



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NUMBER E033 OF 2021

ORSBORN OBAIGWA NANGA.....CLAIMANT

VERSUS

GUSII WATER & SANITATION COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 1st April, 2021, and filed before court on even date, the Claimant seeks a declaration that his termination from the service of the Respondent is unfair, payment of Kshs.8,718,000 comprising of three months' salary in lieu of notice, salary arrears and compensation for unfair termination.
2. The Respondent entered appearance and filed a Statement of Response and Counter Claim dated 5th August, 2021, and filed in court on 10th August, 2021 through the Law Firm of **Aboki Begi & Associates Advocates**.
3. The Claimant testified in support of his case. The Respondent did not participate in the hearing despite service.
4. The Claimant filed submissions.

The Claimant's Case

5. The Claimant's case is that he was appointed to the position of Managing Director of the Respondent on a three (3) year renewable contract of service effective 5th April, 2019, at a monthly gross salary of Kshs.300,000.
6. The Claimant states that prior to this appointment, he served in the position of Technical Manager with the Respondent's Company for 4 years.
7. The Claimant states that he was suspended from the service of the Respondent on 8th March, 2021, and shortly thereafter terminated from service on 23rd March, 2021 for undisclosed reasons. He further states that he was not asked to show cause why he should not be terminated and neither was he taken through a disciplinary process
8. The Claimant states that the Board of the Respondent demanded that he signs appointment letters for employees that the Company/Respondent had not recruited through the regular procedure, and change the Respondent's security company amongst other irregular demands. He states that on declining to sign the letters and change security, the suspension and the eventual termination ensued.
9. The Claimant avers that he was not taken through a disciplinary process and neither was he given reasons for suspension and termination. He further states that his employment contract entitled him to three months' salary in lieu of notice, which monies were not remitted upon his termination.
10. The Claimant further states that the Respondent owes him salary arrears for the months of January, February and March, 2021. He further avers that his employment contract entitled him to gratuitous pay at the rate of 31% for every year served.
11. It is the Claimant's case that he has remained jobless to date, even after sitting five interviews, due to the manner in which the Respondent terminated his service, as the termination tainted his name to the extent that he is unable to secure alternative employment. The Claimant further avers that during his service with the Respondent, he got a job elsewhere but the Respondent recalled him.

12. It is the Respondent's case that the audit issues raised by the Respondent in their statement of Response are untrue as the same were not brought to his attention, and that the audit report attached to the response is a draft report which report is not signed by its purported maker.

13. The Claimant further states that he would have answered to the audit issues had they been put to him, either through a disciplinary process or as the Managing Director of the Respondent. He further avers that he was never accused of fraud or asked to explain to any government oversight body issues of misappropriation of funds.

14. The Claimant denies the Respondent's Counter claim in toto. He prays that this court grants him the reliefs listed in his statement of claim.

The Claimant's Submissions.

15. It is submitted for the Claimant that the Respondent bore the burden of proving that the termination of the Claimant was fair by giving valid and justified reasons for the termination as required under the Employment Act.

16. The Claimant further submitted that the Respondent contravened Section 35 of the Employment Act, for not having given the Claimant notice prior to his termination.

Analysis and Determination

17. I have considered the pleadings, the Claimant's oral testimony and his written submissions. The issues that present for determination are two:

- i. Whether the termination of the Claimant was fair
- ii. Whether the Claimant is entitled to the remedies sought.

Whether the termination of the Claimant was fair

18. A determination of fair or unfair termination is premised on the adherence or lack thereof to Sections 41, 43, 45 and 47(5) of the Employment Act, 2007. These provisions relate to both the procedure adopted by the employer prior to the termination as well as the substantive justification for the termination.

19. Section 41 of the Employment Act, 2007, specifically obligates an employer to give an employee a hearing whenever it is contemplating termination for reason of misconduct, poor performance or physical incapacity.

20. The Claimant herein stated that he was neither issued with a notice to show cause letter nor was he taken through a disciplinary process. The Respondent from the evidence before this court did not at all attempt complying with Section 41 of the Employment Act.

21. On the question of substantive justification, the Employment Act places the burden of proving that a termination is fair on the employer. In this respect, the employer must give the employee reasons for termination, prove that the reasons are valid and fair, and finally prove that the reasons are justified. The Court of Appeal in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** opined thus:

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”

22. The Respondent did not provide the Claimant with any reasons for termination. The termination letter being the only document the Respondent issued to the Claimant in relation to the termination stated thus:

“The Board of Gusii Water & Sanitation Company Limited as it sitting on 22nd March, 2021 resolved to terminate your appointment as the Managing Director of Gusii Water & Sanitation Company with effect from 23rd March, 2021 in accordance with the Company's Human Resources Policies and Procedure Manual and your appointment letter.

Upon clearance you will be paid your benefits and dues less any liabilities due to the company at the time of termination as follows:

- 1. Three months' salary in lieu of notice**
- 2. Gratuity at the rate of 31% of your basic salary for the period you worked on pro-rata basis up to the date of termination of your services ; and**
- 3. Unutilized earned leave days up to the date of termination.”**

23. The termination letter only informs the Claimant of his termination, the date the termination takes effect and his entitlements in as far as the termination is concerned. No reason(s) whatsoever were given for the termination contrary to the clear and mandatory provisions of the

Employment Act.

24. I find and hold the termination of the Claimant both procedurally and substantively unfair.

Whether the Claimant is entitled to the Reliefs sought

25. The Claimant seeks that the court makes a declaration that his termination from the service of the Respondent is unfair, and further order that he is paid a total of Kshs.8,718,000 comprising of three months' salary in lieu of notice, salary arrears and compensation for unfair termination.

Three Months' Salary In lieu of Notice

26. The letter terminating the services of the Claimant indicates that he was to be paid three months' salary in lieu of termination notice. The appointment letter also provides for a three months' notice period or pay in lieu thereof.

27. Section 49(1) (a) provides as follows in regard to pay in lieu of notice:

“Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following –

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;”

28. Although the Claimant was informed in the termination letter that he will be paid a three months' salary in lieu of notice, no evidence of such payment was adduced before this court.

29. I find the claim for three months salary in lieu of notice merited and is hereby awarded.

Salary Arrears

30. The Claimant averred that the Respondent did not pay him salary for the months of January, February and March, 2021. The letter terminating the services of the Claimant indicates the effective date of termination as 23rd March, 2021.

31. Such a claim could only have been controverted by the Respondent through production of pay slips or other forms of pay advise. None was produced leaving the court with no option but to make an award for payment of two months' and 23 days salary in arrears and which is hereby awarded.

Compensation for unfair termination

32. Termination of the Claimant has been found to have fallen short of both the procedural and the substantive fairness test. This by law entitles the Claimant to compensation in accordance with Sections 49 and 50 of the Employment Act, 2007.

33. The Claimant told this court that he has to date not been able to secure alternative employment, and which he attributes to the manner in which the Respondent terminated his services.

34. The Claimant was in the service of the Respondent for four years prior to his appointment to the position of Managing Director, where he served for close to two years.

35. The Claimant's last contract with the Respondent was a three (3) year fixed term contract. He served for one year and eleven (11) months before the contract was terminated. Had he served his full contract term, he would have exited on the 4th April, 2022, assuming that the contract was not renewed though the same was renewable.

36. Taking into consideration the Claimant's total length of service with the Respondent, his legitimate expectation as to the length of time for which his employment with the Respondent might have continued but for the termination, that he has not been able to secure alternative employment, and considering that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but are meant to redress economic injuries in a proportionate way (**See Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR**), I award the Claimant 7 months' salary as compensation for unfair termination.

37. In whole, Judgment is entered for the Claimant against the Respondent as follows:

- i. A declaration that the termination of the Claimant is unfair.
- ii. Three Months' Salary in lieu of termination notice at Kshs. 1,800,000/-
- iii. Three Months Salary arrears at Kshs. 1,800,000/-

iv. 7 Months Salary in compensation for unfair termination at Kshs. 2,100,000

v. Costs of the suit and interest until payment in full.

vi. For the avoidance of doubt, all payments shall be subject to Statutory deductions.

38. 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:

Mr. Ombachi present for the Claimant

N/A for the Respondent

Ms. Christine Omollo C/A