



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 413 OF 2016

MANASSES SUMBI.....CLAIMANT

VERSUS

TOTAL KENYA.....RESPONDENT

JUDGMENT

1. The claimant filed this claim as amended as a result of the Respondent's actions, seeking the following remedies:

i. The sum of Kshs.7,998,912/= being salary for each year worked ($444,384 \times 18$) = Kshs.7,998,912/=

ii. General damages for wrongful termination of employment.

iii. Interests on (a) and (b) above from the date of filing this suit till full payment.

iv. An injunction compelling the Respondent to release the title deed over Athi/River Block 2/3842 and to forgo any interest in that property and release duly completed transfer forms for motor vehicle registration number KBX 774J in favour of the claimant to the claimant.

v. Costs of the suit and interests.

CLAIMANT'S CLAIM

2. The brief factual background of the case is that the Respondent employed the claimant in the position of Airport Superintendent located at Nairobi effective 13th November 2007 at a commencing salary of Kshs.152, 327/= per month.

3. The Claimant states that on or about October 2009, the Respondent acquired Chevron Kenya Limited as a going concern which according to the agreement between the two companies the claimant was acquired by the Respondent under similar terms of service as he had with Chevron Kenya Limited. The Claimant's salary had increased to Ksh.264,469/= per month.

4. It is said the claimant had performed his duties well, with due diligence and enthusiasm and he was reliable, honest, and responsible during his employment with the Respondent rising through the ranks to the position of Project Engineer and getting commendations and periodical bonus as a reward from the Respondent. His salary was increased as a result of good work to Kshs.444,384/=.

5. On the 4th September 2015 however the Respondent maliciously, wrongfully and with no justifiable cause terminated the claimant's employment contract.

6. The claimant in addition says that the Respondent purchased L.R. Athi River Block 2/3843 for him and the agreement was that the Respondent would retain the original title deed and release it to the claimant after 10 years of service. The claimant says that the Respondent ought to release the said title deed now that the claimant's services were terminated before the end of the 10 years period. The claimant also says that he purchased motor vehicle KBX 774J through the Respondent which the Respondent had registered in their joint names. The Respondent terminated the employment before the payments were completed and should therefore release its log book to the claimant.

RESPONDENT'S DEFENCE

7. The Respondent entered an appearance through the firm of Mohammed Muigai Advocates on the 12th August 2016 and filed a

memorandum of response on the 25th November 2016 and an amended response and counter claim dated the 29/7/2021.

8. It avers that the claimant's employment was terminated due to his wilful neglect of duty despite the Respondent having raised the issue severally with the claimant. In particular, the Respondent says that it sought an explanation from the claimant on issues relating to incomplete projects, absence from duty, late reporting to work and incomplete work done on the new Jomvu Project.

9. The Respondent gave the claimant opportunity to respond to the show cause letter on the above issues and upon finding the claimant's explanation insufficient gave warning to the claimant to undertake his duties diligently. The claimant appealed the decision which led the Respondent to set up a Disciplinary and Project Review meeting on the 29th April 2015 between the claimant and the Respondent's management.

10. The Respondent says that there was a cost variance in one of the Respondent's projects and that was one of the issues of misconduct.

11. The Respondent then issued the claimant with a Notice to show cause letter in reference to the audit queries on New Jomvu service station project. The Respondent's main concern was the huge variation between the approved LPO amount of Kshs.149 million and the actual cost realized by the end of the project of Kshs.203 million without due process for such variations being followed.

12. The Claimant thereafter responded to the notice to show cause vide a letter dated 8th July 2015 which the claimant found to be unsatisfactory considering the gravity of the issues.

13. The respondent states that the reasons thereto for the termination were explained to the claimant in compliance with the Employment Act.

14. The Respondent avers that the claimant is aware that where any employee has a loan arrangement with the Respondent, the loan and or interests thereon becomes due and payable immediately upon the termination of the claimant's employment for any reason. The claimant says it is entitled to recover the balance of the loan and or interests by way of salary, allowances, gratuities and remuneration of whatever nature.

CLAIMANT'S CASE

15. Claimant witness Manases Sumbi Thuku testified that he was employed by Total Kenya from 2007 to September 2015 as an engineer. He was initially employed by Chevron Kenya which was taken over by Total Kenya. His duties entailed supervising several projects from 2009 to 2015. He did the work diligently throughout the country and was given salary increments and bonuses as a result.

16. The Claimant testified that his services were terminated in September 2015. He was given a show cause letter in January 2015 by the operations manager. He was given several days to respond to the said letter but the operations manager went on retirement before he could respond. He responded to the Human Resource Manager. He was invited for a meeting to discuss the show cause letter. The witness says that his boss and the HR Manager became very hostile when he started explaining his response. The meeting ended prematurely and he was told to go and wait for a response.

17. He got a response to the show cause letter on the 23/3/2015 which referred to unsatisfactory work performance. In the letter there was no specific thing cited. He requested an appeal on the warning letter on the 24/3/2015. In the Appeal he asked to be furnished with specific details relating to the accusations. He was called to a meeting to discuss his request on the 29/4/2015.

18. The meeting was attended by the acting operations manager, Chief Internal Auditor as well as the Human Resource Manager where the appeal was discussed. After giving his reasons and explanations, new issues were introduced without being given a notice. He was not taken through disciplinary proceedings except the warning letter and show cause letter. The Committee did not call him with a representative and all his meetings were abrupt. He was given three grounds of termination including investigations which he was not a party to.

19. He was paid salary in lieu of notice and yet he was summarily dismissed. The termination was unfair and was arrived at in unfair manner without following the due procedure. The people handling his termination were not privy to his terms. He had a car loan guaranteed by the Company and upon termination he cleared the balance of 50% but was not issued with company documents for the vehicle.

20. The Claimant says that there is a property which was to be amortized for 10 years. The 10 years were not over.

21. The witness adopted the witness statements filed on the 17/3/2016 as part of the evidence in the cause as well as the list of documents and supplementary list of documents as exhibits. He prayed for the reliefs sought.

22. Upon cross-examination, he said he was issued with a notice to show cause letter. The request for details was for the first warning letter. The witness states that there was hostility in the first meeting but that he had no proof as to what happened. He did not receive any minutes and letter stated there was a meeting on the 6th February 2016 between employees' relations HR Manager. He says he was told the response was unsatisfactory but there was no specifics and minutes were not availed. He says he never asked for the minutes.

23. He was not accompanied by anybody during the hearing. It is a requirement of the law to be accompanied by another person of his choice. He said that he was informed there was an internal audit and irregularities discovered where he was the engineer. He responded to the notice to show cause. The Respondent gave him the opportunity to respond to the show cause letter and the reasons for the termination were given in the letter of 4/9/2015. He says that although he was told the response was unsatisfactory, it was not explained why the response was unsatisfactory.

24. The claimant further answered that he had taken a car loan agreement and the Respondent guaranteed 3,500,000 and was to pay in 60 months. The deductions were made in the payslip. He said he could not confirm he was still servicing car loan after his dismissal. His car loan was Kshs.2,275,000/= he paid 50% of the same. He said there was evidence to show he paid 100% via his affidavit.

25. The witness said he was not being deducted house loan from the salary but was amortized within 10 years. He was terminated and so did not complete the amortization and the evidence of the amortization is the payslip itself.

26. He said the payslip confirms there was also a Bon voyage deduction which was a nominal deduction. He had not applied for Bon voyage card but it was a standard card for every field staff. He was given a termination letter but no statement to show he owed any money. He does not know about the Bon Voyage statement and was not furnished with the documents.

27. The payment of the medical scheme was subject to the maximum limit but was not aware he went beyond the limit. He said he did not exceed the medical scheme by Kshs.28,462/=. Upon re-examination he said that he was not aware of any balances owed to his employer. He said he paid 50% of his car loan as it was jointly owed. The company never wrote to him that he owed Bon Voyage and money owed to the medical scheme. He said he did not agree with the reasons given by Total Kenya regarding his termination

RESPONDENT'S CASE

28. Victoria Tsalwa in her testimony as the respondent witness adopted the witness statement dated 28th November 2019 and the list of documents dated 18th November 2016 as exhibits 1-10. She also adopted the documents contained in the supplementary list of documents as exhibits 11-15. The witness said that the Respondent's fuel card applies where employees apply for fuel card and is available for all employees. The employees are given a credit period of 60 days for financing off any balances. If the employee in case of fuel costs receive statements and lists of due balances, it is recovered from the payroll. Balances were recovered from the claimant. There was balance after he left and is still outstanding. Given the totality of the documents filed the documents has outstanding balances due for recovery.

29. Upon cross-examination she said that she was the payroll supervisor and was not part of the panel that issued notices to the claimant in any meeting between the claimant and the Respondent.

