



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 739 OF 2012

GEORGE OCHIENG OWIDI.....CLAIMANT

VERSUS

NYANZA REPRODUCTIVE HEALTH SOCIETY.....RESPONDENT

AWARD

Introduction

1. George Ochieng Owidi was employed as an office messenger by Nyanza Reproductive Health Society. Following the termination of his employment on 8th January 2012, he brought this claim seeking compensation and payment of accrued dues. The Respondent filed a Statement of Defence on 9th July 2012. At the hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Ferdinand Kizito Osama. Both parties also filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on a five (5) year contract effective 7th April 2008, at an initial monthly salary of Kshs. 13,000 which was progressively increased to Kshs. 43,943 at the time he left employment. He states that he was dismissed on 8th January 2012, on allegations of poor performance.

3. It is the Claimant's case that the termination was unlawful and unfair. In particular, he was not afforded an opportunity to be heard and the Respondent ignored both the law and its own internal Human Resource Policies and Procedures.

4. The Claimant's claim is as follows:

- a) Salary for the remainder of contract period (13,000x9).....Kshs.307,601
- b) One month's salary in lieu of notice.....43,943.00
- c) Leave pay for 22 days.....43,943.00
- d) Leave allowance @ 50% of salary.....21,971.50
- e) Due salary increment prior to termination @ 5%.....8,788.00
- f) Costs

The Respondent's Case

5. In its Statement of Response filed on 9th July 2012, the Respondent admits having employed the Claimant in the position of cleaner/messenger, by contract of employment dated 7th April 2008.

6. The Respondent states that in a meeting held on 1st December 2011, the Claimant was notified of anomalies relating to recording of stock receipts, delay in placing orders and improper recording of stock cards. In particular, the Claimant was accused of failure to issue a Local Purchase Order (LPO) for printing of t-shirts in time, as instructed by the Respondent's Director. The Claimant's failure led to delay which occasioned complaints by the Respondent's partners.

7. The Claimant was subsequently suspended to pave way for stock taking and a systems audit. On 4th January 2012, the Respondent convened a meeting to provide feedback from preliminary findings of an audit conducted in the Stores and Transport Departments. At the said meeting it was noted *inter alia*, that the Claimant had been irregularly deployed in the Stores Department and a decision was therefore made that he be re-deployed to his contractual position of cleaner/messenger.

8. At a further meeting held on 12th January 2012, which sought to clarify the Claimant's re-deployment to his contractual position, the Claimant displayed acts of arrogance and used abusive language towards the Finance Manager. The Claimant was consequently summarily dismissed in accordance with Section 44(4) (d) of the Employment Act. The Respondent denies any unlawful, wrongful or unfair conduct in relation to the Claimant's dismissal.

9. Findings and Determination

There are three issues for determination in this case:

- a) Whether the Respondent had a valid reason for dismissing the Claimant summarily;
- b) Whether in effecting the dismissal the Respondent observed due procedure;
- c) Whether the Claimant is entitled to the remedies sought.

Reason for Dismissal

10. The Respondent states that the Claimant was summarily dismissed for gross misconduct. In particular, the Claimant is accused of using abusive language against his superior as well as disobeying a lawful instruction.

11. The summary dismissal letter issued to the Claimant on 12th January 2012 states as follows:

“Dear George,

RE: SUMMARY DISMISSAL

I refer to the meeting held today at 1 pm in the Program Director's office. In attendance were the Program Director, Finance Manager, Human Resources Manager and you. The meeting sought to obtain clarifications from you regarding your deployment to the position of Hygiene Officer.

In the meeting you showed acts of arrogance, appeared unremorseful to your seniors despite the explanations given to you as to why you were deployed. In the process you ended up calling the Finance Manager a liar before his Senior Colleagues.

This is a gross misconduct under section 44(d) of the Employment Act 2007. Therefore in reference to the insulting language used and arrogant nature of your behavior over persons

placed in authority over you, the employer is left with no option but to terminate your contract summarily.

