REPUBLIC OF KENYA

IN THE INDUSTIRAL COURT OF KENYA AT KISUMU

CAUSE NO. 62/2013

(PREVIOUSLY NAI NO. 1289/2012)

(BEFORE HON. LADY JUSTICE HELLEN WASILWA ON 18TH DECEMBER, 2013)

FRED BABU OCHIENG ....…......CLAIMANT/APPLICANT

VS

MEDICINS SAN FRONTIERS..................................RESPONDENT

JUDGMENT

The claimants herein Fred Babu Ochieng filed his statement of claim on 9/8/12 through Nyauke and Company Advocates. The claimant further gave oral evidence before Court on 3.6.2013. He had previously filed his statement in Court with his claim which is dated 18.7.2012. The gist of the claimant's case is that he was an employee of the respondents herein working as a Laboratory Technologist from February 2007. He was subsequently promoted to T.B. Laboratory supervisor in 2008 and finally in September 2009, he was promoted to Laboratory Manager co-ordinating all the laboratory work. He served in this position earning Kshs 117,267/= and his duties included co-ordination of laboratory activities. He was in charge of two laboratories and also represented the Laboratory Department in the Heads of department meetings and at managers meeting. He was to ensure harmonization of laboratory responsibilities.

His problems with the respondent began when he was trained to implement the use of Pima machine used for CD4 checking. The respondent procured 3 of such machines which were brought to Homabay field office through the respondents headquarters. The machine was received by the pharmacy and then the laboratory was informed that the equipment had arrived. The claimant received there machines at the laboratory and thereafter these machines were put to use. The ministry of health were to validate these machines but this was not done.

Another 10 machines were received at the pharmacy in September 2011. The claimant had not ordered for them. He was informed by the Pharmacy of their arrival and he informed the field co-ordinator. In October 2011 at a meeting of Heads of Department it was noted that the 10 Pima Machines were discussed and Mary was to advise (Page 2 of APP3).

Mary was Pharmacist co-ordinator. The issue was to be discussed by the claimant, Richard, David and Mary. Richard was claimants immediate boss and David was the overall boss. There were several meetings to discuss the issue of these machines. The 10 machines were subsequently put to use without validation by the Ministry of Health. The laboratory department proceeded and used these machines which generated results.

In April 2012, there as a visit by the medical boss from Paris. It is this visit that was final straw on the claimant as the boss discovered that the 10 Pima machines were being used apparently without authority. On 12/6/2012 the claimant came to work as usual. He was given a show cause letter and asked to reply by 16.6.2012. He made his representation. On 19/6/12 he was given a dismissal letter. The letter indicated that he had been dismissed for gross misconduct. He reported to the labour office and finally sought counsel of a lawyer who wrote the respondents a demand letter. He told court that he was the unfairly dismissed because the procedure used was unfair. He was also never given his benefits. He indicated that the mistake in using these machines was not his and seek orders that he be paid terminal dues plus costs and interest. In cross-examination he told court that the meeting of 24.2.2012 authorized the use of these machines and he tested them to his satisfaction.

The respondents filed their statement of defence through the firm of Hamilton Harrison & Mathews. The respondents called 2 witnesses; the respondents finance and HR co-ordination in Kenya and the medical

co-ordinator. It is the respondents case that the claimant worked for the respondent as laboratory manager. However, the claimant caused the Pima machines to be used without validation. This led the respondents to initiate disciplinary procedures against him and this led them to summarily dismiss him. The 2nd witness told court that the 10 machines were wrongly routed to Kenya from Paris. That when the machines were brought to Homa bay, the field co-ordinator authorized their use. She told court that this field co-ordinator was not disciplined. The witness further told court that the machines were finally validated and are currently in use.

I have considered the evidence of both Parties and their submissions. The issues for determination are as follows:_

1. Whether the claimant failed in his duties as labooratory manager to warrant summary dismissal?
2. If whether the respondent used the correct procedure in summarily dismissing?
3. Whether the claimant is entitled to the remedies he sought.

The claimant told court that he was a laboratory manager and he

co-ordinated all laboratory activities. The Pima machine could not have been put to use without his knowledge. However, evidence adduced shows that the claimant put these machines to use after a series of meetings with his bosses who authorized their use. This evidenced from APP 3- the minutes of the Heads of Department at Pg 2 which shows that the Pima cartridges were to be used on the machines. Fred and David were the action persons. In the meeting, the claimants bosses Richard and David were also present. It also emerged that these machines were wrongly routed to Homabay and kept there in warehouse until a decision was made that they be put to use to avoid the cartridges being destroyed.

The respondent Internal Regulation (APP 10) deal with issues of dismissal without notice under Clause 8.2. Some of the reasons that may lead to dismissal without notice under these regulation include theft, drunkennesses, damage to property of respondent and gross or serious negligence where the security of MSF-F staff, patients or the local population is at stake. The respondent tend to point to the fact that the claimant was negligent in his duties when he allowed the use of these machines without validation. However, the blame cannot fall on the claimant given that the use of these machines was authorized by his supervisors who were not even disciplined when it was discovered that the machines were in use. This in itself stands out as discrimination where disciplinary action was instituted selectively against the claimant to the exclusion of others. The claimant may have done some act on omission which was procedurally wrong but this did not warrant summary dismissal.

The regulation of the respondent Clause 8.1 point to what should be done when disciplinary action is envisioned. This includes occasion where there is repetitive negligence. In the case of claimant, it was not established that this had never happened before and therefore action taken against him was harsh and flouted the respondents own disciplinary regulations.

The next issue is the procedure employed before claimant was dismissed. Rpeatedly, this Court has discussed the provision of the Employment Act 2007, Section 41 on procedure to be employed before an employee is dismissed. The requirement that the employee must be accorded a fair hearing is mandatory. The law provides that;-

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.***

The same right is given under Article 50(1) of the Constitution of Kenya which provides as follows:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"

ILO Committee of experts in its general survey on Protection against unjustified Dismissals No. 150 states,

"It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment, and even if the termination is not considered as final until the appeals procedures are exhausted, it is necessary for the Application of Article 7 that the worker be given an opportunity to defend himself "before his employment is considered to have been terminated"

All these provisions were flouted and therefore I find that the procedure used before claimant was dismissed was unjustied and wrongful. I therefore find that the dismissal was unfair and I will convert it to a normal termination.

On prayer sought by the claimant, I award him as follows:_

1. 1 Month salary in lieu of notice Kshs 117,267/=
2. 15 days salary for each year worked being from 2009 to 2012 –

3 years Kshs 175,900.5

3. 6 months salary as compensation for wrongful termination

Kshs 703,602.

TOTAL = Kshs 996,769/=. This is subject to statutory deductions.

4. Claimant should be issued with a certificate of service.

Respondents to pay costs of this cause.

HELLEN WASILWA

JUDGE

18/12/2013

Appearance

Claimant present

Siganga holding brief HHM for respondent- present

C/c- Wamache Sammy