



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1822 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 30th June, 2015)

CYRUS NYONGESA SIMIYU.....CLAIMANT

VERSUS

CONCEPTS AFRICAN LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Statement of Claim on 3/11/2011 through the firm of Kipsang & Mutai Advocates. The issues in dispute were unfair termination of the Claimant by the Respondents, failure to pay the Claimant 3 months salary in lieu of notice and failure to pay the Claimant his emoluments for the month of May, June and part of July 2011 and applicable leave pay.

The Claimant's case

2. The claimant's case is that on 20th November 2010, he was employed by the Respondent as a Medical Representative, the position he occupied until he was terminated on 6/7/2011. His salary was 35,730/= per month plus a further travelling allowance of 20,000/= per month. The Claimant exhibited his pay slip for March 2011 as *Exhibit (NS1)*.
3. It is the Claimant's case that on 6/7/2011, without justifiable cause and in contravention of the employment contract and Respondents own Human Resource Policies, procedures and practices and principles of natural justice, the Respondents terminated his services. It is the Claimants averment that the Respondents had no valid reason to so terminate his services and he that he was not subjected to any known disciplinary proceedings nor was he given an opportunity to be heard on his own defence.
4. The Claimant submitted that his termination was unlawful hence his prayer that the termination be declared unlawful and that he be compensated accordingly as per his paragraph 6.0 of the Claim.

Respondents case

5. The Respondents filed their Statement of Defence on 18/2/2014 through the firm of Njoroge O. Kimani & Company Advocates. The Respondents admitted employing the Claimant but deny that his salary was 35,000/= plus 20,000/= travelling allowance as alleged but sought to rely on the appointment letter of the Claimant which stated that his salary was 20,000/= plus 1% commission on sales above 1 million payable in arrears on the day of each calendar month.

6. The Respondents also aver that they dismissed the Claimant with notice dated 6/7/2011 on the grounds of his failure to collect the amount of money he had sold to customers despite having promised to collect 1.8 million within one month. The Respondents exhibited a letter dated 27th November 2011 allowing him to carry out sales and collect money (**Exhibit CAL-2 & 3**).
7. The Respondents further deny breaching any law in termination of the Claimant and deny that the claimant is entitled to the remedies he has sought. They aver that the Claimant had been stealthily but gradually misappropriating/embezzling proceeds of the sales to their detriment. They asked the court to dismiss the Claimant's case with costs accordingly.

Issues for determination

8. After considering the evidence of the parties herein, the issues for determination are also follows:

1. ***Whether there were valid reasons to terminate the Claimant***
2. ***Whether due process was followed before the Claimant was dismissed.***
3. ***What remedies if any the Claimant is entitled to.***

9. On 1st issue, it is evident that Claimant was employed as a Sales Representative. As per his appointment letter his salary was 20,000/= plus 1% commission on sales over 1 million. However, from the pay slip produced in court that of May 2011, the basic pay is indicated as 35,130/= without any other benefits.

I will take that as the basic pay of the Claimant as at the time of termination in July 2011. The Respondents have averred that they terminated the claimant's services for failing to collect outstanding dues for goods supplied. This averment remained just a statement as there was no proof adduced about this omission.

10. Section 43 of Employment Act 2007 states that:

“(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.

11. The reasons leading to the termination must therefore be proved by the Respondent. It is not enough to state that the Claimant failed to collect moneys from the sales made. The Respondent should have gone ahead to show the merchandise allocated to him, their cost vis a vis moneys brought in to show what he failed to bring in.

The Claimant denied this allegation and it remained Claimant's word against Respondents.

12. It is this court's finding that there is no valid reason proved by the Respondents that led to the termination of the Claimant.

13. On the 2nd issue, the Claimant has averred that he was not accorded any hearing before his termination. The Respondents contend that they gave him notice of his failures on 6/7/2011. The alleged notice was not adduced in court. The only document exhibited by Respondent is the termination letter which stated that he had failed to collect 1.8 million sold to customers. It was also stated that he was doing his own business with the same clients he was to serve as the Respondents Sales Representative.

14. In all these allegations, it was paramount that the accusations be placed before the Claimant and

he be given an opportunity to answer to them. This encapsulates the principle of natural justice that a man should not be condemned unheard.

Section 41 of Employment Act 2007 also gives the same directive:

“(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.

15. In case of the Claimant, he was not given any opportunity to defend himself and in this case, the termination was unfair within the meaning of Section 45 of Employment Act which states as follows:

1. *No employer shall terminate the employment of an employee unfairly.*
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.*

16. I do find that this termination was unfair and wrongful and I declare it so.

I therefore award Claimant as follows:

1. **1 months salary in lieu of notice = 35,130/=**
2. **Pay for May, June and 6 days of July 2011**
= 77,280/=
3. **12 months salary as compensation for wrongful termination = 12 x 35,130/= = 421,560/=**
TOTAL = 533,970/=
Less statutory deductions
4. **The Claimant be issued with a Certificate of Service.**
5. **Respondent will pay costs of this suit.**

Read in open Court this 30th day of June, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimeto holding brief for Kunga for Respondent Present

Mulaku holding brief for Mutahi for Claimant - Present