



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 696 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

JOSEPH MUTUNE MAKAU.....CLAIMANT

VERSUS

DIRECTLINE ASSURANCE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a statement of claim dated 19th April 2016 filed on 22nd April 2016 alleging unfair and unlawful dismissal non-payment of terminal dues, discrimination and other benefits.

2. The Claimant prays for –

- (a) Breach of contract (Kshs.23,000 x 27 months) Kshs.621,000
- (b) 12 months' compensation (Kshs.23,000 x 12 months) Kshs.276,000
- (c) Unpaid house allowance (Kshs.3,450 x 33 months) Kshs.113,850
- (d) Gratuity/severance (23,000/26 x 15 days x 3 years) Kshs.39,808
- (e) General damages for discrimination
- (f) Interest on (a), (b), (c), (d) and (e) at Court rates
- (g) Costs of this suit.

3. The Claimant's case is pleaded as follows:

4. That he was first employed by the Respondent as an Assistant Records Clerk for Kairu & Mc Court Advocates on 1st February 2012 at a monthly salary of Kshs.20,000/=. The salary was reviewed to Kshs.23,000/= in January 2013.

5. The Claimant avers that his contract of employment was reviewed and he was transferred to the Respondent in the same capacity for a 3 year term. It is further averred that the Respondent promised to review his salary to Kshs.30,000/= in three months but the Respondent did not honour the promise.

6. It is also averred that on 21st October 2014, the Respondent issued the Claimant with a notice to show cause in violation of the provisions of the Employment Act, 2007.

7. It is alleged that the Claimant was subjected to an improperly constituted disciplinary committee which acted in blatant disregard of the procedures prescribed by the Employment Act. The committee was non representative, the Claimant were denied the right to attend the hearing with a fellow employee and was denied a chance to give evidence.

8. It is the Claimant's case that he was wrongfully and unfairly terminated from employment on 21st October 2014.

9. Finally, the Claimant avers that on 22nd October 2014, the Human Resource and Administration Manager summoned him to the office and ordered him to return the termination letter and write a resignation letter for purposes of being paid terminal dues. That the letter is written under duress and coercion.

Respondent's Case

10. In its statement of response filed on 20th May 2016, the Respondent denies the Claimant's allegations of termination of employment and urges the Court to rely on the written contract of employment on record dated 1st February 2014.

11. The Respondent avers that it employed the Claimant for a period of three years effective 1st February 2014 and thereafter for such period as the parties would agree.

12. That his consolidated monthly salary was Kshs.23,000/=. It denies having promised to review the Claimant's salary after three months.

13. The Respondent avers that the notice to show cause was necessitated by the Claimant's inability to discharge his core duties of: -

(a) Retrieving and delivering physical files to various departments as requested.

(b) Ensuring such files are collected and returned to the Registry every day.

(c) Refiling of physical files in the required cabinets in as systematic a manner.

(d) Responding to file requisitions from various departments.

(e) Assisting in retrieval of archived files on referral cases as needed.

14. That the Claimant was unable to handle file requests, retrieval and collections as expected.

15. It is the Respondent's case that the disciplinary committee was properly constituted.

16. It is further averred that the Claimant was paid one month's salary in lieu of notice as per the contract of employment and the Employment Act, 2007. That the Claimant wrote the resignation letter on his own accord and free will.

17. The Respondent acknowledges receipt of the demand letter and prays for dismissal of the suit with costs.

Evidence

18. The Claimant adopted the witness statement and was cross examined. The witness confirmed that he signed the contract of employment on 3rd February 2014 and his salary was Kshs.23,000/= per month including house allowance. CW1 further confirmed that he received a notice to show cause on 21st October 2014 and responded on the same day. That a disciplinary hearing was conducted and he stated his case.

19. He testified that he was coerced to write the resignation letter dated 21st October 2014.

20. On re-examination, CW1 told the Court that he wrote the resignation letter so as to access his terminal dues. When questioned by the Court about the resignation letter, the Claimant stated that he wrote the letter in the Human Resource Office and was alone in the room. That he was given paper and pen to write the letter and the Human Resource Officer or Manager was a lady and had no weapon.

21. Counsel for the Claimant indicated that they were adopting the statements of Enock Thiongo Kibathi, Harrison Mwarumba Mbui and Lawrence Maina as evidence and the Respondent's Counsel had no objection.

22. **RW1, Lillian Ouko** confirmed that she had the Claimant's file which had the notice to show cause only. That there was no record of a disciplinary hearing.

23. The witness confirmed that the show cause letter itemised the allegations made against the Claimant.

24. With regard to paragraph 12 of the statement of response which states that the disciplinary committee was properly constituted, the

witness stated that she was not an employee of the Respondent at the time and could not vouch on its veracity and the same applied to the paragraph 14, that the Claimant was summarily dismissed of neglect of duty.

25. Finally, the witness confirmed that disciplinary proceedings are supposed to be minuted including the findings. That she could have handled the matter differently.

Claimant's Submissions

26. From the Claimant's submissions, two issues arise for determination: -

- i) Whether the Claimant resigned or was terminated;
- ii) Whether the Claimant is entitled to the reliefs sought.

27. As regards separation, the Claimant submits that although RW1 testified that the Claimant resigned from employment, the Respondent's pleadings and documents record corroborate the averments that the Claimant was indeed dismissed from employment. Reliance is made on paragraphs 9 to 12 of the statement of response and contends that parties are bound by their pleadings. The decisions in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002** and **Raila Odinga & another v IEB and 2 others [2017] eKLR** are relied upon in support of the submission.

28. It is the Claimant's submission that the letter of resignation was written under duress and was done in a hurry and did not give a one month's notice as provided by the contract of employment.

29. Reliance is also made on the statements of Enoch Thiongo Kibathi, Harrison Mwarumba Mbui and Lawrence Maina to urge that they were all employed by the Respondent to work at the law firm of Kairu and Mc Court until February 2014 when they were transferred to the Respondent. It is important to highlight that the statement of Harrison Mwarumba Mbui was also used in **ELRC Nairobi Cause No. 461 of 2016 Enoch Thing'o Kibathi v Directline Assurance Company Limited**.

30. The Claimant relies on the statements to corroborate the concatenation of event leading to the termination of the Claimant's contract of employment. The decision in **CMC Aviation Ltd v Cruisair Ltd (No. 1) [1978] KLR 103** is relied upon to urge that averments became evidence when proved.

31. It is the Claimant's submission that he did not resign but was unlawfully terminated by the Respondent.

32. As to whether termination of employment was unfair and unlawful, it is submitted that it was in that the notice to show cause was issued on 21st October 2014 and a response demanded on the same day, disciplinary proceedings took place on the same day and termination as well.

33. It is submitted that the Respondent did not discharge its burden of proof under Sections 43, 45 and 47(5) of the Employment Act.

34. The decisions in **Margaret Lihabi Ngaira v Winfrida Ngumu Charles [2016] eKLR** and **Jared O. Otete v Factory Guards Ltd [2014] eKLR** are relied upon to urge that the Claimant's employment contract was terminated contrary to the provisions of the Employment Act, 2007 and he is thus entitled to compensation as ordained by Section 49 of the Act.

35. As regards breach of contract, it is submitted that parties are bound by the terms of a fixed employment contract for the fixed period such a contracts has no rights beyond the expiry dates. That since the Respondent terminated the contract before its effluxion, the Claimant is entitled to compensation for the 27 months unserved. The decision in **Donas Lombom & 7 others v Civicon Limited [2016] eKLR** is relied upon to urge that the Claimant deserves compensation for the unserved duration of the employment contract.

36. Other reliefs submitted on are house allowance at 15% of the monthly salary for 43 months as well as gratuity and/or severance pay at the rate of 15% per year.

Respondent's Submissions

37. The Respondent isolate two issues for determination:

- i) Whether the Claimant resigned or was unlawfully terminated;
- ii) Whether the Claimant is entitled to the reliefs sought.

