



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1657 OF 2011

HASSAN NYWANGA.....CLAIMANT

VERSUS

PATHFINDER INTERNATIONAL (KENYA).....RESPONDENT

JUDGMENT

By a Statement of Claim dated 12th September 2011 filed through the firm of J.A. GUSERWA & CO Advocates the Claimant alleges arbitrary, capricious and unfair termination of his employment contract and seeks the following orders;

- | | |
|--|-----------------|
| a. 1 month salary in lieu of notice | Kshs.113,431.00 |
| b. Accrued leave | Kshs.85,073.25 |
| c. Refund of unlawful deductions | Kshs.46,073.00 |
| d. Refund of Sacco funds in June, 2011 | Kshs.25,000.00 |

Total **Kshs.269,577.00**

The Respondent filed its Statement of Reply and counterclaim dated 26th March 2012. In the Statement of Reply the Respondent denies the claim and avers that it complied in all aspects with the provisions of the Employment Act. It prays for dismissal of the claim and entry of Judgment in the sum claimed in the Counter claim of Shs.20,452 with costs and interest.

The case was heard on 30th April 2013. The Claimant testified under oath while the Respondent did not call any witness and relied on its pleadings and written submissions.

The Claimant testified that he is a nurse by profession. Currently he works with Jpaigo Corporation where he started working on 2nd May 2012. He was employed by the Respondent from September 2010 to 25th July 2011 as a Maternal Neonatal Child Health Coordinator for Central Province. From January to 25th July 2011 he was working as a Service Delivery Coordinator for Coast and was stationed in Malindi. His salary was Kshs.113,431 per month. He worked hard, diligently and was recommended for the job in Coast when the project in Central Province ended. That when he was transferred to the coast, he was accommodated at Ogalis's K-coast Hotel for the first 30 days. He was with colleagues namely Patrick Muriuki Muhuru with whom he resided at the same hotel for 30 days, and Mr. Kimotho who was their driver. They were all working in Affia + Project. He stayed at the Hotel from 15th February to 15th March 2011. He was allowed a maximum expenditure of Kshs.6,000/= per day. At the Hotel he was paying Kshs.4,000/= per day. He attached receipts and a letter confirming he stayed at the Hotel and paid kshs.4,000 per day as Appendices HN3 and 4. After the 30 days he was posted to Malindi where he was stationed at the time of dismissal. He was given Kshs.180,000/= for accommodation for the 30 days. He

spent Kshs.120,000/=. Some issues arose about his receipts and he was summoned by the Project Director Mombasa and the Finance Management Specialist to whom he made an explanation. He was directed to go back and bring copies of the receipts. He went back to the Hotel and was given the receipts and a letter. When he presented the receipts and the letter he was informed that there will be a disciplinary hearing for his case on 27th June 2011. He was given a letter to that effect. He was sent on compulsory leave by the same letter. He did not attend meeting of 27th June 2011 as the meeting did not materialise. Thereafter he received the letter of dismissal on 25th July 2011.

In reference to the minutes of a disciplining hearing attached to the Statement of Reply, he stated he did not attend the hearing on 27th June as he was never invited.

He seeks payment of one month's salary in lieu of notice in line with his letter of appointment, refund of Kshs.46,073/= deducted from his final pay, SACCO contributions for June 2011 which was deducted but not remitted to SACCO.

He stated he was unfairly dismissed as he stayed in the same Hotel with Patrick Muhoro who was never punished. He sought orders as prayed in paragraph 15 of the statement of claim.

Under cross examination he denied attending the disciplinary hearing or making representations at the disciplinary hearing. He disowned paragraph 8 of his Memorandum of claim. He stated the letter from the Hotel was written by the Hotel Manager Mr. Muema. He admitted that receipts no. 6479 and 6118 were not in chronological order. He further admitted that he had not given any details of leave and SACCO funds. He stated he is currently earning Kshs.120,000/= gross which is more than he earned while working for the Respondent. He denied working for Great Lakes University as a lecturer.

