



REPUBLIC OF KENYA

High Court at Mombasa

Cause 146 of 2012

ALPHONCE MAGHANGA MWACHANYA.....CLAIMANT

v

OPERATION 680 LIMITED.....RESPONDENT

JUDGEMENT

1. This Cause was filed on 14th December, 2012 by Alphonce Maghanga Mwachanya (the Claimant) against Operation 680 Limited (the Respondent) seeking a declaration that the Claimant's dismissal or termination of employment was unfair, discriminatory and certain reliefs.
 2. I heard the evidence on 25th March, 2013 and reserved judgment for 3rd May, 2013. However due to electricity supply problems I could not finalise this judgment as scheduled and postponed the delivery. I will set out only the relevant case for each party for my decision.
- Claimant's case**
3. According to the Claimant he was employed by the Respondent initially on 4 February, 2010 as a Trainee Assistant Unit Manager on a fixed term contract ending on 31st January, 2011. The contract was variously renewed, the last renewal being on 1st February, 2012 to run until 31st January, 2014. During the course of the last contract, the Claimant was to get a consolidated gross salary of Kshs 25,000/-
 4. Around 16th March, 2012, the Respondent wrote to the Claimant informing him that he was being summarily dismissed for lack of trust and that he would be paid salary up to 16th March, 2012, and 2 days accrued leave less any company debts.
 5. Before the dismissal, the Claimant testified that he had been on leave and that when he resumed duty on 16th March, 2012, he was informed that he was not required to work and that he called and talked with the Respondent's Human Resources Manager and the Chief Executive Officer who showed him a letter from Chester Insurance Brokers seeking his dismissal. The letter made reference to theft of Kshs 106,297/- by servant.
 6. Regarding the events preceding the dismissal, the Claimant testified that before the leave, he had received a cheque of Kshs 106,297/- which he cashed at New Generation Stores, Voi which deducted a sum of Kshs 5000/- and the balance he handed over to the Respondent's Accountant Andrew Ole Kiu in the presence of two of the Respondent's employees but that the Respondent's view was that the Claimant had failed to account for the money.
 7. The issue of the cash became a police issue and the named Accountant was charged but later acquitted, and that he was one of the witnesses lined up to testify against the Accountant.

8. According to the Claimant, the dismissal was unlawful or illegal because he was not given any notice, the termination was not for a lawful cause and was discriminatory and unfair. The Claimant therefore sought the declaration already referred to and salary in lieu of notice, salary for remainder of contract period of 23 months and 12 months compensation, which he quantified at Kshs 900,000/-

Respondent's case

9. The Respondent in its Memorandum of Reply denied all the facts of the claim set out in the Memorandum of Claim but admitted that the Claimant was its employee.

10. It was also the case of the Respondent that the Claimant was given a fair hearing where he had an opportunity to explain his side of the case before dismissal and that the reason for the dismissal was because the Claimant misappropriated some Kshs 106,297/-.

11. The Respondent's only witness, Andrew Ole Kiu denied that the Claimant handed over to him any money after cashing the cheque. It was his evidence that handing over of the cash would have been acknowledged in writing.

Issues for determination

12. The three primary issues which emerge for determination based on the pleadings, evidence and submissions are:

(i) Whether the termination of the Claimant was unlawful or unfair

(ii) Whether damages equivalent to unserved term of contract are available or in other words whether damages are an appropriate remedy on premature termination of a fixed term contract (I will discuss this issue under remedies).

(iii) Other, appropriate relief.

Whether the termination of the Claimant was unlawful or unfair

13. Section 41 of the Employment Act, 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity* to explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present. This is what is now referred to in employment law and practice as procedural fairness.

14. In my view the premature termination of a fixed term contract is no different from the termination of an indefinite contract of employment or even what is normally referred to as permanent employment. The procedural requirements of section 41 of the Employment Act are applicable to all the three types of contracts.

15. I have therefore first to determine whether the Claimant was terminated and if the Respondent complied with the requirements of section 41 of the Employment Act.

16. The Claimant annexed to his Memorandum of Claim a copy of the letter through which he was summarily dismissed by the Respondent. The letter gave the reasons/ grounds for the dismissal of the Claimant, as lack of trust occasioned by being implicated in an on-going police investigation. It is not in dispute that the alleged ground for dismissal of the Claimant was misconduct which is one of the three listed grounds in section 41 of the Employment Act.