30. The witness further said that the response to the show cause letter was unsatisfactory as the claimant had no supporting documents. The witness said that the documents to support the variation were not produced. The recommendations for variation came from operations department and marketing department does not need to approve. The marketing team reviewed what is already recommended by operations department. The witness further testified the issue raised was that payment was done irregularly. Payment was done as requested. The discovery was done after payment and was an audit issue.

31. Project was reviewed by chief internal auditor and the claimant was present during the meeting with the chief auditor. The said report was not in court but was shared during audit meeting. The witness says that the claimant did sign the minutes of the meetings on the 10/6/2015. The motor vehicle was jointly registered with the company. The company amortised the loan owed and value goes down but at the end the employee pays what is owed.

32. The witness said that at the termination balance was

Kshs.2,275,000/=. The amount of 50% was paid to the Respondent. There were deductions done on land through amortization. The loan for housing was not being deducted but was amortization. The Claimant applied for Bon Voyage card but application was in the system and not in court. Upon re-examination she said that in relation to the approvals for audit concern there were no discussion of any report but reference was made by the chief internal auditor. He raised issues of project overrun without any approvals.

33. There were no support documents to the claimant's response to the Notice to Show Cause. He committed to provide the documents but never did so. The house balance was Kshs.1,050,896.45 as at 30/9/2016. The claimant never cleared loan which is reflected in the payslip. The 50% payment is not reflected and the claimant has an obligation to pay the balance.

CLAIMANT'S SUBMISSIONS

34. The Claimant submits that he was terminated unfairly and unlawfully. The claimant submitted that no variation to the projects could be done without the approval of the committee of the Respondent as was clear from the Respondent's witness Victoria Tsalwa. The claimant contended that the project had long been completed at the time of termination.

35. The Claimant also submitted that due procedure as mandated by section 41 of the Employment Act was not followed as he was not given the opportunity to invite fellow employee to the hearing and there was no justifiable reason given for the termination. The claimant submitted that given the claimant was given one month salary in lieu of notice indicates that it was not a case of summary dismissal as indicated by the Respondent. The claimant also reiterated his contention relating to the status of the subject motor vehicle KBX 774J and the LR Athi River/Block 2/3842.

RESPONDENT'S SUBMISSIONS

36. The Respondent submitted that the termination of the Respondent was valid under section 44(4) of the EA. The Respondent submitted that the termination of the claimant was related to his misconduct and incapacity in the performance of his work and duty and the failure to satisfactorily observe and execute the Respondent's operational requirements. The Respondent submitted that the claimant never adduced any evidence of non compliance of termination procedure by the Respondent.

37. The Respondent further contends that the claimant was given the reasons for the termination, was called to the meetings and given opportunity to put in written responses. The Respondent submits that the termination of the claimant was fair and lawful. The Respondent also submitted on its counter claim as regards the car and house loan and amounts owed to them.

ISSUES FOR DETERMINATION

- a. Whether the Claimant's termination of employment was lawful and fair.
- b. Whether the Counter claim has merit.
- c. What remedies, if any, the claimant is entitled to.

DETERMINATION

38. It is worth noting at the outset that whilst the first allegations against the claimant included, inter alia, issues to do with absence from duty, lack of business continuity and late reporting to work and incomplete projects, the Respondent elected to issue a warning to the claimant in response to the allegations following of which an appeal was proffered to the Respondent. The dismissal is based on the project variations on the New Jomvu Service Station. I have looked at the show cause letter dated the 2nd July, 2015, the response given thereto and the evidence the parties have proffered in the instant claim.

39. It is my considered opinion that the issues raised by the respondent go to the question of poor work performance. The case and issues have everything to do with the manner in which the claimant did his work in relation to the project with no outright accusation of financial impropriety by the Respondent against the claimant. Section 43 and 45 of the Employment Act 2007 require the Employer to demonstrate valid reason or reasons in justifying termination.

40. Rika J in the **INDUSTRIAL CAUSE NO 1073 OF 2012 ABRAHAM GUMBA VERSUS KENYA MEDICAL SUPPLIES AUTHORITY KENYA RIKA J** held that *'Poor work performance is an allegation that should be supported by evidence of specific performance targets, appraisal of the performance, with specific results. The Claimant had worked directly for 2 months, for the Respondent. There were no targets set for him in those 2 months which he was shown to have been appraised on, and failed to meet. It was alarming to hear Mutuku say that the emails exchanged between the Claimant and Laban constituted performance appraisal. The Court has not found any evidence or material on record to conclude that the Claimant performed his work poorly'*.

