



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1193 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th October, 2015)

BRIAN ONGERI MACHUKACLAIMANT

VERSUS

KENYA MEDICAL SUPPLIES AUTHORITYRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Brian Ongeri filed his Claim on 17/7/2014 in person. He stated that he was employed by the Respondents on 25/11/2011 as a General Support Staff in Warehouse Department of the Respondent situated at Industrial Area. His work station was in Embakasi. He avers that he was serving on a one year renewable contract subject to performance and availability of work. The contract for year 2012/2013 was renewed and was to run from 25th November 2012 to 26th November 2013.
2. This contract was however signed on 22/1/2013 and the Claimant's salary was increased to 10,000/= from 8,000/=.
3. The Respondent however alleged that this contract was forged and so the Claimant continued to serve on the terms of the expired contract until February 2014.
4. It is the Claimant's case that his contract was terminated on 2014 February without notice as stipulated in the Employment Act 2007 and this amounted to unfair termination. He states that he was not paid his salary for March 2014 nor was he paid salary in lieu of notice and leave earned. He seeks to be paid the same plus gratuity of 15 days for each year worked amounting to 22,500/= and also 10,000/= for his participation in Rapid Response Initiative (RRI) and others as per his claim.
5. The Claimant gave his oral evidence in Court and he avers that his relationship with his Manager deteriorated in 2012 and it was alleged he had stolen gumboots. Then in 2012, it was alleged he had stolen more items from Respondent which was not me and this is what led to his termination.
6. The Respondents on their part filed the defence on 11/8/2014 though the firm of Nyamodi & Company Advocates. They aver that the Claimant had been employed by them as a General Support Staff in Warehouse Department and this was on a one year contract with effect from 20th November 2011 to 25th November 2012. The contract was renewed for a further term of one year from November 2012 to November 2013. They deny increasing Claimant's salary to 8,000/= in the 2012/2013 contract.

7. The Respondents also aver that the Claimant had in December 2013 produced a contract of employment supposedly photocopies from Respondents office increasing his salary to 10,000/= which was a forgery.
8. The Respondents have submitted that on 19th February 2014 the Claimant was reasonably suspected to have stolen a Rapid Test Kits from the Warehouse and these items were found on his motorcycle. This is what led to him being supposed to attend a meeting with his supervisor and he didn't attend. He was then suspended on 28/2/2014 to pave way for investigations as per a letter dated 28/2/2014. Investigations were conducted and he was found culpable.
9. On 4/3/2014, a disciplinary meeting committee was held and C Claimant was invited. After the hearing and deliberations the committee found that he had stolen 5 sachets of Rapid Test Kits and it was therefore recommended that he be dismissed from the service. He was therefore dismissed on 31st March 2014 for gross misconduct.
10. Having considered the evidence from both parties, the issues for determination are as follows:
 1. ***Whether there were valid reasons to warrant dismissal of the Claimant.***
 2. ***Whether due process was followed before Claimant was dismissed.***
 3. ***Whether the Claimant is entitled to the prayers sought.***
11. On the 1st issue, the Respondents have submitted that the Claimant was dismissed for stealing Rapid Test Kits belonging to the Respondent. The Respondents aver that they carried out investigations which revealed this theft. The Respondents decision was based on the fact that previously the Claimant had been suspected of forging an employment contract and had previously been found guilty of other misconduct.
12. It is the Respondents position that his movements on the date of the alleged theft were also suspicious and that the stolen items were found on Claimant's motor bicycle. Considering this events, it is apparent that there was suspicion that the Claimant had been involved in theft. The stolen items were found on Claimant's motor bicycle.
13. However the Claimant denied stealing those items and stated that he didn't know how they found their way on his motor bike. No one had seen the Claimant steal the items and with the security in Respondents premises, the Claimant had not been seen putting the items on his motorbike. It is my finding that the reason for termination was based on suspicion.
14. Under Section 43 of Employment Act it states:

“(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.
15. The reasons must be real reasons and not imagined ones which must exist at time of dismissal. They should not be reason for other far-fetched occurrences. It is my finding that their reasons of stealing of the Rapid Test Kits would be a valid reason to dismiss but in this case this had not been established.

16. On the 2nd issue, the due process envisaged is one provided for under Section 41 of Employment Act 2007 which states as follows:

“(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.”

17. There is no indication that the Claimant was subjected to any disciplinary hearing. Minutes of such hearing have not been displayed before this court in any case. That being the case it is this Court's finding that there was no due process followed before the Claimant was dismissed.

18. This Court thereof finds that the dismissal of Claimant was unlawful and unjustified in terms of Section 45 of Employment Act 2007 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.**

19. I therefore find for the Claimant and award him as follows:

1. **1 months salary in lieu of notice = 8,000/=**
2. **12 months salary as damages for unlawful termination = 8,000 x 12 = 76,000/=**
3. **4 days salary for the month of march 2014 = 1,066/=**

TOTAL = 85,066/=

Plus costs and interest.

Read in open Court this 19th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Oruko for Respondent – Present

Claimant in person – Present