



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 229 OF 2018

GEORGE MWANGICLAIMANT

-VERSUS-

HAPPY GO LIMITED..... RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In an amended memorandum of claim dated 5th October, 2018 the Claimant prays for the following:-

A. An order to set aside and declare the same as null and void the summary dismissal letter dated 20th July, 2018 consequently reinstating and/or re- engaging the Claimant to his previous position without making changes to his wages, allowances or dues thereto.

B. That the Respondent do issue the Claimant with adequate compensation as a shareholder in terms of unpaid dividends. Finance Director in the terms of unpaid Director Remuneration and as an Accountant.

C. An order for the Respondent to determine the shareholding interest of the Claimant with regard to all capital contributions made from 2006 to date.

IN THE ALTERNATIVE

D. Kshs.6,920,175/= in wages and benefit due as currently paid by the Respondent.

D. (i) Unpaid Salary for 23 years – Kshs.23,632,000/=.

E. Damages for unfair/wrongful Dismissal from employment.

F. Costs and interest at court rates

G. Any other relief deemed as appropriate.

2. Together with the original memorandum of claim dated 31st July, 2018 were filed a verifying affidavit

by the Claimant, Claimant's witness statement, and copies of several documents annexed thereto.

3. During the hearing the Claimant abandoned the main prayers and proceeded to testify in support of the alternative prayers. Counsel for Claimant in his written submissions concentrated on the alternative prayers as he had informed the court during the hearing that the Claimant was abandoning the main prayers in favour of the alternative prayers.

4. In a reply to the amended claim dated 27th February, 2020 the Respondent prayed for dismissal of the entire claim with costs for want of merit. Along with the amended reply to the claim the Respondent filed witness statements, list of documents, and copies thereof.

5. This cause proceeded for hearing on 1st November, 2021 when the Claimant (CW1) testified alone in support of his case. The defence was heard on 6th December, 2021 whereby **CATHERINE MWAURA** (RW1) testified in support of the Respondent's position.

6. Counsel for both parties summed up their respective positions by way of written submissions, Claimant's dated 24th January, 2022 and Respondent's dated on even date.

II. CLAIMANT'S CASE

7. Based on the amended statement of claim, the oral and documentary evidence tendered, and the written submissions by his Counsel, the Claimant's case is that he was originally engaged by the Respondent in 1995 as a part-time accountant.

8. The Claimant further alleged that in 1996 he was engaged on full-time basis at gross salary of Kshs.208,246/= per month. He avers that in 2015 the Respondent started defaulting in paying the monthly salary and other allowances and that in 2016 the Respondent hired external auditors to perform the same duties that the Claimant had been executing. The Claimant alleged that by 2017 the Respondent had established a new finance department that was running parallel functions to that of the Claimant.

9. The Claimant alleged that he complained severally to the managing director in regard to the parallel department but no action was taken.

10. On 20th July, 2018 after a long strained relationship with the Respondent the Claimant was served with a letter of summary dismissal from Respondent's Advocates. The said notice stated that the Claimant had absconded duty for over 12 months which the Claimant claimed to be false and total fabrication by the Respondent to allegedly sanitize what the Claimant considered unfair, wrongful, and unlawful dismissal. The Claimant alleged that as at the time of the dismissal he had served the Respondent for over 20 years.

11. In his oral testimony in court the Claimant testified that he was not given a hearing before or during the termination or even thereafter to express and explain his side of the story and events. He alleged that as at the time of dismissal his gross salary stood at Kshs.209,146/= . He cried out that his dismissal was grossly unprocedural. He stated that it was unprocedural for the notice to be issued by the Respondent's lawyers and that he was totally denied procedural fairness. He alleged that he had not been issued with a warning prior to the dismissal.

12. The Claimant produced 13 documents as exhibits attached to and filed with his original statement of claim.

13. In cross examination the Claimant admitted that he had no letter of appointment or contract for 1995. He further admitted that he was not earning a salary for the first 10 years of working with the Respondent. He alleged that he used to send fee notes for accountancy services rendered to the Respondent during the first 10 years of his relationship with the Respondent.

14. The Claimant admitted that the first and only contract of employment between him and the Respondent was that dated 16th January, 2006. He alleged that he was not paid dues upon dismissal.

15. It is on the basis of the foregoing that the Claimant pleaded with the court to be granted the alternative prayers in the amended statement of claim as set out at the onset of this judgment.

