent.
15. The Claimant admits having owed the Respondent Kshs.72,938.70 in the counterclaim. The Claimant, however states that this amount was deducted from his commission. The 2nd amount regarding delivery to Baptist Church was also recovered from his commission. The amount of Kshs.10,440.00 was paid by the customer. The Claimant seeks to be awarded as prayed and for the counterclaim to be dismissed in total.
16. The Claimant was subjected to intense cross examination by counsel for the Respondent. He maintained his denial with respect to the allegation that he gave preferential treatment to On and Off Road Access Company Ltd. He denied that there was conflict of interest in him being a share-holder of On and Off Road Accessories Ltd. The Claimant admitted that he never worked on Saturdays stating that this was in terms of a standing arrangement under which he filled a form to be approved by the Director and this happened all the time. That this was confirmed to be the case and the Director apologised to the Claimant regarding the matter.
17. The Claimant stated that he was on leave on the specific day he is accused of having instructed a junior staff to give preferential treatment to On and Off Road Accessories Co. Ltd. The Claimant also said he did not deny at any time being a share-holder of the said Company since no company policy prohibited him from holding such shares.
18. The Claimant said that he fully complied with terms set out in the letter of 17th November 2011. That he submitted daily email returns on his movement. That he could not access the emails to submit them to Court since he was locked out of the company premises upon termination of his employment.
19. The Claimant said he gave 110% to the Respondent and the turnover of the Respondent is evidence of his input at the time. The Claimant denied being engaged in personal work during working hours.
20. The Claimant said it was not his duty to raise invoices though the money for Baptism Mission was recovered from his commission. If there was any oversight it was by Stores Manager and not him. The Claimant did not accept to be deducted the money but it was deducted.
21. The Claimant stated he was currently a Director of Kenya Office Printing Solutions. That he became director after he was dismissed in 2012.
22. The Claimant added he was dismissed for the same reasons addressed and resolved in the letter dated 17th November 2011 and no due process was followed the second time before the dismissal.

Defence

23. The Respondent did not call any witness in support of its case and solely relied on the pleadings and written submissions. The Court was told that the Respondent had since stopped trading but it

was not wound up yet. This was the explanation for the failure to call any witness.

24. The oral evidence by the Claimant therefore remains wholly unrebutted given that the averments in the memorandum of Response and the documentation attached thereto do not constitute evidence unless the documents are submitted to the Court either by consent of the parties or through a defence witness.

Determination

25. The issues for determination are as follows;

- i. Whether the Respondent had a valid reason to dismiss the Claimant;
- ii. Whether the dismissal was in terms of a fair procedure;
- iii. Whether the parties are entitled to the remedies sought in the Claim and in the Counter claim.

Issue i

26. The testimony by the Claimant remains uncontroverted. The Claimant denied in the Statement of claim and in his oral testimony the charges laid against him by the Respondent. The Claimant made candid explanation on each of the charges set out against him and the Court is satisfied that the Claimant made reasonable explanation, sufficient to exonerate him from any misconduct as alleged by the Respondent.

27. The Claimant therefore discharged the onus placed on him in terms of Section 37 (5) of the Employment Act, 2007 to show that the dismissal was wrongful and unlawful given his good track record at the workplace and the large turnover the Respondent made during the Claimant's tenure.

28. The Respondent has failed to rebut the candid evidence by the Claimant and the Court finds that, the Respondent did not satisfy the provisions of Section 43 as read with Section 45 of the Employment Act, in that, the Claimant has demonstrated that the dismissal was not for a valid reason.

Issue ii

29. It is clear that the Claimant was subjected to a disciplinary hearing and the issues were resolved in a letter dated 17th November 2011 between the Claimant and the Respondent.

30. The Respondent subsequently revisited the same issues and admitted that, it did not give a show cause letter nor provide a disciplinary hearing to the Claimant to demonstrate that he had not breached any of the conditions set out in the letter of 17th November 2011.