38. As regards separation, the Respondent submits that the Claimant resigned by letter dated 21st October 2014, before which he had responded to the notice to show cause and subjected to disciplinary hearing. That the Respondent did not deny that disciplinary proceedings were conducted although it had no evidence for the same.

39. It is the Respondent's submission that the Claimant did not substantiate the allegation that he wrote the resignation letter under duress. That all the Claimant's witnesses were employees of the Respondent and all resigned other than Harrison Mwarumba Mbui whose employment was terminated.

40. It is submitted that based on the evidence in Court, the Respondent has established that the Claimant resigned from employment on 21st October 2014.

41. As regards, the unfairness and unlawfulness of the termination, the Respondent submits that although the Claimant resigned, the Respondent issued a notice to show cause which raises legitimate concerns, but having resigned, no compensation is payable.

42. On breach of contract, it is submitted that having resigned, the Claimant cannot claim compensation for unfair termination of employment. That neither the law nor the contract of employment provided for payment of the unserved term of the contract. The decision in **Andrew Mwaniki Gachuba v National Oil Corporation of Kenya [2018] eKLR** is used to urge that anticipatory benefits are not anchored in law.

43. The provisions of Section 35 of the Employment Act, 2007 and the decision in **Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR** are relied upon to urge that the Claimant is neither entitled to gratuity nor severance pay. On house allowance, the Respondent relies on clause 4 of the employment contract.

44. As regards general damages for discrimination, the Respondent submits that the Claimant adduced no evidence to substantiate the claim of discrimination. In sum, the Respondent submits that the claim be dismissed with costs.

Determination

45. From the pleadings, evidence on record and submissions by the Claimant, the issues for determination are: -

a) Whether the Claimant was terminated on account of redundancy;

b) Whether the Claimant is entitled to the reliefs sought.

46. As regard separation, evidence on record show that the Respondent employed the Claimant as an Assistant Records Clerk on 1st February 2014 for an initial period of three years subject to a probationary period of six months. After probation, either party had to accord the other a 30 days' notice of termination.

47. The Claimant's monthly salary was Kshs.23,000/= described as consolidated salary. The Claimant served the Respondent for about eight months. As held in **Enoch Thiong'o Kibathi v Directline Assurance Company Limited [2021] eKLR**, the Court is guided by the holding in **Samuel G. Momanyi v Attorney General & another [2012] eKLR**. On the applicability of Section 45(3) of the Employment Act, 2007. This decision was relied upon by Ongaya J. in **Linus Barasa Odhaimbo v Wells Fargo Ltd [2013] eKLR**. See the Court of Appeal decision in **Samuel G. Momanyi v SDV Transami Kenya Ltd [2017] eKLR**.

48. On this issue the parties have adopted diametrically opposed positions. While the Claimant submits that it was an unlawful termination of employment, the Respondent asserts that it was a voluntary resignation.

49. Although the Claimant alleges that it was an unlawful termination of employment, he did not adduce any documentary evidence of a termination letter or notice to show cause. He however testified that he was taken through a disciplinary process.

50. In its list of documents dated 19th May 2016, the Respondent *inter alia* identified the show cause letter and determination letter both dated 21st October 2014 as documents 3 and 4 respectively, but no copies were availed. It only furnished the Claimant's notice of resignation dated 21st October 2014.

51. A modified list dated 25th April 2019 retains the resignation notice but adds a discharge voucher allegedly signed by the Claimant on 24th October 2014. The voucher makes no reference to any payment to the Claimant.

52. Further, it is noteworthy that in its pleadings, the Respondent admits that it issued a notice to show cause (the same was in the Claimant's file kept by the Respondent). The notice contained several allegations as confirmed by RW1, Lillian Ouko. The Respondent also admits that the Claimant was taken through a disciplinary hearing and that the committee was duly constituted.

53. Paragraph 14 of the response is unequivocal that "... *the Claimant was summarily dismissed for wilfully neglecting to perform his work.*" The particulars of the neglect are itemised.

54. This averment is confirmed by the list of documents dated 19th May 2016. It is unclear how and when the Claimant resigned having been summarily dismissed by the Respondent. The Respondent led no evidence as to whether the letter of resignation dated 21st October 2014 was indeed accepted and under what conditions.

55. It is trite law as submitted by the Claimant that parties are bound by their pleadings. The Court is guided by the sentiments of Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002**, adopted with approval by the Court of Appeal in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (supra)** on the essence of

pleadings.

56. For the foregoing reasons, it is the finding of the Court that the Claimant's employment was terminated by the Respondent on 21st October 2014. The Respondent's submission that the Claimant merely resigned on 21st October 2014 is in the Court's view not sustainable having admitted that the notice to show cause was issued and disciplinary proceedings took place.

57. Relatedly, the Respondent submits that Section 44(4)(c), (d) and (e) of the Employment Act, 2007 justified the Claimant's dismissal. The alleged resignation was intended to camouflage the termination to relieve the Respondent from liability.

58. As to the lawfulness or otherwise of the termination of the Claimant's employment, the provisions of Sections 35, 41, 43, 44, 45 and 47(5) of the Employment Act as interpreted by judicial decisions are clear on the substantive and procedural requirements of a fair termination. The employer must demonstrate that it had a fair and valid reason to terminate the Claimant's employment and conducted the same in accordance with a fair procedure.

59. Judicial authority is unshakable that the hallmarks of a fair termination are substantive justification and procedural fairness. See **CMC Aviation Limited v Mohammed Noor [2015] eKLR**, **Standard Group Limited v Jenny Luesby [2018] eKLR**, as well as **Naima Khamis v Oxford University Press [EA] Ltd [2017] eKLR**.

60. Whereas Sections 45(2)(a) and (b), Section 44 and 47(5) of the Act address substantive aspects of termination of employment, Section 41 set out the procedural precepts to be complied with. These tenets were elaborated by the Court of Appeal in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**.

61. I will now proceed to apply the foregoing principles of law to the facts of the instant case.

62. Puzzlingly, the Claimant did not vehemently dispute the grounds upon which he was allegedly dismissed from employment other than alleging in paragraph 9 of the statement of claim that the Respondent "... *without sufficient notice or reason*" gave him a notice to show which he responded to. Neither party produced a copy of the notice to show cause or response and none is on record.

63. Relatedly, none of the parties produced a copy of the termination letter. The Claimant's story is that on 22nd October 2014 he was summoned to the office and told to return the termination letter and write a resignation letter instead for purposes of payment of dues. The statement does not allege any duress or coercion. The statement is clear that he received his dues.

64. As regards the procedure employed by the Respondent, the entire drama was staged on 21st October 2014 when the notice to show cause was served, responded to, disciplinary proceedings conducted at 2.00 pm and summary dismissal later in the afternoon.

65. Intriguingly, the Claimant did not retain a copy of the notice to show cause and the Respondent did not avail a copy to Court. The Respondent admits that the disciplinary committee was properly constituted and the Claimant was there, though it lead no evidence on this issue and did not avail copies of minutes of the disciplinary hearing which was its obligation.

66. In the totality of the pleadings, evidence and submissions, the Court is in no doubt that the Respondent has not demonstrated that it conducted the Claimant's termination of employment in accordance with the dictates of Section 41 of the Employment Act.

67. The Respondent tendered no evidence that it accorded the Claimant a fair hearing. Section 41 is unambiguous on the specific requirements. See **Postal Corporation of Kenya v Andrew K. Tanui (supra)**.

68. Evidently, the Claimant was taken through the process mechanically to accord it some semblance of legality which miserably failed.

69. The Respondent may have had valid and fair reason to terminate the Claimant's employment but employed a flawed procedure thereby vitiating the process. In addition, the Respondent did not comply with the disciplinary procedures contained in the letter of employment.

70. Having found that the Claimant's termination of employment was unfair for want of procedural fairness, I will now examine the reliefs available to the Claimant.

