



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 2076 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th September, 2016)

PATRICK CHEBOSCLAIMANT

VERSUS

STOKMAN ROZEN KENYA LIMITED RESPONDENT

JUDGMENT

Pleadings

1. The Claimant filed his claim on 19.11.2014 through the firm of Hamilton Harris and Matthews seeking damages for breach of contract and unlawful termination of employment.
2. He states that he was employed by the Respondent on 17.6.2005 as a Chief Accountant with effect from 11.6.2005. Under the said contract of employment, the Claimant was required to and performed the duties of Accountant and Human Resources responsibilities that were assigned to him by the Manager and the Board.
3. The Claimant states that he discharged his duties faithfully and diligently until his contract was wrongfully and unlawfully terminated for no valid or fair reason.
4. He states that on 27.3.2014, the Claimant received a call from the Respondent's Finance Director's office by which he was asked to attend what he was informed was an urgent meeting on 28.3.2014 with a Mr. Kieran McGirr a Director of Mavuno Investment Group a subsidiary of the Respondent, in the board room of Oserian Developments Company Limited. He was not given any details of what was to be discussed at the meeting.
5. It is the Claimant's contention that on 28.3.2014, he attended the meeting with Respondent's General Manager and two other directors including Mr. McGirr at which meeting various accusations of financial impropriety were levelled against him but the details of which were not disclosed.
6. He was threatened with undisclosed consequences if he did not admit to the allegations. He states that the Respondent's directors informed him that the Respondent had reached a decision to either dismiss him from employment or terminate his contract of service because a new Chief Accountant had already been hired to replace him.
7. He further states that he was handed a letter by Mr. McGirr dated 28.3.2014, that he allegedly was

supposed to have written indicating that he had given 30 days' notice of resignation from employment with the last day of employment being 30th April, 2014.

8. He was also supposed to admit having irregularly advanced himself money without authority which offence was to be forgiven on condition that he voluntarily resigned from employment.

9. The Claimant further contends that he denied the allegations set out in the said letter but he was coerced to sign it with threats to himself and spouse if he did not sign it. He was ordered to hand over his office to the new Chief Accountant which orders he reluctantly complied with. He was informed that he would receive his terminal benefits together with the salary of the month of April immediately upon leaving employment. To date the Claimant states that he is yet to receive any of his dues.

10. On 26.5.2014, he received a breakdown of what the Respondent purported to be his terminal dues amounting to Shs. 1,532,120 which in his view had been computed wrongly on account of firstly, being paid one month's salary in lieu of notice instead of three months salary as per the contract of employment; and he had 83 accrued leave days whereas the Respondent only paid him for 39 days.

11. He pointed out the errors to the Respondent who responded saying that the Claimant had advanced himself a loan on which they were made to pay taxes and penalties amounting to Shs. 1,007,786.55.

12. The Claimant denies all allegations of financial impropriety and states that all employees of the Respondent were allowed staff advance accounts and he has always made payment on this account. He admits owing Shs. 2,010,478.00 and that he had authorized the Respondent to deduct this amount from his terminal dues. The Respondent has to date not remitted the said Shs. 1,532,120.00 that they had themselves computed as owing to the Claimant.

13. He avers that due process was not followed in his termination as provided for under Section 41 of the Employment Act and that the Respondent did not also comply with the rules of natural justice as a result of which he has suffered immensely as his employment was his only source of income. He therefore prays for:

a. A declaration that the termination of his employment on 31.4.2014 was unfair, unlawful and wrongful.

b. An order for payment of his salary for the month of April, 2014, of Shs. 503,393.00, three months' salary in lieu of notice of Shs. 1,510,179.00, eighty three leave days accrued and not taken of Shs. 1,606,983.75, gratuity 3,717,360.00.

c. A declaration that the Respondent's demand for interest and penalties is discriminatory, null and void.

d. Such compensation for wrongful and unlawful termination of employment and for infringement of the Claimant's Constitutional rights as the Court may assess.

e. Certificate of Service.

f. Costs on a full indemnity basis.

14. The Respondent filed a Response to Claim and Counterclaim on 19.12.2014, through the firm of Ochieng, Onyango, Kibet and Ohaga Advocates, wherein they admit existence of an employment relationship with the Claimant but deny that the Claimant was dismissed but rather voluntarily terminated his employment contract by issuing one month's notice as opposed to the three months' notice provided in the employment contract. They allege that the Claimant resigned to save face after a forensic audit report revealed financial impropriety on his part.

15. They further allege that the Claimant breached the fiduciary duty as their employee by unlawfully,

irregularly and without any authority overdrawing his staff account by advancing himself the sum of Shs. 2,010,478.10.

16. The Respondent have filed a counterclaim wherein they raise issues that the Claimant overdrew his staff account without authorization on which they became liable to the Kenya Revenue Authority for tax in the sum of Shs. 1,007,786.55, advancing another employee unapproved cash advance beyond the approved limit, approving his own cash advances and taking goods on credit at a hotel owned by a subsidiary Company of the Respondent and charging the goods against his staff account for recovery from the payroll.

17. They also aver that the Claimant admits to owing them Shs. 2,010,478.10, which the Respondent was to recover from his gratuity.

18. The Respondent thus prays for:

a. Payment of the unauthorized cash advance of Shs. 2,010,478.10.

b. Accrued tax and the interest on tax of Shs. 1,007,786.10.

c. Interest.

d. Costs.

e. Any other relief that the Honourable Court may deem fit to grant.

Submissions

19. The Claimant has framed issues for resolution as:

a. Whether there were valid or lawful grounds for the Respondent to terminate the Claimant's employment.

b. Whether the procedural requirements set out in section 41 of the Employment Act were observed.

c. Whether there are any grounds entitling the Respondent to withhold the Claimant's salary for the period between 30.4.2014 to 25.10.2015.

d. Whether the final dues have been paid in full.

e. Whether the Respondent is entitled to any of the Claims set out in its Counter-Claim.

20. The Claimant in his submissions states that the Respondent did not have reason to dismiss him and due procedure was not followed. He states that the resignation letter alleged to have been written by him was prepared by the Respondent and he was coerced to sign.

21. He states that he was not the author of the said resignation letter as it did not bear his proper postal address but bore the address that he provided his employer at the time of employment.

22. He also alleges that he could not have requested for the matter not to be reported to ICPAK for the reason that he was not a member of that body. Further, that he had no reason of giving one month's notice instead of three, thus forfeiting two month's pay.

23. The said resignation letter the Claimant states, is an attempt by the Respondent to cover up their unlawful acts.

24. As to overdrawing his staff account without authority, he states that this was a benefit available to other employees for which a fringe benefit tax was paid by the beneficiaries and he relied on his payslips to show the monthly deductions towards clearing the facility.
25. Any balance on a staff account he states was deducted from an employee's final dues.
26. When he complained about the computation the Respondent decided not to pay any of the Claimant's dues. He states that even after paying off the staff loans there was still an excess of Kshs.2,500,000 which has never been paid to him.
27. The Claimant also submits that substantial fairness as required under Section 43 of Employment Act and the requirement to comply with justice and fairness in carrying out a termination were not adhered to. He was allegedly not invited to show cause why he should not be dismissed for misconduct.
28. He submits that he was not provided with the audit report on which the Respondent placed reliance in reaching the conclusion to terminate him.
29. It is the Claimant's submission that the fact that the Respondent did not put up any witnesses, is evidence enough that they have something to hide.
30. The Claimant further submits that provisions of Section 41 of Employment Act were not complied with and thus the dismissal is unlawful.
31. He prays for his terminal dues and damages for wrongful and unfair termination. They rely on the case of ELRC No. 46 of 2012. Alphonse Maghanga Mwanchanya vs. Operation 680 Limited where the Court made an award for 12 months compensation in cases where the Respondent's conduct was not as far reaching and injurious to the Claimant.
32. The Respondent filed submissions on 18/8/2016 wherein they frame the issues of determination as:
- a. Whether the Claimant voluntarily resigned from employment.*
 - b. What remedies (if any) are available to the Claimant.*
33. It is the Respondent's submission that the Claimant voluntarily resigned after being found guilty of financial impropriety. They buttress this assertion by stating that the Claimant signed a resignation letter voluntarily as there was no evidence led to support the allegation that he had been threatened with dire consequences if he failed to sign. Further that there was no evidence of a report of the threats to the Police or Ministry of Labour and as such the allegation is untrue.
34. The Respondent further submits that the Claimant failed to explain how he came to owe the admitted sum of Kshs.2,010,478.10 without any application for a loan or authority from the Respondent's General Manager. That this clandestine action of the Claimant cost the Respondent a sum of Kshs.1,007,786.55/= as tax due on the loan to the Kenya Revenue Authority.
35. That the Respondent decided to be lenient to the Claimant and accepted the letter of resignation without pursuing him for criminal conduct.
36. They submit that the standard of reasonableness is an objective one as was stated in a case of **Patrick Njuguna Kariuki vs. Del Monte (K) Limited (2012) eKLR:**

“If the ground or reasons for removal of an employee amount to gross misconduct, then the employer is entitled to dismiss the employee without giving a notice and a hearing as envisaged under Section 41 of the Act. However, if the reasons for removal are not proved to amount to gross misconduct, then the wings of Section 41 of the Act will have to spread out and the employee is entitled to the full protection of the Section”.

37. The Respondent submits that the Claimant's actions amounted to gross misconduct and as such warranted summary dismissal but the Respondent exercised good faith by not taking such action.

38. The Respondent concludes his submissions stating that the Claimant is not entitled to any compensation since he was not terminated but voluntarily resigned. Notice period does not apply in this case in the Respondent's view. They pray for the claim to be disallowed.

39. Upon hearing both parties herein and analyzing their submissions, the issues for determination are as follows:

- 1. Whether Claimant resigned or was terminated.**
- 2. If he resigned whether the resignation was coerced on him.**
- 3. If terminated, if the termination was fair or justified.**
- 4. If terminated unfairly what remedies are available?**

40. On the 1st issue, the Respondents have averred that the Claimant resigned on 25th March 2014. The Respondents however did not annex the Claimant's resignation letter as pleaded.

41. The Claimant on the other hand stated that the Respondents had forced him to resign on the material date. They presented him with a letter of resignation purportedly written by him which he declined to sign.

42. As a proof of the allegation, the Claimant annexed a purported resignation letter dated 29/3/2014 which is signed by Hamish Ker and James Hutchings but not by the Claimant himself. The letter in question is indeed not signed by the Claimant and so the averments in the said letter cannot be attributed to him.

43. The allegation that the Claimant resigned is therefore not supported by any evidence and the only inference this Court can make was that the Claimant was dismissed by the Respondents who wanted it to appear as a resignation by the Claimant himself.

44. On the 2nd issue there is no letter written to the Claimant terminating his services but Appendix 5 is a letter dated 23/5/2014 written by the Respondents Finance & Administration Manager titled Termination. The letter refers to a resignation letter dated 28.3.2014 which is assumed to be the unsigned letter purportedly written by the Claimant but signed by the Respondents themselves.

45. This letter of 23.5.2014 is proof that the Respondents themselves initiated the termination of the Claimant with an assumption that he had resigned. There is no indication that the Claimant was subjected to internal disciplinary hearing or even informed of the reasons as to why his services were being terminated under Section 45 (2) of Employment Act 2007:

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.

46. In the case of the Claimant, no valid reasons are given for his termination nor was he subjected to a fair disciplinary process. I therefore find that the Claimant was unfairly and unjustly terminated.

47. On the Counter-claim filed by the Respondent, the Respondent avers that the Claimant was guilty of financial impropriety which cost the Respondent 1,007,786.55 to Kenya Revenue Authority (KRA). This was occasioned by his advancing himself unapproved cash beyond the approved limit.

48. That the Respondent also took cash on credit and charged it against his account for recovery on the payment

49. They aver that the Claimant agreed to this issue and in a meeting of 28th March 2014 indicated that he had overdrawn his account by Kshs.2,020,478.10 without authorization.

50. The Respondents are still referring to the letter of 28/3/2014 – the purported letter of resignation which they contend the Claimant wrote but which this Court has found untenable as it is not in any way signed by the Claimant.

51. No other evidence was led to prove that indeed the Claimant had misappropriated any funds.

52. I find the Respondents have not established their Counter-claim and it is dismissed with costs to Claimant.

53. What remedies are therefore available to the Claimant? As per Claimant's appointment letter, he is entitled to 3 months salary in lieu of notice which I award him:

1. $3 \times 503,392.50$ as per February 2014 payslip = 1,510,177.5 .

2. Leave for 83 days accrued and not paid = 1,606,983.75/=.

3. Gratuity pay as the letter dated 23/5/2014 = 3,717,360/=.

4. 12 months salary as compensation for unlawful and unfair termination = $503,392.50 \times 12 = 6,040,710/=$.

TOTAL = 12,875,231.75/=.

Plus costs

Read in open Court this 5th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tugee for Claimant – Present

Mayende for Respondent – Present