



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 687 of 2011

NELSON OCHIENG NYOTURU.....CLAIMANT

-VS-

TELKOM KENYA LIMITED.....RESPONDENT

JUDGMENT

By a memorandum of Claim dated 5th May 2011 and filed in court on 6th May 2011, the Claimant seeks the following prayers:-

1. **THAT**, the Claimant's termination of his services by the Respondent on 11th December 2006 and 27th May 2009 was unlawful, unfair as the reason given was invalid.
2. **THAT**, the Respondent, Telkom Kenya Ltd be ordered to pay:-
 - [i] A sum of Kshs.16,189x12 months = Kshs.194,268/= a requirement under the Labour Institutions Act and Employment Act.
 - [ii] A further sum of Kshs.16,189x15 years of service = Kshs.242,835/= as special damages.
3. **THAT**, in the alternative the Court orders reinstatement of the Applicant.
4. **THAT**, the Respondent be ordered to pay the costs of this Claim.

The parties were heard on 29th September 2011, 29th March 2012 and 23rd May 2012 by Hon. Justice Isaac E.K. Mukunya (Retired). The case was fixed for hearing of closing submissions on 5th June 2012 when it was rescheduled to 30th July 2012. The parties appeared before me on 30th July 2012 and agreed to do written submissions. The Claimant was represented by Mr. Tom Wachakana of Wachakana & Company Advocates while the Respondent was represented by Ms. Munyu of Iseme, Kamau & Maema, Advocates.

The Claimant **NELSON OCHIENG NYOTURU** gave evidence in support of his case. In his testimony he stated that he was employed by the Respondent **TELKOM KENYA LIMITED** on 3rd August 1992 as a technician trainee at a salary of Kshs. 2120/- and confirmed as a technician in 1999 at a salary of 7455/-. He rose through the ranks and at the time of termination of his employment on 11th December 2006 he

was a senior technician earning Kshs. 16450/-. He received the letter of termination on 30th January 2007. The reason for termination was that he made a fraudulent medical claim of Kshs. 76,500/- in respect of treatment of his son, Nyoturu Ochieng. The Claimant denied making false medical claims as alleged. He stated that he paid Kshs. 85,000/- for treatment of his son at Gertrudes Childrens Hospital with money borrowed from friends and that he was entitled to a refund as he was covered under the inpatient staff medical scheme together with his family. He was never given notice of termination or paid terminal benefits. His appeal against termination was not successful.

He prays for reinstatement or in the alternative maximum compensation of 12 months' salary, that is Kshs. 194,268/-. He further seeks special damages of Kshs. 242,835/- and costs of the case.

The Respondent called 2 witnesses.

DW1, CLEOPA KINYUA NJIRU, a Regional Human Resources Manager with the Respondent testified that the Respondent has an in-house medical scheme which covers both inpatient and outpatient treatment. The Respondent pays inpatient medical expenses to the hospitals directly. He stated that it is not normal to reimburse Gertrudes Hospital directly and that this would require investigations to establish why the hospital demanded payment from the Claimant. If a sponsor paid as in the case of the Claimant there cannot be reimbursement. In cross examination he stated that he was not aware that the Claimant incurred a bill of 85,000/- from Gertrudes Hospital. He stated the claim by the Claimant bordered on fraud.

DW 2, BONIFACE KIILU MWENDO, a senior investigator with the Respondent testified that he carried out investigations of the claim by the Claimant and established that a claim of kshs.76,500/- had been presented by the Claimant for refund. The claim was supported by an invoice from Gertrudes Children's Hospital. He visited the hospital to authenticate the claim and established that the invoice had been issued against a cheque of kshs. 85,000/- drawn by Christmas Trust Fund for medical treatment of Joseph Ochieng, a son to Claimant. He further established that the Christmas Trust Fund is a charitable fund which donates funds to medical cases without requiring refund. The investigations concluded that the claim was intended to defraud the company. In cross examination he stated that the Claimant was entitled to medical scheme which covered the employee and his dependants. The investigations revealed a fraud as the payment was made through a donation and yet the Claimant claimed a reimbursement.

From the evidence and the pleadings there is no contention that the claimant was employed by the Respondent in August 1992 and was dismissed by letter dated 11th December 2006. In his evidence he stated that he was not paid any terminal benefits. He has however not made any claim for the same.

The issue to be decided by the court is whether the claimant was fairly terminated and whether he is entitled to payment of Kshs.194,268/= and Kshs.242,835/= as claimed in his prayer no. 2.

The court notes that no evidence was submitted by the Claimant in respect of special damages. The prayer is therefore deemed redundant.

The Claimant alleges that the termination was unlawful and unfair as it was in violation of the Respondents regulations, the Employment Act and the Labour Institutions Act. Counsel for the Claimant has not drawn the courts attention to the relevant sections of the two Acts or the paragraphs of the regulations that have been violated. Suffice to mention here that both the Employment Act and the Labour Institutions Act had not been enacted at the time the Claimant was dismissed from employment on 11th December 2006. The Respondent could thus not be in violation of a nonexistent law. This also applies to the reference by the Claimants advocate to Article 41 of the Constitution. It is also worth noting that this case was filed in May 2011 while the Claimant was dismissed from Employment on 11th December 2006. His claim was therefore statute barred by the time the claim was filed. However, since this was never raised by the Respondent in their pleadings or at any time during the hearing, it is deemed that the Respondent waived its right to raise the objection.

On the violation of the Respondents regulations, paragraph 7 cited by the Claimants advocate is not

material as the issue in dispute is not the right to medical treatment but an attempt to make a fraudulent medical claim. From the evidence on record the Respondent has on a balance of probabilities proved that there was in fact a claim for reimbursement of the medical bill by the Claimant, a fact that is not denied. The Respondent has proved that the bill was settled through a donation from the Christmas Trust Fund and was a gift therefore not subject to refund. The claim was therefore fraudulent and a legitimate ground for summary dismissal.

The other issue to be considered is whether the Respondent complied with the procedure in its regulations and/or fair procedure. Again both parties did not address this issue. The court however notes that the Claimant was never called to defend himself before the committee investigating the case. He was asked to show cause which he did by letter but was never summoned to appear before the committee. I therefore find that the procedure used was unfair.

Under section 49 read together with section 50 of the Employment Act, the court is supposed to consider several factors before deciding on a remedy in cases of unfair dismissal. Among the factors to be considered are the employee's length of service and conduct of the employee which to any extent caused or contributed to the termination. In this case as I have already stated above, I have found that the Claimant was culpable and the Respondent had justifiable grounds to dismiss him. However the Respondent failed to use fair procedure by failing to give the Claimant a hearing.

The remedy of reinstatement is not available to the Claimant due to the fact that he has been out of employment since 11th December 2006, which is more than 3 years within which the court can order reinstatement in accordance with section 12(3)(vii) of the Industrial Court Act, 2011. In any event, he was culpable and reinstatement would not be justifiable in his case. For the foregoing reasons I award the Claimant compensation of 6 months' salary with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THE 5TH DAY OF OCTOBER 2012.

HON. LADY JUSTICE M. ONYANGO

JUDGE

In the presence of-

For Claimant:

For Respondent:

Mr. Tom Wachakana of Wachakana & Company Advocates appeared for the Claimant

Ms. Munyu of Iseme, Kamau & Maema, Advocates appeared for the Respondent