



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1172 OF 2017

MOSES WAWERU.....CLAIMANT

VERSUS

DIGNITAS.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim, brought by a Memorandum of Claim dated 22nd June 2017 and filed in court on 23rd June 2017, is for compensation for unlawful and unfair termination of employment. The Respondent denies the claim by way of Response dated and filed in court on 20th July 2017.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Executive Director, Deborah Ruth Kimathi. Thereafter, the parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 18th January 2016 in the position of Operations Director, earning a gross monthly salary of Kshs. 170,000.
4. The Claimant worked for the Respondent until 1st April 2016, when he was summarily dismissed.
5. The Claimant's case is that his dismissal was unjustifiable and unfair as there was no valid reason for it and he was not allowed an opportunity to be heard.
6. The Claimant therefore pursues the following remedies:

- a) 12 months' salary in compensation.....Kshs. 2,040,000
- b) 1 month's salary in lieu of notice.....170,000
- c) House allowance for 4 months.....102,000
- d) Accrued leave days.....36,992
- e) General damages
- f) Costs plus interest

The Respondent's Case

7. In its Response dated and filed in court on 20th July 2017, the Respondent admits having employed the Claimant as pleaded.

8. The Respondent however denies that it summarily dismissed the Claimant and avers that it adhered to its laid down contractual obligations under the employment contract by giving the requisite termination notice.

9. The Respondent states that it gave the Claimant 5 days' notice as stipulated in his contract of employment and the Claimant did not raise any objection at the time.

10. The Respondent avers that the termination of the Claimant's employment was not subject to a disciplinary hearing as he was not dismissed as a result of disciplinary issues. The Respondent asserts that the termination was based purely on the Claimant's performance and his inability to meet the expectations of the Respondent.

11. The Respondent adds that the Claimant was, vide the termination letter, informed of the reasons for termination and was paid all his dues in accordance with the provisions of the contract of employment.

12. The Respondent contends that the Claimant is not entitled to any compensation or other dues.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

14. On 1st April 2016, the Claimant wrote to the Respondent as follows:

Dear Moses,

This letter serves to inform you that your employment at Dignitas is hereby terminated with 5-days notice.

While I had high hopes for your role and leadership at Dignitas, it has become clear that there is a mismatch in the expectation for an Operations Director and your performance during this probationary period.

On behalf of the team and board of trustees, I wish you the very best in your future pursuits.

Best regards,

(signed)

Tiffany Cheng Nyaggah

Executive Director, Co-Founder”

15. This letter simply states that there was 'a mismatch in the expectation for an Operations Director and [the Claimant's] performance during [the] probationary period'. There was no further explanation as to the Claimant's performance vis-à-vis the Respondent's expectation of him. The Respondent's Executive Director, Deborah Ruth Kimathi did not produce any benchmark against which the Claimant's performance could have been assessed.

16. In its written submissions, the Respondent suggests that because at the time of termination the Claimant was serving probation, he was not entitled to the procedural fairness safeguards provided under Section 41 of the Employment Act. In pursuing this argument, the Respondent relies on Section 42(1) of the Act.

17. On his part, the Claimant takes the converse view and relies on the decision in **Hellen Mino Munguti v Itabuild Imports [2018] eKLR** where **O.N Makau J** held that the legislature could not have contemplated that employees serving probation would be terminated without justification. The learned Judge therefore concluded that under Section 43 of the Employment Act, an employer is required to justify termination of employment of an employee even during probation, by proving a valid and fair reason.

18. The Claimant further relies on the decision in **Jennifer Ndinda Maingi v Sahal International Trading Group Ltd [2016] eKLR** where this Court stated thus:

“While agreeing that an employee serving probation may not enjoy all the rights accruing to a confirmed employee such as full notice, I think such an employee is entitled to all the requirements of due process. I say so because an employee who takes up a new employment has to make major adjustments, including terminating a running employment contract. It cannot therefore be justifiable that such an employee could be terminated without a valid reason and without being heard.”

19. In a recent three-judge bench decision of this Court (**Mbaru, Abuodha & Ndolo JJ**) in **Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR** Section 42(1) of the Employment Act, in so far as it appears to lock out employees serving probation from the safeguards of due process, was declared unconstitutional.

20. Flowing from the foregoing, I find and hold that the Claimant was entitled to due process as provided in law. I further find that in terminating the Claimant's employment, the Respondent failed to comply with the procedural fairness requirements thus rendering the termination unjustifiable and unfair.

21. Regarding the acknowledgment of receipt of dues signed by the Claimant on 1st April 2016, the only thing to say is that the said acknowledgement only discharged the Respondent from claims on terminal dues and could not cure an otherwise unlawful termination of employment.

Remedies

22. In the circumstances, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the short stint of service but also the finding that the employment was cut short by the Respondent's unlawful and unfair action against the Claimant.

23. There is evidence on record that the Claimant was paid notice pay as per his contract of employment. The claim thereon is therefore misplaced and is disallowed.

24. The Claimant also claims house allowance. His employment contract however, provided for a gross monthly salary, which would ordinarily be inclusive of house allowance. This claim is therefore without basis and is declined.

25. Finally, I enter judgment in favour of the Claimant in the sum of **Kshs. 510,000** being three (3) months' salary in compensation for unlawful and unfair termination of employment.

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant will have the costs of the case.

28. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022

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JUDGE

Appearance:

Mr. Okoth for the Claimant

Ms. Mucheru for the Respondent