



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 23 OF 2015

AMOS OTIENO ONJALA.....CLAIMANT

v

OPPORTUNITY KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Amos Otieno Onjala (the Claimant) was offered employment as a Loan Officer for 3-years by Opportunity International Wedco Ltd on or around 3 September 2008. The parties entered into a new contract on or 5 August 2009 (Opportunity International Wedco Ltd had now been renamed Opportunity Kenya Ltd) (the Respondent). The Claimant was to serve as a Loan Officer.

2. On 9 December 2013, the Respondent wrote to the Claimant to notify him of summary dismissal, and this prompted the Claimant to institute these legal proceedings against the Respondent. He stated the Issues in dispute as:

Unlawful termination of the Claimant's employment, unpaid terminal benefits, one month salary in lieu of notice, unpaid salary for days worked, one year's salary for unlawful termination of employment and letter of service.

3. The Respondent filed a Statement of Response on 26 March 2015, and the hearing commenced on 24 October 2018 when the Claimant testified and closed his case.

4. When the Respondent's case came up for hearing on 13 May 2019, none of the parties was in Court, and therefore the hearing aborted.

5. The next time the Respondent's case up on 15 July 2020, the Respondent was not in attendance, and the hearing was rescheduled to 1 December 2020.

6. On this latter date, the Respondent indicated that it was not ready to proceed as its witness had left employment, and due to other engagements, he could not attend Court. The Court fixed the Respondent's case for hearing on 9 December 2020.

7. Come 9 December 2020, and the Respondent closed its case without calling any witnesses.

8. The Claimant filed his submissions on 18 January 2021 (should have been filed and served before 9 January 2021). The Respondent filed its submissions on 9 February 2021.

9. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

10. In challenging the fairness of the summary dismissal, the Claimant contended that the email inviting him to the disciplinary hearing scheduled for 9 December 2013 did not outline the allegations the subject matter of the hearing. He also contended that the email did not specify the hearing was a disciplinary hearing.

11. To further demonstrate that a disciplinary hearing was not held, the Claimant alluded to the lack of any minutes.

12. The Court has looked at the email sent to the Claimant. It referred to previous audit meetings attended by the Claimant and indicated that

it was a formal invitation to a meeting at the head office. The Claimant was specifically advised to come along with a colleague.

13. The Claimant did not deny having participated in an audit process. He must have become aware of the subject of discussions during the audit meetings. He was put on notice to attend a formal meeting accompanied by a colleague. He admitted that he was given a document with allegations to confront on 9 December 2013 though he had only a few minutes to go through it.

14. Despite the Claimant asserting that minutes of the meeting were not available, the Respondent filed in Court both handwritten and typed notes of a disciplinary hearing on 9 December 2013. The notes show that about 6 allegations were made against the Claimant and that he responded to the allegations.

15. On the material on record, the Court is satisfied that the Respondent was in substantial compliance with the requirements of procedural fairness. And considering that this was a case of summary dismissal as contemplated by section 41(2) of the Employment Act, 2007, written notice or show cause was not mandatory.

Substantive fairness

16. Unlike the evidential framework under the Evidence Act, sections 43 and 45 of the Employment Act, 2007 has placed a statutory burden upon an employer to prove the reasons for dismissal and that the reasons were valid and fair.

17. The burden kicks-in once an employee has discharged the low threshold burden in section 47(5) of the Employment Act, 2007.

18. In his testimony, the Claimant asserted that the allegations against him were false. He denied that he falsified/manipulated records or accounts. He equally denied having a bad working relationship with staff.

19. The Respondent did not call any witness or lead evidence to discharge the burden expected of it, and the Court can only conclude that there were no valid and/or fair reasons to dismiss the Claimant.

Compensation and salary in lieu of notice

20. The Claimant served the Respondent for 5 years, and in consideration of the length of service, the Court is of the view that the equivalent of 5-months gross salary would be appropriate (gross monthly salary in November 2013 was Kshs 68,838/-).

21. The Court has found that the Respondent was in substantial compliance with the procedural fairness requirements and therefore declines to award salary in lieu of notice.

Breach of contract

House allowance

22. The Claimant sought Kshs 51,630/- on account of house allowance. Clause 5 of the contract dated 5 August 2009 provided for gross monthly salary and indicated that it was inclusive of house allowance.

23. The Respondent was therefore not in breach of contract as the salary included house allowance.

Gratuity

24. The Claimant pleaded that he was entitled to gratuity at the rate of 15 days' pay for each completed year of service.

25. The contract between the Claimant and the Respondent provided that the Claimant was entitled to join a pension scheme where he and the Respondent would make contributions.

26. The Respondent offered in the dismissal letter to pay any pension dues according to the Rules of scheme, and nothing turns on the head of the claim as the Rules of the Scheme were not disclosed to the Court.

27. Payment, if any, should be paid under the Rules of the Scheme.

Earned wages December 2013

28. The Claimant parted ways with the Respondent on 9 December 2013. He is entitled as of right to the earned wages, which he computed as Kshs 20,651/-. The Respondent did not rebut the computations or provide pay records to show the same was paid. The claim is allowed.

Pro-rata leave for 2013

29. The Claimant's plea for *pro-rata* leave for 2013 in the sum of Kshs 68,838/- was not controverted as required by section 10(3) of the Employment Act, 2007. The head of the claim is allowed. The Court notes that the Respondent had offered to pay the same.

Conclusion and Orders

30. The Court finds and declares that the summary dismissal of the Claimant was unfair and further that the Respondent was in breach of contract.

31. The Claimant is awarded

(a) Compensation Kshs 344,190/-

(b) December 2013 wages Kshs 20,651/-

(c) Pro-rata leave Kshs 68,838/-

TOTAL Kshs 433,679/-

32. The Claimant filed submissions late without tendering any explanation. He is denied costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 24th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant D.O.E. Anyul & Co. Advocates

For Respondent Naikuni, Ngaah, Miencha & Co. Advocates

Court Assistant Chrispo Aura