III. RESPONDENT'S CASE

16. In a nutshell, the Respondent's case, as expressed and captured in amended reply to the claim, oral and documentary evidence as produced through **CATHERINE MWAURA (RW1)**, and the written submissions by its Counsel, is that the Claimant was originally engaged as an accountant in 2005.

17. **RW1**, the general manager of the Respondent, testified that from 2005 to 2013 the Claimant was on a monthly salary of Kshs.55,000/= which was enhanced to Kshs.208,000/= for the period from 2013 to 2018.

18. Further, **RW1** testified that for the period from 1995 to 2004 the Claimant was a financial or accounting consultant for the Respondent and that the Claimant became a fulltime employee of the Respondent in January 2005. She testified that the Claimant ceased to be a consultant in November, 2004 and took up the job of a full-time accountant of the Respondent in January, 2005.

19. **RW1** testified that in 2015 the Claimant abruptly and without notice stopped reporting to work on allegation that his life was in danger and it is then that the Respondent decided to hire another accountant.

20. **RW1** stated that the Claimant stayed away for long and on 20th July, 2018 the Respondent decided to terminate the Claimant through a notice issued by the Respondent's lawyer. The **notice of termination** was produced as **Respondent's exhibit 5**. **RW1** testified that the Claimant had been issued with several warnings and that for the period between 2015 and 2018 the Claimant was paid a salary without working. **RW1** testified that the Claimant worked for the Respondent for a period of 13 years.

21. **RW1** testified that no gratuity was payable to the Claimant and no leave pay was due as the Claimant took so many days out of work yet he was paid full monthly salary for almost three(3) years without reporting to work.

22. In cross-examination **RW1** admitted that the Claimant was not issued with a show cause letter and that there were no records of disciplinary hearing before the dismissal. She also admitted that there were no records of any terminal dues paid to the Claimant although she alleged that the Claimant was paid a sum of Kshs.318,000/= and a further Kshs.200,000/= was applied in purchasing a car for the Claimant. But she admitted that there was no evidence of such payments filed in court.

23. **RW1** testified that the Respondent keeps employees' work attendance register but admitted that the same had not been availed in court to illustrate the attendance of the Claimant.

24. Further, **RW1** testified that the Claimant refused to sign letters of appointment in 2005 and 2013 and that in particular he destroyed the one of 2005.

25. It is on the basis of the foregoing that the Respondent prayed that the Claimant's entire cause be dismissed with costs.

IV. ISSUES FOR DETERMINATION

26. This court has carefully and dutifully gone through the pleadings filed by both parties, the oral and documentary evidence tendered, and the written submissions filed by learned Counsel. In my view the following issues commend themselves for determination:-

(i) Was the summary dismissal of the Claimant by the Respondent unfair/wrongful and therefore unlawful?

(ii) If (i) above is in the affirmative, is the claimant entitled to the remedies sought for?

(iii) Costs.

V. DISMISSAL

27. It is common ground that the Claimant was terminated by the Respondent vide a notice dated 20th July, 2018 issued through Ikuu, Mwangi & Company Advocates for the Respondent. The notice was to take effect from 1st August, 2018.

28. Acknowledging that the notice was shorter than the 28 days stipulated under **Section 35 (1) (c)** of the **Employment Act (the Act)**, the Respondent undertook to pay to the Claimant one month's salary in lieu of notice and July salary.

29. The notice indicated that the Claimant was summarily dismissed due to prolonged absenteeism in the entire period of 2017 and 2018 without approval from the Respondent, and yet he was receiving his monthly salary as though he was working. The said notice was copied to the County Labour office, Nakuru.

30. It is not denied that the Claimant was served with the notice. However, the Claimant has taken issue with the fact that the notice was issued by the Respondent's lawyers rather than the Respondent itself.

31. Advocates are recognized agents in law and when duly instructed they are allowed to carry all lawful instructions from a client to full effect. No legal reasons have been advanced as to why a duly instructed lawyer cannot issue such a notice for and on behalf of the client, the Respondent herein.

32. In the circumstances, the fact that the notice was issued by the lawyers and not the Respondent does not of itself invalidate the notice.

33. There is a plethora of decided cases on the importance of both substantive and procedural fairness in termination of employment by whatever method, may it be summary dismissal, redundancy, or other. Such decisions include **Mary Chemweno -Vs- Kenya Pipeline Company Limited (2017) eKLR**, and **Loice Otieno -Vs- Kenya Commercial Bank Limited (2013) eKLR**, and **Walter Ogal Anuro -Vs- Teachers Service Commission (2012) eKLR**.

