



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1563 of 2011

PATRICK ANGALACLAIMANT

VERSUS

PATHFINDER INTERNATIONAL (KENYA) RESPONDENT

JUDGEMENT

By a statement of claim dated 6th September 2011 supported by a Verifying Affidavit of the same date and filed in court on 12th September 2011, the claimant alleges unlawful and malicious termination of his employment by the respondent on 25th July 2011. He seeks payment of Kshs.313,998 being one month's salary in lieu of notice, accrued leave of 20 days and unlawful deductions. He further seeks the following orders;

- a. A declaration that the claimant's dismissal was unlawful and unfair.
- b. Salary arrears for the entire period the Claimant has been out of employment.
- c. Maximum compensation by way of damages for wrongful and/or unlawful dismissal.
- d. In the alternative, payment of all the claimant's lawful terminal dues.
- e. Cost of relocation back to Nairobi.
- f. Costs of this suit with interest.

- h. Amount due to claimant on relocation of meals and Incidentals Expenditure

The respondent filed its statement of Reply dated 26th March 2012 on the same date. In the Reply the Respondent denies the allegations in the statement of claim and avers that the claimant was lawfully dismissed in accordance with the law. The Respondent further claims by way of counter-claim the sum of Kshs.136,329/= on account of refund due to the respondent from the claimant. The Respondent prays that the claim be dismissed with costs.

The claimant's testimony was heard on 23rd November 2012 while the respondent's witness testified on 11th February 2013.

The claimant was represented by Ms. Gaserwa while the respondent was represented by Ms. Babu.

The main facts of the case are not contested. The claimant was employed by the Respondent on 1st April 2009 as data manager on a 2 year fixed contract. The contract expired on 30th March 2011 and the claimant was given another contract of 2 years starting 1st April 2011 as data officer. The contract was to be performed in Mombasa where the Respondent was establishing an office. The claimant's salary for the 2nd contract was Shs.136,632/=. He was required to travel and the travel was to be facilitated by the

Respondent.

On 21st February 2011, the claimant was relocated to Mombasa. He was given an imprest of Shs.291,275 to facilitate his relocation of which shs.180,000/= was for hotel accommodation, shs.8,000/= for fuel and shs.103,237 was for meals and incidentals. Around 3rd May 2011 while stationed in Mombasa the claimant was sent to Malindi, Lamu and Voi on official duty and was given an imprest of Shs.19,200/= to facilitate the journey.

The claimant accounted for the money he received as imprest when he travelled back to Nairobi. He also claimed for 18,000/= which he had spent over and above the imprest. On 23rd June 2011 the claimant was called by the Human Resources Officer and handed a letter sending him on compulsory annual leave. The letter stated that charges of fraud had been levelled against him. The letter also invited him for a disciplinary hearing on 28th June 2011 at 10.00 am at the Respondent's Mombasa office. The letter further required him to submit his representations in writing to the Finance Management specialist in Coast Mr. Peter Kisombe on 27th June 2011 by 10.00 a.m. The letter is reproduced below.

Pathfinder International Kenya

23rd June 2011

Patrick Angala

C/O Pathfinder International

Mombasa

Dear Patrick,

RE: MANDATORY ANNUAL LEAVE

I write to confirm our discussion this afternoon on 23rd June 2011 in which an explanation was given to you of the allegation of fraud leveled against you. This is a serious allegation. Pathfinder International considers fraud and dishonesty of falsifying of records to be unacceptable and in breach of organizational policy.

There will be a disciplinary hearing on 28th June 2011 at 10.00 am at the Farasi conference room in the Pathfinder Mombasa office. The purpose of the hearing is to give you an opportunity to make representations on the allegation. You may be accompanied at the hearing by a fellow employee of your choice. I must warn you that if the allegation of fraud and dishonesty is found to be true, a possible outcome is summary dismissal on grounds of gross misconduct.

You are required to submit you representations in writing to Mr. Peter Kisombe, the Finance Management specialist for coast on 27th June 2011 by 10.00 am.

You have the right to be accompanied at this meeting by a fellow employee should you wish. If you will be accompanied, the person accompanying you is required to submit his/her representation alongside you own submission in writing by 27th June 2011 by 10.00 am.

You are hereby sent on mandatory leave pending conclusion of the disciplinary process.

If you have any questions regarding the above, please do not hesitate to contact me.

Yours sincerely.

Peter Eerens

Country Representative

The claimant responded on 25th June 2011. He narrated his itinerancy from Nairobi to Mombasa and his stay in Mombasa. He also gave a breakdown of how he spent the Kshs.180,000/=. The claimant also wrote a Memorandum to Peter Kisombe on 25th June 2011 explaining the accommodation expenditure at Malindi.

The disciplinary hearing was held on 28th June 2011 although the minutes erroneously give the date as 27th June 2011. Mr. Peter Kisombe the Finance Management Specialist for Coast and Ms. Joyce Kibathi, the Human Resource Manager and the Claimant attended the meeting. The minutes of the disciplinary hearing are annexed to Respondents statement of Reply as Appendix 1.

The claimant was eventually dismissed summarily by an undated letter which is attached to claimants statement of claim as Appendix P.A5 at page 20 of his bundle of documents. The letter of dismissal gives the date of disciplinary hearing as 27th June 2011. It states the reason for dismissal as obtaining fraudulent receipts.

The letter is reproduced below.

Pathfinder International Kenya

Patrick Angala

C/o Pathfinder International

MOMBASA

Dear Patrick

RE: TERMINATION OF CONTRACT

We refer to the disciplinary hearing held on 27th June 2011.

We have considered your written response; the representations which you made at the hearing and the circumstances of this matter and we are of the view that the charges made against you that you obtained fraudulent receipts during an asocial trip to Malindi and while accounting for relocation expenses during your stay at Manson Hotel have been proved. You were deemed to have acted contrary to the interests of Pathfinder International.

We hereby inform you of your summary dismissal with effect from 25th July 2011. You will be paid the following;

- 1. Salary up to 25th July 2011 (cheque attached)**
- 2. Less kshs.734.00(Forty thousand, seven hundred and thirty four shillings).**
- 3. You will also receive a certificate of service.**

We hereby demand payment to Pathfinder International of the amount of Kshs.136,329.00 (One hundred and thirty six, three hundred and twenty nine shillings) being the balance of the amount given to you by P1 for which you have failed to account. Payment should be made within 14 days of the date of this letter failing which P1 shall no choice but to institute civil proceedings against you to recover the said amount.

Sincerely

Peter Eerens

County Representative

Cc: Labour officer

The Claimant was unhappy with the dismissal and wrote to the Respondent on 25th July 2011 stating that he did not agree with the decision in the letter. He also stated that he would accept his salary but did not accept any conditions attached to the payment and further that he declined to sign a discharge in favour of the Respondent.

The issues for determination are

1. Whether the summary dismissal of the claimant was unlawful and unfair.
2. Whether the claimant is entitled to the prayers sought.
3. Is the Respondent entitled to the prayers in the counter claim,

Was the summary dismissal of the claim unlawful and unfair.

At Paragraph 13 of the Statement of Reply and Counterclaim, the Respondent gives the reasons for summary dismissal of the claimant as follows;

The Respondent was not satisfied with the representations made by the claimant to the allegations or with the proof adduced by the claimant.

- a. ***The claimant did not produce a guest register to confirm the days he stayed at the Tana Guest House and Manson Hotel.***
- b. ***The receipts produced were not certified as true copies;***
- c. ***Manson hotel had confirmed that the receipts provided by the Claimant were not authentic;***
- d. ***Manson Hotel had confirmed that all its receipts are produced through electronic tax registers;***
- e. ***Manson Hotel had confirmed that the claimant was not a guest at the hotel in the month of March, 2011;***
- f. ***Tana Guest House had confirmed their rates;***
- g. ***The amount was inordinately high for the calibre of hotel.***

I have also looked at the proceedings of the hearing. The claimant was required to respond to 4 questions put to him by the Finance Management specialist Mr. Peter Kisombe, after which the conclusion was arrived at. It has not been shown that there were regulations of the Respondent requiring the Claimant to ask hotels where he stayed to certify their original receipts before he could submit them to account for his impress or that there was such a practice.

The minutes also state and I quote from the minutes

For Mason Hotel.

“Again a case where hotel has not verified anything in writing and staff continues to insist that he was a guest in the hotel in 20 days”

For Tana Guest House

“The Management of the Guest House has refused to give any written confirmation on actual amount paid or to give certified copies of the receipts”

The Employment Act at Section 45 requires an employer to prove that the reason for termination is valid and that employment was terminated in accordance with fair procedure.

In this case the Respondent required the Claimant to prove what the Respondent was unable to prove. This was contrary to the provisions of Section 43 of the act which places the burden of proof on the Respondent.

Secondly the reasons given to the claimant in the letter sending him on mandatory annual leave was that there were allegations of fraud levelled against him. Having failed to confirm from both Mason Hotel Mombasa and Tana Guest House Malindi that the receipts submitted by the claimant were not issued by the Hotels or that the claimant did not pay the amount shown in the receipts to the said hotels, I find that the allegation of fraud was not proved and for this reason the termination of the claimants services on the said ground was unfair. I also find that the Respondent was unfair in forcing the claimant to travel to the 2 hotels to look for evidence to exonerate himself from the allegations instead of the Respondent looking for the evidence to prove its allegations against the claimant. For these reason I find that the summary dismissal of the claimant was unfair.

Is the Claimant entitled to the prayers sought.

The Claimant prayed for the following.

1. NOTICE

Having found the dismissal unfair the claimant is entitled to notice as provided under section 49(1) (a) of the Employment Act.

I award him 136,632 being 1 month's salary in lieu of notice.

2. ACCRUED LEAVE 20 DAYS

No evidence was submitted in support of the claim for annual leave. The claimant simply stated in his claim that he was seeking leave of 20 days. He did not state for which year. In his testimony he stated it was leave for 2010/2011. Annual leave for each year as per the Claimants contract is 21 days. He was also on compulsory annual leave before his dismissal. It was therefore imperative that the claimant explains how he arrived at the 20 days. He was also calculated the 20 days at Shs.6831.60 which has not been explained.

I find that the claimant has not proved his claim on annual leave and dismiss the same.

3. REFUND OF SHS.40,000/=

The Respondent did not explain the basis for deduction of shs.40,000/= from the salary of the Claimant. The Respondent stated it was in accordance with the Employment Act but did not state which section or give an explanation of how the amount was arrived at. I find that the deduction was unlawful and that the Claimant is entitled to a refund of the same and award the said Shs.40,000/= as prayed.

4. MAXIMUM COMPENSATION

Having found the Claimants dismissal unfair, he is entitled to compensation. The claimant was on a 2 year fixed term contract which was to expire in 2013. He had earlier served for just over 2 years. I find that the claim of maximum compensation is excessive. I consider 6 months salary as reasonable compensation and award him Shs.819,792.00 being 6 months salary as compensation.

5. ARREARS OF SALARY FOR ENTIRE PERIOD OF CONTRACT

The claimant has claimed arrears of salary for unexpired contract period of 18 months. The claimant has not given any legal or contractual justification of the same.

Granting the prayer would be tantamount to requiring the Respondent pay for services not rendered.

I find that the claim has no legal basis and dismiss the same.

6. REFUND OF SHS.136,632.00 UNLAWFULLY WITHHELD.

The Claimant did not explain how this sum accrued. My understanding is that this amount had already been paid to the claimant as imprest and it is the amount he was to account for. The very same money which is the subject of the counter claim.

I find that the Claimant and dismiss the claim.

7. COUNTER CLAIM

The Respondent counter claimed the sum of Kshs.136,329/=. No evidence was adduced in respect of the same. As stated above this is money that was paid to the Claimant as imprest. Having failed to prove that the Claimant did not expend the money, the Respondent cannot claim a refund of the same.

I find that the counter claim has not been proved and dismiss the same.

In summary Judgment is entered for the Claimant against the Respondent as follows;

1. The dismissal of the claimant is declared unfair.
2. Judgment is entered for the claimant in the total sum of Kshs.996,424.00.
3. The Respondents counter claim is dismissed.
4. The Respondent shall pay claimants costs for the case.

Read in open Court this 3rd day of July 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

MS ASHUBWE _____ for Claimant

MAKORI _____ for Respondent