



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2186 OF 2015

MICHAEL KIBBECLAIMANT

VERSUS

UCHUMI SUPERMARKETS LIMITEDRESPONDENT

JUDGEMENT

1. The claimant avers that he was employed by the respondent with effect from 1st April, 2011 as a Human Resource Manager and that he undertook his duties diligently and was at the fore front of streamlining the respondent's workforce. He averred that on 16th June, 2015, he was directed by Mr. Owino Ayodo, the then acting Chief Executive Officer (CEO), of the respondent, to proceed on 30 days leave and as he was completing his leave application form, he was given a letter suspending him from duty on grounds of gross misconduct and gross negligence. This was followed by a letter of termination dated 1st September, 2015. It is on the basis of the said termination letter that the claimant moved the Court seeking against the respondent the sum of **Kshs 4,683,516/=** being notice pay, accrued leave days totaling 100 and compensatory damages for unlawful and unfair termination.

2. Opposing the claim, the respondent averred that the claimant failed in the discharge of his duties as a Human Resource Manager. It cited the claimant for negligence and poor performance. It maintained that the claimant's termination was legal and procedural on account that together with other managers, the claimant had brought the respondent to a near collapse.

3. The matter proceeded for part hearing on 23rd September, 2021 when the Court took the claimant's case. The matter was adjourned to 22nd November, 2021, for defence hearing and upon conclusion, trial closed and parties directed to file submissions.

Claimant's case

4. The claimant told Court that he is a Human Resource practitioner and was employed by the respondent with effect from 1st April, 2011 until 15th June, 2015, when he came to learn of his suspension. That he was suspended from duty with effect from 16th June, 2015 until 1st September, 2015 when his employment was terminated for "lack of confidence". In testimony, he stated that his duties entailed maintaining industrial relations, employee recruitment, discipline and development of the respondent's human resource policy. That at the time he joined the respondent company, the employees were 1,700 but by the time he left, the number had risen to 4,500. That this signified a major growth of the respondent company, as recruitment was robust.

5. The claimant further testified that the respondent undertook a monthly human resource skills audit to ensure that there were no ghost workers. It was his further testimony that he had never been cited for negligence and that indeed, the Board had always congratulated him for his excellent work. That this can also be confirmed by the upward salary reviews he had enjoyed over time.

6. He further told Court that the charge of "lack of confidence" as stated in his letter of termination was not clarified and that the respondent did not comply with the procedure laid down in its Human Resource Manual, in terminating his employment.

7. The claimant further testified that he was subjected to negative publicity, which tarnished his name and that the same was a death sentence to his career. He stated that he was not paid terminal dues upon termination. He asked the Court to allow his claim as prayed.

8. During cross examination, the claimant maintained that the respondent did not clarify the term "lack of confidence" as used in the letter of termination.

Respondent's case

9. The respondent presented oral evidence through its Human Resource Manager, Ms. Elizabeth Oyombe, who testified as RW1. Ms. Oyombe informed Court that she was employed when the claimant had already left the employment of the respondent hence her testimony was based on review of his employment records.

10. Ms. Oyombe told Court that the claimant's termination was occasioned by issues relating to management. That there were challenges with suppliers who had not been paid and that the respondent was going through an economic down turn. RW1 added that there was a decline in the respondent's performance. Ms. Oyombe further told Court that the respondent's suppliers had petitioned the Court for orders of liquidation under the Insolvency Act. She termed the claimant's termination as fair.

11. In cross examination, Ms. Oyombe told Court that there had been no proper handing over report by the Advocates who were formally on record for the respondent hence there were challenges regarding access of documentation relevant to the case. She further stated that the general state of documentation at the respondent company was poor as job holders had been leaving employment without a proper handing over.

Submissions

12. In his submissions, the claimant urged that the respondent had not proved validity of the reason for his termination. That further, the respondent had failed to discharge the burden of proving that his termination was fair and justified as required under sections 41, 43 and 45 of the Act. To buttress his submission, the claimant placed reliance on the case of **Abisalom Ajusa Magomere vs Kenya Nut Company Limited (2014) eKLR**.

13. The respondent did not tender any submissions despite being granted an opportunity to do so, hence the Court did not have the benefit of considering the same.

Analysis and determination

14. Having reviewed the record before me, constituting the pleadings, evidence and submissions, the following are issues falling for the Court's determination;

a) Was the claimant's termination unfair and unlawful?

b) Is the claimant entitled to the reliefs sought?

Unfair and unlawful termination?

15. The parameters for determining fair termination are two-fold that is, substantive justification and procedural fairness. In order to prove fair termination, these elements ought to be satisfied by the respondent. I will address the two elements under separate heads.

(i) Substantive justification

16. Substantive justification is addressed under **Section 43(1)** of the Employment Act and it requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, **section 45 (2)(a)** and **(b)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.

17. This position has been reaffirmed through case law time and again. Case in point is the holding by the Court of Appeal in **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) vs Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, where the Learned Judges rendered themselves thus;

"In light of the above provision, termination of employment will be unfair if the Court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45."

18. As per the claimant's letter of termination, the reasons resulting in his termination was "lack of confidence" in him by the respondent. I will produce the relevant excerpt of the said letter of termination thus;

"RE: TERMINATION OF CONTRACT

Further to the suspension letter dated 16th June, 2015, your employment is terminated for lack of confidence with effect from 1st September, 2015. You will be paid 30 (thirty) days salary in lieu of notice and any dues (accumulated leave days and worked for upto 31st August, 2016). You may contact the payroll section for your final dues after returning any company property your possession and being cleared by (sic) Chief Executive Officer.

Yours faithfully,

Uchumi Supermarkets Limited

Julius Kipng'etich

Chief executive officer”

19. Prior to his termination, the claimant had been suspended from duty on grounds of gross negligence and gross misconduct.
20. It is instructive to note that the allegations of “*lack of confidence*” or “*gross negligence*” and “*gross misconduct*” were not substantiated at all. As a matter of fact, the same are too general and do not contain better particulars.
21. In its defence, the respondent particularized the acts of negligence against the claimant as follows;
 - a) ***Refused, failed and or neglected to apply established human resource principles in the course of discharging his professional functions.***
 - b) ***Refused, failed and or neglected to make any or any proper internal human resource audits or evaluation reports on the competence and competitiveness of the Respondents Employees.***
 - c) ***Further and alternatively refused, failed and or neglected to set up employee management systems that focus on recruiting, training and developing staff members to meet the current demands of the Respondents nature of business.***
 - d) ***Refused, failed and or neglected to develop and document policies, procedures and employee data for purposes of record keeping.***
 - e) ***Refused, failed and or neglected to consult and or advise the Respondent on employee relations.***
 - f) ***Refused, failed and or neglected to provide adequate and effective solutions and or strategies to improve quality of human capital.***
 - g) ***Paid himself unlawful and unjustified salaries and allowances.***
22. Indeed, the above particulars ought to have been specified in the claimant’s letter of termination, at the very least. The term “*lack of confidence*” ought to have been specified. The same is too general and it’s impossible to decipher its real meaning and import. Indeed, the same does not disclose any particular action or omission on the claimant’s part.
23. The claimant was entitled to know the substance of the allegations against him, but in the face of such a blanket term as “*lack of confidence*”, he was denied such an opportunity
24. Coupled with the general nature of the allegations levelled against the claimant, there was no evidence presented before Court to justify his termination.
25. In its defence, the respondent alluded to the existence of a Consultant’s Report which it averred, would reveal his weaknesses and anomalies in the performance of his duties.
26. In the end, the said Consultant’s Report, which was the smoking gun in this case, was never availed at all and the respondent’s witness in her oral testimony did not make any mention of the same.
27. Ultimately, the respondent’s allegations against the claimant remained bare and were not backed by any evidence in whatever form, shape or nature.
28. Ms. Oyombe in her testimony before Court stated that the state of documentation at the respondent company was wanting. That notwithstanding, there must have been some form of evidence to justify the claimant’s suspension from duty and his subsequent termination. What informed these actions by the respondent if there was no evidence in its possession? In absence of such evidence, it cannot be established that the reasons for the claimant’s termination were fair and valid. Needless to say, the allegations against the claimant were not proved and substantiated.
29. The Court of Appeal in the case of **Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR**, found that the allegations against the respondent were too general hence termed his termination as unfair.
30. In light of the foregoing, I cannot help but conclude that there was no valid and fair reason to justify the claimant’s termination, hence the respondent failed to prove substantive justification. The claimant’s termination was therefore unfair having failed to satisfy the requirements set out under section 43(1) as read together with section 45(2) (c) of the Act.

(ii) Procedural fairness

31. **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. Further, **Section 41(1)** of the Act provides in an extensive manner, the specific requirements an employer must comply with in order to meet the test of procedural fairness. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

32. The claimant has contended that he was not issued with a show cause letter and neither was he subjected to a disciplinary hearing. Despite the respondent's assertions that the claimant's termination was undertaken legally and procedurally, there was no evidence to prove the same.

33. Indeed, there is no evidence that the claimant was notified of the allegations against him and that he was given an opportunity to respond to the same either in writing or through an oral hearing. Beyond the letter of suspension, there is no proof that he was subjected to any process. In fact, there is no evidence that his termination was in line with any single requirement stipulated under section 41 of the Act.

34. Notably, the requirements of section 41 of the Act are mandatory regardless the nature of the transgressions alleged to have been committed by the claimant. My position is fortified by the finding by the Court of Appeal in the case of **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** where the learned Judges reckoned as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

35. Having failed to comply with the requirements of section 41 of the Act, the respondent did not accord the claimant procedural fairness.

36. The allegations against the claimant had the potential of wrecking his career and indeed, this came to pass. The least the respondent could have done is afford the claimant a right to be heard on any allegations it may have had against him before effecting the termination.

37. The upshot of the foregoing, is that I find that there was no substantive justification to warrant the claimant's termination, and that he was not accorded procedural fairness. This fell short of the requirements stipulated under sections 43, 45 and 41 of the Act hence the claimant's termination was unfair and unlawful.

Reliefs

38. On account of the claimant's unfair and unlawful termination, the Court awards him five (5) month's gross salary as compensatory damages.

39. The claimant is further awarded one month's salary in lieu of notice.

40. As regards the claim for leave days, the respondent advised the client through the letter of termination that he would be paid accrued leave days up and until 31st August, 2015. As per clause 7 of his contract of employment, he was entitled to 21 leave days and when prorated, the same comes to 14 days. There was no evidence on the part of the respondent to prove that the claimant had utilized any of the leave days for the year 2015, hence he is entitled to compensation in lieu thereof.

Orders

41. Accordingly, I enter Judgment in favour of the claimant against the respondent as follows;

(a) A declaration that the claimant's termination by the respondent was unfair and unlawful.

(b) Compensatory damages in the sum of Kshs 1,951,465.00 being equivalent to 5 months gross salary.

(c) One month's salary in lieu of notice being the sum of Kshs 390,293.00.

(d) Accrued leave days Kshs 182,136.00.

(e) The total award is Kshs 2,523,894.00.

(f) Interest on the amount in (e) at Court rates from the date of Judgement till payment in full.

(g) The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

Appearance:

FOR THE CLAIMANT MR. WATHOME

FOR THE RESPONDENT MS. MATATA

COURT ASSISTANT BARILLE SORA

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 had 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.

STELLA RUTTO

JUDGE