(a) Breach of contract Kshs.621,000/=

71. The Claimant's submission that fixed term contracts of employment bind the parties for the entire duration, until expiration is not entirely sustainable as is the decision in **Donas Lombom & 7 others v Civicon Limited (supra)** where Nzioki Wa Makau awarded the unserved terms of the contract. It is unclear for how long the Claimant's had been employed by the Respondent and the terms under which they were engaged are unclear too.

72. In the instant case, clause C of the contract of employment was explicit that either of the parties could terminate the contract by giving the other a 30 days' notice or salary for the same period in lieu of notice.

73. The submission is however sustainable if the fixed term contract has no exit clause other than effluxion of the duration agreed upon as it creates an expectation of service for the entire duration.

74. Relatedly, and as submitted by the Respondent, courts have been reluctant to award anticipatory earnings since employment is not

permanent and such an award is not anchored in law. See **D. K. Njagi Marete v Teachers Service Commission (supra)**. The contract herein had an exit clause other than by effluxion of time as was the case in **Andrew Mwaniki Gachuba v National Oil Corporation of Kenya (supra)**. The claim is **declined**.

(b) 12 months' salary as damages for unfair termination Kshs.276,000/=

75. Having found that the Claimant's employment contract was terminated unfairly, the Claimant becomes entitled to the reliefs prescribed by Section 49 of the Employment Act subject to compliance with Section 49(4) of the Act.

76. In arriving at the level of compensation, the Court has taken into account the following factors: –

- i) The Claimant was an employee of the Respondent for a period of about eight months and wished to continue.
- ii) The Claimant had just completed probation and training period of six months and there is no evidence that his performance was wanting nor a warning letter or notice to show cause.
- iii) The Claimant did not appeal to the Managing Director as ordained by clause 17 of the letter of employment.
- iv) The Claimant contributed to the termination of his contract of employment.

77. In the circumstances, the Court is satisfied that the equivalent of two (2) months' salary is fair, **Kshs.46,000/=**.

(c) Unpaid house allowance Kshs.113,850/=

78. Section 31(1) of the Employment Act, provides that it is the duty of the employer to provide reasonable accommodation for the employee or pay a sufficient sum as rent in addition to the wages or salary of the employee to enable the employee obtain reasonable accommodation. This provision however, does not apply where the contract of service contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or enable the employee to provide himself with reasonable accommodation.

79. In this case, clause 4 of the contract of employment provided that:

“The remuneration of the Assistant Records Clerk shall be a consolidated salary of Kenya shillings twenty three thousand only (Kshs.23,000) per month... It is hereby agreed and understood that the remuneration stated above will enable the officer to provide him/herself with reasonable housing accommodation.”

80. This clause is unambiguous on the fate of house allowance. The claim is **dismissed**.

(d) Gratuity/severance pay Kshs.39,808/=

81. Whereas gratuity has a contractual underpinning on the part of the employer, severance is only payable under Section 40(1)(g) of the Employment Act in cases of redundancies which is not the case in this case. See **Nixon Mandala Malongo v Clifford Okello Rachuonyo & another [2014] eKLR** on severance.

82. The contract of employment between the Claimant and the Respondent had no clause on payment of payable to the Claimant on expiration of the duration or at any other time. In addition, the Claimant led no evidence of entitlement to gratuity or severance.

83. Accordingly, the prayer for gratuity/severance is **declined**.

(e) General damages for discrimination

84. Although the Claimant testified that he had raised the issue of salary with his supervisors and had been promised a review after three months, he led no evidence of who he raised the issue nor how it was responded to. In addition, the Respondent denied having made the promise.

85. More significantly, the Claimant led no evidence of his qualifications and experience vis a vis those of his colleagues who were allegedly earning more than him and how much they earned for comparative purpose. The claim is **dismissed**.

86. **In conclusion, judgment is entered for the Claimant against the Respondent for the sum of Kshs.46,000/= with costs.**

87. Interest at Court rates from the date hereof till payment in full.

88. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE