



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1417 OF 2012

TIMOTHY JOHN BUKIBINGA IGAGA.....CLAIMANT

VERSUS

DT DOBIE & CO. (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 17th August 2012 against the Respondent his former employer seeking resolution of a dispute he framed as unlawful termination of employment and refusal to pay terminal benefits to him. The Claimant annexed in support of his claim various documents including the letter of Appointment, the letter of termination, demand letter and reply from FKE Head of Industrial Relations.
2. The Respondent denied the claim and filed a Statement of Defence on 17th September 2012 and subsequently an Amended Response which contained a counter claim for the sum of Kshs. 385,922/- and one months salary in lieu of notice. To the Response the Respondent attached copies of email correspondence and the discharge certificate as well as the letter of Clearance from the Respondent. The Amended Response attached a printout copy of the Claimant's LinkedIn profile.
3. The Claimant filed a Reply to the Response and Defence to Counter Claim on 31st January 2013. In the Reply to the Amended Response and Defence to Counterclaim, the Claimant denied tendering a resignation and also denied being indebted to the Respondent as alleged.
4. The Respondent filed a Supplementary Bundle of documents on 12th June 2013. The bundle comprised of the Respondent's Employee Handbook, the Claimant's Payslip for October 2011, the Claimant's leave form for year 2011 and the Respondent's Sales reports for September and October 2011.
5. On 2nd July 2013, the Claimant filed a Supplementary Bundle of Documents which included the Schedule of Germany Trip expenditure, receipts in support of the payments made in Germany, copy of the DanFil Carz Webpage.
6. The Claimant testified on 2nd July 2013 and stated that he was employed by the Respondent on 1st January 2006 as a Quality Assurances Coordinator. He testified that he earned Kshs. 190,000/- as basic pay plus Kshs. 47,000/- as mileage allowance. He worked with the Respondent till 25th

October 2011 which was about 5 years. He stated that on 25th October 2011 he met 2 managers Keld Olsen and Usha Nagpal who informed him that his contract with the company had been terminated and he was to leave the premises immediately. His gross pay per the payslip for October 2011 was Kshs. 325,660/-. He claimed that he was not paid his salary for October 2011 captured in the payslip. He termed his termination unfair. The letter was signed by Vicky Nyaga and Keld Olsen and the reason for termination was failure to abide to instructions given by Manager. He stated that as at termination he was General Manager for Mercedes and no meeting was held where reasons for his termination were explained. He had 13 leave days per the leave application form produced by the Respondent. He sought permission to be away for 4 days off. The payment of Kshs. 1,233,926.95 was in respect of his pension and he signed a discharge to that effect. He testified further that he did not get any pay for unutilised leave days, pay for October 2011 and the Respondent did not make any offer to settle the sums. Regarding the uncleared imprest he stated the sum of Kshs. 385,922/- was for the trip to Germany and subsequent to his frogmarching he was able to retrieve the receipts which he produced in his Supplementary List of Documents. He thus sought the payment of 12 months salary as compensation, payment of 1 years salary for loss of career and unfair labour practice, pay for the unutilised leave days, one months notice pay, pay for October 2011 and the costs of the suit.

7. In cross examination by Miss Bubi, the Claimant was referred to the sales returns for September and October 2011. He admitted the units sold were below the target. He stated that sales were low and his team was based at both Lusaka Road and College House. His times of work were flexible depending on clients. He stated that the course he was to attend was not well received by Keld the General Manager Sales at the Respondent. He went into the emails exchanged between him, Keld and Zarakh Khan. He denied that he resigned from the Respondent. He admitted that his profile on LinkedIn referred to him as a Regional Sales Manager MHH International. He said he could sell outside Kenya. Regarding the trip to Germany he did not have a reason why he had not returned the receipt. He stated that Keld runs an office in Kenya and owns Danfil Carz.
8. In re-exam he stated that the performance had nothing to do with the case. He said that on termination there was notice due. He had given intimation that he was ready to resign but did not. He would not have been served with letter of dismissal if he had resigned.
9. The Respondent called Keld Michael Olsen who stated that he lived in Thailand. He stated that he owned a car company that sold cars in Kenya including armoured cars. The trade name was Danfil Carz but he denied having an office in Kenya. He joined the Respondent in 2010 and was in charge of sales for Jeep, Mercedes, Nissan and Renault. He testified that Claimant did not get his permission before going on leave. He stated that the Claimant did not come to work on Monday. He denied that the Claimant was frogmarched. He said that on the 25th October he had a dismissal ready and he asked Usha Nagpal to witness as he gave the letter to the Claimant and he requested the Claimant to sign it and leave. He testified that Claimant's friend came and collected the Claimant's personal items. He claimed that the company would purchase tickets and give employee funds for accommodation and other expenses.
10. In cross examination, he testified that he did not have the answer to the manner of the Claimant's termination. When asked whether he had documentation to prove the Claimant reported to him, he testified that he had none. Regarding the termination he stated that it was the responsibility of the Human Resources to do that. He signed the letter of dismissal for gross misconduct and Vicky HR Manager also signed the letter. The letter of dismissal was ready on 24th evening. The termination letter was done after he failed to show up to work on the Monday preceding. He did not copy in the Directors and also denied being malicious to the Claimant. Regarding the ticket for the Germany trip he stated that he was not aware of ticket was purchased by the company. Regarding the sales report, he stated that the performance of Claimant was below par for the 2 months.
11. The second defence witness was Vicky Nyagah who testified that she is the HR Manager at the Respondent. She stated that the Claimant was required to obtain permission to attend the training from the Manager Mr. Olsen and he did not get permission prior to attending the course. She said

the Claimant applied for the leave but the leave was not approved. She stated that the Claimant was adamant he would go for the training in spite of her advice that he should not. His gross pay was 325,066/- as he received a basic pay of 257,160/- and mileage allowance of 68,000/-. She stated that he received payment for October 2011. The company took into account the unaccounted imprest of 385,000/- which was deducted from his dues. She stated that he owed the company 220,000/- after deductions and that the counter claim was to be reduced to that sum. She testified that he owed the company due to the imprest of € 3,000 given for the Germany trip. She was not sure if the company gave the Claimant a ticket. He did not account for the trip expenses as required within 2 weeks of return. She testified that he owed a loan of Kshs 1,302,750/- which is being settled by guarantors.

12. In cross exam she testified she was aware of the emails and it was her duty as HR to advise. She advised the Claimant against taking the decision he took. He communicated with Olsen and stated he was not coming to work and the Respondent has rules and regulations. It was decided that the Claimant could not be contained and thus he was dismissed. The dismissal letter was ready on Tuesday. She stated that one can be absent for reasons such as an accident. She admitted that the payment made and for which a discharge was signed was the pension dues.

13. In re exam, she testified that the dues held for the Claimant are the October salary and the leave accrued. The debt was not the Respondent's dues.

14. The parties filed extensive submissions each reinforcing their positions. The Claimant filed Submissions on 16th September 2013 and the Respondent filed on 23rd September 2013.

15. It is clear the contract of employment between the Claimant and the Respondent came to a grinding halt on 25th October 2011 on account of what the Respondent termed as gross misconduct. The testimony of both the Claimant and the defence witnesses confirms that the Claimant failed to report to work in order to attend to a personal matter which related to a competition. The Claimant had offered to resign but did not. He received a letter of dismissal for gross misconduct. The Employment Act 2007 is crystal clear in Section 41.

41. (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.

16. The Claimant and the Respondent's witnesses all agree that no explanation was given, the safeguards the Claimant was entitled to under the law were not observed. I would find the termination unfair in terms of Section 41. That is not to say that it was not warranted. The Claimant had decided to defy his Manager and take a day or two off without permission. That conduct would attract consequences including dismissal. However, even when dismissal is merited, the law must be followed. For this infraction, the Claimant is entitled to recover. As he was not entirely without blame, the Court will cap the compensation for this to 3 months. The loss of future earning cannot be granted as it would be in the nature of exemplary damages which I have held previously to be inapplicable in almost all the employment contracts I have come across. In the premises, the Claimant was entitled to proper termination which would have included notice pay and pay for days worked. His contract provided for one month's notice or pay in lieu of notice. He would recover that as well as pay for the month of October and the 9 days leave earned but not taken. He is also entitled to costs and interest at Court rates. The sums due to the Claimant shall be subject to statutory deductions as provided for under the Employment Act.

17. The Respondent dismissed the Claimant and demanded from him an account of funds expended in respect of a trip in Germany. The Claimant had not accounted for the trip by the time of the dismissal. The Respondent disparages the accounting done after the case was filed and questions the account as the trip summary and documents do not agree. The Respondent accepts only a part as being accounted for hence the reduction of the counter claim to Kshs. 220,000/-. Having scrutinised the documents, it is clear the Claimant did not fully account for the imprest. In the premises, the counterclaim succeeds to the extent of Kshs. 220,000/-. Judgment is entered against the Claimant for this sum together with costs and interest at Court rates.

18. Before I depart from this decision the second defence witness Vicky Nyagah confessed that she has had to bear the burden of settling the Claimant's debt with the SACCO. While this is not part of the case before me, I hope the Claimant's conscience will be pricked and he will reconstitute the guarantors who have had to bear his personal obligations in relation to the debt he owes.

19. For avoidance of doubt, the Claimant is entitled to

- a. Kshs. 976,980/- - 3 months pay compensation
- b. Kshs. 325,660/- 1 month pay in lieu of notice
- c. Kshs. 325,660/- salary for October 2011
- d. Kshs. 97,695/- 9 days leave
- e. Costs and interest at Court rates

20. As for the Respondent, the Respondent is entitled to:-

- a. Kshs. 220,000/-
- b. Costs and interest at Court rates.

It is so ordered.

Dated and delivered at Nairobi this 16th day of January 2014

Nzioki wa Makau

JUDGE