17. In my considered view in order for an employer to meet the legal requirements of procedural fairness section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following:

(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination.

(ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.

(iii) Heard and considered any explanations by employee or his representative.

(iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules.

18. In the context of section 41 of the Employment Act, 2007 it is not enough for an employer to simply set out the reasons for termination or dismissal in the termination or dismissal letter. The letter of termination/dismissal's primary purpose when the whole parameters of sections 10, 12 and 41 of the Employment Act is considered is to convey the decision reached by an employer after holding a disciplinary hearing.

19. In the case under consideration, it was the submission of the Respondent that the reasons for the termination were indicated in the letter of summary dismissal and that the Claimant was given an opportunity to respond and that he did respond/explain vide letter dated 6th February, 2012, annexed as Appendix 6 in the Memorandum of Reply.

20. According to the Claimant he was not notified of the grounds or explained to reasons for his dismissal and that the letter he wrote on 6th February, 2012 and attached to the Memorandum of Reply as Appendix 5 was an explanation to the Respondent's Auditors.

21. I am inclined to accept the evidence of the Claimant that the letter annexed as Appendix 6 was a response to queries by the auditors rather than a response to notice from the Respondent that his termination was under contemplation.

22. And in my considered view, explanations made to auditors cannot be relied upon or used by an employer to establish in Court that an employee was given an opportunity to be heard as required by section 41 of the Employment Act. In my view the Act does not contemplate an employer delegating the obligation placed upon it by section 41 to its auditors or other separate entities.

23. The Respondent in the pleadings, oral evidence and submissions was silent on who informed/explained to the Claimant that his termination was being considered/contemplated. It is not even clear what representations the Claimant made. In fact, the witness produced by the Respondent was not involved in the disciplinary proceedings or hold an office of authority over the Claimant to even know what proceedings were being contemplated or decisions were to be made.

24. On its side the Respondent annexed to its Reply, a letter dated 21st February, 2012 from Chester Insurance Brokers asking for a dismissal of the Respondent's employees suspected of involvement in the loss of the funds.

25. The Respondent has not satisfied me that it complied with the requirements of section 41 of the Employment Act as I have enumerated in paragraph 17 herein above and therefore the Claimant was placed at a procedural disadvantage. I do hold that the dismissal of the Claimant was procedurally unfair.

26. Having found that the dismissal was procedurally unfair it is not necessary for me to discuss or determine whether the Respondent has met the requirements of section 43 and 45 of the Employment Act to prove the reasons for the dismissal and whether the reasons were fair and valid.

Appropriate Relief

27. The Claimant has sought several prayers in relief and I need to discuss each head separately.

Salary in lieu of Notice

28. Having found that the dismissal of the Claimant was procedurally unfair, it is only logical that I should invoke the provisions of section 35(1)(c) of the Employment Act and award him the equivalent of one month's salary in lieu of Notice. The evidence was led that the gross consolidated salary the Claimant was earning as Kshs 25,000/- and I assess the salary in lieu of Notice at Kshs 25,000/-.

Whether damages equivalent to unserved term of contract are available/whether damages are an appropriate remedy on premature termination of a fixed term contract/ Salary for remainder of contract.

29. The Claimant was on a fixed term contract which was meant to end on 31st January, 2014. He had 23 more months to end of the contract. He sought Kshs 575,000/- being the salary he would have got for the remainder of the contract. The Claimant in his submission relied on the authority of *Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa & Presbyterian Foundation* (2012) eKLR. Further reliance was placed on section 49(4)(f) of the Employment Act. The section provides that

(4) A Labour officer shall, in deciding whether to recommend the ***remedies specified in subsections (1) and (3)***, take into account any or all of the following-

(f) *the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination (emphasis mine and for Labour officer substitute Court).*

30. In the authority cited, my brother Justice Ongaya made reference to the principles of *constructive renewal* and *reasonable expectation of employment* to award the Claimant the salary she would have earned during the term of the 3 year renewed contract. These two concepts have been widely discussed within the South African context where the statutory framework expressly includes failure to renew a fixed term contract as a species of dismissal in section 186(b) of the Labour Relations Act 66 of 1995. In Kenya, the term dismissal is not defined in any statute. In any case, the non renewal or failure to renew a fixed term contract is not in contention as it was in the *Ruth Gathoni* case.

31. The *Ruth Gathoni* case was cited and relied upon in any case as authority for the award of damages for the unserved portion of a fixed term contract. I humbly wish to take a contrary position to that taken by my brother Judge that damages are available as a remedy. But before discussing my understanding of the remedial scheme created by section 49, I believe I should go into a very brief jurisprudential overview starting with the position at common law and case law emanating from the Court of Appeal and the South African position because our Employment Act has many similarities to the comparable South African statute.

32. A good starting point would be the decision of the House of Lords in *Addis v Gramophone* (1909) AC 488 where the Court held that damages for wrongful dismissal were confined to loss of salary equivalent to the notice period of six months. Although the harsh effects of this decision have been ameliorated by statute in England, the same trend is visible in the well known passage in *Malloch v Aberdeen Corporation* [1971] 1 W.L.R. 1578 that

At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. *The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.*

33. The situation in South Africa seems to be different however. According to Prof Marius Olivier, *Legal Constraints on the Termination of Fixed-term contracts of Employment: An Enquiry into Recent Developments* 17 Indus. L. J. Juta 1001 1996, an employee whose fixed term contract has been prematurely terminated is entitled up to the maximum 12 months' compensation, (1036); *may claim damages at common law based on breach of contract (1038) and normal rules are applicable; may seek*

specific performance in the form of wages against tendering of services(1039) but the claim is for a contractual debt and not damages, and it is immaterial whether the employer utilizes the services of the employee.

34.The remedies available within the South African jurisdiction in any case is underpinned by section 195 of the Labour Relations Act which provide that

An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

35.As regards the position in Kenya, I would wish to cite in extenso what the Court of Appeal in *Rift Valley Textiles Ltd v Edward Onyango Oganda* in Nakuru Civil Appeal No. 27 of 1992 that

But the appellant appeals to this court because having found and held that the summary dismissal was unlawful, the learned Judge proceeded to award to the respondent twelve months gross salary as general damages and despite the respondent's repeated admission that he had been paid for the three months salary in lieu of notice. Was the Judge entitled in law to do this?

We have no doubt whatsoever that the law did not entitle the judge to do any of these things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In *CYRUS NYAGA KABUTE V KIRINYAGA COUNTY COUNCIL*, Civil Appeal No. 29 of 1985 (Unreported),the appellant had made prayers for, among others:-

- (i) General damages for loss of employment and retirement benefits from the date of judgment to the attainment of the appellant's 60th birthday
- (ii) Aggravated damages and general damages for breach of contract.

In rejecting these claims, the Court said:- "Apart from that, even if the appellant were able to re-open that matter and supposing that he had shown that his dismissal had not been justified, he would not have been able to get any of the prayers for which he prayed in the plaint.....those damages would not have been aggravated damages and would not have been given him benefits upto his 60th birthday, not arrears of salary from July 1980...

36.The High Court (Justice Waki) in *Wanjohi v Mitchell Cotts Kenya Ltd* (2002) 2 KLR 462 similarly held that the general damages for wrongful dismissal is well settled, such that damages are limited to the amount that the employer would have been obliged to pay in accordance with the terms of the contract.

37.In my view what the above 2 authorities suggest is that in so far as remedies for breach of contract is concerned damages were restricted to what the contract provided for.

38.The question therefore is whether the Employment Act or the Industrial Court Act can now be authority to grant damages for breach of contract under the common law. My simple answer is that the Employment Act, 2007 and the Industrial Court Act have not opened an avenue for this Court to grant damages equivalent to the unserved term of an employment contract. What the Employment Act has done is to empower the Court to award compensation up to a maximum of 12 months gross pay for unfair termination of contract, whether definite, fixed term or indefinite. The only exception would be where the contract of employment provides for payment of salary for unserved part of the contract.

39.Section 49(1) and (3) of the Employment Act has set out the remedies that the Court can grant where it finds that a termination of employment was unjustified and unfair and these are:

- (i) Wages that an employee would have earned had he been given notice

- (ii) Proportion of wages due as between date of notice and dismissal
- (iii) Maximum 12 months compensation
- (iv) Reinstatement
- (v) Re-engagement.

40. To my mind these are the primary remedies where the Court finds that termination of employment was unjustified and/or unfair. Unlike the South African statutory framework, the award of compensation under the Employment Act, 2007 is not stated to be in addition to any other award. It is a primary remedy. Specific performance is also allowed only in very exceptional circumstances.

41. The crucial point is whether a remedy of granting compensation or damages equivalent to the salary an employee would have earned were a fixed term contract of employment be terminated prematurely can be located anywhere in section 49 of the Employment Act.

