



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 874 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

IDRIS OMAR ABDI.....CLAIMANT

VERSUS

GARISSA WATER AND SEWERAGE COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claim herein was instituted vide the Claimant's memorandum of claim dated 20th May, 2015 and filed on 21st May 2015. The Claimant prays for judgement against the Respondent for:

i. An order of injunction to restrain the Respondent from recruiting or appointing any other person to the position of Managing Director of the Respondent

ii. An order of reinstatement of the Claimant to his position of Managing Director.

iii. Alternatively, an order for

a. One month's salary in lieu of notice, being Kshs.120,000/=

b. Compensation for unfair termination, being the maximum provided under Section 49 of the Employment Act for 12 months' salary, Kshs.1,440,000/=

c. Salary of unexpired term of the contract, being salary for 26 months, Kshs.3,120,000/=.

d. Certificate of service

iv. Costs of this suit

v. Interest at court rates for all amounts awarded to the Claimant.

2. The Respondent filed a memorandum of reply dated 2nd June 2015.

3. The court directed that the hearing proceeds by way of documentary evidence upon application by the Claimant. Both parties filed sworn statements as evidence.

Claimant's Case

4. The Claimant, through the memorandum of claim and sworn witness statement avers that he was employed on a fixed term contract of three years by the Respondent as its Managing Director on 24th July 2014. That at his appointment, he was entitled to a basic salary of Kshs.120,000/= per month together with other benefits as set out in his employment letter.

5. The Claimant states that on 16th February 2015, the Respondent sent him on a two month's compulsory leave with full pay to pave way for an audit to be conducted on the Respondent and himself. He was also relieved of his duties pending completion of the audit.

6. The Claimant avers that upon receiving a letter on 16th February 2015, he wrote to the Respondents through his advocates on 26th February 2015 and demanded he be given an opportunity to respond to any queries raised by the auditors appointed by the Respondent. The Respondent did not respond to the letter and as such his demands were not met.

7. On 16th April 2015, the Claimant states that the Respondent wrote to him informing him that the audit report had revealed several issues against him and further informed him that he would be dismissed summarily. He avers that this letter was delivered to him by way of courier service on 28th April 2015.

8. He states that he was given seven days from the date of the letter to respond to the letter and the alleged findings made against him. The Respondent unilaterally and without regard to the law decided to pay the Claimant a quarter month's pay pending the further determination by the Respondent. The Claimant states that he wrote to the Respondent on 21st April 2015 and demanded to be provided with the audit report and to be allowed to Respondent within 10 days of receipt of the audit report and the Respondent did not respond to the demand.

9. He avers that upon receipt of the letter he was orally instructed by the Respondent's directors to respond to the letter of 16th April 2015 by close of business on 4th May 2015. He replied to the letter by way of a letter dated 4th May 2015 which was delivered via email on the same day and a hard copy delivered on 5th May 2015. This letter responded to all the issues raised in the audit report and reiterated in the letter of 16th April 2015.

10. The Claimant states that on 4th May 2015, the Respondent summarily dismissed the Claimant via a letter setting out the allegations in the audit report and others not set out in the report. He avers that he did not receive any notice or invitation to the Board meeting of 4th May 2015 that deliberated his dismissal and as a result was denied an opportunity to defend himself during the crucial meeting.

11. As such, he states that his termination was malicious, unlawful and unfair the particulars of which are as follows:

a. There was no valid reason for termination of the Claimant;

b. All the allegations raised on the audit report relate to the Respondent's operational requirements and conditions and did not relate to the conduct of the Claimant which allegations the Claimants responded to;

c. The Respondent terminated the Claimant on the allegations that had not been raised in the audit report and which did not form part of the reasons for his compulsory leave;

d. The Respondent did not give the Claimant an opportunity to be heard on allegations which formed part of the reasons for termination before the Respondent terminated him;

e. The Respondent did not follow the procedure under the Employment Act while terminating the Claimant;

f. The decision to pay to the Claimant a month's quarter pay was not based on any fact or law and was meant to cause the Claimant mental anguish, embarrassment and pain;

g. The directors of the company did not have the mandate to terminate the Claimant as their tenure in office ended on 1st May 2015.

Respondent's Case

12. The Respondent countered through a response and witness statements sworn by Mr. Abdi Haji and Mr. Salan Nuno; the Human Resource officer and Chairman of its Board respectively. The Respondent avers that the termination of the Claimant emanated from the Board's decision that directed an audit investigation to be carried out by the Kenya National Audit Office (KENAO); an independent, competent and professional body.

13. It submits that it acted lawfully and in accordance with the law and that it had granted the Claimant an opportunity to defend himself but he insubordinately chose not to attend. It added that a perusal of the contract of employment in issue and relevant statutes will show that the termination on 4th May 2015 was lawful.

14. The Respondent states that the summary dismissal was precipitated by information contained in the Audit report dated 10th April 2015 and the failure of the Claimant to make timely responses in his defence to issues raised therein. It avers that the said dismissal was occasioned by gross financial mismanagement and irregular salary increment by the Claimant.

15. The Respondent states that the Claimant, in breach of the employment contract mismanaged the finances of the company and irregularly and fraudulently diverted funds to himself and other employees without prior consultation as evidenced in the Report by the auditors. It avers further that the Claimant purported to fraudulently alter the original employment agreement that stipulated his salary as KShs.120,000/= to KShs.300,000/= as evidenced by the purported employment letter dated 4th July 2014 placed by the Claimant in his human resource file.

16. As such, the Respondent states that the Claimant did actually deserve to be dismissed summarily. It adds that the Claimant was sent on compulsory leave with full pay after he appeared before the Respondent's sub-committee on Finance and human resource. The Respondent avers that it will institute criminal charges against the Claimant for the above-mentioned offences.

Claimant's Submissions

17. The Claimant submitted that the termination of his employment contract was unlawful and relied on the case of **Moi Teaching and Referral Hospital v James Kipkonga Kendagor (2019) eKLR** where the Court of Appeal, held that although nothing stops an employer from summarily dismissing an employee, section 44 of the Employment Act requires an employer to demonstrate that the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

18. The Court further held that an employer must comply with the provisions of Section 41 of the Act which provides the procedure for notification and hearing before termination on grounds of misconduct. The Claimant submitted that the Respondent blatantly ignored to follow the procedure envisaged above and terminated his employment unilaterally.

19. The Claimant further urged the court to be guided by the case of **Kenafriic Industries Limited v John Gitonga Njeru (2016) eKLR** where the court, while evaluating what constitutes unfair termination, held that three things must be satisfied. That the reasons for the termination must be given, these reasons must be fair and the procedure followed too must be fair. The court added that these three conditions are designed to apply to all cases in which an employer instigates the termination of employment.

20. The Claimant added that these three factors were not satisfied prior to his termination.

21. The Claimant further relied on the case of **Standard Group Limited v Jenny Luesby (2018) eKLR** where the Court held that an employee must be given a hearing as the law made it mandatory even in the worst case scenario where an employee grossly misconducted himself or herself. That the right to hearing is what amounts to compliance with the true tenets of natural justice. That however senior an employee is, where the case is that of misconduct, the seniority is no justification for failure to meet the mandatory provisions of the law.

22. On whether the reasons for termination were justified, the Claimant submitted that in the **Kenafriic case (supra)** the court held that it is trite law that where the termination of employment is contested and alleged to be unfair, the burden of proving the unfairness rests on the employee while the burden of justifying the grounds for termination or dismissal rests with the employer.

23. He contends that he has proved that his termination was unfair and the grounds for his dismissal were not justified. He submits that the Respondent has failed to discharge its burden to justify the grounds for dismissal or that the procedure it used to dismiss the Claimant was lawful. That it did not provide any cogent proof or evidence.

24. The Claimant added that he is indeed entitled to the remedies sought as provided under Section 49 as read with Section 50 of the Employment Act as he has successfully proved that his dismissal was unfair and wrongful. That the court has the discretion to award the remedies under Section 49 as held in the Supreme Court's decision in the case of **Kenfreight (E.A) Limited v Benson K Nguti (2019) eKLR**.

Respondent's Submissions

25. The Respondent submitted that it followed due process of the law in terminating the Claimant's contract. It relied on the provisions of Section 41 and 44 of the Employment Act to justify the decision to terminate the contract on grounds of gross misconduct which justified his summary dismissal.

26. It further submitted that it had demonstrated that the termination of the Claimant's service was fair and lawful and as such, no other compensation is payable. It relied on the provisions of Section 45(5) of the Employment Act.

Analysis and Determination

27. Having considered the facts of this cause, evidence adduced by the parties hereto, submissions and authorities cited by both parties, the following are the issues for determination:

- i. Whether the Claimant was terminated unfairly.
- ii. Whether the Claimant is entitled to the reliefs sought.

Whether the termination was unfair

28. The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

29. An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer's burden is justifying the reasons for such termination.

30. The Respondent has stated that the Claimant herein was summarily dismissed for gross financial mismanagement and irregular salary increments to himself and other members of staff without prior consultation.

31. In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

32. In **Swaleh David v Premier Cookies Limited [2021] eKLR** the Court stated:

“Under Section 45 of the Employment Act, termination of an employee’s contract of service is unfair and therefore unlawful if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. A reason is valid and fair if it relates to the employee’s conduct, capacity and compatibility or based on the employer’s operation requirements.

On the other hand, procedure is fair if the employer accords the employee a fair hearing in the presence of another employee of his choice and the representation made by the employee and his companion are considered before making the decision to terminate the contract.”

33. Both parties are in agreement that the Claimant was engaged in the position of Managing Director and Chief Executive Officer of the Respondent by letter dated 24th July 2014. That he was sent on a two months’ compulsory leave to pave way for an audit to be conducted by letter dated 16th February 2015.

34. The Claimant was not accorded a chance to defend himself. This is admitted in the witness statement of ABDI HAJI, the Human Resource Manager of the Respondent at paragraph 6 thereof where he states –

“Although the Respondent was entitled to terminate the employment of the Claimant upon proper reasons being given as per the Employment Act and one (1) month’s notice being issued to the Claimant, the Respondent nevertheless states that such summary dismissal was precipitated by the information contained in the Audit Report dated the 10th of April 2015) and the failure of the Claimant to make timely response in his defence to issues raised therein.”

35. The Claimant was never even invited to a disciplinary hearing. The audit report whose findings were used to terminate the Claimant’s employment was never availed to him. There is no indication from the report that the auditors ever contacted the Claimant to clarify any issues during the preparation of the audit report even though the Claimant requested to be given such opportunity.

36. From the foregoing, it is clear that the Respondent failed to comply with fair procedure as envisaged under Section 41 or to prove the reasons for dismissal under Section 43 of the Act. The termination was therefore unfair within the meaning of Section 45(2) and (5) of the Act.

Remedies

37. The Claimant sought several remedies. The first prayer is an order to restrain the Respondent from recruiting or appointing any other person to the position of Managing Director. The preservation of a position can only be made by the Court where the Claimant is likely to be reinstated into that position. It is an order that must first be made at interlocutory stage before the suit is heard and determined. This is because the remedy of reinstatement can only be ordered by the Court after a finding that the Claimant was unfairly terminated, and where such position is still available.

38. Section 49(3) of the Employment Act which provides for reinstatement reads as follows –

(3) Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or

b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

39. Having not moved to Court to preserve the position, it is too late to grant the said order. The Claimant did not even inform the Court if the position is still vacant.

40. The foregoing notwithstanding, the remedy of reinstatement can only be made within three years from the date of termination. The Claimant’s contract of employment having been terminated on 4th May 2015, the remedy is no longer available to him.

41. For these reasons, the Claimant’s prayers 1 and 2 being preservation of the position of Managing Director/Chief Executive Officer of the Respondent and reinstatement to the position must fail.

42. The Claimant sought alternative prayers being pay in lieu of notice, compensation, salary for the unexpired term of the contract, certificate of service and costs.

43. The Claimant having been unfairly terminated, he is entitled to one month's salary in lieu of notice which I award him at **Kshs.120,000** as prayed.

44. On compensation for unfair termination, taking into account the length of service of the Claimant, the grounds for the termination of his employment, the manner in which he was dismissed including the payment of one quarter salary during suspension which is not backed by either the terms of his contract or the law or regulation as well as the totality of the compensation payable to the Claimant, I award him 6 months' salary as compensation in the sum of **Kshs.720,000**.

45. The Claimant is not entitled to payment for the balance of his contract as this is covered by the compensation as provided under Section 49 of the Employment Act. This is based on the reasoning applied in the court's decision in **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR** where it was held that:

*“This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In **Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited [2013] eKLR** and the unreported **Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa Limited**, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.”*

46. **In conclusion judgement is entered in favour of the Claimant against the Respondent in the total sum of Kshs.840,000/=.**

47. The Respondent is directed to issue to the Claimant a certificate of service in accordance with Section 51 of the Employment Act.

48. The Claimant is awarded costs of the suit and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE