



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 1538 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th September, 2016)

TITUS WANYONYI.....CLAIMANT

VERSUS

COMET HEALTH CARE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his claim on 31.8.2012 through the firm of Nyabena Nyakundi and Company Advocates seeking damages for unlawful and unfair dismissal.
2. He states that he was appointed to work for the Respondent on 1.4.2010 as a Sales Representative at a monthly salary of Kshs.22,000/= which was later increased to Kshs.25,000/=.
3. He avers that before being issued with a letter of appointment he had worked for the Respondent under an oral contract from June 2009 at a monthly salary of Kshs.17,000/=. He has attached his payslip for the month of June 2009 marked as Appendix 3 to confirm this.
4. He contends that he worked with due diligence and faithfulness until 1.2.2012 when he was dismissed for allegedly having questionable business deals particulars which were not disclosed. He has attached his letter of dismissal dated 1.2.2012.
5. The Claimant further contends that he was not paid his terminal dues and to date they remain outstanding.
6. He prays for his claim to be allowed as drawn.
7. The Respondent filed a Response to claim on 17.12.2014 through the firm of Omwoyo, Momanyi, Gichuki & Company Advocates wherein they admit the employment contract and the terms thereof.
8. They deny that the Claimant worked with due diligence and faithfulness as he engaged himself with activities that bordered on gross misconduct leading the Respondent to incur huge losses.
9. The Respondent alleges that an audit was done establishing discrepancies in his account leading them

to ask the Claimant to show cause for the discrepancies. They state that in a meeting held on 3.5.2012 the Claimant admitted to have swindled the Respondent of a sum of Kshs.204,291.50 leading them to terminate his contract.

10. They further state that the Claimant was arrested and placed in the custody of Kamkunji Police Station with a view of charging the Claimant with the offence of theft by servant.

11. The Respondent also states that the provisions of Section 41 of the Employment Act 2007 were followed to the latter and as such the dismissal was not wrongful.

12. The Respondent filed a counter-claim seeking compensation for Kshs.204,291.50 which the Claimant admitted having swindled them of.

13. In evidence the Claimant led evidence as drawn in the plaint. In cross examination he admitted owing Kshs.204,291.50 to the Respondent which he had committed to repaying at Kshs.1,000/= per month. He denied ever going on leave or receiving pay in lieu thereof.

14. The Respondent in evidence put up one witness. RW1 stated that the Claimant's contract was terminated on account of gross misconduct. He admitted that the Claimant was not given a hearing before dismissal as he was summarily dismissed.

15. He stated that before dismissal the Claimant had been called for a number of meetings to discuss the discrepancies in his account after which they reached the decision to dismiss him. The Respondent led evidence to the effect that they paid the Claimant what was due to him and retained money allegedly misappropriated by the Claimant.

16. In cross-examination RW1 conceded that he did not have any documents in Court to show that the Respondent held a series of meetings to discuss the Claimant's misconduct neither did he have documents to show that the Claimant had taken all his leave days. RW1 prayed for the claim to be dismissed and counter-claim to be allowed.

17. In submissions, the Claimant submitted that there was no valid reason for dismissal. In his letter of dismissal the reason given for termination of contract is questionable business deals details of which were not disclosed. Upon enquiry he was told by the Managing Director that there were loses. He further submits the threshold set out in Section 43(1) of the Employment Act 2007 was not met.

18. It is the Claimant's contention that the procedure required is under Section 42(1) and as such his termination was unlawful.

19. The Claimant states that he is entitled to one month's pay in lieu of notice of Kshs.25,000/= as he was not served with any notice of dismissal. He also seeks for leave pay of Kshs.75,000/= citing that he had never proceeded on leave for the whole time he worked for Respondent.

20. He also seeks service/gratuity pay and 12 months pay as compensation for unlawful dismissal. He further seeks to be supplied with a certificate of service.

21. As to the counter-claim, the Claimant prays for it to be dismissed even though he did not file any response to the counter-claim. He states that he was never issued with any demand notice to settle the alleged outstanding amounts in his account and as such the counter-claim is an afterthought.

22. The Respondent in submissions states that there existed a valid reason for termination. They state that the Claimant admitted having swindled the company of money which informed their decision to terminate him. They state that the Claimant seeks equity whereas he did not do equity by stealing from the Respondent.

23. The Respondent also submits that they adhered to the provisions of Section 41 and 42 of the

Employment Act by a series of meetings held with the Claimant before his dismissal.

24. The Respondent further submits that the Claimant is not entitled to any of the reliefs sought for the reasons that termination was governed by the contract.

25. They aver that the Claimant was terminated for gross misconduct and as such notice was not applicable. They also contend that the Claimant exhausted all his leave days and as such none are payable. They have conceded to payment of gratuity but only for a period of 1 year 9 months.

26. As to compensation for unlawful dismissal, the Respondent submits that it should not be awarded for the reasons that termination was lawful supported by the fact that no response to counter-claim was filed in Court.

27. In relation to the counter-claim the Respondent prays that it be allowed as prayed as there is no evidence on record to rebut the counter-claim and it should be considered as unopposed.

28. I have considered evidence of both parties and the issues for determination by the Court are as follows:

1. Whether there were valid reasons to dismiss the Claimant.

2. Whether due process was followed before dismissal of Claimant.

3. Whether the Counter-claim by Respondent is proved.

4. What remedies to grant in the circumstances.

29. On the 1st issue, the Respondents aver that the Claimant was dismissed for gross misconduct after he misappropriated the Respondents moneys.

30. The dismissal letter addressed to the Claimant dated 1/2/2012, reads as follows:

“...You are hereby dismissed with immediate effect due to your questionable business deals that lead the company loosing monies in your former territory of Central and Nyanza region.

You will be paid your dues once the company recovers all the outstanding sales you made during your deployment in the said areas.

Dr. Peter Asingo

Managing Director”

31. The questionable business deals are not explained however.

32. Under Section 43 (1) and (2) of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) 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.

33. From the above provision, the reason must be clear and must be one that existed at the time of termination.

34. In the case of the Claimant however, the issue of questionable deals needed to be proved by the Respondent. This, the Respondent didn't explain to the Claimant nor given him the details.

35. The only way such details would have been availed to the Claimant is if he was taken through due process as envisaged under Section 41 of Employment act which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(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”.

36. In their evidence in Court the Respondent admitted that the Claimant was not asked to show cause why he should be dismissed or terminated. There was also no formal hearing of any disciplinary case. The letter written by Claimant admitting he owes 204,291.50 was written 2 months after the dismissal and so would not have been the reason for the dismissal.

37. Though Respondents insist that Claimant was given a fair hearing, there are no proceedings of that hearing produced in Court and therefore this Court finds that the dismissal of Claimant was unfair and unjustified in terms of Section 45(2) of Employment Act which states as follows:

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

38. On issue of Counter-claim, the Claimant acknowledged he owes the 204,291.50 in writing. There was also no reply to the Counter-claim as filed in Court.

39. I therefore find the Counter-claim is proved as admitted in writing and I find for Respondent in terms of that admission of Kshs.204,291.50.

40. What remedies then are available to the Claimant?. I award the Claimant as follows:

1. 1 months salary in lieu of notice 25,000/=

2. Service gratuity at 15 days for each year worked

= $\frac{1}{2} \times 25,000 \times 3 = 37,500/=$.

3. 12 months compensation as damages for unlawful termination = $25,000 \times 12 = 300,000/=$

TOTAL = 362,500/=.

Less amount in Counter –claim of 204,291.50/=

Balance is Kshs.158,208.50/=.

Plus costs of this suit.

4. The Claimant should also be issued with a Certificate of Service.

Read in open Court this 19th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabena for Claimant – Present

Nyaberi for Respondent – Absent