41. There is no evidence of prior appraisal done that found performance of the claimant wanting for the many years he served the Respondent in a senior position. Indeed, there were salary reviews and bonuses given in recognition of good performance well into the year 2015 which is the year the claimant was terminated. There ought to have been substantiation of poor performance through appraisals demonstrating why an employee who all along had been performing well was all of a sudden found to have fallen short of the standards required by the Respondent.

42. The court also finds it significant that the audit whose findings was used to terminate the claimant was never availed to him and there is no indication that those who prepared the report ever contacted the claimant to clarify any of the issues leading to the preparation of the report.

43. Although the Respondent's witness in her testimony maintained the claimant was present during the meeting on the audit, there was no such indication in both the show cause letter and termination letter. The actual audit report itself was not availed in court. It is also apparent that the Respondent never informed the claimant of the opportunity to bring a representative of his choice, as his witness although there were some attempts to comply with the procedures relating to the hearing.

44. The Respondent has brought case of poor performance by the employee. He had worked for the Respondent from 2007 upto 2015 and had fairly good evaluation and he continued receiving upward salary reviews. In April, 2015 he got a notice to show cause why he should not be disciplined.

In the case of **MAINA MWANGI VS THIKA COFFEE MILLS LIMITED (2012) eKLR** the court held that where the employee fails to meet the standards the first duty of employer is to let the employee know where his performance has fallen below the standards.

The employer should then propose guidance, training and fresh instructions. If no improvement, employer should then give the first warning and warn him that he may be separated on grounds of poor performance.

45. The employer can also investigate and see if employer can fit in another department.

Only if all these steps do not work termination can be considered under Section 41 of the Employment Act Cap. 2007.

46. The Respondent rushed through the process and did not even invite the Claimant for a disciplinary meeting as provided in Section 41 of the Employment Act in the presence of a fellow worker of his choice or a shop floor union steward.

47. There are numerous authorities that demonstrate that to terminate the employment of an employee, the employer must give a valid reason and must show he followed fair procedure.

In **WALTER ONURO VS TEACHERS SERVICE COMMISSION NO.955 OF 2011 and KENFREIGHT (E.A) LIMITED VE**

BENSON K. NGUTI (2016) eKLR the principle of an employee you must pass a fairness test and ought to show there was not only substantive justification for the termination but also procedural fairness.

48. The respondent did not comply with the requirements of the law relating to fair termination of an employee's termination and so the termination hereby is declared unlawful and wrongful.

REMEDIES

49. Having found the Claimant's termination was unlawful so I proceed to make the following findings:-

(i) On the question of the subject motor vehicle KBX 774J. I have looked at the contract dated 9/9/2014. The claimant in the event of termination for any reason was to pay the unpaid balance or deliver possession of the car to the Respondent. There is no material in form of documents placed before the Court that the claimant has cleared the remaining balance.

The Claimant says he paid 50% of the balance. That would have been easy to produce in court if at all he paid the same. In the absence of such proof the court will take it that the same was not paid.

As for the land the court accepts the Respondent's testimony that the amortization simply reduced the value of the asset in relation to the question of the housing. The claimant is expected to pay the amount which falls due as can be seen from the payslips. The claimant has availed no evidence that he has completed the payments for the housing.

(ii) There is no prayer for salary in lieu of notice so the same is not granted.

(iii) On the compensation under section 49(1) of the Employment Act 2007, the court awards 8 months' salary compensation taking in account the 8 years of service and the fact that the claimant on the facts cannot be said to have contributed to the termination. The total awarded on this prayer is Kshs.444,384/= x 9 totalling Kshs.3,555,072/=.

(iv) In relation to the counter claim, there is ample evidence as can be seen in the sale agreement and the payslips mentioned above that the claimant has outstanding balances for the car loan and house assistance. The counter claim for the house assistance and the car loan are allowed. The Respondent to deduct 2,034,286.74 being the outstanding amounts for the house assistance and the car loan. There was no documentation in support of the counter claim for the medical scheme and fuel card bill. The claims are accordingly rejected. Once this is implemented the Respondent to release the title deed and the log book to the Claimant.

(v) Costs are awarded to the Claimant.

(vi) Interest at court rates from date of Judgement till full payment.

(vii) Orders accordingly.

Delivered, dated and signed in Nairobi this 31st day of March, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

50. 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE