



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI

CAUSE NO. 2440 OF 2016

BETWEEN

SIMON MBUGUA.....CLAIMANT

VERSUS

RIDHIKA CAPITAL LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Kariuki Kagunda & Company Advocates for the Claimant

Kasina & Associates, Advocates for the Respondent

JUDGMENT

1. The Claim herein was filed on 26th November 2016. The Claimant avers, he was employed by the Respondent as a Manager on 14th February 2015, on a monthly salary of Kshs. 75,000.
2. He was confirmed on 17th October 2015, and his monthly salary increased to Kshs. 80,000.
3. He received a letter of warning from the Respondent, dated 21st June 2016. He was told that the Respondent had sustained losses and that the Staff had lost confidence in his stewardship.
4. He replied at length on 24th June 2016, explaining that the problem was caused by the Board of Directors, who would bypass the Claimant, and make their own decisions.
5. The Claimant was placed on compulsory leave on 13th July 2016, to allow the Respondent evaluate his performance. He was not paid his salary for the period of compulsory leave.
6. He was issued a letter of termination of employment dated 16th August 2016. The letter gave the reasons for termination to include Respondent's financial losses, and poor performance by the Claimant. It was alleged that the Claimant did not properly manage, appraise and disburse loans, and his managerial culture was poor.
7. He was not issued letter to show cause. He was not given a hearing before the Board of Directors. There was no valid reason or reasons, to justify termination. He was not given notice of termination, and was denied his salary for the period under compulsory leave. He never went of annual leave or paid in lieu thereof. He was not issued his Certificate of Service.
8. His prayers are: -

- a. 1-month salary in lieu of notice at Kshs. 80,000.
- b. 1-month salary for the period of compulsory leave at Kshs. 80,000.
- c. Service pay at 15 days' salary for 1 ½ years of service, at Kshs. 69,230.
- d. Annual leave for 1 ½ years at Kshs. 96,922.
- e. 12 months' salary in compensation for unfair termination at Kshs. 960,000.

Total.....Kshs. 1,286,153.

- f. Declaration that termination was unfair.
- g. General damages for breach of contract.
- h. Punitive damages for victimization.
- i. Certificate of Service.
- j. Costs
- k. Interest.
- l. Any other suitable order.

9. The Respondent filed its Statement of Response and Counterclaim, on 15th December 2016. If the Claimant was issued a contract of employment by the Respondent, it was subject to satisfactory performance. The Claimant did not perform satisfactorily. He was the source of financial losses sustained by the Respondent. He was placed on suspension in good faith. Termination was fair.

10. At the time of termination, he had a loan of Kshs. 227,490. The Respondent states that it has suffered loss and damages as a result of the Claimant's poor management. It seeks general damages by way of counterclaim. It urges the Court to allow the Counterclaim and dismiss the Claim with costs to the Respondent.

11. Hearing was scheduled for 25th February 2021. There is an Affidavit of Service sworn on 17th July 2020, showing that Hearing Notice was served upon Kasina & Associates, Advocates for the Respondent, on 17th July 2020. It was received, and receipt acknowledged by Dan J. Kasina Advocate. The Respondent and its Advocates did not attend Court on the date appointed for hearing. The Claimant gave evidence and rested his case.

12. He restated the contents of his Statements of Claim and Witness on record, as summarized at the beginning of this Judgment. There is no need to rehash his evidence here, as he was not subjected to cross-examination, and added nothing significant in his oral evidence, to what is contained in his Statements of Claim and Witness.

The Court Finds: -

13. It is established that the Claimant was employed by the Respondent, through a letter of appointment dated 4th February 2015, exhibit 1, of the Claimant's documents.

14. He was employed as a Manager.

15. His basic monthly salary was Kshs. 75,000, with a monthly airtime allowance of Kshs. 5,000.

16. He was confirmed through a letter dated 1st October 2015. His basic monthly salary was increased from Kshs. 75,000 to Kshs. 80,000. The letter does not say anything about the airtime allowance, post-confirmation.

17. He was warned for poor performance, and waning staff confidence in him, by the Board of Directors, in a letter dated 21st June 2016.

18. He replied on 24th June 2016, explaining that his situation was caused by the conduct of the Board of Directors, which sidestepped Management and engaged Staff directly, in disregard of existing structure and protocol.

19. He was sent on compulsory leave over 3 issues: handling of company issues; conduct towards Staff; and integrity issues. He was advised that his performance would be evaluated during compulsory leave.

20. He replied on an undisclosed date, through a letter marked exhibit 6 in his documents, undertaking to unreservedly abide by the decision taken against him, and committing to avail himself to the Respondent, whenever required.

21. The Respondent issued the Claimant a letter terminating employment, effective 16th August 2016. The reasons given for this decision are: company losses and performance during the Claimant's tenure; quality of loans appraised and disbursed; and managerial culture. He was advised that he would be paid terminal benefits within 3 months of termination. He was advised too, that the statement on lack of integrity made earlier, had been withdrawn.

22. From the trail of papers above, it can easily be concluded that the Respondent failed the basic tests on substantive and procedural fairness.

23. First, the allegations against the Claimant were not established by evidence. There is no investigation report on record, showing that the Claimant was the cause of financial losses sustained by the Respondent; there was no evidence of financial losses; there was no evidence of quality of loans appraised and disbursed by the Claimant; there was no evidence of any loans appraised and disbursed at all, by the Claimant; and managerial culture is quite vague. What did the Respondent mean by managerial culture? What was managerial culture, how did it relate to the Claimant, and in what way did managerial culture amount to an employment offence?

24. There was complete failure on the part of the Respondent, in establishing substantive justification, under Section 43, 45 and 47[5] of the Employment Act.

25. Second, there was no hearing envisaged by Section 41 and 45 of the Employment Act. The Claimant was placed on compulsory leave. He was advised performance evaluation would be carried out during this period. He offered himself for evaluation but was not called for any such exercise. Instead, he was informed through the letter of termination, that the Board had sat down and evaluated his performance. He did not participate in performance evaluation. He was not called for any hearing. Termination was at the will of the Respondent. There was no letter to show cause, or invitation to attend hearing, in the company of a colleagues, under Section 41 of the Employment Act. There were no specific charges put to the Claimant at a hearing forum.

26. Termination was unfair, for lack of substantive justification and procedural fairness. It did not meet the statutory threshold of fair termination, under Sections 41, 43, 45 and 47[5] of the Employment Act.

27. ***The prayer for notice pay is allowed at Kshs. 80,000 as prayed.***

28. The Claimant was on a term-indefinite contract. He served probation and was confirmed. He commenced employment on 19th February 2015, and his contract was terminated on 16th August 2016. He worked for 1 ½ years. He expected to go on working until retired. He was not at fault in termination of his contract. ***He is allowed compensation for unfair termination, equivalent of 4 ½ months' salary at Kshs. 360,000.***

29. He was sent on compulsory leave effective 18th July 2016. Termination was effective 16th August 2016. He was not paid salary for the period of compulsory leave, which the Court agrees, was about 30 days. ***He is granted salary for 1 month under compulsory leave, at Kshs. 80,000.***

30. He states without contestation, that he did not go on annual leave for the period in employment. No annual leave documents were exhibited by the Respondent. His contract entitled him annual leave of 21 days. He served 1 ½ years, translating into annual leave entitlement of 31.5 days. ***Based on a working month of 26 days, he is granted annual leave pay at Kshs. 96,923.***

31. There is no support in evidence for service pay. The Claimant's contract, paragraph 7. 4 suggests he was subscribed to the N.S.S.F, and therefore, ineligible for service pay, under Section 35 of the Employment Act. This prayer is declined.

32. There is similarly no evidence to support the prayers for award of general and punitive damages. The Claimant has adequately been compensated for unfair termination.

33. ***Certificate of Service to issue under Section 51 of the Employment Act.***

34. ***Costs to the Claimant.***

35. ***Interest allowed at the rate of 16% per annum, from the date of Judgment till payment is made in full.***

36. The Respondent offered no evidence to support the Counterclaim. It alleges it was owed a specific amount of Kshs. 227,490 by the Claimant at the time of termination. Rather than counterclaim the specific sum, the Respondent counterclaims general damages. General damages for what? There is no support for the Counterclaim and the same is declined.

IN SUM IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant: notice of 1 month at Kshs. 80,000; compensation for unfair termination equivalent of 4 ½ months' salary at Kshs. 360,000; salary for the period under compulsory leave at Kshs. 80,000; and annual leave at Kshs. 96,923- total Kshs. 616,923.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest allowed at the rate of 16% per annum, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 23RD DAY OF JULY 2021.

JAMES RIKA

JUDGE