He stated the responses attributed to him in the minutes of the disciplinary hearing at Annex 2 of Respondents statements of Reply are those he gave in his written submissions. He stated the people in the meeting he attended were Margaret Labale, the Director for Coast and Mr. Peter Kisombe, the Finance Management Specialist.

In re-examination the claimant denied attending the disciplinary hearing on 27th June 2011, he stated that the receipts he submitted were not in chronological order but he had no control over the manner in which the Hotel issued receipts and that the Hotel confirmed payment. He admitted not submitting leave records as the records were in the custody of the Human Resources Manager. He also stated he was never served with a notice to produce Leave and SACCO records.

The Respondent did not call any witness and relied of its pleadings and 8 written submissions.

I have considered the pleadings, the oral evidence, the submissions filed by the parties and the Law. The main facts of this case are not in dispute. The Claimant was employed by the Respondent initially as a maternal neonatal child health coordinator for Central Province in September 2010. When the project he was working on ended he was recommended and employed as a Service Delivery Coordinator, Coast Province. When he reported to the Coast he was paid a sum of Kswhs.180,000/= to cover his hotel accommodation. He was to account for the money. While accounting for the money he produced 2 receipts No. 6118 dated 16th March 2011 for Kshs.32,000 and No. 6479 dated 8th March 2011 for Kshs.28,000. The receipts were suspected by the Respondent to have been fraudulently obtained and after going through a disciplinary process the Claimant was issued a letter of summary dismissal which is not dated, on 25th July 2011. He was dissatisfied with the summary dismissal and filed the case herein.

The issues for determination are whether the summary dismissal was fair both substantively and procedurally, whether the Claimant is entitled to his prayers, and whether the Respondent is entitled to the prayers in the counter claim.

Sections 41 of the Employment Act sets out the procedure for termination of employment as follows;

41. Notification and hearing before termination on grounds of misconduct

(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.

Section 43 and 45 of the Act provide for proof of reasons for termination and fair procedure. In the present case the Claimant admits that he was called to the office in Mombasa on 22nd June 2011 where he was informed of the intention to commence disciplinary action against him. He was also given a letter of compulsory leave on the same date. The letter informed him of the date, time and venue of the disciplinary hearing. It informed him of his right to be accompanied by a fellow employee at the hearing. It further required him to submit his written representations to Mr. Peter Kisombe by 24th June 2011 by 10.00am. He complied and presented his explanation which he has attached together with the letter of compulsory leave as Appendix HN5 of the Statement of Claim.

At the hearing the Claimant attempted to deny having been called for the disciplinary hearing. I find this absurd. He admitted at paragraph 8 of the Statement of Claim that he attended the disciplinary hearing and made representations at the hearing. In the 2nd page at paragraph 2 of his appendix HN5, the Claimant wrote as follows in reference to the disciplinary hearing **“At around 2.30 pm. I entered the Farasi Conference Room as scheduled where the HR Joyce and Mr. Kisombe constituted the disciplinary team.”**

The minutes of the disciplinary hearing submitted as Appendix 2 of the Respondents Statement of Reply confirm the attendance of the Claimant at the disciplinary hearing.

For the foregoing reasons I find that the Respondent complied with the law in the procedure adopted prior to the dismissal of the Claimant.

There is however a second limb to this. Was the reason for dismissal valid as provided in Section 43 and 45(2)(a)?

The reason given in the letter of mandatory leave is that there were allegations of fraud, dishonesty or falsifying of records against the Claimant. The letter of termination gives reasons for the termination as obtaining fraudulent receipts while accounting for relocation expenses following the Claimant’s stay at Ogalis Hotel in Mombasa.

In the submissions the Respondent has given reasons for dismissal as follows;

1. The Respondents Investigations revealed that the hotel’s rates were Kshs.1,500/= for single room and Kshs.2,000/= for a double room on bed and breakfast.
2. That the letter allegedly written by the hotel did not indicate the author.
3. That the amount was inordinately high for the calibre of hotel.
4. That there was no chronological orders in the receipts.
5. That the hotel had failed to cooperate with the Respondent to verify the authenticity of the receipts and letter.