42. To my mind section 49 of the Employment Act is no authority and cannot be the basis for the grant or award of any remedy of damages. Indeed the phrase “*damage(s)*” is not mentioned anywhere in the section. In my considered view section 49(4)(f) of the Employment Act cannot be the legal basis of making an award of damages where a fixed term contract has been terminated prematurely or not been renewed. It just provides one of the factors to consider in granting any or all of the primary remedies set out in sections 49(1) and (3) of the Employment Act.

43. But can the remedy find a foundation in the Industrial Court Act? As regards the 12 months’ maximum compensation mentioned in section 49(1)(c) of the Employment Act, it is now generally accepted in the awards made by the Industrial Court that it is a compensatory remedy and is distinguishable from the remedy of damages made pursuant to section 12(3)(vi) of the Industrial Court Act. The section provides that:

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

44. The question which arises then from the aforesaid section is whether the Industrial Court Act has contemplated the award of any damages. The jurisdiction to award damages must be located in a *written law*. The remedy of damages for unjustified, unfair termination of employment or breach of employment contract made by the Court must be pursuant to some statutory provision if my understanding of section 12(3)(vi) of the Industrial Court Act is correct.

45. The common law is not a written law and I am not sure that an award of damages for breach of an employment contract/premature termination of a fixed term contract can be found in the section.

46. From the brief discussion on the position at common law there is no other conclusion which can be reached except that an employee whose fixed term contract is terminated prematurely cannot be granted an award of damages equivalent to the unserved term of the contract under the common law or statutory law in Kenya.

47. Further, it would not make sense and cannot be the intention of the Employment Act or the Industrial Court Act to award employees whose fixed term contracts have been terminated prematurely generous damages equivalent to the salary which could have been earned during remainder/unserved term of the contract and restrict compensation to a maximum of 12 months’ for employees who were in permanent employment, but were terminated unfairly. It would not be fair and just as a matter of legal principle to treat employees on fixed term contracts differently from employees on permanent contracts, who have been unfairly terminated.

48. One word on the *Oganda* case before I move to the next head of relief is worthwhile. The holding in *Oganda* case regarding natural justice or the giving of reasons as to why an employee is being terminated no longer holds because of the express provisions of sections 41, 43 and 45 of the Employment Act which commenced on 2nd June, 2008. The right to a hearing/natural justice or procedural fairness is now a statutory entitlement in all types of employment contracts.

12 months compensation

49. Section 49(1)(c) of the Employment Act provides that where the Court finds that a termination of an employment contract or summary dismissal is unjustified, then it may award compensation not exceeding twelve months' gross monthly salary of the employee as at the time of dismissal.

50. In determining whether to make this award the Court is required to consider some thirteen factors which have been set out in section 49(4) of the Act. The Claimant had served the Respondent for only about two years by the time of termination. An employment contract is one of mutual trust and confidence which dissipates when one party terminates the contract. Having regard to this, the factors set out in the quoted section and that the Claimant did not express any intention or wish to be reinstated, it is my view that he is entitled to an award of 12 months' compensation for the unfair termination. He still had nearly two more years to end of the contract.

51. Evidence led before the Court indicated that the Claimant was earning Kshs 25,000/- per month. I do assess the 12 months' compensation at Kshs 300,000/-.

Certificate of service

52. There is a statutory obligation upon an employer to issue an employee with a certificate of service on separation in spite and despite the circumstances of the separation. The Respondent indicated that the Claimant's certificate was ready. The Claimant should collect the certificate of service.

Conclusion and Orders

53. In conclusion, it is my humble view that an award of damages equivalent to the salary an employee would have earned is not available as a remedy for premature termination of a fixed term contract and that the only avenue available is for the employee to seek compensation for unfair or unjustified premature termination of the contract.

54. I do find and declare that the termination of the Claimant's fixed term contract prematurely was procedurally unfair and order the Respondent to pay him:

(a) One month salary in lieu of Notice	Kshs 25,000/-
(b) 12 months' compensation	Kshs 300,000/-
TOTAL	Kshs 325,000/-

55. The Respondent to issue the Claimant with a Certificate of service.

56. There is no order as to costs.

Dated, delivered and signed in open Court in Mombasa on this 24th day of May 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Mwakireti instructed by

Mwakireti Ndumia & Co. Advocates

Mr. Mogeni instructed by Kelvin Mogeni Advocate

for Claimant

for Respondent