



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.2 OF 2020

(Before D.K.N.Marete)

JOHN ANGWENYI BASWETI.....CLAIMANT

VERSUS

ALMASI BEVERAGES LIMITED.....1ST RESPONDENT

ALMASI BOTTLERS LIMITED.....2ND RESPONDENT

JUDGMENT

This matter was originated by way of Memorandum of Claim dated 24th January, 2020. The issue in dispute is therein cited as;

Unfair, unlawful and constructive dismissal from employment and unlawful withholding of terminal dues

The Respondent in a Respondent's Memorandum of Defence dated 22nd July, 2020 denies the claim and prays that the same is dismissed with costs to herself.

The Claimant's case is that vide a letter dated 1st January, 2018, he was employed by the Respondent. He successfully completed his probation period and was confirmed Human Resource Manager (ERS & Administration) earning a gross salary of Kshs.301,833.00 per month.

The Claimant's further case is that he served dedicatedly and reservedly. In as much, the Respondent, through her Chief HR office engaged in nefarious and unfair labour practises to his detriment. This is as follows;

- a) Failing to provide a relevant job description to the Claimant for the work that he had been employed for and was continuously tossed from one position to another at the Chief Executive office and General Manager at will without any certainty as to which work, he was to do and how to do it;*
- b) Forcing the Claimant to work and or undertake work in an area that he had not been hired for and not of his area of expertise. The Claimant had been hired for his expertise in human resource employment but was forced to work and serve in other departments e.g. the legal department without being offered any training or consultations whatsoever;*
- c) The Respondent often introduced unattainable and unrealistic targets through a very questionable and misused assessment criteria contrary to the terms of the employment contract and labour laws with the penalty of countless threats of dismissal from employment if the targets are not met;*
- d) Forcing the Claimant to work overtime without pay and very late in the nights, during public holidays and on Sundays with threats of termination of his employment if he does not and;*
- e) The perpetual insulting, abusing and use of profanities by the Respondents Chief executive officer and, General Manager Resource from time to time against the Claimant; and*
- f) Subjecting the Claimant to unfavorable and harsh working conditions and environment as described above including forcing the Claimant to work very late in the night without caring about his safety.*

g) *Withholding and/or making unlawful deductions to the Claimant's payment from the moment his services were unfairly terminated.*

h) *The Respondent subjected the Claimant to ridicule constantly blames for all court cases they lost.*

i) *The Respondent's often bad-mouthed and engaged the Claimant in unnecessary confrontation. Many are the times the Chief executive offices openly verbally confronted the Claimant for no apparent reason.*

j) *Withholding the Claimant's (Add: Original) certificate of Service.*

k) *Subjecting him to an unfair hearing and sticking his appeal out without considering the appeal and the issues raised.*

This *in toto* made his working environment and conditions deplorable, unfavourable and untenable.

The Claimant's other case is that despite his especial service, the Respondent, by a letter dated 11th September, 2019 issued him a notice to show cause letter demanding a written explanation regarding his alleged incompetence leading to company losses. These allegations were new and had never arisen in the course of work. They were driven by *mala fides* and ill will orchestrated by his constant pressure on him to retire.

It is the Claimant's case is that despite his issue of a written explanation, the Respondents proceeded to form and institute disciplinary proceedings against him. He appealed against this move but his appeal was even considered on a tribunal formed to listen to the matter in accordance with the law.

The Claimant's service was terminated vide a letter dated 24th September, 2019. This was contrary to the Employment Act, 2007. This is because his accuser also comprised and participated in the disciplinary committee and that the charges adjudicated on at the disciplinary hearing were totally different from those notified and answered by himself. Further, the minutes of the said disciplinary committee were never availed or disclosed to him and he was neither given a chance to explain himself or afforded an opportunity to have a representative as required by the law.

The Claimant in the penultimate avers that the Respondent's conduct as displayed by her chief officer constituted a repudiatory breach of contract whereas there was no complaint against his work or performance by the respondent's clients against him.

He claims thus,

1. *Immediate and unconditional admission liability in writing for unlawful and unfair termination of our client's employment whereafter the issues of quantum will be gone into. In this regard, without prejudice to such other remedies our client is entitled to, you are bound to pay to our client one (1) year consolidated gross salary amounting to Kshs.3,552,000.00.*

2. *Pay of Kshs.25,000.00 deducted from his salary.*

3. *Certificate of service.*

4. *Costs of the suit plus interest thereon from the date of Award.*

5. *Any other relief that this honourable court may deem fit to and just to grant in the circumstances.*

The Respondent's case is a denial of the claim. However, they admit that the Claimant was employed in 1998 as a Human Resource Officer and was variously positioned until 1st January, 2018 when he was placed as HRM (Employee Relations Services and Administration)

It is the Respondent's case that all throughout his employment, the claimant's performance was under par and despite being put under various improvement plans, this continued to deteriorate leading to his dismissal on 1st October, 2019.

It is the Respondent's further case that due to the Claimant's under performance in 2017 and 2018, which he was alerted on but neither atoned or appealed against.

Further, he was to be issued with a Notice to show cause letter dated 13th September, 2019 which in his response requested as follows;

"At paragraph 5 of the Claimant's response to the show cause letter, the Claimant admitted that there had been gaps in his performance and requested to be given six (6) months to improve. The Claimant proceeded to give an action plan of what he intended to achieve".

This was admission that his performance was wanting.

The Respondent avers that the claimant's response was unsatisfactory thereby prompting the Respondent to institute disciplinary proceedings with the involvement of the claimant. He was issued with the incriminating outcome of these proceedings. This is as follows;

19. *The Claimant responded in writing and in his response, the Claimant did not admit liability for poor performance as he had in*

his response to the show cause letter. Refer to Appendix 10 being the Claimant's response to the summary of the disciplinary hearing.

20. In fact, the Claimant all but rescinded express admissions he had made in his response to the show cause letter. For instance, in his response to the show cause letter, the Claimant admitted at Paragraph 4 thereof, that he had not been sending weekly HR Operations reports but in his response to the summary of the disciplinary hearing, while addressing the Fifth Accusation- Wilful refusal to provide top management with records', the Claimant reneged on his admission by alleging that he had 'religiously' sent these reports.

His service was ultimately terminated.

The matter came to court variously until the 26th November, 2020 when the parties agreed on a determination by way of written submissions.

The issues for determination in the circumstances therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the Claimant entitled to the relief sought?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The Claimant in her written submission dated 17th January, 2021 enters a case of unfair and unlawful termination of employment. In this he reiterates his case as presented and faults the disciplinary process leading to his termination of his employment on grounds of its composition. It is his submission that this was illegal all the way. He submits thus;

The claimant has thus shown that the procedure leading to his termination was overly flawed. To this end, he indicated that he was ambushed with allegations that he had never heard of during the tenure of his employment. That no proof was tabled to show that the company incurred losses and lastly the very same people that accused him were also the panellists at the hearing nor were the same. Tentatively that the appeal he lodged via his letter dated 28th September, 2019 and labelled exhibit JAB 4a was never deliberated upon.

The Claimant further seeks to buttress his case by relying on the authority of **Mary Chemwemo Kiptui v Kenya Pipeline Company Limited (2014) eKLR**, where the court observed thus;

The industrial court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the strict provisions of the law and to avoid making the same invalid. This court in the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited Cause No.74 of 2013 held that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act.

Further,

Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.

It is his case that the Respondent's counter claim comprises of non-issues only intended to crowd the courts mind and should be disregarded in a determination of this cause.

The Respondent in her written submissions dated 3rd February, 2021 reiterates her case and submits that the termination of the employment of the Claimant was lawful and compliant.

The Respondents written submissions also display the reasons for termination of employment and narrates that this was occasioned by his non-performance which was ably addressed and countenanced but which the Claimant was not able to remedy, or at all. The reasons for termination of employment were availed to the Claimant and he was fully involved in the disciplinary process leading to the termination of his employment.

Overall, the Respondents case overwhelms that of the Claimant. She well illustrates and demonstrates a case of termination of employment which pursued all disciplinary process. The Claimant was taken through the legal modules of discipline culminating in an appeal against termination of his employment. He participated in all this. This complies with the provisions of Section 41 and 43 of the Employment Act, 2007 which provide for substantive and procedural fairness in cases of termination of employment. The Claimant cannot be heard to complain. I therefore find a case of lawful termination of employment in this cause. This answers the first issue for determination.

The 2nd issue for determination is whether the Claimant entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, the Claimant becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same. And this answers the last issue for determination.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Ochieng instructed by E.Ochieng & Company Advocates for the Claimant.
2. Mr. Kilonzo instructed by Federation of Kenya Employers for the Respondents.