



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.19 OF 2014

(Before D. K. N. Marete)

CHRISTOPHER KOECH.....PLAINTIFF

VERSUS

KAPCHEBET TEA FACTORY LIMITED.....RESPONDENT

JUDGEMENT

The matter is brought to court vide a Memorandum of Claim dated 12th March, 2014. It does not disclose an issue in dispute on its face.

The respondent denies the claim and prays that it be dismissed with costs. It is her case that there never was a termination of the employment of the claimant in the first place.

The claimant's case is that on 2nd December, 2010, he was employed by the respondent as a driver and later promoted to Sales Assistant Grade II. He held his position until 6th January, 2014 when he was dismissed from employment. He earned Kshs.28,000.00 on termination.

It is the claimant's further case that during the three year stint of employment, his service was diligent with no issues of complaint against him. He narrates the sequence of events leading to his termination as follows;

6. On 31st December, 2013, the claimant attended the said meeting and in attendance were the Factory Manager, Field Extension Officer, Assistant Production Manager and the Dispatch Supervisor.

7. In the said meeting, the claimant was informed that investigations had been carried out, and found that he owed the company Kshs.2,048,182/= which he had not accounted for. No reconciliation was carried out and no evidence was supplied to the claimant to support the said allegation.

8. The four company officers summoned the company guards and the claimant was frog matched to his uncle's premises which are nearby and a search was conducted under the pretext of recovering the alleged unaccounted money. The guards were further instructed not to allow him back into the premises and thus the claimant was verbally dismissed.

The claimant's other case is that;

9. That surprisingly on 10th January, 2014 when the claimant went back to his place of work, the defendant served him with two letters dated 30th December, 2013 and 3rd January, 2014 respectively informing him that he owed the company Kshs.2,048,182/= and that the company had decided to involve the claimant's family members and that he had also absconded duty. APPX 1a&b are true copies of the said letters.

10. The claimant was unaware of the said debt as no evidence was given to him or reconciliation was done between him and the defendant's accountants. And in event there was no clear policy of how the sales proceeds were to be surrendered to the defendant as in many occasions he was under instructions by the Managing Director to send money to him and other individuals including creditors through M-pesa. APPX. 2 is a true copy of the claimant's m-pesa account.

It is his averment that the dismissal was hasty and was done without procedure or any prior warning addressed to the claimant on any form of misconduct. He denies this and deems the dismissal as unfair and unlawful.

He prays as follows;

a) A declaration that the respondent's verbal dismissal of the claimant from his employment was unfair and unlawful, hence null and void.

b) That conduct by the defendant to frog match the claimant to his relative's residence and informing them of the said allegations violated the plaintiff's rights as to personal dignity and then the claimant is entitled to general damages and

c) The respondent pay to the claimant loss of remuneration calculated at the rate of the claimants remuneration of Kshs.28,000/= per month to be paid between January, 2014 until the date of reinstatement of employment.

In the alternatively

d) Outstanding salary for the month of January, 2014 Kshs.28,000.00

e) Three month's salary in lieu of notice Kshs.84,000.00

f) Maximum compensation of 12 months salary for wrongful/unfair dismissal Kshs.336,000.00

g) General damages for infringement of his constitutional rights to dignity and psychological integrity Kshs.3,000,000.00

Kshs.3,448,000.00

I) Interest at court rates on (d), (e) and (f) above from the date of filing the claim.

j) Costs of this claim

The respondent's case is that the claimant was never dismissed in any manner but;

a) Absconded duty without permission from the respondent

b) Misappropriated the respondent's funds and that is the reason of him absconded duty.

She claims that the claimant

- 1. Has habitually violated his contract of employment by absconding duty without respondent's permission.*
- 2. Misappropriating the respondent's funds.*
- 3. Willfully making a false claim.*
- 4. Bearing false testimony against the respondent that he was frog marched by the respondent's guards under the instruction of the four respondents' officer to his uncle premises and conducting unlawful search.*
- 5. Giving false testimony that the respondents officer after frog marching him instructed the guards not to allow the claimant back into the premises and hence verbally dismissing him and yet on 10/01/2014 he was at his place of work.*
- 6. Giving false testimony that he is unaware of the debt of Kshs.2,048,182 and yet after him being served with letter demanding payments of Kshs.2,048,182 he undertook to pass the message to his customer to pay the amount within two weeks in essence he was to recover the amount alleged.*
- 7. Giving false testimony that there was not evidence of the debt when he acknowledged to pay the debt.*
- 8. Wrongfully suing the respondent when the claimant absconded duty.*

It is her further case that this claim is based on lies and falsehoods and should be dismissed with costs.

Further, the respondent avers and submits that the claimant was not a diligent or integrity ridden worker as follows;

- 1. That the sum total of the claimant's conduct has been contrary to sound employer-employee relationships in so far his actions herein amounts to gross misconduct, promote discord and desertion.*
- 2. That having admitted his error and having been offered opportunity to repay and now confirming his decline, by absconding duty, the tribunal be at liberty to direct the dismissal of Christopher Koech from employment.*

The matter came to court variously until the 26th July, 2017 when they agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant by the respondent, if at all, was wrongful, unfair, and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of the cause?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. This is a contentious issue in this cause with the parties taking opposing positions. The claimant puts in a case of unprocedural and unlawful termination which fact is denied by the respondent.

The respondents cite and submit a case of fraudulent misappropriation of the claimant's property to the tune of Kshs. 2,048,182.00. It is the respondent's further evidence that this was admitted by the claimant who undertook to make good the amount by requesting the respondent's customers to pay this to the respondent. This is documented and signed by the claimant in an annexure to the defence.

It is the claimant's further case that the claimant was never terminated from employment but instead absconded duty as a consequence of this fraud and other misconduct during his tenure of office. The respondent also denies the allegations of inhuman treatment (frog match) of the claimant as alleged and deems these as lies intended to secure sympathy and build his case.

The claimant further in his written submissions eloquently does and reiterates his case with a claim of Kshs. 3,448,000.00 in totality. I however note and observe that beyond the claim, the claimant does not tender any evidence in support of his case. His list of documents comprises of the following;

1. A letter from the respondent dated 30th December, 2013 on the outstanding debt.
2. A letter dated 3rd January, 2014 from the respondent to the applicant on the outstanding debt of Kshs.2,048,182.00.
3. Unclear seemingly accounting documents at appendix 2.
4. A letter of demand dated 7th February, 2014.
5. A letter of response to demand by the respondent dated 8th February, 2014.

These are not *in toto* supportive of the claim. The claimant had a duty of proving his claim on a balance of probabilities. This is moreso with the blatant denial of termination by the respondent. He chose not to. I therefore find a case of no termination of the employment of the claimant by the respondent. And this answers the 1st issue for determination.

With a finding of a case of no termination of employment, the other issues for determination abate and are not worthy of consideration.

I am therefore inclined to dismiss this claim with costs to the respondent.

Delivered, dated and signed this 8th day of December, 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Miruka instructed by Enock Anyona Miruka & Company Advocates for the Respondent.
2. Mr. Obosso holding brief for E. M. Juma & Company Advocates for the Claimant.