Hand over any Organizational property under your custody to clear you of any liability and commence the clearance process immediately.

Sincerely,

(signed)

Ezra O. Okello

Human Resources Manager”

12. From the evidence placed before the Court, it would appear that the Claimant who was initially employed as a cleaner/messenger was at some point asked to take up the duties of Stores Assistant. The Respondent's Human Resources Manager, Ferdinand Kizito Osama told the Court that the Claimant's deployment as Stores Assistant was irregular.

13. The Court did not find any evidence that the Claimant had any influence on his deployment to stores. What is clear is that the Claimant was unable to cope with the double deployment as cleaner/messenger and Stores Assistant. The Claimant himself admitted as much. It was therefore perfectly in order for the Respondent to review the Claimant's deployment. Nevertheless, the Respondent appears to have taken the wrong approach.

14. While the review ought to have been a routine management process, the Respondent appears to have taken a disciplinary approach. First, the Claimant was suspended by letter dated 8th December 2011 on allegations of poor performance. Second, in a disciplinary and review meeting held on 4th January 2012, it was recommended that the Claimant be re-deployed to his former duties according to his contract of employment. The position of Stores Assistant was to be advertised and the Claimant was encouraged to apply. From the proceedings of this meeting, it is apparent that the positions of cleaner/messenger and Stores Assistant were two distinct positions in the Respondent's establishment. It was therefore not clear whether the Claimant's performance challenges were as a result of too much work or lack of capacity on his part.

15. Having said that, the letter dated 12th January 2012 states that the Claimant's summary dismissal was triggered by his assertion that the Finance Manager, had lied. In summarily dismissing the Claimant, the Respondent relied on Section 44(d) of the Employment Act which is the first limb of what is commonly known as insubordination. This Section renders an employee who uses abusive or insulting language to their employer or a person placed in authority by the employer liable to summary dismissal.

16. What is in issue in the instant case is whether the use of the verb '*lie*' and its derivative noun '*liar*' qualify as abusive language within the meaning of Section 44(d) of the Act.

Black's Law Dictionary (Ninth Edition) defines '*lie*' as:

“To tell an untruth; to speak or write falsely”

17. As held by **Rika J** in ***Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR***, an employer who alleges insubordination as a ground for dismissal must provide particulars of insubordination. I do not think that to say a superior has told an untruth qualifies as insubordination. For this reason, I find that the Respondent had no valid reason for dismissing the Claimant and the dismissal was therefore substantively unfair.

Dismissal Procedure

18. Section 41 of the Employment Act, establishes the following mandatory procedure for handling cases of misconduct:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- (b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- (c) That the employer has heard and considered any explanations by the employee or their representative;

19. Additionally, Section 12 of the Act requires an employer who has more than fifty (50) employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

20. From the record, the Claimant was redeployed to the position of Hygiene Officer by letter dated 5th January 2012. Subsequently, a meeting was held on 12th January 2012 with the Program Director, Finance Manager, Human Resources Manager and the Claimant in attendance. The Claimant's utterances at this meeting led to his summary dismissal on the same day. The summary disciplinary procedure adopted in the Claimant's case flew in the face of both the law and the Respondent's own Human Resource and Procedures Manual. The dismissal was therefore procedurally unfair as well.

Remedies

21. In light of my finding that the Claimant's dismissal was both substantively and procedurally unfair, I award him eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the dismissal process. I further award the Claimant one (1) month's salary in lieu of notice. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay which therefore succeeds and is allowed.

22. No basis was laid for the claim for salary for the remainder of the contract period which therefore fails and is dismissed. Similarly, the claims for leave allowance and salary increment were not proved and are dismissed.

23. Ultimately I make an award in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 282,240
- b) month's salary in lieu of notice.....35,280
- c) Leave pay for 22 days (35,280/30x22).....25,872
- Total.....343,392**

24. The Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

25. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MAY 2016

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JUDGE

Appearance:

Mr. Mangerere for the Claimant

Mr. Owiti for the Respondent