



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1975 of 2011

WENSLAUS ODUKI ODINGA.....CLAIMANT

VS

KENYATTA NATIONAL HOSPITAL BOARD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 21st November 2011 and filed in Court on even date the Claimant sued the Respondent for unlawful termination of employment and defamation. The Respondent filed a Statement of Defence (under protest) on 31st January 2013.

2. At the interlocutory stage, the Respondent raised a preliminary objection with regard to parts of the Claimant's claim and one Seth Panyako trading in the name of Africa Labour Consultants Institute applied to be joined as an Interested Party. The Court dismissed both applications and the matter was heard on 29th January and 20th February 2013 with the Claimant appearing in person and Mr. Mutubwa instructed by Lubulellah & Associates appearing for the Respondent. The Claimant and his witness, Seth Panyako gave sworn evidence and Peris Nyawira Ndungu testified on behalf of the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent on 4th January 1983 as a subordinate staff in Job Group A and rose through the ranks to the position of Theater Assistant 1 in Job Group K12. On 4th February 2009 on his way to his rural home via the Nairobi City Centre he was intercepted by Security Personnel at Gate B of Kenyatta National Hospital. The Claimant had in his possession medicines he had bought for his father. He was then arrested and charged at Kibera Law Courts with the offence of Theft by Servant contrary to Section 281 of the Penal Code.

4. On 10th February 2009, the Respondent issued the Claimant with a suspension letter in which the Claimant was accused of illegally obtaining 5 packets of anodal injections each containing 5 ampoules and 155 pieces of I.V branulars (gauge '22') from the Respondent's Theater No 11. The suspension letter made reference to the Claimant's admission of the charges against him.

5. On 17th February 2009, the Claimant received a notice to show cause why disciplinary action should not be taken against him. The Claimant responded by denying stealing any medicine or other property belonging to the Respondent. He stated that the 4 packets of anadol and I.V branulars (gauge 22) found in his possession were his personal property. He produced an invoice/cash sale receipt dated 3rd February 2009 issued by Ken-Bridge Chemists (invoice/cash sale receipt is marked WOO-5 in the Claimant's documents).

6. The Claimant claimed that he was forced to sign a statement admitting the charges leveled against him. On 5th November 2009 the Claimant was dismissed on account of gross misconduct and loss of trust. On 23rd November 2009 he was asked to vacate the Respondent's house he was occupying.

7. It was the Claimant's case that his dismissal was unlawful since at the time of dismissal the criminal charges against him were still pending. On 29th December 2010, the Claimant was acquitted of the criminal charges under Section 215 of the Criminal Procedure Code. The Claimant thereafter wrote to the Respondent asking the Respondent to admit liability for his arrest. The Respondent wrote to the Claimant on 26th April 2010 notifying him that the Board of Management had upheld his dismissal. The Claimant averred that the Respondent had failed to remit his NSSF dues as required.

8. The Claimant told the Court that prior to his dismissal, he was not given an opportunity to appear before his Supervisor, the Departmental Disciplinary Committee, the Staff Disciplinary and Advisory Committee or the Board to present his case. He was therefore condemned unheard. The Claimant claimed that the officers who signed his suspension and dismissal letters were not duly authorised to do so. The Claimant submitted that the allegations leveled against him had injured his reputation and that he had been defamed.

9. The Claimant therefore claimed the following:

- a) A declaration that his suspension and subsequent dismissal of the Claimant was unfair, unlawful and un-procedural hence null and void.
- b) 3 months' salary in lieu of notice.....Kshs.85,290
- c) General damages (Kshs.18,403x12 yearsx12 months).....2,650,032
- d) 12 months' salary in compensation for unfair termination.....340,836
- e) Damages for defamation.....7,000,000
- f) Pension, gratuity and annual allowance
- g) Costs
- h) Any other relief the Court may deem just to grant

The Respondent's Case

10. In its Statement of Defence the Respondent took issue with the Claimant's claim on the ground that the Court has no jurisdiction to entertain some of the reliefs sought by the Claimant. The Respondent further stated that the Service Commission Act which the Claimant relied on was irrelevant in this case.

11. It was the Respondent's case that the Claimant expressly admitted having stolen the Respondent's property in question. The Respondent further stated that the Claimant had been given adequate opportunity to respond to the charges leveled against him. In this regard the Respondent had complied with the law and the Respondent's Code of Conduct.

Findings and Determination

12. The first issue for determination is whether the termination of the Claimant's employment was lawful in light of the criminal case at Kibera Law Courts and its eventual outcome. It was the Claimant's case that since his termination took place before conclusion of the criminal case, the termination was not lawful. Further, since the Claimant was acquitted of the criminal charge then his termination had no basis.

13. The question then is whether internal disciplinary proceedings against an employee must pend

until conclusion of external criminal proceedings against the employee and whether in fact the outcome of a criminal case determines the decision to be taken by the employer. In the case of **David O. Owino Vs Kenya Institute of Special Education (Industrial Court Cause No 453 of 2012)** this Court restated that:

“Acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

14. Applying this principle to the current case, I find that the Respondent was well within its right to institute internal disciplinary proceedings against the Claimant in spite of the criminal case or even its eventual outcome. I will therefore proceed to examine the disciplinary procedure adopted by the Respondent in that light. The Respondent produced a written statement signed by the Claimant in which he admitted the charges leveled against him. The Claimant denied the contents of the said statement and testified that he signed it under duress. Apart from the general claim of duress, the Claimant did not adduce any particulars.

15. An employee alleging duress or inducement to sign a document in a non custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect means that the Respondent had a substantive justification for terminating the Claimant's employment.

16. The next question is whether the Respondent followed the procedure set out in law for termination of employment on the ground of misconduct under which the charge against the Claimant would ordinarily fall.

17. Section 41 of the Employment Act, 2007 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity 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

18. The Respondent issued the Claimant with a show cause letter to which the Claimant responded. Subsequently for some unexplained reason, the Respondent decided to conduct disciplinary proceedings in the Claimant's absence. In this regard I find that the Respondent short circuited the disciplinary procedure thus rendering the Claimant's termination unfair for want of due procedure. For this reason, I find the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Employment Act and award him 5 months' salary in compensation. I also award him one month's salary in lieu of notice.

19. I will now deal with the claim for defamation. Counsel for the Respondent submitted that this is a claim under tort and that consequently this Court has no jurisdiction since it only deals with employment contracts. With respect, this is a very narrow interpretation of the jurisdiction of the Industrial Court. My view is that if in the course of an employment relationship a party defames another,

a claim in defamation would legitimately lie before this Court. I however agree that the Claimant failed to give particulars of the defamatory words complained of as required and this head of the Claimant's claim therefore falls. No basis was laid for the claim for general damages and it is hereby dismissed.

20. It was common cause that the Claimant was a member of a Provident Fund as well as the National Social Security Fund (NSSF). The claim for gratuity is therefore precluded under Section 35 of the Employment Act.

21. The final effect of this Award is as follows:

- a) 5 months' salary in compensation for unfair termination..Kshs.120,860
- b) 1 month's salary in lieu of notice.....24,172
- Total.....145,032**

Each party will bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF APRIL 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

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