31. The procedure followed by the Respondent was in violation of Section 41 of the Employment Act, and the dismissal was therefore not in terms of a fair procedure as dictated by Section 45 of the Employment Act. The Court so finds.

Issue iii

Notice pay

32. The Claimant has proved on a balance of probabilities that he was wrongfully and unlawfully summarily dismissed from work and is entitled to one month's salary in lieu of notice, being a minimum condition of employment in terms of Section 35 (1) (c) of the Employment Act, 2007. The Claimant is entitled to Kshs.65,000 in respect thereof.

Accrued leave

33. The claim in lieu of seven (7) leave days is not rebutted and the Court awards Kshs.18,956.00 as claimed.

Gratuity

34.The Claimant was registered with NSSF and the employer contributed to the fund on his behalf. By dint of Section 35 (5) as read with Section 35 (6) the Claimant is not entitled to payment of gratuity and the Claim is dismissed.

Ten (10) days salary for April 2012

35.The Claimant was not paid salary for days worked upon dismissal and is awarded Kshs.27,080.00 in respect thereof.

Salary arrears (13 months x 3,000)

36.This Claim is not rebutted by the Respondent and is found to be sufficiently proved. The Court awards the Claimant Kshs.39,000 in respect thereof.

Unpaid commission for January to February 2012

37.The Claimant has sufficiently shown that he was entitled to commission in respect of sales made and that he was not paid commission for the months of January, February, March and April 2012 in the sum of Kshs.315,990.50. The Court awards the Claimant accordingly.

Compensation

38.The Claimant seeks twelve (12) months maximum compensation for the wrongful and unlawful summary dismissal. The Claimant served the Respondent from August 2003 as a sales and marketing manager until he was summarily dismissed on 10th April 2012, a period of about nine (9) years. There is evidence that the Claimant offered good service to the Respondent and the turnover on sales was very high during the tenure of the Claimant.

39.It is admitted that the Claimant made some mistake but issues were amicably resolved until when the Respondent without following due process revisited the same issues and summarily dismissed the Claimant. The Claimant was not paid any terminal benefits including arrear salary, notice pay, commission earned; and for leave days not taken at the time of dismissal. The Claimant suffered sudden loss and damage. He lost his means of livelihood and support for himself and family. The Claimant did not wish to be reinstated to his work and has since moved on with his life. The conduct by the Respondent caused pain and suffering to the Claimant.

40.Taking into consideration these factors and in terms of Section 49 (1) (c) as read with Section 49 (4) of the Employment Act, 2007, the Court awards the Claimant ten (10) months' salary as compensation for the wrongful and unlawful summary dismissal in the sum of kshs.650,000.00

Counter Claim

41.The Respondent did not adduce evidence in support of the counterclaim. The Claimant has shown that some of the alleged losses were recovered from the commission owed to the Claimant and from the defaulting customers. It has not been proved on a balance of probability that the Claimant caused the losses set out in the counter claim for lack of timely invoicing. The Claimant admitted the sum of Kshs.72,938.00 in respect of which he had personally taken goods from the Respondent but stated that the amount was recovered from his commission.

42.Accordingly, the counterclaim is not sufficiently proved and same is dismissed.

43.In the final analysis the total award to the Claimant as against the Respondent is as follows;

- i. Kshs.650,000.00 compensation;
- ii. Kshs.65,000.00 in lieu of notice;
- iii. Kshs.18,956.00 in lieu of leave;
- iv. Kshs.27,080.00 arrear salary for April 2012;
- v. Salary arrears (13 months x 3,000) Kshs.39,000.00;
- vi. Unpaid commission Kshs.315,990.50.

Total award is Kshs.1,116,026.00.

44.The same is payable with interest at Court rates from date of filing suit till payment in full.

45.The Respondent to pay the cost of the suit.

Dated and Delivered at Nairobi this 5th day of February 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE