



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 153 OF 2014

DUNCAN MWIRIGI ARITHI..... CLAIMANT

VERSUS

JHPIEGO KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st July, 2015)

JUDGMENT

The claimant filed the statement of claim on 24. 11. 2014 through Waweru Macharia & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Severance pay calculated at one month's pay for each completed year of service.
- b. Kshs. 601, 620.00 being 12 months compensation for unfair or unlawful dismissal.
- c. Costs of this suit.

The respondent filed the statement of defence on 15.12.2014 through Muturi Kamande & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

It is not disputed that the claimant was employed by the respondent on 16.06.2008 as a driver at a monthly salary of Kshs. 50, 135 and that the claimant's employment was terminated effective 27.05.2013.

The claimant's evidence was that on 8.05.2013 he was assigned to drive the respondent's Finance Officer from Nairobi to Nyeri. Upon arrival in Nyeri the claimant was assigned to go and support other respondent's staff then working at Njoki-Inn Dispensary. The claimant's duty was to drive the staff while on the field assignments that day. The claimant was also assigned and scheduled later that day (but unknown to the officers at the dispensary) to drive the Finance Officer from the respondent's Nyeri office back to the Nairobi office. The claimant was ordinarily deployed at the Nyeri office.

The claimant proceeded to the dispensary as required and the officers on duty at that dispensary took long at the meeting so that the claimant had to wait for them for a considerably longer time than the claimant anticipated before they were ready to be driven by the claimant to the next station they were required to go to.

The staff eventually completed their work at the dispensary and the first person to board the vehicle, according to the claimant's evidence and which was not rebutted, was one Mr. Patrick Muriuki. The claimant explained that at that moment he explained to Mr. Muriuki how the claimant's sister who was a married woman was causing the claimant stress because she wanted the claimant to give her money but the claimant did not have such money. It was in that process, discussion and moment that the claimant uttered the word in the Meru language thus, "Mukenye" meaning "uncircumcised girl or girls." The

officers, some of whom were women had at that time boarded the vehicle or were in the process of boarding the vehicle and it appears that as the claimant uttered the word, they heard it.

Some of the women in the team, say at least two of them, understood the Meru language and their testimony was that the words were abusive as understood in the Meru culture and usage because female genital mutilation (FGM) was not allowed and was discouraged in Kenya and using such words, as was testified for the respondent, was calculated to bring down women; that it was derogatory and calculated to annoy and to make the women present feel uncomfortable.

The evidence in support of the respondent's case was that the claimant had used the word in a mix of Swahili and English words at the time and the claimant rushed to drive the officers to the next station. It was suggested at the hearing that by rushing, the claimant was keen to drive the Finance Officer back to Nairobi in which event the claimant would benefit by being paid the relevant night-out allowance. It was also suggested in testimony for the respondent that the claimant had directed the word to one Gloria who was a member of the team at the material time and who did not understand the Meru language.

On the other hand the claimant's case was that he had used the word in reference to his sister who had caused him stress and in the conversation he had with the said Mr. Muriuki. The parties did not call Mr. Muriuki to testify before the court but parties did not dispute that the said Mr. Muriuki understood the Meru language and in an email filed in court he gave a different account from that of the respondent's witnesses who were in the team on the material date as far as the claimant used the word.

The email filed as exhibit 4 on the claim bundle and which was copied to all the team members on the material date clarified that the claimant had been having an argument with his sister on phone earlier before he entered the vehicle at the material time at Njoki-Inn Dispensary. The email further stated that the claimant uttered the word to vent his anger to the sister and not the staff in the vehicle. Mr. Muriuki further stated in the email that at the material time he did not talk to anyone because a member of the team known as Shirley had responded to the claimant's words with a lot of anger. The email further stated that the claimant had tried to explain that he was not directing the statement towards the ladies in the team but the ladies refused to listen. Mr. Muriuki concluded his email that in his perception the claimant was an angry man speaking his mind but he did not mean to direct it to the program officers.

By the letter dated 16.05.2013 the claimant was suspended with effect from 16.05.2013 until further notice. The suspension was on account of alleged lack of cooperation while out on the field activities and the use of vulgar and derogatory language at the workplace. By the letter dated 27.05.2013 the respondent summarily dismissed the claimant from employment with effect from 27.05.2013 because, as the letter stated, the respondent had investigated the matter and established that the claimant committed the gross misconduct as alleged in the suspension letter.

The **1st issue** is whether the termination was unfair. The claimant was given notice of the allegations and was given a hearing as envisaged in section 41 of the Employment Act, 2007 except that at the hearing he was not accompanied with a person of his choice as provided for in the section. The pertinent issue in this case is whether the reason for termination was valid as per section 43 of the Act. The court finds that it was not in dispute that the claimant uttered the abusive word in the Meru language and that the word was in fact abusive. The matter in dispute is whether the word was directed at the program officers and particularly the ladies in the team at the material time. Evidence suggested that the claimant had directed the word to Gloria who did not understand the Meru language and further conflicting evidence was that the word was generally directed to the women that were present. The email filed for the claimant shows that the respondent long after the event required the aggrieved officers to provide the accurate story and details about the alleged offensive events.

The court considers that the conflicting account as given for the respondent's case is not convincing especially that the claimant could not have directed the word to Gloria who did not understand the language. It is the court's view that the respondent's witnesses gave conflicting account as to the target of the utterance and that evidence is therefore not believable. The court further considers that the account by the said Mr. Muriuki as per the email he issued and which matches the claimant's account is believable

because throughout the disciplinary proceedings it was not shown that it was disputed or found wanting in any respect. The court finds that the claimant did not direct the offensive word to the ladies in the team but that his uttering of the word was misconstrued as such by the officers.

Under section 44(4) (d) of the Employment Act, 2007 it is gross misconduct for an employee to use abusive or insulting language, or to behave in a manner insulting, **“...to his employer or to a person placed in authority over him by his employer.”** Thus, the court holds that under that section the abuse or insult must be directed to the employer or to the person placed in authority by the employer over the employee. The court has found that in the present case the abusive or insulting word was directed to the claimant’s sister and not any of the officers in the team. Accordingly the reason for dismissal purportedly founded upon section 44(4) (d) was not established by the respondent. The court finds that the termination was unfair for want of a genuine or valid reason as envisaged in section 43 of the Act.

The **2nd issue** for determination is whether the claimant is entitled to 12 months’ salaries for compensation for unfair termination and as provided for in section 49(1) (c) of the Act. The claimant had served for 5 years and he expected to continue in employment. He had not obtained alternative employment at the time of hearing of the suit. The court has considered that the claimant contributed to his termination because he mixed his private communication and anger with his work leading to the misunderstandings that lead to his termination. In the circumstances the court finds that the claimant is not entitled to the maximum 12 months’ salaries. The court, instead, considers that 8 months’ salaries at Kshs.50, 135.00 making **Kshs.401, 080.00** will meet the ends of justice in the circumstances of this case. While making that award, the court considers that the respondent would have done better to carefully examine and investigate the case and thereafter would have arrived at a more just decision.

The **3rd issue** is whether the claimant is entitled to the severance pay. The claimant prayed for severance pay at a month’s salary for every completed year of service. Section 35(5) of the Act entitled the claimant to service pay for every year served upon agreed terms but such service pay would not apply, as per section 35(6) of the Act, where the parties have alternative arrangements for pension or terminal benefits; or the employee is a member of the National Social Security Fund. The parties did not provide evidence or make submissions on the prayer. The court considers that the prayer was abandoned as it was not justified and the same shall fail.

The **4th issue** is whether the claimant was barred from filing the suit in view of the exit agreement and discharge of liability. The claimant signed the agreement on 1.07.2013 acknowledging receipt of Kshs. 98, 900.00 from the respondent and confirming that the amount received was in full and final settlement of all the monies due to the claimant from the respondent in respect of the service up to 27.05.2013. The claimant further signed to certify that he had no further claim whatsoever in respect of his service with the respondent prior to 27.05.2013. The claimant testified that he signed to receive the money because he was told if he did not sign he would not be paid yet he was under serious economic pressure and he needed the money.

The claimant urged the court to follow the opinion in **Simon Muguku Gichuki –Versus- Taifa Sacco Society Limited [2012]eKLR** where **Ndolo J.** stated thus,

“Before proceeding to address the issue of remedies, I will dispense with the discharge note signed by the claimant to the effect that he had no further claims to make against the respondent. I take judicial notice that this is a common requirement by employers for departing employees. It is however expected that parties will work within the law. An employer cannot therefore circumvent their obligation to an employee by producing a form of discharge executed by an employee. If the law is not followed, no form of discharge can cure the irregularity. I have therefore disregarded the discharge note executed by the claimant in determining this case.”

The court has followed that opinion and finds that the exit agreement and discharge of liability did not bar the claimant from urging the case of unfair termination before this court. In any event, section 35(4) of the Act provides that nothing in the section (like or including payment of agreed service pay in section 35(5) or pay in lieu of termination notice in section 35(1) (c)) affects the right of an employee whose

services have been terminated to dispute the lawfulness or fairness of the termination in accordance with section 47 of the Act.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the claimant **Kshs.401, 080.00** by 1.10.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
2. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 31st July, 2015.**

BYRAM ONGAYA

JUDGE