



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA NAIROBI
CAUSE NO. 517 OF 2011

PETER MUNGAI GACAGACLAIMANT

-VS-

PRIMAROSA FLOWERD LTD.1ST RESPONDENT

ATUL PAREKH2ND RESPONDENT

JUDGEMENT

This matter was brought to court vide a Memorandum of Claim dated 4th April, 2011 and filed on 7th instant. The issue in dispute as per the claim is cited as

“unlawful and illegal suspension of ...”

It is incomplete, but later completed in the supplementary claimant’s memorandum of claim.

The respondents in their reply deny the claim and pray that the same be dismissed with costs.

The claimant’s case is that he was employed by the 1st respondent on 7th March, 2005 as a Human Resource Manager pursuant to a contract of employment dated 19th March, 2005 at a basic salary of Kshs.63, 416.00.

He worked for the respondent faithfully and diligently until the 5th February, 2010 when he was unprocedurally verbally suspended by the 2nd respondents and this was later confirmed by the Finance Manager, Vishal Shah. He has to date not been served with a suspension letter.

The issue of termination or suspension arose out of the respondent’s spray section where after a routine cholinesterase screening in October, 2009, thirty (30) workers were detected to have abnormal results. Ordinarily, these would have been redeployed to a non-spray job for a minimum of four weeks after which a retest would be done to find out if the level had normalized. When these tests were done and results released to the sprayers, those with abnormal results took issue with the technician and the departmental head. The Human Resource Manager called a meeting which meeting recommended that a meeting be held with all sprayers to explain the cholinesterase issue. This was done but instead of sitting a retest, they served the employer with letters of termination of services and received their terminal pay in January, 2010. The respondent was thereafter served with court summons on this and blamed the claimant for the same. He was subsequently suspended from employment.

The claimant contends that suspension was unlawful as no warning, show cause or other suspension letter had been made to him. He also submits that the procedure obtaining the employee's disciplinary manual was not adhered to therefore making it fallacious. Natural Justice and its tenets thereof were not met.

The 1st respondent admits that the claimant was employed as Human Resource Manager vide an agreement dated 19th March, 2005 but absconded duty on 5th February, 2010 and only re-appears in this claim for unfair dismissal. He submits that the respondent had mechanisms for resolution of disputes but not for handling cases of absconding of duty. He submits that the claim does not proffer a reasonable cause of action and is a gross abuse of court process and therefore should be dismissed.

The 2nd respondent pleads the absence of privity of contract between himself and the claimant. He denies terminating the claimant's services and submits that he indeed absconded. He was not in a position to employ or dismiss anyone and *in toto* denies the claim and prays that it be dismissed.

When the matter came for hearing on 21st March, 2013 the claimant in his testimony reiterated his claim. This was also reinforced on cross examination.

In his written submissions, the claimant rubbishes the respondent's defense of absconding duty and submits that the same is not supported in evidence. That should this have been the case, then the respondents had administrative recourses and could also have preferred disciplinary action against the defaulting claimant by way of a show cause letter, oral warning and these were not evidenced by the respondent. Further the suspension was not formalized or issued. Absconding from duty attracts summary dismissal but the respondent chose to go round in circles and not focus on the issues in dispute. The claimant in penultimate submits that he has adduced adequate oral documentary evidence which has not been rebutted by the respondent who has chosen to thrive on mere denials. He is therefore entitled to his claim.

The respondents in their submission also reiterated their defense and aver that the claimant is the author of his own misfortunes. There was never a case of suspension, the claimant having absconded duty only to later come back with a letter of demand to the respondent. He has failed to prove the suspension.

The issues for determination therefore are;

1. Was the claimant unlawfully and illegally suspended from employment?
2. Is the claimant entitled to the relief sought?

It would appear that the events leading to the termination of the employment of the claimant are not recorded or in the custody of the said claimant. He has made oral and written submissions on his side of the story but not had documentary proof of his suspension. Does his evidence pass the test on a balance of probabilities? The answer is yes. This is because despite the claimant's elaborate analysis of the events leading to his suspension or termination, the respondent does not rebut this but only chooses to deny the same and bring in a case of absconding from duty. This cannot hold the day in the circumstances and fails. I would find for the claimant instead of the respondent and discount the respondent's version of the events. In any event, what action did the employer take in the circumstances of the anomalies alleged against the claimant?

A finding for the claimant entitles him to the relief sought and I so find in answer to issue number 2 above. I therefore find for the claimant and order as follows;

1. That the claimant's suspension from employment was illegal and unlawful.
2. The respondents be and are hereby ordered to compensate and pay the claimant as follows;
 - i. Notice pay = Ksh.63,416.00
 - ii. 28 days leave – $28/30 \times \text{Ksh.63,416.00}$ = Ksh.59,188.00

iii. 5 days worked in February, 2010

$$- 5/30 \times \text{Ksh.}63,416.00 = \text{Ksh.}10,569.00$$

iv. 8 months compensation for wrongful

$$\text{iv. termination of employment} - 8 \times 63,416.00 = \underline{\text{Ksh.}507,328.00}$$

TOTAL

Ksh.640,501.00

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3. That the respondent be and is hereby ordered to meet and pay the claimant within thirty (30) days from the date of these orders of court.
4. The cost of this cause shall be borne by the respondent.

Dated, signed and delivered this 5th day of June 2013.

D.K. Njagi Marete

JUDGE

Appearances

1. Claimant in person.
2. Mr. Omuko instructed by V.A Nyamondi & Company Advocates for the respondent.