



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1341 OF 2012

JOEL NJERU MATHENGE.....CLAIMANT

VERSUS

TRANSWIDE PHARMACEUTICALS.....RESPONDENT

JUDGMENT

1. In his memorandum of claim filed on 7th August, 2012, the claimant pleaded that he was employed by the respondent as a delivery assistant at an annual salary of Kshs.97,548/=.
2. On 16th November, 2011, the respondent through their manager informed the claimant together with two other employees that they had been suspended on the allegations that some drugs had been found missing and they were to remain suspended pending investigation into the alleged theft. The suspension was verbal and indefinite. According to him the indefinite suspension amounted to wrongful termination of services.
3. The respondent on the other hand pleaded that the claimant was its employee having been employed in 2008. It denied the claimant was suspended on 16th November, 2011. According to the respondent the claimant absconded duty after discovery of drugs theft from the respondent's premises. The respondent contended that since the claimant absconded duty, it was not possible or necessary to inform him of when to resume duty.
4. At the hearing, the claimant stated that he was employed in 2008 as a dispenser but later transferred to wholesale department where he used to distribute medicine. He was never issued with a letter of appointment but was given staff identity card. The card was given in 2008. He stated that he worked throughout without any disciplinary issues.
5. It was his evidence that he was accused of theft after staff were asked to anonymously write down those they suspected could be involved in the theft. Four of them were suspected and taken to Kamukunji Police Station to record statements. According to him they were accused as a group and no one specifically pointed at him. None of them was prosecuted for any offence. He stated that he went back to his place of work after two weeks and was told to wait to be called. He was never called nor was he paid his salary during suspension. He therefore considered himself terminated.
6. The respondent called one witness, Mr. Kenneth Ndichu. He stated that he was informed that for several months medicine was getting lost from the store. He asked the General Manager to conduct a stock take and it was established that the drugs were missing. He stated that he called all the staff and

informed them. Consequently the store staff were asked to make anonymous report on who they suspected and reason why. The results showed for members of staff including the claimant were involved. He consequently instructed the store manager to trail the four anonymously and they were trailed to CBD where it was found they frequented a particular pharmacy known for buying stolen medicine.

7. The four were called and findings made known to them but they denied. The matter was subsequently reported to the police and the four picked up for further investigations. The matter was thereafter left to the police who told them to wait. According to Mr. Ndichu, the claimant was never suspended. He went away after the police picked him up for questioning over the theft. He never came back to his workplace. In cross-examination he stated that he never wrote to the claimant and his colleagues asking them to resume duties.

8. Employment relationship is founded on trust and confidence. Once the trust and confidence has been eroded or lost, the parties cannot reasonably continue in it. It has to end but in terminating the relationship there must be justifiable and valid reasons the burden of proof of which rests on the employer. It is however upon the employee to show that the dismissal was unfair. In discharging their respective legal and evidentiary burden, it must be borne in mind that the threshold of proof is on a balance of probability as in any other civil claim.

9. The reason for which the claimant was dismissed or left employment are serious enough to justify termination. He need not have been charged with a criminal offence to justify the fact that he was implicated in theft.

10. The respondent however did not carry out the termination process in accordance with the procedure laid down in law. If it be true that the claimant was dismissed for absconding duty after being implicated in theft and picked up by police for further investigations, it was incumbent upon the respondent to show by way of evidence the attempt it made to contact the claimant to resume work but which the claimant ignored.

11. In the circumstances the Court find the claimant's version of events plausible and holds that his termination was carried out following improper procedure hence unfair.

12. The Court therefore awards him as follows:-

Kshs.

a. One month's salary.....16,258.00

b. Six months salary as compensation from unfair termination of services.....97,548.00

113,806.00

c. Costs of the suit.

13. It is so ordered.

Dated at Nairobi this 24th day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 24th day of June 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge