



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE 414 OF 2015

ROBERT MUNYOKI KIMANZI.....CLAIMANT

VERSUS

C.L.A.....RESPONDENT

J U D G M E N T

Introduction

1. The Claimant was employed by the Respondent on 1.12.2014 as the Operations Manager earning Kshs. 30000 per month. He worked until 18.4.2014 when he was dismissed for gross misconduct. The Claimant denies the alleged misconduct and avers that he was never accorded a fair hearing before his dismissal. He has therefore brought this Suit claiming his separation dues plus compensation for unfair dismissal.
2. The Respondent has admitted the employment relationship between her and the Claimant. She however denies that she dismissed the Claimant unfairly. She avers that the Claimant sexually harassed female employees and also used solicited bribes from her suppliers which offences were criminal in nature and also amounted to gross misconduct.
3. When the Suit came up for hearing on 15.2.2016, the parties recorded settlement on the Claim for leave, salary, off days and public holidays totaling to kshs 46307 less kshs. 24000 being loan advanced to the Claimant by the Respondent. Additionally, the parties agreed to dispose of the remaining claims, that is, salary in lieu of notice, compensation for unfair termination and allowance for acting as the general Manager by written submissions.

Analysis and Determination

4. The issues for determination arising from the pleadings and submissions are:-
 - a. Whether there was valid and fair reason for dismissing the Claimant.
 - b. Whether he was accorded a fair hearing before dismissal.
 - c. Whether the dismissal was unfair.
 - d. Whether the reliefs sought should issue.

Valid and Fair Reason

5. The Claimant denied the offence of sexually harassing female staff in his written Statement filed herein on 25.6.2015. He however never denied the offence of soliciting bribe or commission from suppliers. The Respondent has contended that the Claimant sexually harassed female staff including the Procurement Officer P.M and several female interns. She filed proceedings of the disciplinary hearing for the Claimant dated 14.4.2015 detailing the testimonies of the female staff

- and interns who were sexually harassed by the Claimant. The supplier from whom bribes were solicited by the Claimant in the name of Commission also testified. The proceedings were signed by the Claimant to confirm that he attended the hearing and that the contents therein is what transpired in the hearing. The Claimant also apologized and sought for forgiveness in the proceedings.
6. After the hearing the Respondent made a finding that the Claimant was guilty of sexually harassment and abuse of office and that the reason was good enough to warrant the dismissal of the Claimant. Under section 43(2) of the Employment Act, an employer is entitled to make a subjective decision on whether the conduct of his employee constitutes a valid reason for summary dismissal. Section 43(2) states that ***“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***
 7. In this Suit the Claimant has not filed any reply to the defence denying any averments made in the defence or the Witness Statements or the exhibits annexed. Without any oral evidence or at all to contest the defence averments, leaves the Court with no option but only to make a finding on a balance of probability that the Claimant misconducted himself grossly, by using his office to sexually harass female staff and also to solicit financial favours and kick-backs from suppliers of the Respondent. The said misconduct entitled the Respondent to dismiss him summarily under section 44(3) & (4) of the Employment Act.

Fair Hearing

8. There is no doubt that the Claimant was accorded a hearing before the dismissal. He was able to face his accusers and was given a chance to defend himself. He has not denied that he attended the hearing on 14.4.2015 and he has not faulted the proceedings in any way. The Court therefore finds that the Claimant was accorded a fair hearing before his dismissal.

Unfair Dismissal

9. Under section 45(2) of the EA, termination is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. As held herein above, the Respondent has proved that there existed a valid and fair reasons to warrant the dismissal of the Claimant. The Respondent has also proved that she accorded the Claimant a fair hearing before the dismissal. Consequently, the Court finds that the termination of the Claimant's Contract of employment was fair.

Reliefs

10. In view of the foregoing finding that the Claimant was fairly dismissed, the claim for salary in lieu of notice and compensation are dismissed. Under section 49(1) of the E.A the said reliefs are only available if the Court makes a finding that the termination of the employment of the employee was unjustified or unfair.
11. The Claim for acting allowance for the period the Claimant was the General Manager is also dismissed for want of particulars and evidence. The period he acted as the General Manager is not pleaded and no evidence has been produced to support the same. The Court has however considered the letter dated 24.10.2014 filed by the claimant which appointed him to act as the General Manager after the substantive General Manager resigned. The letter is much older than the time pleaded by the Claimant as the commencement date of his contract being 1.12.2014. Assuming that the Claimant started working for the Respondent earlier than the date pleaded and that the letter to act is genuine, the Court is still unable to determine the length of the period the Claimant acted as the General Manager. The jurisdiction of the Court is only limited to determining disputes based on the laws, pleadings and evidence before it. In this Case, the law, pleadings and evidence do not support the Claimant's submissions that judgment should be entered in his favour.

Disposition

12. Save for the sum of Kshs. 46307 – less Kshs. 24000 agreed by the parties on 15.2.2016, the Suit is dismissed. The Respondent will therefore pay to the Claimant Kshs. 22,307 plus one quarter of costs of the Suit.

Signed, Dated and Delivered at Mombasa this 24th day of June 2016.

ONESMUS MAKAU

JUDGE