



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1962 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

MARTIN SITUMA BAKULI

CLAIMANT

VERSUS

AFRICAN EXPRESS AIRWAYS

RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 19th September 2016 and filed in Court on 23rd September 2016, the Claimant instituted proceedings against the Respondent alleging that he was unfairly suspended and subsequently terminated by the Respondent. The Claimant prays for;

- (a) A declaration that he was wrongfully and unfairly terminated from his employment
- (b) Unpaid dues totalling Kshs.1,122,000.00
- (c) Notice period of one (1) month Kshs.60,000.00
- (d) 12 months' salary as compensation for wrongful and unfair termination (Kshs.60,000 x 12 months) Kshs.1.720,000
- (e) Punitive and aggravated damages for breach of the Claimant's constitutional rights
- (f) Costs and incidental to his suit.

2. The Respondent was served on 13th November 2016 but neither entered appearance nor responded to the memorandum of claim. A subsequent hearing notice by the Deputy Registrar of the Court issued on 5th October 2018 and a notice to show cause served on 22nd April via email elicited no response from the Respondent.

3. The Respondent did not participate in the proceedings in anyway. The matter was certified as undefended on 23rd March 2017.

4. At the instigation of the Claimant's Counsel, the Court directed that the matter proceeds by way of submissions and affidavit for expediency and the Court was in agreement.

Claimant's Case

5. The Claimant avers that the Respondent employed him as the Chief Security Officer for a term of 2 years by a written contract of service dated 4th March 2016 effective 5th May 2016. His gross consolidated monthly salary was Kshs.60,000 and leave entitlement was 21 days at the end of the contract year. Termination after completion of a two or more consecutive months entitled the Claimant to leave on prorated basis and termination was by one week's written notice or payment or one week's salary in lieu of notice. The contract provide that the Company was not bound to give a reason for terminating the Claimant's employment either by notice or payment in lieu of notice.

6. Paragraph 8(a) of the letter of appointment was unlawful since it is inconsistent with the provisions of the Employment Act, 2007, on length of notice and reason(s) for termination.

7. The Claimant further avers that on 19th July 2013, the Respondent suspended him from duty without justification or pay for an uncertain duration and subsequent termination when the contract lapsed on 4th March 2015 by reason of effluxion of time. That the Respondent breached the contract of employment between them and as a consequent the Claimant is entitled to recover outstanding pay, vacation pay,

house allowance, overtime pay, pay in lieu of reasonable notice, compensation for benefits during the notice period and severance pay together with interest.

8. It is also averred that the Claimant is entitled to punitive and aggravated damages arising from mental distress, inconvenience and psychological injury occasioned by the termination.

9. Finally, the Claimant avers that owing to the Respondent's conduct which is characterised as outrageous, reckless, wanton, without care, callous, disgraceful, wilful and actuated by malice, he is entitled to punitive damages.

10. That prior to the suspension, the Claimant was an excellent employee whose performance exceeded expectations.

Evidence

11. Documents on record show that the Claimant was employed under a two year contract of service from 5th March 2013 to 4th March 2015. The Claimant was an employee of the Respondent from 5th March 2013 to 19th July 2013 when he was suspended for:

- Noncompliance of Company policies
- Absent or unreachable for duty on critical times
- Misplacement of legal documents (deportee files).

12. The suspension letter further stated that the notice was a follow up on several verbal warnings from the Supervisor and requested the Claimant to immediately surrender the Airport Security Pass, Company ID, office keys and reflective jacket. This was an early indication that the Respondent had had enough of the Claimant.

13. Finally, the suspension was without pay and until further notice. According to the Claimant, no other notice was sent to him and thus considered himself terminated on 4th March 2015 when his two year contract was supposed to lapsed.

14. However, the Claimant provided a copy of a letter he allegedly wrote on 17th September 2014 to Captain Ruben Gumero on the suspension, terms of the contract and allegations of misconduct by the Ruben Gumero some of which are of a criminal nature.

15. The letter is allegedly copied to the Managing Director of the Respondent, Director NIS, Director of Immigration, Director Labour Department, Criminal Investigation Department, Managing Director KAA and KAO Regional Director.

16. The Claimant led no evidence that the letter was dispatched to any of the person or officers identified.

Claimant's Submissions

17. The Claimant submitted that he had discharged the burden of proof and cites the decision in **Monica Karimi Mutua v Al-Arafat Shopping Centre and Another (2018) eKLR** for the proposition that in an undefended claim, the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship as a preliminary issue. Further reliance was made on Sections 43 and 45 of the Employment Act on the duty of the employer to establish the reason(s) for termination as well as its validity and fairness. That since the Respondent did not take part in the proceedings, it had failed to discharge its burden of proof. The Court was urged to declare the termination of employment unfair.

18. On duration, it was submitted that the Claimant was employed to serve from 5th March 2013 to 4th March 2015 unless terminated earlier. That the suspension on 19th July 2013 was unfair since it was not provided for in the letter of appointment.

19. On remedies, Counsel submitted that since the Claimant was engaged on a fixed term contract, unpaid salary of Ksh.1,200,000 is warranted. Section 10(3)(c) of the Act was invoked. That he had 20 months of the contract outstanding.

20. On the 12 months' salary compensation at Kshs.730,000, Counsel submitted that the Claimant had a legitimate expectation that the contract would be renewed after the first two years. Reliance was made on the decision in **Teresa Carlo Omondi v Transparency International – Kenya [2017] eKLR** on the right of legitimate expectation. That the non-renewal of the employment contract amounted to an unfair dismissal and termination.

21. The decision in **Kenya National Union of Nurses v Nairobi County Government & 5 others [2016] eKLR** was relied upon on the reason(s) for termination.

22. On notice, reliance was made on Section 35 of the Employment Act, 2007 and the Court was urged to grant one month's salary in lieu of notice.

23. On unpaid leave, Counsel relied on Section 28 of the Act and urged the Court to award Kshs.120,000 for the 42 days' leave in 2013 to 2015.

Analysis and Determination

24. After careful consideration of the pleadings and submissions of Counsel, the issues for determination are;

(a) Whether the Claimant was unfairly terminated;

(b) Whether the Claimant is entitled to the reliefs sought.

25. On termination, the Claimant alleges that it was unfair because the notice of suspension dated 19th July 2013 was categorical that the suspension was until further notice and the Respondent did not revert to him thereafter. He thus deemed himself terminated on 4th March 2015 when his two year contract terminated by reason of effluxion of time.

26. The Employment Act, 2007 has elaborate provisions on termination of employment in Kenya and a termination must be compliant with these provisions if it is to pass as lawful. Sections 41 and 45 of the Act provide that for a termination to be legally compliant, it must pass the substantive and procedural fairness test. The reason for termination must not only be valid but fair and the procedure invoked must have been fair. The employer and employee must in addition discharge their respective burden of proof.

27. In the instant case, there is no termination letter. A suspension notice typically signifies invocation of internal disciplinary processes by the employer. On the face of it, the letter required no action on the part of the Claimant and the suspension was for an indefinite period. According to the Claimant there was no further communication from the Respondent.

28. For unexplained reasons, the suspension was effected by the Director of Flight Operations, Captain Ruben Gumero and it would appear that the Claimant made no inquiries or follow up with the Managing Director his Supervisor or the Human Resource Manager or anyone in the Respondent Company. The letter was copied to the Managing Director.

29. Clause 3 of the letter of appointment provided by the Claimant stated that *“You will report and be responsible to the MANAGING DIRECTOR and/or any other person placed in position of authority above you on all matters pertaining to your job.”*

30. The Claimant’s letter dated 17th September 2014 written more than one year after suspension appear to have been an afterthought and none of the allegations made there in have been substantiated by evidence. As the Chief Security Officer of the Company, the Claimant was a very senior employee and should have taken reasonable steps in making inquiries and/or following up the issue with the Managing Director or the Human Resources Department. He did not. Whereas the Respondent is culpable for the lack of communication to the Claimant, the Claimant is also to blame for what befell him.

31. The Court is not persuaded that the Claimant acted reasonably to mitigate his losses as provided by Section 49(g)(i).

32. The Court is guided by the sentiments of the Court of Appeal in **National Social Security Fund v Grace K. Kazungu & another [2018] eKLR**, as followed:

“In the Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] e-KLR, this Court held that employees have the obligation to move on, and look for fresh employment after termination, and not sit back in the hope of enjoying anticipatory remuneration. Employment remedies must be proportionate, and employees must be discouraged from replicating employment wrongs and multiplying remedies.”

33. Keeping an employee on suspension for a long duration without lifting the suspension or inviting him/her for disciplinary hearing or terminating the employee altogether is frowned upon by the courts and if it takes inordinately long as was the case herein, it is deemed to be a termination. It is the duty of the employer to conclude any disciplinary issues it may have with an employee and refrain from keeping him/her waiting for too long. In this case, the Respondent did not invite the Claimant for a disciplinary hearing or back to work. It would appear that the Respondent forgot about its employee, an inexcusable omission on its part.

34. The fact that the Claimant was suspended with no pay made his circumstances dire and unfair in the least.

35. Based on the evidence on record, the Court finds that the Claimant was constructively dismissed and his termination was therefore unfair. The principle of constructive dismissal was explained by Lord Denning in **Western Excavating (EEC) Ltd v Sharp [1978] 2 WLR 344** and elaborated by the Court of Appeal in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**. The indefinite suspension of the Claimant entitled him to treat himself as discharged from further performance of the contract. He was constructively discharged.

36. Counsel’s submissions that the Claimant had a legitimate expectation that the contract would be renewed after two years would have been persuasive if the Claimant was still in employment by 4th March 2015 which was not the case. The Claimant was not serving the Respondent from 19th July 2013 and should have contacted his Supervisor, the Managing Director or the Human Resource Department for an update on the matter which he did not in which case he should have deemed himself constructively dismissed on expiration of reasonable time without a response from the Respondent. Claiming unpaid dues not worked for is neither

fair nor reasonable.

37. I now turn to the reliefs sought by the Claimant –

(a) Declaration that he was wrongfully and unfairly terminated from his employment

38. Having found the Claimant was constructively dismissed, a declaration is hereby issued that the Claimant's termination was unfair.

(b) Unpaid dues totalling Kshs.1,122,000.00

39. It is unclear how the sum of Kshs.1,122,000.00 was computed and in particular the unpaid salaries. The Claimant did not allege that his salary for any duration was outstanding. If the amount comprises anticipatory earnings during his contract with the Respondent, the same has no legal justification under the Employment Act, 2007 as was held by the Court of Appeal in **Hema Hospital v Wilson Makongo Marwa [2015] eKLR** where the Court cited with approval the holding of the Labour Court of South Africa in **Le Monde Luggage cc t/a Pakwells Petze v Commissioner G. Dun and Others, Appeal Case No. JA 65/205** on the Labour Relations Act of South Africa as follows –

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.”

40. Anticipatory remuneration is not generally available in a contract of employment since it is terminable earlier by either party giving the other the required notice. Relatedly, it is not recognised by the Employment Act.

41. As the Court of Appeal observed in **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR** “Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, ...” The Trial Court had held that “A grant of anticipatory salaries and allowances ... would not be a fair and reasonable remedy ...”

42. The fact that the Claimant had a two year contract did not mean that he would remain in employment for 2 years. He could have terminated the contract himself if he obtained a better offer so could the Respondent. The doctrine of legitimate expectations could thus not apply. The claim is declined.

43. On leave, since the Claimant had a leave entitlement of 21 days which translates to 1.75 days per month and since the Claimant worked for 4 months and 16 days, his leave entitlement was 7 days for 4 months and 1 day for the 16 days making a total of 8 days. With an average of Kshs.2,000 per day, his leave entitlement is **Kshs.16,000** which the Court hereby awards.

(c) Notice period of one (1) month

44. Having found that the Claimant was unlawfully terminated without any notice, this claim is merited and is awarded **Kshs.60,000**.

(d) 12 months' salary as compensation for unfair termination

45. Having found that the Claimant was unfairly terminated, Section 49(1)(c) of the Employment Act, 2007 applies and the Claimant is entitled to compensation for the unfair termination. The level of compensation is dependent on the parameters set forth in Section 49(4) of the Act which the Court is enjoined to take into account. I have considered that the Respondent suspended the Claimant on 19th July 2013 until further notice and did not revert to him as necessary. This subjected the Claimant to hardship and anxiety of having to wait for communication for a long time. I have also considered the fact that the Claimant served the Respondent for 4 months and 16 days only and intended to continue working. On the other hand the Claimant was suspended on various grounds implicating serious misconduct and finally he made no attempt to contact his Supervisor or the Human Resource Department for 2 years. In the premise, the equivalent of three (3) months' salary **Kshs.180,000** is fair. The award is comparable to the 3 months awarded in **Liz Ayangu Leisure Lodge Ltd [2015] eKLR** where the Claimant had served for 4 years and in **KUCFAW v Kisii Bottlers Ltd [2020] eKLR** where the Claimant had served of 12 years.

(e) Punitive and aggravated damages for breach of constitutional rights

46. The scope of aggravated damages was formulated in **Rookes v Bernard [1964] AC 1129**. As the Court of Appeal held in **Godfrey Julius Ndumba Mbogori & Another v Nairobi City County [2018] eKLR** –

*“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of **Rookes V Barnard [1964] AC 1129** where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:*

i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,

ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and

iii) where exemplary damages are expressly authorized by statute.”

47. The Court does not find the Respondent's conduct was deliberately oppressive, arbitrary or unconstitutional nor was it proved that the Respondent's conduct justified the award of punitive damages. The claim is accordingly declined.

48. In conclusion, judgment is entered for the Claimant for the sum of Kshs.(60,000 + 180,000 + 16,000) = Kshs.256,000.00 with costs.

49. Interest at Court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE