



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 998 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DENNIS ASENJI.....CLAIMANT

VERSUS

THE STANDARD GROUP LIMITED.....RESPONDENT

JUDGMENT

1. Vide his statement of claim dated 20th May, 2016 and filed in Court on 27th May, 2016, the claimant avers that his employment was wrongfully and unlawfully terminated by the Respondent, a registered limited liability company.
2. It is the Claimant's averment that he was employed by the Respondent on or about 29th November, 2011 in the capacity of Manager – Broadcast Creative on a fixed term contract for a period of four (4) years that was to terminate on or about 30th November, 2015.
3. The Claimant avers that he worked diligently and to the Respondent's satisfaction until 12th July, 2013 when the Respondent unlawfully and unfairly terminated his employment without any notice or hearing despite the fact that his employment record was exemplary.
4. He states that at the time of separation he was earning a monthly salary of Kshs.389,689/-.
5. The Claimant contends that the Respondent through its actions has contravened the provisions of Sections 43 and 45 of the Employment Act, 2007.
6. Aggrieved by the decision to unlawfully and unfairly terminate his employment, the Claimant filed the instant claim in which he seeks the following reliefs:
 - a. A declaration that the Claimant suffered unfair and wrongful dismissal by the Respondent.
 - b. Reinstatement to his previous position/job without any loss of benefits.
 - c. Salary arrears for the entire period the Claimant has been out of employment.
 - d. Special damages as set out below and proved at the hearing:
 - e. Maximum compensation of 12 months for wrongful dismissal.
 - f. In the alternative, payment of all the lawful terminal dues set out below:
 - i. Pay in lieu of notice of the remainder of the contract term at Kshs.389,689/-
per month----- Kshs.11,106,136.50
 - ii. Expected Gratuity for the said

period----- Kshs.1,350,000.00

iii. Expected leave pay for the same

period----- Kshs.1,036,572.74

iv. 12 months' salary

compensation----- Kshs.4,668,000.00

TOTAL----- Kshs.18,160,709.24

g. Costs of the suit with interest thereon.

7. The Respondent in its Response to the Claim dated and filed in Court on 11th July, 2016 admits that it engaged the Claimant from 29th November, 2011. The Respondent further admits terminating the Claimant's employment 12th July, 2013. However, the Respondent denied that the Claimant's termination was wrongful and unlawful as alleged by the Claimant.

8. The Respondent maintained that the Claimant's termination was in accordance with his employment contract and that the termination clause therein did not oblige either of the parties to give reasons for the invocation of that right.

9. The Respondent further denied any malice on its part in the manner it exercised its right to terminate the Claimant's employment. It contended that the Claimant was duly notified of the intention to terminate his employment and was in fact paid in lieu of notice as provided in his employment contract.

10. It is further contended that the Respondent did adhere to the contractual terms; due process was followed in the Claimant's termination, that the Claimant undertook formal clearance from the Respondent and was paid all his terminal dues at the time of separation.

11. The Respondent on this basis contended that the Claimant is not entitled to any compensation as prayed in his Statement of Claim and urged this Court to dismiss it with costs to the Respondent.

12. At the hearing on 13th July, 2021 the Claimant testified on his behalf. The Respondent on the other hand closed its case without calling any witness.

Claimant's Case

13. The Claimant adopted his witness statement dated 4th October, 2018 as his evidence in chief. The Claimant testified that his termination was malicious as he neither had any disciplinary issues nor was he accorded any hearing prior to the termination.

14. The Claimant testified that his fixed term contract with the Respondent was for a duration of 4 years effective 1st December, 2011 and was expected to end on 1st December, 2016. He further testified that at the time of separation he was paid Kshs.1,600,000/- that was not itemized.

15. On cross examination, the Claimant stated that his letter of termination did not give the reason for the same, it only stated the notice period and the payment in lieu of notice.

16. The Claimant admitted that he received payment of his dues from the Respondent up to and including 12th July, 2013 and that his Claim is not for the said period but for the remainder of his contract term.

Submissions

17. The Court takes note that at the time of writing this judgment there were no submissions on record filed on behalf of the Respondent despite the fact that counsel informed the Court that the same had been filed at the time of taking directions on judgment date.

18. It is submitted on behalf of the Claimant that his termination from the Respondent's employment was wrongful, unfair and unlawful as he was neither informed of the reasons for the termination nor was he given an opportunity to defend himself of any wrongdoing prior to the termination.

19. He submitted that the termination was contrary to the mandatory provisions of Sections 41, 43 and 45 of the Employment Act and Section 4 of the Fair Administrative Action Act as read with Article 47 of the Constitution of Kenya, 2010.

20. The Claimant contends that the termination of his contract was both substantively and procedurally unfair and as a result urged this Court to allow his Claim in terms of the reliefs sought therein.

21. The Claimant further contended that his evidence remained uncontroverted as the Respondent did not call any witness to testify on its behalf. That he is therefore entitled to the reliefs sought. For emphasis the Claimant relied on the provisions of Section 49 of the Employment

Act, 2007 and the cases of **Idris Omar Abdi v Garissa Water and Sewerage Company Limited (2021) eKLR**, **Onesmus Mbithi Muia v David Engineering Limited (2021) eKLR** and **Jacob Omondi Guma v East African Portland Cement; Japheth Ombogo (Interested Party) (2020) eKLR**. In all the cases the Court held that a termination was unlawful and unfair where an employee is not given reasons for such termination and an opportunity to defend himself before the termination is effected.

Analysis and Determination

22. Having considered the facts of this cause, evidence, submissions and authorities on record, there is no dispute that the Claimant was employed by the Respondent herein on a fixed term contract effective 1st January, 2011. The contract was to run for a period of 4 years and was therefore expected to lapse on or about 30th November, 2015.

23. It is further not in dispute that the Claimant's contract was prematurely terminated on 12th July, 2013 prior to the expiry of the fixed term contract. The Issues for determination therefore are:

- i. Whether the Claimant's termination was valid both procedurally and substantively;
- ii. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

24. Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair in the event his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employees conduct, capacity and compatibility and that while arrive at the decision to terminate the services of such an employee fair procedure was followed.

Reason for termination

25. The Claimant's letter of termination dated 12th July, 2013 reads as follows:

“PRIVATE & CONFIDENTIAL 12th July 2013

Dennis Asenji

P O Box 4373 00200

Nairobi

Dear Dennis,

RE: TERMINATION OF EMPLOYMENT – STAFF NO. K0429

Pursuant to the contract period clause in your contract of employment, we wish to advise you that your employment with Standard Group has been terminated with immediate effect. Your last working day will be 12th July 2013.

By a copy of this letter Finance is advised to pay you the following less any money owed by you in your staff account and statutory deductions:

1. Payment for days worked up to and including 12th July 2013
2. Payment for days up to and including 12th October 2013 *in lieu of notice*
3. Payment of 15% gratuity for every year of service with effect from December 2011 – 10th July 2013
4. Payment for seventeen (17) accrued leave days

Please note that your final dues will be released after you have completed the enclosed Clearance Certificate and returned all company property in your possession.

On behalf of the Management of Standard Group Limited, I thank you for your contribution to the organisation especially in the KTN Creative Department and wish you success in your future endeavours.

Yours faithfully

(Signed)

26. It is evident from the letter of termination that no reason was given for the termination. The Respondent only made reference to the clause in the Claimant’s contract which allowed either party to terminate the employment relationship with notice or payment in lieu thereof.

27. In its response to the claim, the Respondent pleaded that on the basis of the termination clause in the employment contract it was not obligated to give any reasons for invoking its right to terminate the Claimant’s employment.

28. Section 43 of the Employment Act does not distinguish the procedure for terminating a fixed term contract from that of any other type of contract. All contracts of employment whether fixed term or otherwise are subject to the provisions of Section 43 unless the fixed term contract has lapsed.

29. I find that there was no reason, whether valid or otherwise, given for the termination of the Claimant’s contract.

Procedure followed.

30. Section 41 of the Employment Act, 2007 provides for the procedure to be followed while terminating the services of an employee. The section provides as follows

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.

31. The Claimant in evidence and submissions maintained that he was not accorded a disciplinary hearing prior to the Respondent terminating his employment.

32. Indeed the Respondent confirmed this in its defence where it asserts that it exercised its right under the contract to terminate the Claimant’s employment.

33. I therefore find that due process as provided under Section 41 of the Employment Act was equally not followed.

34. In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

35. From the foregoing I find that the termination of the Claimant’s contract was both substantively and procedurally unfair as it failed to follow the mandatory provisions as provided under Section 41 and 43 of the Employment Act, 2007.

Whether the Claimant is entitled to the reliefs sought

36. Having found that the termination of the Claimant’s contract was unfair both procedurally and substantively, I now consider the reliefs sought.

a. A declaration that the Claimant suffered unfair and unlawful dismissal by the Respondent

37. As I have already found above, the termination of the Claimant’s contract was unfair. I therefore declare accordingly.

b. Reinstatement to his previous position/job without any loss of benefits

38. The Claimant is not entitled to this relief as the same is only available within 3 years from the date of an employee’s termination as provided under Section 12(3)(vii) of the Employment and Labour Relations Court Act. Further, the Claimant must prove exceptional circumstances to warrant such an order being made in his favour provided in Section 49(4) which he did not.

c. Salary arrears for the entire period the Claimant has been out of employment

39. Compensation under this head is untenable. The Claimant cannot be awarded remuneration for the unexpired period of his contract as he cannot enjoy remuneration which he has not worked for. Awarding such a relief would amount to unjust enrichment by the Claimant. This was the decision of this Court in the cases of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** and **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR** which I entirely agree with.

d. Special damages

40. As part of his special damages the Claimant seeks payment of dues owed to him for the remainder of the contract terms. This is a repetition of the claim above which I have already pointed out the Claimant is not entitled to as it would amount to unjust enrichment.

e. Maximum compensation of 12 months for wrongful dismissal

41. Taking into account the claimant's length of service and the Respondent's handling of the termination of the Claimant's contract, it is my view that an award of 8 months' salary as compensation in the sum of **Kshs.3,117,512/-** is reasonable compensation and I award the Claimant the same. I have further taken into account that the Respondent failed to call any witness or to file any submission in its defence.

42. The Claimant is also awarded costs of this suit and interest from the date of this Judgment until settlement in full.

43. In summary, judgment is entered in favour of the Claimant in the following terms:

i. Eight (8) months' compensation for unfair termination Kshs.3,117,512.00

ii. Costs for the suit.

iii. Interest from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF FEBRUARY, 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE