



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 96 of 2010

FELIX MUTHEE MWONGERA CLAIMANT

-VERSUS-

FIVE FORTY AVIATION LIMITED RESPONDENT

JUDGEMENT

By a Memorandum of Claim dated 29th January 2010 and filed in Court on 9th February 2010, the Claimant **FELIX MUTHEE MWONGERA** alleges wrongful dismissal/termination against the Respondent for:-

- a) Kshs.1,534,167/=
- b) General Exemplary damages for wrong dismissal
- c) Certificate of Service
- d) Costs of this suit
- e) Interest on (a) (b) and (d) above at Court rates

f) Any other relief that this Honourable Court may deem fit and just to grant. The Respondent filed its Statement of Reply in which it alleges the Claimant was sent on leave pending investigations but declined to report back to work as requested as a result of which the Claimant was dismissed.

The parties were heard on 29th June 2010 by Hon. Justice Charles P. Chemmutut with O.A. Wafula and J.M. Kilonzo, Members of the Court as then constituted. Mr. Mbabu appeared for the Claimant while Mr. Mungu appeared for the Respondent.

The case was reallocated to me after the Court was reconstituted. Parties appeared before me for directions on 11th October 2012 when they agreed that I should proceed and prepare judgement. The parties were directed to prepare submissions and judgement reserved for 29th March 2013.

I have read the pleadings by both parties, the record of proceedings and the written submissions. The issues for determination are whether the Claimant was dismissed unfairly and whether he is entitled to the prayers sought.

Both parties proceeded by way of oral submissions before Hon. Justice Chemmuttut and then made written submissions for my consideration.

The uncontested facts of the case are that the Claimant was employed as Finance Manager on 1st June 2008. On 11th September 2009 he was requested to proceed on leave pending investigations and was informed that he would be contacted on 22nd September 2009 to review the findings of investigations. His last salary was shs.263,416.

The Claimant's case is that he went back to the office on 22nd September as advised but was informed that there were instructions that he should not be allowed into the premises and that his efforts to know his fate were not successful.

On 2nd October 2009 he received an email from a colleague forwarding to him a circular to staff titled "[Everyone] Felix Muthee – Dismissal. In the circular the staff were informed that the Claimant was no longer an employee of the Respondent. That he was sent on leave while review of his work was undertaken but he did not report back to work on the requested date. The mail further informed staff that he had since refused to answer any telephone calls and had stated via email that he had left the country. The staff were advised to contact the writer of the mail should any of them hear about the Claimant as the Respondent needed to locate him as part of the ongoing investigation.

On the same date the Claimant received a work related email from the office at 10.30 a.m. He responded to the email asking why he was being asked about official work when the Respondent had already issued a memo to staff advising that he was no longer an employee.

A reply to his email on 5th October stated the work related email was in error and asked the Claimant to go and see Don Smith to resolve the matter.

The Respondent on the other hand alleges that the Claimant was called to the office but declined leading to his summary dismissal.

Was the Claimant fairly dismissed?

For summary dismissal to be lawful the Respondent should show that it complied with the provisions of Section 41 of the Employment Act by giving the Claimant an opportunity to be heard, that fair procedure was used and that there was valid reason.

In the present case the Respondent submits that the Claimant was contacted on 22nd September and asked to report back to work but declined as a result of which he was dismissed. The Respondent is silent on the mode of communication to the Claimant. The Respondent further alleged that the investigations had unearthed financial impropriety yet no charges were preferred against the Claimant nor was a copy of the investigation report which the Claimant did not give an input into, either sent to the Claimant or annexed to the Respondent's Statement of Reply.

In the absence of an invitation to the Claimant to report back to work, a copy of the investigation report or charges preferred against the Claimant, there is no valid reason for termination of his services. The Claimant was never informed of a disciplinary hearing or given an opportunity to defend himself. For these reasons the dismissal was unfair.

Section 45(5) of the Employment Act provides that in deciding whether it was just and equitable for an employer to terminate employment of an employee, the Court shall consider among other issues, the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision. The Section further requires the Court to consider the extent to which the employer has complied with any statutory requirements connected with the termination including the issuing of a certificate under Section 51 and the procedural requirements under Section 41. In the present case the Respondent has not complied with any of the foregoing.

I find the dismissal of the Claimant to have been unfair.

Is the Claimant entitled to the prayers sought?

The Claimant has prayed for the following reliefs:-

1. Salary for the month of September

Having been terminated on 30th September 2009 as alleged by the Respondent in the annexed letter of termination, the Claimant is entitled to salary for September 2009 in the sum of Shs.263,416.00. I award him the same.

2. 3 months' salary in lieu of notice

Having found the dismissal of the Claimant unfair, he is entitled to salary in lieu of notice as provided for in Section 49(1) (a) of the Employment Act. His letter of appointment at Paragraph 10 provides for 3 months notice in writing. Since the notice was not given, he is entitled to 3 months salary in lieu of notice. I therefore award him Shs.790,248 being 3 months' salary in lieu of notice.

3. Pro-rata leave 1 year 4 months

The Respondent did not submit any evidence to show that the Claimant took leave during the period he was in employment. His letter of appointment provided for 21 working days leave excluding Saturdays, Sundays and Public holidays. Having been in employment for one year and four months, he is therefore entitled to 28 working days leave which translates to Shs.245,854.90. I award him the same sum in lieu of leave.

4. Severance pay

The Claimant was not declared redundant and is therefore not entitled to severance pay. The claim is dismissed.

5. Damages for wrongful dismissal

Having found that the Claimant was wrongfully dismissed he is entitled to compensation. In awarding compensation the Employment Act at Section 49(1) allows the Court to give up-to 12 months salary as compensation. Taking into account the Claimants length of service of 1 year 4 months and the manner in which he was dismissed, it is my opinion that 4 months' salary will be adequate compensation.

I therefore award him the sum of Shs.1,053,664 being 4 months' salary as compensation.

6. Certificate of Service

The Claimant is entitled to a Certificate of Service as provided in Section 50 of the Employment Act.

I therefore give judgement to the Claimant against the Respondent as follows:-

i) Shs.2,353,182/=.

ii) Certificate of Service.

iii) The Respondent shall pay Claimant's costs of this suit.

Orders accordingly.

Read in open Court and signed on this 23rd day of April 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Kanyi h/b for Mbabu

In the presence of:-

.....for Claimant

No appearance

.....for Respondent