



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 822 OF 2017

SAMUEL KIMANI MBUGUA.....CLAIMANT

VERSUS

BROADFOCUS CONSULTING LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit through a Memorandum of Claim dated 4th May, 2017, through the Firm of David Okoyo Ondieki & Co. Advocates and filed in court on the same day.
2. The Claimant's case is that he was an employee of the Respondent from 24th October, 2016 to 9th January, 2017, where he served as a project accountant earning a monthly gross salary of Kshs. 31,579/=
3. The Claimant states that he signed a contract of employment with the Respondent on the 28th of November, 2016, which contract, provided that each party can terminate the same by giving a one (1) month notice or pay a one month's salary in lieu of notice before terminating the contract.
4. It is his case that on the 9th of February, 2017, he received a termination letter from the Respondent after inquiring why his salary for January, 2017, had not been paid.
5. It is his case that he was never given notice prior to this termination and neither was he paid in lieu of such notice as required under his contract of employment.
6. The Claimant further states that his working hours were between the hours of 8a.m and 5 p.m and Monday to Saturday of every week.
7. It is his case that he worked beyond the said hours on various occasions and that he was not compensated for the overtime hours worked.
8. It is the Claimant's case that his contract was unfairly and procedurally terminated
9. The Claimant's prayers are that he be granted:
 - i. An overtime pay of Kshs. 92,400;
 - ii. 12 months' pay for unfair termination;
 - iii. Unpaid salary and allowances
 - iv. Damages for breach of contract; and
 - v. Costs of the suit
10. The Respondent put in a Memorandum of Appearance dated 28th of June, 2017 and filed in court on 30th June, 2017, through the Firm of Kiarie, Kabita, Kihunyu & Co. Advocates.
11. The Respondent did not file a response and neither did it appear for various mentions of the matter before court and hence the matter was certified to proceed as undefended. The matter was heard on 9/8/2021 as listed.

12. The Claimant testified through video-link in support of his case and adopted his witness statement filed in court on the 4th of May, 2017 and his list of documents of similar dates.

13. The Claimant filed his submissions on the 16th of August, 2021.

The Claimant's Submissions

14. It is submitted for the Claimant that he was employed as a project accountant of the Respondent's company between 24th October, 2016 and 9th February, 2017.

15. It is further submitted that the Claimant was terminated without any valid reasons, statutory notice, previous warnings in violation of *Sections 43(1), 44 and 45 of the Employment Act, 2007*.

16. It is further submitted that the Claimant's termination was unfair, unprocedural and wrongful and that he is entitled to consequential damages and costs. The Claimant sought to rely on the case of *Elizabeth Kioko V Beyene Haire Warde & Another (2018) eKLR* where the learned judge relied on the authority of *Walter Anuro V Teachers Service Commission (2013) eKLR* where the court observed thus:

“ ... 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 in effecting the termination.”

17. The Claimant submits that the Respondent was under an obligation to hear and consider any representation from him as provided for under *Section 41 of the Employment Act, 2007*. The Claimant sought to rely on the holding in the case of *Alphonse Machanga Mwachanya V Operations 680 Limited (2013) eKLR*, where the court summarized the legal fairness requirements for termination of employment on grounds of misconduct, poor performance or physical incapacity as set out in *Section 41 of the Employment Act, 2007* as follows:

(i) that the employer has explained to the employee in a language the employee understood the reasons why it was considering the termination.

(ii) that the employer has allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.

(iii) that the employer has heard and considered any explanations by employee or his representative.

(iv) that the employer has where the employer has more than 50 employees as required by section 12 of the Employment Act, that it had and complied with its own internal disciplinary rules.

Determination

18. The court identified the following as issues for determination in the matter:

i. Whether the Claimant's contract of service was unfairly and unprocedurally terminated.

ii. Whether the Claimant deserves the reliefs sought.

Whether the Claimant was unfairly and unprocedurally terminated

19. The Claimant has produced before court a contract agreement between him and the Respondent, executed by both parties herein on the 28th of November, 2016.

20. The Claimant has further produced a termination letter signed by one Margaret Irungu for the Respondent, terminating his services. The termination letter though undated, is signed by the same Margaret Irungu and the Claimant on the 9/2/2017. The letter notifies the Claimant that his services are no longer required effective 10/2/2017, and that his last working day was the date of the said letter.

21. The letter does not refer to a disciplinary process that resulted in the said termination contrary to *Section 41 of the Employment Act*.

22. The court finds that the termination of the Claimant was indeed both substantively and procedurally unfair and unprocedural and in contravention of *Sections 41 and 43 of the Employment Act, 2007* (See *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and *Pamela Nelima Lutta v Mumias Sugar Co. Ltd (2017) eKLR*) The Claimant was not given prior written reasons for his termination and neither was he given an opportunity to make representation or a hearing before termination.

23. The Claimant's termination fell short of the fair process stipulated under *Sections 41, 43 and 45 of the employment Act, 2007*, hence unfair and unprocedural.

Whether the Claimant deserves the reliefs sought

24. The Claimant has sought payment of overtime for the days he worked beyond hours, a 12 months' salary as compensation for unfair termination and costs of the suit.

Overtime allowance:

25. Although the Respondent did not file a response to the claim nor present a witness to rebutt the Claimant's claim, the Claimant is under obligation to prove his claim and nothing in the Claimant's witness statement, his bundle of documents or his testimony before court, showed that indeed he worked beyond hours.

26. The provision in his contract agreement produced before court indicating his working hours as being between 8a.m and 5p.m, Monday to Saturday, is not in itself prove that he worked beyond the hours provided therein as his working hours.

27. The court therefore has not found a basis upon which to grant orders for payment of overtime allowances as the same has not been proved and this claim fails and is dismissed.

12 Months' Salary Compensation

28. In making an award for compensation, the court is guided by the provisions of *Section 49 of the Employment Act, 2007*, In the case of *Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR*, the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under *Section 49 (4) of the Employment Act*, The court having found that the termination of the Claimant was unfair, must now consider these provisions, to establish whether the Claimant has proved a case for maximum compensation.

29. The Claimant was in the service of the Respondent for about 3 months before his termination and nothing points to him having contributed to his termination.

30. The Claimant's contract of employment indicated that he was to serve as a project accountant from 24th October, 2016, but did not provide the date the same would end. This was an open-ended contract, which in the opinion of the court would not have created reasonable expectation to the Claimant as to the period the employment might have continued but for the termination.

31. The Claimant told the court at the hearing, that he is a trained accountant and the court believes this career presents opportunities for the Claimant to secure comparable employment. For this reasons and taking into account the provisions of *Section 49(4) of the Employment act*, the court finds and holds that the Claimant has not established a case for maximum compensation and is awarded an equivalent of 3 months' salary in compensation for unfair termination.

Damages for breach of contract

32. Having awarded the Claimant compensation for unfair termination and for reasons that he has not made a claim for violation of his constitutional rights, the prayer for damages for breach of contract is unmerited and is dismissed.

Unpaid Salary and Allowances

33. The evidence before court is that the Claimant was not paid his salary for January, 2017. The letter of termination is dated 9/2/2017, and though it indicates that the Claimant's dues will be cleared immediately as per his contract, nothing shows that the same was paid. The court holds that the Claimant is entitled his unpaid salary for the month of January and the 9 days served in February, 2017, and is hereby awarded as per the claim.

1-Month Salary in Lieu of Notice

34. The Claimant at the hearing, stated that though his contract of service had an exit clause that provided that either party could terminate the contract by giving one month's notice, or paying one month's salary in lieu thereof, the Respondent terminated him without notice and without paying him for the notice period. The court holds that notice, though a statutory requirement, was also a provision in the Claimant's contract of employment and which term of contract was contravened by the Respondent. For this reason, the Claimant is awarded a one-month salary in lieu of notice.

Costs of the suit

35. It is trite law that costs shall follow the cause and for this reason the Claimant is awarded costs of this suit.

36. In conclusion, the court holds for the Claimant against the Respondent as follows:

1. A declaration that the termination of the Claimant was unprocedural and unfair.

2. That the Respondent pays the Claimants:

- i. 3 months' salary in compensation in the sum of Kshs.94,737/=
- ii. One-month's salary in lieu of notice at Kshs. 31,579/=
- iii. Unpaid salary for the month of January and 9 days of February, 2017 at Kshs. 41,053/=
- iv. Costs of the suit and interest at court rates from the date of this judgment till payment in full.

37. The Deputy Registrar to transmit this file back to Nairobi after the delivery of this Judgment.

38. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18th DAY OF OCTOBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ondieki for the Claimant

N/A for the Respondent

MS. Christine Omollo - Court Assistant.