



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.363 OF 2014**

**DAVID MAINA NDIRANGU.....CLAIMANT**

**VERSUS**

**TUSKER MATTRESSES LTD.....RESPONDENT**

**JUDGEMENT**

On 1<sup>ST</sup> January 2006 the Claimant was employed by the Respondent as the Finance and Administrator Manager earning a consolidated salary of Kshs.120, 000.00. On 31<sup>st</sup> July 2013 the Claimant was promoted to General Manager Finance and Administration at a salary of Kshs.300, 000.00. On 21<sup>st</sup> February 2014 the Claimant was summoned to the managing director's office and directed to resign from his position on the grounds that the Respondent was restructuring. The directive was accompanied by threats of dire consequences if the Claimant failed to follow as directed.

The claim is that there was no notice or lawful reasons given for his dismissal. There was no disciplinary or genuine reason for the dismissal and no time was allowed for the Claimant to argue his case. That by being forced to resign from his employment, the Claimant in essence constructively dismissed. That such dismissal was malicious and in bad faith on the grounds that;

The Claimant was forced to resign and immediately hand over his duties;

The Respondent created false reasons in an attempt to legitimise the dismissal;

The termination was without hearing or natural justice;

There was no formal record of dissatisfaction of the Claimant's services;

There was no hearing; and

Threatening the claimant with dire consequences if he failed to tender his resignation.

That this amounted to unlawful and unfair termination of employment. the Claimant is seeking for a declaration that his employment was unlawfully terminated and therefore null and void; compensations for unfair termination and payment for 3 years as compensation; costs, interest and issuance of a Certificate of Service.

In his evidence, the Claimant testified that upon employment by the respondent, he served diligently until 21<sup>st</sup> February 2014 when the managing director called him to his office at 1pm. Present was the co-director and the Claimant was informed that the Respondent was effecting changes and the Claimant

should leave office immediately. There was no reason given and the Claimant was not allowed to ask questions as he was directed to handover to his junior.

The Claimant proceeded to his office where he wrote an email and asked for time so as to absorb the shock and be able to hand over. He copied the managing director and the general manager.

The Claimant also testified that he was not given notice of the impending dismissal; he had no prior knowledge of any wrongdoing and the reason given of a restricting was not valid.

That the Respondent has since issued him with a Certificate of Service.

In cross-examination, the Claimant testified that he was responsible for overall finance of the Respondent but not part of human resource. He had no role in hiring of staff and where his department required new staff he would participate in interviews but the human resource office would do the hiring. He interviewed candidates and the handed over to human resource.

On 21<sup>st</sup> fairy 2014, he was called by Stephen Kamau without a prior agenda, notice or reason and told to resign from his position. No discussion was allowed. There was no reason to resign but the most senior officer of the Respondent issued the directive. The only recourse available to lodge a complaint was with the board of directors but the Claimant had no access and the managing director was the head. He opted to file his claim with the court.

Upon termination, the Claimant was paid Kshs.268, 000.00 which was his monthly pay less statutory deductions. He had a salary advance and Sacco contributions.

## **Defence**

In defence, the respondent's case is that the claim is an abuse of court process and the remedies sought cannot issue. The Claimant was an employee of the Respondent and his last salary was not kshs.300, 000.00 as alleged. That the letters of employment and confirmation documents submitted by the Claimant are fraudulent as no such documents were ever issued to him. The letter of offer of employment dated 2<sup>nd</sup> November 2005 is signed by Peter Mwenda as General Manager-Human Resource even though he was not a holder of such position until 2009. The Claimant's acceptance of employment is witnessed by Anna Gathoga who was only employed by the Respondent in 2009.

At all material times it was understood that in a case of gross misconduct under section 45<sup>1</sup> of the Employment Act the Claimant could be summarily dismissed without notice. The dismissal of the Claimant was not malicious or in breach of hi employment terms.

That the claim is based in fraudulent documents and cannot enjoy the remedies sought.

The defence is also that during the Claimant's employment with the Respondent as general manager he used forged documents and also influenced and sanctioned several underhand dealings which exposed the Respondent to grave liability. These underhand dealings constituted a conflict of interest and prejudiced the Claimant's ability to carry out his duties and to focus on his full time attention to his duties.

The claim should be dismissed as it is based on false allegations. Costs should be paid to the respondent.

### 1. Reference to section 45 on unfair termination while section 44 relates to summary dismissal

In evidence, the respondent's witness was Joshua Wambua the Human Resource Coordinator. He testified that he is aware from his position that the Claimant was called by the managing director together with other general manager on different days to meet the board of directors and agreed on a resolution that the Claimant would tender his resignation. The Claimant was not the only employee affected. All general managers were affected. The Claimant wrote an email noting these facts. All other general managers resigned save for the claimant.

That he was not privy to the meetings held between the Claimant and managing director but the outcome of the meetings was clear. On 21<sup>st</sup> February 2014 the Claimant wrote an email on *offer to resign* following his meeting with the managing director.

Upon the Claimant resignation, his terminal dues were all paid. The Respondent accepted the resignation.

### **Submissions**

The Claimant submit that section 41(1) of the Employment Act requires an employer to give an employee a hearing before termination and even in a case of gross misconduct, notice and hearing should be complied with. The Claimant was never given a hearing, there was no notice and no reasons that were genuine or valid were given for his dismissal. Where there due process has not been observed in terms of termination of employment and no substantive reasons are given, such termination is unfair in terms of section 43 and 45 of the Employment Act. The remedies under section 49 of the Act are available to the claimant.

The Claimant has relied on the case of **Mary Chemweno Kiptui versus Kenya Pipeline Co. ltd [2014] eKLR; Shankar Saklani versus DHL Global Forwarding (K) Limited [2012] eKLR; and Jonathan Macharia & 24 Others versus Bulk Warehouse Management & 2 Others [2013] eKLR.**

The Respondent submit that the Claimant resigned from his employment and was not terminated. The Claimant voluntarily handed over his resignation letter to the Respondent and there is no evidence that such was forced upon him to warrant the claims made.

That the Claimant was summoned to a meeting and asked to explain why he should not be dismissed and instead of waiting for due process he offered to resign from his positions. Notice pay is therefore not due. In Frederick Kariuki Kamau versus bank of India [2015] eKLR; the court held that an employee is allowed to resign and or terminate his employment contract by giving notice and the employer has to accept or reject such a notice for the notice to take effect. That in **Martin Vindija Nyambuku versus Mbukoni Logistics Limited [2016] eKLR;** the employee did not notify the employer upon resignation. The employee resigned and left on the same day. The Claimant in this case is liable to pay the Respondent in lieu of notice.

The Respondent also submit that upon the Claimant's resignation, no notice was due form the respondent. Clause 12.3 of the letter of appointment set out the terms governing termination of employment and where there was gross misconduct, summary dismissal would follow, section 44 of the Employment Act allow for summary dismissal. In Linus Barasa Odhiambo versus Wells Fargo Limited {2012} eKLR; the court held that an employer has the right to summarily dismiss an employee as set out under an employment contract. Where an employee by his conduct is in breach of the employment contract, the employer has a right to dismiss such an employee.

The Claimant is not entitled to the remedies sought. The claim for compensation for 3 years lacks basis or legal justification and should be dismissed. The remedies for wrongful dismissal are set out under section 49 of the Employment Act based on the required standard of proof under section 47 of the Act which the Claimant has failed to do.

The claims should be dismissed with costs.

### **Determination**

Was the Claimant summarily dismissed or he resigned?

Whether there are remedies due

The claim is premised on the evidence that the Claimant was summarily form his employment with the Respondent after he was called by the managing director and directed to resign from his position but the

respondent's defence is that they never dismissed the claimant, rather he resigned from his position. Despite the disagreement on the reason as to why the Claimant left his employment, what is admitted by both parties is that on 21<sup>st</sup> February 2014, the Claimant and the respondent's managing director held a meeting and where another director was called. Following this meeting, the Claimant left the employment of the respondent. This meeting then holds the key.

It is trite, an employer is the legal custodian of all work records. Further, when a dispute such as this one is filed by an employee, the duty is upon the employer to submit all the work records. Section 10(6) and (7) of the Employment Act provides that;

*(6) The employer shall keep the written particulars prescribed in subsection*

*(1) for a period of five years after the termination of employment.*

*(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

The rationale for the above can be found at section 47(5) of the Employment Act that provides that;

*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

As such, the Claimant as the employee, where a meeting was held with him and the Respondent officers on 21<sup>st</sup> February 2014, the Respondent as the employer should have documented and submitted such proceedings with the court upon the filing of this claim and with the defence as the Claimant has the right to dispute the reasons for his dismissal.

In this regard, the defence that the Claimant resigned on 21<sup>st</sup> February 2014 is good to be gone into. In his letter of 21<sup>st</sup> February 2014, the Claimant testified that when he was called to a meeting by the respondent's senior management he was directed to resign but he was not given the reason(s) as to why he had to resign. He left his meeting while still in shock and he asked for more time to do his handover. He thus wrote;

*Offer to resign*

*Dear Sir,*

*This is in reference to the meeting this morning in your office in which you advised me to resign from my position in company. This came to me as a big shock and left me emotionally distressed. You also instructed me to handover immediately. However, please allow me to take the rest of the day off as I prepare to hand over on Monday 24<sup>th</sup> February 2014.*

*Regards*

*Ndirangu*

Was this a resignation letter? Can it be taken as a resignation letter?

First, there is no response to this letter submitted by the respondent. Secondly, the Claimant in his letter, though headed *offer to resign*, the context is clear. This letter followed a meeting held earlier with Respondent officers who as set out asked the Claimant to resign. As the Claimant was still in shock, he followed up the directive to resign with his request for more time to absorb the shock and distress to be

able to hand over.

So effectively, as the Claimant left the meeting on 21<sup>st</sup> February 2014 morning, he knew the Respondent had terminated his employment. The directive to resign was such a matter of course. The fact of no action by the Respondent following the meeting admitted to have been held on 21<sup>st</sup> February 2014 morning and failure to reply to the Claimant's email as set out above, in itself does not exonerate the Respondent and give a good defence that they did not terminate the Claimant's employment. Such inaction and failure to reply and issue a termination letter is engaging in an unfair labour practice. Such practice is specifically prohibited under the Employment Act section 45 read together with article 41 of the Constitution.

In any case the Respondent witness Mr Wambua, was not privy to the meeting held between the Claimant and the managing director on 21<sup>st</sup> February 2014. He could not confirm what transpired in such a meeting. Therefore the action of the Claimant is sending an email and seeking for time to absorb shock and handover can be traced to the events of that meeting. Without the main participate, the managing director being called to challenge the evidence by the claimant, I take it the events set out by the Claimant as the correct version. he was forced to resign from his employment by the respondent.

Termination of any employment must be with reason(s), has to be justified and based on valid and just grounds. Section 43 of the Employment Act provides that;

*43. (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.*

Even in the worst case where an employee has grossly misconducted himself, the employer such as the Respondent is under a mandatory requirement to give such an employee reasons, a hearing and a chance to defend himself. Where the procedures and reasons are challenged, then the employer has the duty to provide the evidence leading to the termination in terms of the process and the substantive reasons for the same. Section 41(2) provides;

*(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.*

To therefore force an employee out of employment by a resignation or through any other unlawful means that is not voluntary, such amount to an unfair labour practice and not justified under section 45 of the Employment Act. In any event, in this case, the Claimant never resigned from his employment with the Respondent and as such, to be treated as having resigned and for the Respondent to demand that the Claimant should pay for notice not issued further confirms the unfair and unwarranted circumstances leading to the summary dismissal of the claimant.

The Respondent has heavily relied on the cases of **Frederick Kariuki Kamau versus bank of Baroda** and **Martin Vindija Nyambuku versus Mbukoni Logistics Limited**, however, my reading of these cases stand out as quite different from the Claimant's case. The Claimant never resigned from his employment with the Respondent for it to be taken as a voluntary action or that he is required to pay the employer in lieu of notice. Quite to the contrary, the Claimant here was summarily dismissed, there is no reason(s) assigned to such dismissal and no notice was given to him.

The allegations by the Respondent that the Claimant forged his employment records, that the letters submitted were signed by persons not the employees of the respondent, such evidence looked at in terms of section 10 of the Employment Act provisions, the duty to ensure proper work records are kept and maintained and addressed while such employment subsists is upon he employer. Where the Respondent became aware that the impugned documents were signed by persons not authorised to witness or were improperly obtained, there are ample legal protections and provisions to address the same. I find not record of the Respondent that they issued the Claimant with any disciplinary or show cause notice to

answer to any allegation with regard to his employment records. Such cannot be used at this last minute against the Claimant upon the Respondent effecting summary dismissal without due process.

Similar the allegations that the Claimant engaged in underhand dealings and leading to conflict of interests, available were provisions of section 44(3) and (4) of the Employment Act to the Respondent to apply. Such provisions however go with due process and procedures set out under section 41(2) of the Employment Act. Such allegations should have been brought to the attention of the Claimant so as to give him time to reply and where found culpable, a written termination letter issued to him. there is no notice of show cause notice submitted as evidence of compliance to the mandatory provisions of section 44 of the Employment Act for the court to make a finding that the Claimant misconducted himself at any point of his employment with the respondent. The Claimant comes out as a diligent and hardworking persons who undertook his duties faithfully and as required by the respondent. To infer otherwise, there is no basis or justification.

I therefore find the Claimant unfairly terminated from his employment with the Respondent contrary to section 45 of the Employment Act. Such termination was not procedural and lacked substantive reasons.

### **Remedies**

On the finding that the Claimant was unfairly terminated from his employment, noting the conduct of the Respondent is effecting the summary dismissal, the Claimant having served diligently with no record of indiscipline, section 49 of the Employment Act allow the maximum compensation at 12 months gross pay. I find an award of 1 months gross pay to the Claimant as compensation as a fair and appropriate remedy in the circumstances of this case. The Claimant's gross pay at the time of termination was Kshs.300, 000.00 and compensation due is Kshs.3, 600,000.00.

The claim for compensation at 3 months is without any justification and noting the above, such is declined.

Notice pay is due in a case of summary dismissal that is not justified. Clause 11.2.2 of the employment contract, parties agreed to notice of 30 days or payment in lieu thereof. In this case the Claimant is entitled to Kshs.300, 000.00 in notice pay.

Certificate of service has since been issued. Such is marked as settled.

On the basis that the Claimant was terminated without notice that is found as due, the notice pay due shall be paid with interest and costs.

**In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;**

- (a) A declaration the Claimant was unfairly dismissed by the respondent**
- (b) Compensation awarded at Kshs.3,600,000.00;**
- (c) Notice pay Kshs.300,000.00;**
- (d) Costs of the suit;**
- (e) Interest is payable on (c) above.**

Delivered in open Court at Nairobi this 25<sup>th</sup> day of November 2016.

**M. MBARU JUDGE**

In the presence of:

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