



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 48 OF 2018

BETHWEL TANUI.....CLAIMANT

VERSUS

STARTIMES MEDIA (KENYA) CO. LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 26/1/2018 by the claimant seeking the following reliefs:-

- (a) Kshs.31,000 in lieu of one month notice.**
- (b) Compensation for unlawful dismissal.**
- (c) Loss of expected income to retirement being 14 years left.**
- (d) Costs and interest.**

2. Respondent filed statement of defence on 10/9/2018 in which particulars of claim are denied. C.w.1, the claimant testified and adopted a witness statement filed on 26/6/2018 as his evidence in Chief. The claimant also produced a list of documents filed on even date as exhibits '1' to 8.

3. C.W.1 stated that he was employed by the respondent on 1/9/2016, and worked until 9/3/2018. That he was summarily dismissed by a letter dated 9/3/2018 for poor work performance by failing to meet set targets; bring new dealers on board and to actively manage any door to door teams in his jurisdiction.

4. The claimant was however to be paid in lieu of notice and in respect of pending leave days.

5. C.W.1 testified that he was not given an opportunity to be heard nor to respond to the allegations raised in the dismissal letter.

6. C.W.1 stated that the respondent took away C.W.1's stock in December, 2017 and so C.W.1 was unable to make sales to meet his targets.

7. That he had brought dealers on board and those he had brought are still actively selling respondent's products to-date.

8. C.W.1 stated that he had never failed to manage door to door teams as alleged by the respondent. That indeed he managed and trained teams very well in selling the products by the respondent and as a result they were absorbed by the respondent and posted to other stations as full time employees of the respondent.

9. That the respondent did not accord the claimant a fair hearing nor any opportunity to make explanation before he was summarily dismissed.

10. The action by the respondent amounted to unfair Labour Practice in violation of Employment Act and Kenya Constitution.

11. That he had constantly delivered at work and was victimized. C.W.1 prays to be awarded as set out in the Statement of Claim.

12. R.W.1 Bernadette Onganyi testified for the respondent and adopted a witness statement filed on 24/9/2019 as her evidence in Chief. She also produced list of documents dated 6/9/2019 as exhibits '1' to '7'.

13. R.W.1 stated that she was employed by the respondent as Human Resource Officer, Western Region in March, 2019. That she had not

met the claimant. That she relied on what she received from the handing over report.

14. That the claimant worked as dealer sales manager in charge of Elgeyo Marakwet County.

15. That his duties included dissemination of sales information; assist in conducting workers research; keep accurate information; develop new dealers in the region and ensure restocking and branding of existing dealers.

16. That the claimant executed monthly target responsibility agreements to meet his set key performance indicators.

17. That the claimant periodically failed to meet his monthly targets and thus was issued with several warning letters requiring him to improve his performance.

18. R.W.1 produced two emailed warning letters which bear no date. The first states that the claimant's mean score for the past month on key performance indicators was 51.8% and the claimant was asked to make the mark of 60%. The second email just stated that it was a final warning letter for poor performance.

19. R.W.1 also produced a typed warning letter dated 5/7/2017 titled "**second warning – poor performance**" in which the claimant was informed that he had fallen short of target for the previous two months. The claimant was given up to 20/6/2017 to improve failing which action including termination would be taken against him.

20. R.W.1 also produced a warning letter dated 9/11/2017 in which is stated the performance for the claimant for the past two months was below the required sales targets. The respondent stated that the claimant had been given up to 20/12/2017 to improve his performance by meeting his monthly target failing which action would be taken against him. This was stated to be the last warning.

21. R.W.1 produced monthly target responsibility Agreement for dealer managers signed by the claimant amongst others.

22. Under cross-examination R.W.1 stated that the warning letters were sent to claimant's email and denied that the same were not delivered to the claimant.

23. R.W.1 stated that records show that the claimant did not meet his targets consistently. R.W.1 stated she did not know if the claimant had been given opportunity to be heard. R.W.1 stated that one had to be given opportunity to be heard before termination and if not termination would be unlawful.

24. **Determination**

The issues for determination are:-

(i) Whether summary dismissal of the claimant was for a valid reason and if a fair procedure was followed to dismiss the claimant.

(ii) Whether the claimant is entitled to the reliefs sought.

25. From the totality of evidence by C.W.1 and that by R.W.1 it is clear that the claimant faced issues of performance between 5th July, 2017 up to the date of dismissal on 9/3/2018.

26. It is common cause that the claimant had disagreement with the respondent in setting key performance indicators to be met by the claimant on a monthly basis.

27. In the letter of dismissal, dated 9/3/2018 the respondent raised three specific issues including failure by the claimant to meet set monthly sales targets to bring new dealers on board; and to actively manage any door to door teams.

28. The claimant gave clear and logical answers to the specific issues raised in the dismissal letter. However, the claimant was not given opportunity to make those key responses to the issues raised by the respondent before he was summarily dismissed.

29. Indeed the claimant was not given any show cause letter nor was he called to a hearing to explain the issues raised by the respondent. R.W.1 under cross-examination conceded that if the claimant was not given a hearing before the summary dismissal, then the dismissal would be unlawful.

30. R.W.1 stated that she did not know if the claimant was given any hearing because she joined the respondent after the dismissal and only relied on records given to her.

31. It is the Court's considered finding that the claimant has demonstrated on a balance of probability that he had reasonable explanation to the issues raised by the respondent but was not given opportunity to do so.

32. The respondent violated sections 36, 41, 43, 44 and 45 of the Employment Act, 2007 and the summary dismissal of the claimant was unlawful and unfair.

33. The Court relies on the decision by Linnet Ndolo J. in **Moses Kaunda Moro –vs- CMC Motors Group Ltd. [2013] eKLR** in which the judge found the dismissal of the claimant to be unlawful and unfair for the failure by the respondent to follow the procedure set out under Section 41 of the Employment Act, 2007. The judge said:-

“the Court found no evidence that the claimant was subjected to either the disciplinary procedure set out in Section 41 of the Employment Act, 2007 or the Respondent’s internal disciplinary procedure rules. I therefore find the procedure adopted by the respondent in summarily dismissing the claimant irregular.”

34. This Court in the present case similarly finds the procedure followed by the respondent in summarily dismissing the claimant irregular and the summary dismissal is unlawful and unfair.

35. The claimant is entitled to compensation under Section 49(1) (c) and 4 of the Employment Act. The claimant was a senior officer with the respondent and had about 24 years left to retirement age. The claimant suffered loss and damage by fact of the unlawful termination of employment. No contribution to the dismissal by the claimant has been proved by the respondent. The claimant was not paid in lieu of notice nor given any other compensation for the unlawful dismissal. The claimant had not found alternative employment at the time of the hearing of the suit. The claimant had served for one year and five (5) months at the time of summary dismissal.

36. Following the decision of the Court in **Moses Kaunda Moro Case, supra** the Court awards the claimant five (5) month’s salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.(31,000x5) 155,000 and one month salary in lieu of notice in the sum of Kshs.31,000.

37. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

(a) Kshs.155,000 in compensation.

(b) Kshs.31,000 notice pay.

Total: 186,000

(c) Interest at Court rates from date of judgment till payment in full.

(d) Costs of the suit.

Dated and delivered at Nairobi this 11th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Mwakio Kirwa & Co. Advocates for the claimant.

Ashitiva Advocates – LLP

Chrispo: Court clerk.