



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1177 OF 2013**

**SIMON ABERE GICHANA.....CLAIMANT**

**VERSUS**

**GATEWAY INSURANCE COMPANY LIMITED..RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent seeking resolution of the dispute he framed as wrongful dismissal. In his Memorandum of Claim filed on 25<sup>th</sup> July 2013 he averred that he was employed between 1<sup>st</sup> December 2007 and 21<sup>st</sup> February 2011. He averred that his dismissal on 21<sup>st</sup> February 2011 was unjustified, unlawful, illegal and in breach of the contract of employment between the Claimant and the Respondent contrary to the employment laws and in breach of the rules of natural justice. The Claimant pleaded that he was not given any charges or opportunity to defend himself before the sacking. He sought a declaration that the sacking was illegal and unlawful and payment of unpaid but earned leave Kshs. 215,575/-, unpaid salary for days worked in 2011 Kshs. 34,375/-, one month salary in lieu of notice Kshs. 82,500/-, erroneous deductions from salary Kshs. 60,000/-, payment for unlawful retirement pay for 6 years 6,682,500/- and pay for 21 days worked in February 2011 Kshs. 57,500/-. He also sought general damages for wrongful dismissal, costs of the suit and interest plus any other relief the honourable Court may deem fit and just to grant.
2. The Respondent filed Memorandum of Reply and Counter Claim on 10<sup>th</sup> October 2013. In it, the Respondent averred that the Claimant was its employee but denied categorically that the Claimant's termination of employment was unjustified, unlawful, illegal and in breach of contract employment. The Respondent averred that the Claimant was in actual fact dishonest, errant, negligent and/or compromised in the dispensation of his duties resulting in the loss of money to the tune of Kshs. 550,193/-. The Respondent pleaded that the Claimant was involved in failure to follow lawful commands within the cope of his duty causing financial detriment to the Respondent. It was averred that the Claimant intentionally failed to collect and follow up on premiums from clients and intermediaries inviting the summary dismissal in terms of Section 44(4) of the Employment Act. The Respondent sought to recover Kshs. 550,193/- for undeclared certificates of insurance. The Respondent averred that the Claimant was negligent in allocating insurance certificates without receiving premiums contrary to company policy, failing to give proper account of the circumstances leading to loss of the monies. In the alternative the Respondent sought these sums be set off against the sums the Claimant may be entitled to on

account of the Claim.

3. The Claimant filed a Reply to the Respondent's Memorandum of Reply and Counter Claim on 17<sup>th</sup> October 2013. In it he denied the set off and Counter Claim. He also denied the particulars of negligence alleged.
4. The Claimant testified on 27<sup>th</sup> October 2014. He stated that he worked for the Respondent and his performance was exemplary and received accolades from the Respondent. He testified that he was transferred from Kericho to Kisii and established the branch and management deployed employee who did not meet the standards of running an office. He stated that he fell ill and sought medical attention in Nairobi and on return to Kisii received a Memo from the CEO Mr. Kiboro on 121 certificates not paid for. He testified that no audit had been conducted to give the view that the certificates were not paid for and the process for issuance was that the underwriter would give the premium rate and advise the cashier and upon payment of premiums the certificate would be issued. He stated that in his absence Mary Karanja would sign the certificates and it was not the practice to give certificates without payment. He testified that after receiving the Memo from CEO he did not do much because he had not recovered quite well. He just continued with normal business until October 2010 when he was called and informed of restructuring. He later received a Memo from the CEO through the General Manager asking him to take responsibility for 88 certificates unpaid for while he was in Kisii worth 585,758/-. He testified that he replied to the Memo and denied responsibility. He stated that a manager cannot be asked to take responsibility for debts personally. He testified that he could not remember if he gave certificates without payment and if he did he must have done so and made arrangements on how to collect. He stated that he went to Kisii and assisted in collection of the debt and managed to collect Kshs. 35,565/-. He testified that Kshs. 10,000/- was deducted for 6 months to settle the medical claim at Nairobi Hospital.
5. In cross-exam he testified that the business was a company business and that all the money was banked. He testified that the cashier and receptionist collected and he would counter-check. He stated that he was not responsible for setting operational procedures. He testified that the right caliber of people had been interviewed but were not hired and that he tried to help the office run. He admitted receiving a memo on unpaid certificates but could not say the 121 certificates were not paid for. He testified that he helped collect some of the cash unpaid. He received another memo with 88 certificates which is at variance with the 121 certificates and stated that there was no investigations or audit. He testified that it was not often to give certificates for no pay and they would sometimes get a blank cheque and on Friday they would insert the figure. He stated that it was not his role to collect money and that endorsing his taking personal responsibility was treatment as a shareholder while in essence he has no shareholding. He testified that there was an illegal deduction of Kshs. 10,000/- monthly on medical bill. He stated that the balance of leave days was for leave since inception and there were 12.5 days from 20<sup>th</sup> August 2010 till 21<sup>st</sup> February 2011.
6. The Respondent called Stanley Muraguri Wilunda who testified that the Claimant was at the material times the Branch Manager Kisii and the Respondent found there was something wrong in the way the Claimant was accounting for money received as premium and an audit was done and established some money had not been banked and the Claimant was asked to account for it. He testified that after discussion with the Claimant they expected the Claimant to account for 578,758/- and he made a commitment to do so. He stated that the Claimant accounted for some of the cash but failed to account for the rest and this was gross as he broke the law. He testified that the Insurance Act cap 156 requires underwriters not to insure vehicles before receiving cash payments. He stated that the record shows the Claimant had 78.5 days leave and in 2011 the Claimant earned 1.75 per month and as at February the Claimant had 1.5 days earned and when leaving had about 80.5 leave days due. He testified that there were no erroneous deductions in the Claimant's payslip.
7. In cross-examination he testified that he joined the Respondent in January 2011 and the Claimant

left in February 2011. He testified that every manager has to ensure that the staff are developed in their unit and it was the responsibility of branch managers to train staff. He stated that the Claimant was given time to explain and he was to account for the money. He testified that the Claimant made an effort as captured in the memos. He stated that the Claimant was hospitalized at one time and used money outside the scope of the scheme and because the claim was rejected the Claimant made a request and the company paid.

8. In re-exam he reiterated that there were discussions with the Claimant.
9. The second Respondent's witness was Geoffrey Mariga Ngatia. He testified that he was the Head of Underwriting and visits the branch offices of the Respondent to ensure compliance of underwriting and confirm the pricing of risk, collection of premiums etc. He testified that he visited Kisii branch around September 2010 and found that business was not transacted within the rules of the company and was not in line with the regulator guidelines. He stated that he prepared a report dated 29<sup>th</sup> September 2010. He testified that through sampling he found premiums not collected. He stated that a certificate is only issued after payment of premium as insurance contracts are as per the law cash & carry. He testified that the total amount was 585,758/- and there was a collection of 35,565 made after the inspection and the balance was 550,193/- after the collection. He testified that he asked the insurer to pay for the hospitalization of the Claimant but the insurer declined to pay thus the Respondent advanced the money to the Claimant so that he could be discharged.
10. In cross examination he testified that he was the boss to the Claimant and he prepared the report after the visit to Kisii branch. He testified that the Claimant was competent in terms of registers – opening and keeping of records. He testified that the staff at the time expressed their failure to be inducted. He stated that the induction was to be by the Manager. He testified that the Respondent does not just employ anybody and that they had employed people with competencies. He testified that they did not send an auditor and that the collection of premiums or compliance does not require an auditor. He testified that managers know what is expected. He testified that the company does incur debts and that he takes personal liability if he has committed the company in the process of underwriting.
11. In re-exam he testified that the credit control unit deals with bank assurances and follows up where payments are not made by the banks and that is the only debt there is in underwriting.
12. Parties were to make submissions and at the time of writing the judgment only the Respondent's submissions are on file. In the submissions filed on 25<sup>th</sup> November 2014, the Respondent submits that the Claimant was errant and dishonest and led to a loss of Kshs. 550,193/- due to non-collection of premiums which was grounds for summary dismissal under Section 44(4) of the Employment Act. It was submitted that insurance law provides that insurance companies and agents are obliged to collect insurance premiums before cover commences. The Respondent relied on the cases of **Cynthia Kuvochi Luyegu & 6 Others v Tourist Promotion Services & Another [2006] eKLR**, **Miriam Kyalo v MFI Office Solutions Ltd [2013] eKLR**, **Fredrick Ouma v Spectre International Limited [2013] eKLR**, **Daniel Okoth v Kenya Commission of Human Rights [2014] eKLR**. The Respondent urged the Court to dismiss the Claimant's claim and enter judgment for the Respondent on the Counter Claim.
13. The issues for determination were simply thus:-
  - a. Was the Claimant's termination unlawful?
  - b. If it was unlawful, what remedies lie?
  - c. Is the Respondent entitled to recover for the premiums uncollected?
  - d. Who is to meet the costs of the suit?
14. The Claimant was dismissed after an audit undertaken in 2011 found premiums unpaid in relation to various certificates of insurance issued by the Kisii branch of the Respondent. From the testimony adduced I find the Claimant was well aware of the issuance of cover before premiums

were collected. He said and I quote “it was not often to give certificates for no pay and we would sometimes get a blank cheque”. To my mind this is indicative of the manner he issued cover and awaited settlement at the end of the week. His show cause letter indicates that he was to explain why he had given credit facilities to clients of the Respondent without authority. This was contrary to industry practice and was illegal in terms of the Insurance Act. I thus find there was cause to terminate his services. He was however not paid for leave days earned and not taken, the days worked and the inference is that these are dues he must collect. He was entitled to leave and at the time of disengagement had 80.5 days not taken. He is entitled to these. He was also not paid for 21 days worked in February 2011 and for this he is entitled to pay.

15. On the counterclaim the Respondent averred that sums in excess of 550,193/- remained unpaid. It was however not proved on balance of probability regarding the certificates for which payment was not received. Was it 88 certificates or 121 certificates? How many were issued by the Claimant as opposed to Mary Karanja his colleague? If this was proved I would not have hesitated to hold him liable for the loss. Though he argues that he was not responsible for company debts I find that in insurance business if the manager undertakes an underwriting risk without express authority of the insurer and gives a benefit of cover without payment then the insurance company can look to the official for recompense.

16. In the final analysis I find only a part of the claim is proved and the Claimant will have the following

a) 80.5 days pay and

b) pay for 21 days worked in February 2011.

There will be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 26<sup>th</sup> day of February 2015

**Nzioki wa Makau**

**JUDGE**