



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 59 OF 2019

JOSEPH MWANIKI NGANGA.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted the instant claim through a Statement of Claim dated 18th June, 2019. He seeks payment of three months' salary in lieu of notice, 14 Months' salary for unlawful termination, unpaid leave days for the years worked, costs of the suit and interests thereon.
2. The Respondent filed a Memorandum of Response dated 1st August, 2019, and filed in court on even date. The Respondent wholly denies the Claimant's claim, and further asserts that the Claimant failed in his work performance resulting in the Respondent experiencing unending industrial unrest.
3. The Claimant testified in support of his case during the hearing where he asked to adopt his witness statement and produced his bundle of documents. The Respondent presented one **Simon Egesa**, its Human Resources Manager to testify on its behalf and who likewise adopted his statement and produced documents filed in the
4. Both parties filed submissions on the matter.

The Claimant's Case

- 5., The Claimant's case is that he was employed on a two-year contract that was effective 1st July, 2016, as a Human Resources Manager earning a gross monthly salary of Kshs. 400,000/-.
6. It is the Claimant's case that his letter/contract of appointment stipulated his terms and conditions of service as well as his job description. It is his further case that his area of operation covered Kisumu, Nakuru, Webuye and Busia.
7. The Claimant avers that he was terminated from the service of the Respondent on 9th May, 2017, even after serving the Respondent dutifully and with utmost dedication. He states that at no time was he ever involved in disciplinary issues.
8. The Claimant states that he was neither given adequate notice, nor paid in lieu of the notice. The Claimant however confirmed during the hearing that he was paid three months' salary in lieu of termination notice, and proceeded to withdraw the claim for pay in lieu of notice.
9. The Claimant prays for the award of the reliefs sought, and as stated in his statement of claim.

The Respondent's Rebuttal

10. It is the Respondent's case that it engaged the Claimant in the position of **Human Resource Manager** from 1st July, 2016 to 11th May, 2017. The Respondent confirmed that the Claimant's contract was for a two (2) year contact term.
11. The Respondent avers that along with the letter of appointment, the Claimant was issued with a job description complete with key result areas that he was expected to achieve.

12. The Respondent states that the Claimant failed to take charge of the operations of the Respondent under his docket, such as effective representation of the Respondent in the labour offices over dispute it was facing, and that he was unable to handle disciplinary issues in the Respondent's work place leading to constant industrial strife, even for issues he would have resolved at the shop floor level.

13. The Respondent states that it later discovered that the Claimant was lacking in human resource knowledge, which informed their decision to subject him to a longer probation period to allow him opportunity to improve his performance.

14. The Respondent avers that it invited the Claimant for a performance review meeting vide a letter dated 17/4/2017, and which letter was produced in evidence before this court. The Respondent further states that the performance review meeting took place on 4/5/2017, and that the Claimant was unable to explain the reasons for his poor performance, resulting in an agreement to separate through invocation of the termination clause.

15. The Respondent states that following the agreement to separate, it issued the Claimant a letter of termination dated 11th May, 2017, clearly setting out the reasons for the termination.

16. It is the Respondent's case that though the Claimant was still serving under probationary terms at the time of termination, it proceeded to pay him his 3 months' salary in lieu of notice, salary for the days worked in the month he was terminated, and pro-rated leave. The Respondent asserts that the payment was made directly to the Claimant's account held at **Kenya Commercial Bank** on 12th May, 2017. The Respondent contend that it paid the Claimant a total of Kshs. 1,560,000.00

17. The Respondent states that it terminated the Claimant for lawful cause and following due process. The Respondent avers that the Claimant's claim does not raise a cause of action known to the law and should be dismissed.

Analysis and Determination

18. I have considered the pleadings, the parties' oral testimony and the submissions filed in the matter. The issues for determination are:

- i. Whether the Claimant's termination was unfair
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's Termination was Unfair

19. To arrive at a determination of a fair or an unfair termination, the reason(s) for the Claimant's termination, and the procedure adopted in effecting the termination are paramount.

20. It is not contested that the Claimant was appointed to the position of **Human Resources Manager** for a fixed period of two years. It is also not contested that the Claimant left the service of the Respondent eleven (11) months into his contract.

21. Sections 43, 45(2), and 47(5) of the Employment Act, 2007, places the burden of prove of the reasons for termination on the employer. Section 43 provides that where an employer fails to prove reasons for termination, the termination shall be deemed unfair. Bare denials and putting the employee to strict proof as is always the case in other civil cases does not stand for employment claims.

22. The Respondent's evidence is that it terminated the Claimant for reason of poor performance. It further listed the elements of the poor performance as failure to take charge of the operations of the Respondent under his docket, failure to effectively represent the Respondent in labour disputes it was facing, coupled with his inability to handle disciplinary issues in the Respondent's work place leading to constant industrial strife.

23. The question for this court then become whether these are valid and fair reasons for an employer to terminate an employee. Section 43(2) of the Employment Act defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee. In the case of **British Leyland UK Ltd v Swift (1981) I.R.L.R 91 Lord Denning** described the test of reasonableness in the following words: -

“The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

24. The Respondent told the court, that the Claimant's probation period was extended by a further 6 months on account of poor performance. This is evidenced vide the Respondent's letter to the Claimant dated 19th December, 2016, referenced **“Extension of probation period”**. The Claimant on his part, did not adduce evidence indicating that he challenged the extension of his probation period nor controvert the allegations of poor performance that formed the sole reason for his termination.

25. The Respondent produced various complaints letters addressed to the Claimant in his capacity as the Human Resource Manager, and the Managing Director on issues related to the Claimant's docket. He did not rebut the allegations that the areas in which the Respondent's business suffered, fell under his docket. In **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR** it

was held that the Court looks into the validity and justifiability of the reasons for termination.

26. Poor performance which the Respondent cited for terminating the Claimant, is a valid ground for termination per Section 41 of the Employment Act, 2007. This ground however places a higher level of proof on the employer per Section 8 of the Employment Act. The Court of Appeal in *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause No. 823 of 2010(2010)LLR 255 (ICK)* observed as follows:="

“.....The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance...It will not suffice to say that one has been terminated for poor performance as the effort leading to this decision must be established.”

27. The Claimant's probation was extended for a further 6 months vide a letter dated 19th December, 2016. A meeting to review the Claimant's performance was held on 4th May, 2017, shortly before the end of the 6 months' extended probation period. In *Jane Wairimu Machira v Mugo Waweru & Associates (2012) eKLR*, the court opined:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

28. The extension of the Claimant's probation period for 6 months' is in my view reasonable time to improve. In the circumstances I find and hold that the Respondent had valid, fair and justifiable reasons to terminate the Claimant.

29. The termination of the Claimant is hereby found to be substantively fair.

30. On the question of procedure, the Respondent avers that pursuant to a performance review meeting held with the Claimant, parties agreed to invoke the termination clause in the Claimant's contract of service to separate. No such agreement has been placed before this court as prove that the Claimant acquiescent to the termination upon only, of payment of the amount of salary provided in his contract in lieu of the termination notice.

31. Section 41 of the Employment Act provides as follows in regard to procedures for termination:

“(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.”

32. In view of the provisions of Section 41 of the Employment Act, the employee's right to be heard whenever an employer is contemplating termination, is a sacrosanct right. It cannot therefore, be taken away through the invocation of a termination clause. In *David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR* the Court held that the requirements of section 41 of the Employment Act have a long pedigree in administrative/public law and are referred as the rules of natural justice.

33. The court finds and holds that the procedure adopted in the termination of the Claimant, fell short of the statutory threshold. It then follows that the termination of the Claimant was procedurally unfair.

Whether the Claimant is entitled to the reliefs sought

34. The Claimant seeks payment of three months' salary as pay in lieu of notice, 12 months' salary as compensation for unlawful termination, unpaid leave for the years worked.

Three Months' Salary in Lieu of termination Notice

35. The Claimant during the hearing admitted receipt of three months' salary in lieu of notice. He sought to withdrawn this prayer and the same is marked as withdrawn.

Unpaid Leave for The Years Worked

36. The Claimant's claim under this head, is Kshs. 400,000 being one-month salary for the leave accumulated and not taken in the close to one year he was in the service of the Respondent. The Claimant's contract provided for 23 days of paid leave for every year served.

37. The Respondent's evidence indicate that the Claimant utilized three of his leave days in the time he served, leaving a total of 20 days. the Claimant's last pay slip produced in evidence before this court indicates that he was paid in lieu of leave at Kshs. 213,333.00

38. I find and hold that in view of the prove of payment in lieu of leave, the claim is unjustified. It fails and is dismissed.

12 Months' Salary as Compensation for unfair Termination

39. Compensation for unfair termination/dismissal is guided by the Statutory capping under *Section 49 of the Employment Act, 2007*. (See **Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR**)

40. In making an award of compensation, the court has to take into account a raft of considerations such as; the conduct of the employee which to any extent caused or contributed to the termination, failure by an employee to mitigate his losses attributable to the termination, opportunities available to the employee for securing comparable or suitable employment with another employer amongst others.

41. The Claimant in his testimony, told this court that he has since secured alternative employment and has been in employment with his current employer for about two years.

42. Considering that the Claimant by his poor performance largely contributed to his termination, coupled with the fact that he has since secured comparable employment, I award the Claimant three months' salary in compensation for unfair termination.

43. This suit has partly succeeded and for this reason, the Claimant is awarded half the costs of the suit.

44. In whole, judgment is entered for the Claimant, and against the Respondent as follows:

i. 3 Months' Salary in compensation for unfair termination at Kshs. 1,200,000/-

ii. Half the costs of the suit and interest thereon.

45. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Anyango Present for the Claimant

Mr. Ouma Present for the Respondent

Christine Omollo- C/A