



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1437 OF 2017

BERNARD OGARI.....CLAIMANT

VERSUS

FREIGHT IN TIME LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking the resolution of 2 issues he framed as – unfair, unlawful termination and the non-payment of terminal dues. The Claimant averred that he was employed by the Respondent working as a commercial manager from 15th June 2015 with due diligence and to the satisfaction of the Respondent. He averred that his starting salary was Kshs. 275,000/- a month. The Claimant averred that upon successful completion of probation the salary was to be reviewed upwards to a maximum gross salary of Kshs. 350,000/-. The Claimant averred that the Respondent failed to review the salary after the probation period in spite of several requests and that his core duties were to develop and manage the commercial department in Kenya (Nairobi and Mombasa station) and support and maintain as well as improve service levels among other essential functions and responsibilities captured in the job description form. He averred that his performance was above average and that he made several achievements within the short period he worked with the Respondent as exhibited in the performance appraisal form attached to his claim. He averred that on 31st May 2016 the Respondent unilaterally varied the Claimant's terms of employment by introducing personal performance targets which were unrealistic in the job market to achieve within a period of three months as evidenced in the variation of contract of employment letter. The Claimant averred that he was reluctant to accept the variation of the terms of the contract as he was not consulted and that the performance targets were not only unrealistic to achieve in the job market but were also actuated with malice and a scheme calculated to force him out of employment. He averred that the Respondent unlawfully terminated his employment on 20th June 2016 on account of non-performance as he was neither issued with a warning letter and/or a notice to show cause in regard to his performance nor was he taken through any process as a requirement under Section 41 of the Employment Act 2007. He averred that this was a calculated scheme to constructively terminate the Claimant's employment or force him out of his employment. He averred that he was not fairly accorded an opportunity to be heard as required under Article 41 of the Constitution and that the whole procedure offended the rules of natural justice. He therefore sought unpaid salary arrears as per clause 4 of his contract for 6 months – Kshs. 450,000/-, payment of bonus as per clause 11 of the contract, maximum compensation, damages for breach of contract, costs of the suit plus interest.

2. The Court record does not bear any defence to the suit which position seems apposite the motion dated 12th November 2020 seeking stay of execution proceedings and/or entry of judgment in respect of this suit pending the hearing and determination of the motion. The application sought further that the proceedings of 5th December 2018 be set aside and the Defendant be allowed to prosecute the counter claim and that in the alternative the Plaintiff be recalled for purposes of examination in chief and re-examination. The grounds on the face of the motion were that the application was brought without undue delay upon the realization that the matter proceeded ex-parte on 5th December 2018. It was also asserted on the grounds that the Respondent had a good defence to advance as shown in the draft defence (which was not attached). The affidavit in support was sworn by Kennedy Otieno Arum the Respondent's counsel. In it, Counsel asserted that on the same day he was engaged for hearing in **ELR No. 968 of 2010 – Jane Khainza v Said Mohamed** which was coming up for hearing. Counsel asserted that his clerk informed him, which information he verily believed to be true, that she engaged an advocate who informed the Court to place aside the matter with the belief that he would be able to attend and make relevant application. He averred that while in Court his phone went off due to low battery and he could not communicate to the lawful (sic) clerk and he had to attend to an urgent personal matter in the estate. It was asserted that the Respondent was willing and had been diligent to defend the matter to be heard on merit and to prosecute the counterclaim.

3. Despite there being the said motion with the assertions therein, the Court noted from the record that the matter came up in Court on 5th December 2018 before the Hon. Mr. Justice Radido and his record of the matter shows that in attendance for the Claimant was Ms. Njagi holding brief for Mr. Bosire while Ms. Nchogu held brief for Mr. Arum for the Respondent. The record shows that Ms. Njagi informed the Court that the Claimant had complied with pre-trial and that the Respondent had not filed a response. Ms. Nchogu informed the Court that the Respondent had not complied and thus sought time to file a response for which the Respondent undertook to file within 14 days. The Court determined that no reason had been advanced as to why the Court order of 14th May 2018 had not been complied with. The matter was therefore to be placed for formal proof at a date to be taken at the Registry. On 13th December 2018 the case was set for formal proof on 26th

September 2019 but the case did not proceed as the witness for the Claimant fell ill. It was fixed for hearing on 7th December 2020 when this Court heard the Claimant in the absence of the Respondent.

4. The Claimant testified that he worked as the commercial manager of the Respondent his former employer. He stated that he was in charge of Kenya and was forced to come to Court seeking redress as the Respondent terminated his services unfairly despite having poached him from another company. He produced the evidence attached to his claim and testified that the Respondent did not follow the law in terminating his services and that the prayers in his claim were for compensation for his unlawful dismissal. He conceded that the Respondent had paid him 1 month's salary and the leave pay and the 4 months unpaid salary. He sought the payment of the claim as articulated in his pleadings and asserted there had been no evidence of his alleged non-performance.

5. The Claimant filed submissions in which he submitted that the key issues for consideration were whether the Claimant was entitled to a salary review, whether the Claimant was eligible for annual bonus and whether he was unlawfully terminated. He submitted that the Respondent had provided that under clause 3 of the appointment letter it was willing to review the Claimant's gross salary up to a maximum of Kshs. 350,000/- after successful completion of his probation. On the issue of bonus, the Claimant submitted that he did not receive bonus for 2016 despite the Respondent having performed well in the 2016 financial year recording good profit. As to whether he was unfairly terminated he submitted that he only had one appraisal conducted and there were no measures in place to ascertain whether his performance had improved or not. He submitted that it was notable the Respondent did not accord him a fair hearing as enshrined in Article 41 of the Constitution and Section 41 of the Employment Act. He relied on the case of **Jane Samba Mukala v Ol Tukai Lodge Limited [2010] eKLR** where the Court held that where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in Section 8 of the Employment Act and must show that in arriving at the decision of poor performance they had put in place a policy or practice to measure good performance as against poor performance. The Claimant submitted that the reasons for the termination as well as the process of termination was unfair and unlawful and cannot by any means whatsoever meet the threshold set out in the Employment Act particularly, Sections 41, 43(1) and 45 of the Employment Act. He submitted that having proved his case he is entitled to prayers as per the claim.

6. The Claimant's suit sought relief in respect to two issues which are what crystalized as the issues in contention. First, whether there was unfair, unlawful termination from employment and secondly whether there was non-payment of terminal dues. By his own admission the Claimant asserts that the Respondent paid him one month's salary, leave dues as well as 4 month's unpaid salary. From the Court's surmise the second issue is not an issue for determination as the Respondent apparently met its obligations to pay his terminal dues. That leave only one issue for determination which is whether the Respondent unfairly or unlawfully terminated his employment.

7. The Claimant was dismissed ostensibly for poor performance. His performance appraisal for the period June 2015 to May 2016 showed that he generally met expectations and was to improve in two areas - maintaining control over the activities of the team and drives implementation by team members. His comments on the last page of the appraisal report included an admission that he a few areas need improvement and consistency. He said that he could improve in his performance if a clearer guideline was put in place as to how his targets as commercial manager should be evaluated. He reminded the appraiser that he needed a salary increase as discussed before and indicated.

8. In the case of **Jane Samba Mukala v Ol Tukai Lodge Limited** (*supra*) the learned Judge stated thus:

Majority of employers have now adopted various tools for performance appraisal every year to address matters of employee performance. This is set out as an elaborate system where an employee is given a chance for self evaluation, then peers are invited to evaluate and a supervisor is given a chance to give their evaluation and comments. Where there are weak areas identified following this evaluation, the employee is given work target with a time plan on how to address these weaknesses. A follow up review is done and where such an employee is still found to be below the set criteria, then a warning and eventual termination may arise. Where such an employee show improvement, they are given a chance to demonstrate that indeed given time and the necessary support, they can give their best. This would constitute what is procedurally and substantively fair to an employee.

In this case, the respondent failed to consider or apply the appropriate test for judging the procedural and substantive fairness of a poor work performance termination with no objective criteria that provided for dismissal or termination as a reasonable sanction for failure to meet performance standards where the employee had been made aware of the standard and was given a reasonable opportunity to improve. (emphasis mine)

9. When the Respondent decided to dismiss the Claimant for non-performance less than one month after the appraisal, it is not shown that clear guidelines had been put in place for the proper evaluation of the Claimant. Neither was there any indication the Claimant was given a reasonable opportunity to improve after the evaluation in May 2016. In the Court's view the decision to dismiss for non-performance was without basis and thus fits in the prism of unlawful and unfair termination. The Claimant was not informed prior to dismissal of the reason for termination as prescribed under Section 41 of the Employment Act which provides a safeguard where the performance of an employee is called into question. Having failed to follow the law the dismissal meted out was therefore unlawful within the meaning of Sections 41 and 43 of the Employment Act. Having so found, the Claimant would be entitled to compensation for the unlawful dismissal which is capped at 3 months of his salary. As his salary was only subject to review based on performance and the Claimant having only worked for one year and there having been only one appraisal, the Court did not have sufficient material to make a finding on the appropriateness of an increment. In the final analysis there is judgment entered for the Claimant as follows:-

- a. The dismissal of the Claimant was unlawful and unfair within the meaning of Section 43 of the Employment Act;
- b. 3 months salary as compensation for unlawful dismissal – Kshs. 825,000/-;
- c. Costs of the suit
- d. Interest at court rates on b) above from date of judgment until payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2021

Nzioki wa Makau

JUDGE