VI. SUBSTANTIVE FAIRNESS

34. **Section 43 of the Act** provides as follows:-

“(1) In any claim arising out of termination of a contract, the employee shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

“(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract believed to exist, and which caused the employer to terminate the services of the employee.”

35. **Section 44(4)(a)** provides that an employer may summarily dismiss an employee who without leave or other lawful cause absents himself from the place appointed for the performance of his work. Apparently, this is the ground upon which the Respondent summarily dismissed the Claimant as per the notice dated 20th July, 2018.

36. It was therefore incumbent upon the Respondent to prove that the Claimant was absent from duty without leave or permission. **RW1** admitted in her testimony that there were no records on the work attendance of the Claimant. No records were produced to prove that the Claimant was absent from duty for the period from 2017 to July 2018 or any other time or at all.

37. It is the Respondent, the employer, who has custody of all employment records under **Section 10 of the Act** and as such it is the Respondent who has the burden under **Section 43** of the Act to prove that the Claimant was indeed absent from duty as alleged.

38. This court is of the opinion that the Respondent has failed to illustrate, demonstrate, and prove that the Claimant was indeed absent from duty as alleged and hence holds that there was no reason(s) for the Respondent to dismiss the Claimant as per the notice dated 20th July, 2018.

VII. PROCEDURAL FAIRNESS

39. Procedural fairness is more or less fair hearing as envisaged under **Article 47 of the Constitution, Section 4** of the **Fair Administrative Actions Acts**, and the **Rules of Natural Justice**. Naturally, no one should be condemned unheard.

40. **Section 41 of the Act** provides a brief structure of what procedural fairness entails. In this cause, the Claimant was not served with a show cause letter informing him of the charges or allegations against him. He was not invited for a hearing to present his side of the story, so to say. He was not allowed or informed of his right of appeal on dismissal and the procedure thereof.

41. **RW1** in her evidence admitted that no hearing was held and that there were no minutes for such a meeting. Clearly the Claimant was denied procedural fairness and this court is in agreement with the submissions from learned Counsel for the Claimant on this issue, including the holding in **Kenya Union of Commercial & Allied Workers –vs- Meru North Farmers Sacco Limited (2014) eKLR, Rebecca Ann Maina and Others Vs. Jomo Kenyatta University of Agriculture and Technology (2014) eKLR, and Jared Aimba Vs. Fina Bank Ltd. (2016) eKLR.**

42. Flowing from the foregoing paragraphs this court finds and holds that the summary dismissal of the Claimant by the Respondent was unfair, wrongful, and unlawful for lack of both substantive and procedural fairness.

VIII. REMEDIES

43. At the commencement of the hearing on 1st November, 2021 Counsel for the Claimant informed the court that the Claimant was abandoning the main prayers in the amended memorandum of claim dated 5th October, 2018 in favour of the alternative prayers. The said alternative prayers have been set out at the introductory part of this judgment and this court shall now consider each of the prayers on merit starting at prayer D which is the first of the alternative prayers.

44. Prayer (D) is for **“Kshs.6,920,175/= in wages and benefits due as currently paid by the Respondent.”** This court has tried to decipher what this prayer is about and consulted the Claimant’s Counsel written submissions at paragraph 29 page 8 where counsel submits that **“we therefore urge the court to allow the Claimant’s claim for unpaid wages and dues at Kshs.6,920,175/= and underpaid salary at Kshs.23,832,000/=.”**

45. The amended statement of claim does not provide for particulars on how the figure of Kshs.6,920,175/= has been arrived at. In his testimony, the Claimant did not tender any evidence in support of this claim and no documentary evidence was produced in support of the same.

46. In paragraph 23 of his written submissions, page 6 thereof, Counsel for the Claimant submitted that **“the Claimant pleaded that he had unpaid leave allowance, wages and benefits amounting to Kshs.6,920,175/=.”** Again no particulars are provided or tabulated on how that figure is arrived at.

This begs for the following questions;

What is the period of the unpaid leave? What wages were not paid? What benefits were due and not paid for? These questions find no answer from the Claimant and remain begging.

47. Inasmuch as it is the duty and obligation of the employer, the Respondent in this case, to keep good employment records under **Section 10 of the Act**, it is also an obligation and duty of an employee who files a claim in court to plead with specificity and provide particulars to enable the court to determine the issues in controversy.

48. Pleadings from either party need to be concise and precise. Where a consolidated and liquidated amount of money is claimed the specifics and particulars thereof should be provided to enable the other party to respond with equal precision. Where the particulars are not provided for as is the case in this cause, the Respondent (employer) cannot be blamed for not availing documents or records of employment for unspecified period spanning over 23 years.

49. In the circumstances, and in view of the foregoing this court holds that the Claimant has failed to prove that the claimed sum of Kshs.6,920,175/= is due and payable to him by the Respondent.

50. Prayer D (i) is for underpaid salary for 23 years amounting to Kshs.23,832,000/=. Again, no particulars are provided by the Claimant on how this figure is arrived at. As stated above, it is not enough for a party to plead or make a claim without substantiating and supporting the same by way of particulars, oral and or documentary evidence, and yet expect the court to grant the same.

51. The evidence on record, and which the court finds to be reliable, is that the Claimant was at first (between 1993 and 2004) engaged as a financial consultant by the Respondent. This explains why the Claimant served the Respondent with fee notes and invoices for services rendered. Basically, there is no way that the Claimant could have been an employee of the Respondent earning a salary and at the same time earning consultancy fees for the same accounting financial services.

52. The evidence on record that the court finds credible is that the Claimant was a consultant from 1993(or 1995) to 2004 and took up full employment with the Respondent from 1st January, 2005. The Claimant was unable to substantiate, provide evidence, and or confirm the terms of his alleged employment prior to January 2005. On the other hand **RW1** was unshakable in her evidence that the Claimant entered full employment with the Respondent as from January, 2005.

53. The Claim for Kshs.23,832,000/= in alleged underpaid salary for 23 years by the Claimant is hence misplaced and not proven and the same must fail.

54. Prayer E is for damages for unfair/wrongful dismissal from employment. This court has already found that the summary dismissal of the Claimant by the Respondent was unfair, wrongful, and unlawful for lack of substantive and procedural fairness. It follows therefore that the Claimant is entitled to compensation. The damage that an employee suffers as a result of unlawful dismissal or termination is in the salary and benefits that such an employee could have earned were it not for the dismissal or termination.

55. **Section 49(c)** of the **Act** caps the maximum compensation awardable at 12 months gross monthly wage or salary of the employee as at the time of dismissal. While the Claimant's Counsel submits that his last gross salary was Kshs.208,246/= and the Respondent's counsel agrees with the same in their respective submissions, the court notes that the last pay-slip produced by the Claimant as exhibit from his bundle of documents is for the month of April, 2018 which indicates the gross pay at Kshs.209,146/=. This court shall use this figure of Kshs.209,146/= as the Claimant's last gross pay for all intents and purposes as the same is supported and authenticated by the payslip alluded to above.

56. The Claimant is not interested in being re-engaged or reinstated into the employment of the Respondent. There is no tangible evidence on what role, if any, the Claimant played in his dismissal as

the allegations of absenteeism were not proved. It is obvious that the relationship between the Claimant and the Respondent was bad and bitter at the time of dismissal. The Claimant was in employment of the Respondent for the period from 2005 to 2018, a period of about 13 years, which is a considerably long time.

57. The Claimant did not inform the court if he has found another job, and if he did how long it took him to do so.

58. This court has critically looked at the factors that it ought to consider when making an award under **Section 49 of the Act**. Considering all the relevant factors and the entire circumstances of this cause, this court is of the view that an award of the maximum 12 months gross salary would be fair compensation in this matter.

59. In awarding the maximum 12 months gross salary this court is mindful of the fact that the Claimant served the Respondent for a considerably lengthy period of time of about 13 years and that he was denied both substantive and procedural fairness prior to dismissal. The award is hence calculated as **Kshs.209,146/= X 12 = Kshs.2,509,752/=**. This amount is subject to statutory deductions.

IX. COSTS

60. Costs follow event and the Claimant is awarded costs based on the award.

X. DISPOSAL

61. This court makes the following orders in disposal of this matter:-

- (a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was unfair, wrongful, and unlawful for lack of both substantive and procedural fairness.
- (b) The Claimant is awarded a sum of **Kshs.2,509,752/=** being compensation for the wrongful and unlawful dismissal.
- (c) The award in (b) shall earn interest at court rates from the date of this judgment till payment in full.
- (d) Costs to the Claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF APRIL 2022.

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DAVID NDERITU

JUDGE