



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 421 of 2011

ESHA CHIZI LUGOGO.....CLAIMANT

VS

PACT KENYA.....RESPONDENT

AWARD

Introduction

By a Memorandum of Claim dated 8th February and filed in Court on 18th March 2011, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Reply to Claim and the matter was heard on 28th November 2012.

At the hearing, Ms. Fatuma instructed by Mohamed & Lethome Advocates appeared for the Claimant while Mr. Echesa instructed by Ochieng', Onyango, Kibet & Ohaga Advocates appeared for the Respondent. The Claimant and the Respondent's witness, William Mwasi gave sworn evidence and Counsel for both parties filed written submissions.

The Claimant's Case

The Claimant was employed by the Respondent on 1st December 2002, in the position of Receptionist/Secretary at a monthly salary of Kshs. 35,534. She was promoted to the position of Administrative Assistant at a salary of Kshs. 43,094.70 effective 1st December 2006 (letter of appointment, contract of service and letter of promotion are marked Appendix A in the Claimant's documents). The Claimant told the Court that her last salary was Kshs. 72,000. On 6th April 2009, the Claimant's employment was terminated on allegations of insubordination, dishonesty and fraudulent conduct (letter of dismissal is marked Appendix B in the Respondent's documents).

It was the Claimant's case that prior to termination of her employment, she was not given an opportunity to defend herself and that she was neither given notice nor paid in lieu thereof. The Claimant further testified that she was only paid her pension and not her other dues. She admitted on cross examination that she did not go to collect her benefits from the Respondent because she did not agree with the computation. The Claimant also admitted on cross examination that prior to her termination, she met with the Respondent's Director, Titus and Human Resource Manager, Mwasi at which meeting the issue of telephone bills incurred by her was discussed.

The Claimant stated that between 1st and 7th February 2009, she was sent by the Respondent on official duty to Zanzibar without any funds to facilitate her trip. She therefore incurred expenses on behalf of the Respondent to the tune of US\$ 563.05 which the Respondent had failed to reimburse to the Claimant. She produced some receipts in support of her claim.

The Claimant further stated that the Respondent had declined to meet the cost of official mobile phone calls made by the Claimant to the tune of Kshs. 37,108.81. The Claimant stated that the only calls that were personal amounted to Kshs. 8,567.29. In addition, the Claimant claimed that the Respondent had, without her consent deducted Kshs. 400 per month as welfare contribution which was not part of the contract between the Claimant and the Respondent. However, on cross examination, the Claimant admitted having authorised these deductions. She further admitted that she was a registered member of the National Social Security Fund (NSSF) and that she had not been declared redundant.

The Claimant took issue with her letter of dismissal dated 6th April 2009 in which she was accused of imprudence and dishonesty with regard to taxi claims arising from her trip to Zanzibar. She claimed that the contents of the said letter were defamatory against her.

The Claimant therefore claimed the following:

- a) Severance pay.....Kshs. 190,015
- b) Claim from Zanzibar trip.....US\$ 563.05
- c) Welfare contribution.....Kshs. 35,000.00
- d) Salary in lieu of notice.....Kshs. 74,160.51
- e) Six days pay in April 2009.....Kshs. 14,832.00
- f) Prorata leave
- g) General, aggravated and exemplary damages for defamation
- h) Twelve months' salary as compensation for unfair termination of employment
- i) Costs of the suit and interest
- j) Any other relief the Court may deem just to grant

The Respondent's Case

In its Reply to Claim the Respondent denied that the Claimant's dismissal was unjustified and unfair. It was the Respondent's case that the Claimant committed an act of insubordination by failing to give an account of telephone expenses incurred by her on account of her personal calls.

The Respondent further stated that the Claimant, in an attempt to defraud the Respondent, presented inflated receipts claiming a refund of expenses which upon verification were found to be exaggerated. The Respondent's witness, William Mwasi told the Court that the Respondent's counterpart office in Tanzania had confirmed estimate travel costs with regard to the distances covered by the Claimant during her trip. It was on this basis that the Respondent concluded that the receipts submitted by the Claimant were inflated.

William Mwasi also told the Court that prior to the Claimant's termination, a meeting was held between the Claimant and her supervisor and that the Claimant also met with the Chief Executive Officer, the Deputy Country Director and himself. Mwasi further testified that the agenda of this latter meeting included previous complaints against the Claimant on unallocated telephone calls and taxi receipts related to the Claimant's trip to Zanzibar.

The Claimant was given an opportunity to respond to the allegations raised against her. The witness further testified that the unallocated calls had been pending for 6-7 months and that several reminders had been sent to the Claimant to separate the personal calls from the official ones, which she failed to do. The

Respondent therefore paid the bill, which included Kshs. 37,000 for personal calls made by the Claimant. The Respondent disputed the Claimant's claim that she had incurred expenses to the tune of US\$ 563.05 noting that the receipts marked Appendix D in the Claimant's documents reflected dates in the year 2008 and not 2009.

The Respondent went on to state that the Claimant had failed to comply with the Respondent's Travel Policy and Procedures which required employees to account for previous advances in order to access fresh advances. The Claimant had failed to account for advances previously made to her rendering herself ineligible for further advances.

On the claim for defamation, it was the Respondent's case that this Court lacks jurisdiction to entertain this particular head of the Claimant's claim.

In response to the claim for salary for six days worked in August 2009, the Respondent referred to the Claimant's payslip for April 2009 attached to the Memorandum of Claim, as evidence that the Claimant was paid for the month of April 2009 in full.

With regard to the claim for welfare contributions, the Respondent produced an authorization form signed by the Claimant as well as documentation to prove that the Claimant had benefited from the welfare scheme. The deductions towards welfare took effect from 9th May 2005 and not 2002 as alleged by the Claimant. According to the constitution of Sharaka Welfare Group contributions by members were not refundable.

The Respondent by way of counterclaim claimed the following from the Claimant:

- a) Admitted personal call bill.....Kshs. 8,567.70
- b) Balance on personal call bill.....28,541.00

Findings and Determination

The first issue for determination is whether the termination of the Claimant's employment by the Respondent was justifiable. In the Claimant's written submissions Counsel for the Claimant submitted that the Respondent failed to prove gross misconduct on the part of the Claimant.

Section 44 (3) of the Employment Act,2007 provides that:

Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

Gross misconduct is defined in Section 44(4) of the Act to include a litany of acts

and/or omissions on the part of an employee which by themselves would indicate that the employment relationship has suffered significant jeopardy. These would include failure to follow a lawful instruction by a supervisor or negligence in the line of duty.

The field of gross misconduct is wide. However, the law has a well established procedure to be followed by employers who wish to terminate an employee's employment on grounds of gross misconduct. Section 41 of the Act sets out this procedure 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 the 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

William Mwasi testified and the Claimant admitted on cross examination that prior to termination of her employment some meetings were held between the Claimant and the Respondent's representatives. The Claimant was cagey about the exact nature and content of these meetings. I find it necessary at this stage to comment on the probative value of the Claimant's sworn evidence. Throughout her testimony, the Claimant was economical with the truth and would only admit to adverse facts when pressed under cross examination.

The law on inconsistent and contradictory evidence is well settled. In the case of **Abudi Ali Mahadhi Vs. Ramadhani Saidi & Another (Civil Appeal No. 212 of 1998)** the Court of Appeal held that evidence that is inconsistent and contradictory must be rejected. I have therefore rejected the Claimant's sworn evidence in as far as it is not supported by documentary proof or admitted by the Respondent.

Consequently, I have accepted the Respondent's evidence that the Claimant was given an opportunity to make her presentations on the allegations against her. In the case of **Jackson Butiya Vs Eastern Produce Limited (Industrial Court Cause No. 335 of 2011)** this Court held that:

An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.

In view of the foregoing the Claimant's claim for unfair termination fails and is hereby dismissed. The claim for welfare contributions, which as per the welfare constitution are not refundable also fails.

With regard to the claim for defamation, the Respondent submitted that the Industrial Court has no jurisdiction to entertain a claim in tort. I take a different view that if in the course of an employment relationship one party defames the other, a claim in defamation would lie alongside other claims arising out of the employment relationship. In this case however, the ingredients of a claim for defamation are absent and the claim therefore fails and is hereby dismissed.

The claim for severance pay which is applicable to cases of redundancy under Section 40 Of the Employment Act is misplaced in cases of dismissal such as this one. It is therefore also dismissed. The claim for prorata leave was not proved and the claim for six days salary in April 2009 was misguided since the Claimant was paid full salary for the month of April 2009.

That leaves only the claim arising from the Zanzibar trip and the Respondent's counterclaim for personal calls made by the Claimant. With regard to the Claimant's claim for reimbursement of expenses incurred by her during the Zanzibar trip, I must comment at the jumbled manner in which the Claimant presented her documents. She submitted all manner of documents some dating as far back as 2008 yet it was her case that she took the Zanzibar trip between 1st and 7th February 2009. Parties who come to Court have the responsibility to present their evidence in a cogent manner. In the case of **Bonham Carter Vs. Hyde Park Hotel (1948) 64 T.L.R 177**, Lord Goddard C.J stated as follows:

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the Court saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it

In this case the Claimant failed to present evidence in support of her claim for expenses on the Zanzibar trip and the same is hereby dismissed.

With regard to the Respondent's counterclaim for Kshs. 28,541 being balance on personal calls made by the Claimant, no criteria for separation of personal calls from official calls was presented to the Court. The counterclaim has therefore not been proved and is hereby dismissed. However, the bill for Kshs. 8,567.70 admitted by the Claimant is recoverable from her final dues which are to be computed in accordance with this award and released to the Claimant forthwith.

Each party will bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**
.....**Respondent**