No investigation report was filed and no witness was called to verify this information. The piece of paper attached to the Respondents statement of Reply and counterclaim cannot pass the test of a valid document. It is hand written and hardly legible. It does not state where it came from. It could have

originated from anywhere. In the face of the receipts and letter submitted by the Claimant which is on the Hotel's letterhead the piece of paper produced by the Respondent does not pass the test of admissibility. All the other reasons given by the Respondent are not attributable to the Claimant. The Claimant was not the author of the letter from the hotel, and it is not unusual for a letter not to have a name of the person who has signed it. The contention that the bill was too high for that calibre of hotel is not supported by any comparative analysis and is not an issue for the Claimant to prove. The chronological order of the receipts is also not an issue for the Claimant to prove if the hotel did not deny issuing the receipts. The same goes for the non-cooperation of the hotel. All these factors show that the Respondent had no proof of fraud and the Claimant was being punished for the inability of the Respondent to prove its allegations against him.

I find that the Respondent did not prove that the receipts submitted by the Claimant were fraudulently obtained. The fact that the Respondent did not believe they were genuine is not proof that they were not genuine.

For these reasons I find that the Respondent has failed to prove that there was valid reason for dismissal of the Claimant and the dismissal was thus unfair to that extent.

The Claimant also alleged that he stayed in the same hotel with 2 other employees who also submitted similar receipts but no disciplinary action was taken against them. This contention has not been denied by the Respondent who has on the contrary completely ignored it. The allegation remains uncontroverted.

Now I consider the prayers of the Claimant.

He prays for the following;

- a. 1 month salary in lieu of notice
- b. Accrued leave
- c. Refund of unlawful deductions
- d. Refund of SACCO funds.

a. 1 month salary in lieu of notice.

Having found the dismissal unfair the Claimant is entitled to notice or pay in lieu thereof as provided in Section 49(1)(a) of the Employment Act. I award him the sum of Kshs.113,431 in respect thereof.

b. Accrued leave

The Claimant claims Kshs.85,073.25. The Respondent has not denied that the Claimant was entitled to the said sum in lieu of leave or produced the Claimants leave records to show that he did not have any accrued leave days not taken.

For this reasons I award the Claimant the sum of Kshs.85,073.25 in lieu of accrued leave day not taken.

c. Refund of unlawful deductions

As in the case of accrued leave the Respondent has not explained the purpose or legality of the deduction from the employee's salary. The only statement the Respondent made is that the deduction was under Section 19. The Respondent has not even specified which subsection of Section 19. This claim has not been referred to in the written submissions of the Respondent.

In the absence of an explanation of the legality of the deduction I award the Claimant the said sum of Kshs.46,073.25.

d. Refund of SACCO Funds

The Respondent did not deny recovering the funds from the Claimant's salary and failure to remit the same to the SACCO. For this reason the Claimant is entitled to a refund of the said sum of Kshs.25,000/= which I accordingly award him.

Other prayers

The Claimant made the following other claims in his prayers under the statement of claim.

- i. Salary arrears for the entire period the Claimant has been out of employment.
- ii. Maximum compensation for wrongful dismissal.
- iii. Payment of all lawful terminal dues.

The Claimant did not lead any evidence either in his testimony or in the written submissions in support of these prayers. The same are therefore dismissed for the reason that they have not been proved.

Counter Claim

The Respondent counter-claimed for Shs.20,452 owed by the Claimant. The counter claim was not prosecuted. The same is thus dismissed for want of prosecution.

In the final analysis I give Judgment to the Claimant against the Respondent in the sum of Kshs.269,577.25 with costs.

Orders accordingly.

Read in open Court this 31st day of July 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ashubwe for Claimant

Babu for Respondent