



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 99 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

VINCENT MASINDE MUNUKU

CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED

RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by a memorandum of claim dated 27th January 2016 filed on the same day alleging unlawful termination and non-payment of terminal dues. He prays for –

- (a) 3 months' salary in lieu of notice Kshs.61,636.95
- (b) Unpaid leave for 19 years worked Kshs.390,367.35
- (c) Service pay Kshs.390,367.35
- (d) Salary compensation at 5 years Kshs.102,728.25

Total Kshs.945,099.90

- (e) General damages for wrongful dismissal as the Court shall assess
- (f) Costs of this suit and interest.

2. The Respondent filed a reply to the memorandum of claim on 22nd March 2016 praying for the dismissal of the suit with **COSTS**.

Claimant's Case

3. The Claimant avers that he was an employee of the Respondent from 12th September 1996 to 11th September 2015. That on 11th September 2015 the Respondent terminated his employment without justification or an opportunity to defend himself. That he worked diligently.

4. It is further averred that the Respondent give the Claimant no specific allegations against him to defend himself, that he was terminated arbitrary without terminal benefits.

5. Finally, he avers that his last salary was Kshs.20,545.65.

Respondent's Case

6. The Respondent admits that the Claimant was its employee till 11th September 2015 wrongly indicated as 2016.

7. It avers that the conditions of employment were outlined in the letter of appointment dated 2nd October 2001. That the Claimant's summary dismissal was substantially and procedurally fair. That between January 2015 and July 2015 the Claimant and others created a Facebook page by the name Bravo Mike Forum which the Claimant used to propagate false, malicious and demeaning posts regarding the Respondent's senior management. Some of the Claimant's posts stated as follows "The Luhya fraternity in leadership n politics @ BMI C

hands off style, most were promoted on ethnicity not merit Walidhani BM ni ya mama yao” (2nd April 2015). Other posts are dated 31st January 2015, 4th February 2015, 1st April 2015, 24th and 28th June 2015.

8. That on 1st August 2015 the Claimant posted the following about the Quality Administration Manager, Mr. Michieka “*the said Manager was seriously sick and admitted at Karen Hospital*” which information was false and malicious.

9. It is further averred that the Claimant’s posts on the Facebook page Bravo Mike Forum were injurious to the Respondent and exposed it to ridicule since the posts erroneously and wrongly implied that: -

a. The Respondent’s Human Resource Department has always acted against the interests of the Respondents employees instead of promoting their interests

b. The Respondent employs and promotes staff on the basis of ethnicity by giving undue preference to members of the Luhya community as opposed to merit.

c. The allegation that the Quality Assurance Manager was sick caused unnecessary anxiety to the Respondent’s staff and clients

10. It is contended that the Claimant had claimed that he had received the information about the sickness of Mr. Michieka from one Saul Obwini who denied the same. That on 4th August 2015, the Claimant was invited and attended a disciplinary meeting where his conduct and postings on Bravo Mike Forum between January and July 2015 were reviewed by the Respondent’s disciplinary committee in the presence of the Claimant and his representations were heard and considered by the Committee.

11. Finally the Respondent avers that the disciplinary committee found the Claimant culpable and liable to sanction for publishing derogatory defamatory and unsubstantiated allegations. That the termination was fair and the Claimant was paid the salary for 1st August 2015 to 13th August 2015, house allowance, leave pay for 12 days, suspended off, less statutory deductions. The amount of Kshs.14,083 was paid through CFC Stanbic Bank. That the Claimant was not entitled to any of the reliefs sought.

Evidence

12. The Claimant confirmed that he was initially employed on casual basis but was appointed on permanent terms in 2001. He confirmed on cross examination that he often made posts on the page styled Bravo Mike Forum. He admitted having posted on 2nd April 2015. That he was dismissed because of the posts on Facebook. That he had not been informed about the posts before the disciplinary meeting. The confirmed that Mr. Michieka attended the meeting but was too harsh and intimidating. He also confirmed that he apologised for the posts. He also confirmed that he was a member of the NSSF.

13. **RW1, DENNIS MICHIEKA** testified that he had no personal grudge against the Claimant. That the posts on Facebook were about the Company not the Sacco although it was mentioned once. He told the Court that the Claimant was invited for a disciplinary hearing and was unable to explain or justify the postings. He explained that the meeting had four attendees.

14. He told the Court that the Company had two shop stewards (a Mr. Kalakacha and a Mr. Anunda) who were invited by the Human Resource Officer, Mr. Ochuku. He also confirmed that the Claimant did appeal the decision. On cross examination he confirmed that the disciplinary committee meeting on 8th August 2015 was chaired by Mr. Ochuku. He further confirmed that he brought up the post affecting him at the meeting. He also confirmed that the Claimant’s dues were paid through CFC Bank. Finally, he confirmed that the minutes of the disciplinary committee did not capture the Claimant’s representations.

Claimant’s Submissions

15. The Claimant isolated two issues for determination namely–

(i) Whether the summary dismissal of the Claimant was merited;

(ii) Whether the Claimant was entitled to the reliefs sought.

16. As regards the summary dismissal, it was submitted that the Claimant was dismissed without reason and/or due process being followed. That the grounds on which the Claimant was suspended propagating false, malicious and demeaning information regarding the Respondent’s senior management the Respondent Company were untrue because the postings in question related to Sacco Officials within the employees’ union and the Claimant was a member. Reliance was made on the decision of Abuodha J. in **Derick Pius Raunda Okari v Kenya Kazi Security Services Ltd [2016] eKLR** which related social media posts which the employer felt were inciteful and bordered on hate speech, an allegation the Court rejected and held that the termination was unfair.

17. Reliance was also made on Section 5 of the Employment Act, 2007 on discrimination in employment.

18. It was submitted that the Respondent did not provide a valid reason for the summary dismissal of the Claimant as provided by Section 45 of the Act which the Claimant reproduced in his submissions.

19. Similarly, Section 41 of the Employment Act was relied upon to urge that the Claimant was not given a hearing as contemplated by Section 41. That no show cause letter was issued to the Claimant and he was not accompanied by an employee or shop floor representative

of his choice at the alleged disciplinary hearing. It was submitted that the Claimant's summary dismissal was not conducted in accordance with the prescribed procedure and was therefore unfair and unlawful

20. On reliefs, it was submitted that since the termination of the Claimant by summary dismissal was unfair for want of substantive and procedural propriety, the Claimant is entitled to the reliefs sought.

21. Reliance was made on several persuasive decisions on termination of employment such as **Samsung Electronics East Africa Ltd v K. M. [2017] eKLR** where the Court of Appeal underscored the right of an employee to be heard before being terminated for gross misconduct. The decision in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** was also cited as was **William Kiaritha Gacheru v East African Packaging Industries Ltd [2016] eKLR** where the Claimant was partially successful.

22. Reliance was also made on the decisions in **Everlyn Lynn Kagendo v Statpack Industries Limited [2013] eKLR** and **Josphat Ngigi Ndegwa v Equity Bank Limited [2013] eKLR**. In both cases the Claimants were successful.

Respondent's Submissions

23. The Respondent on the other hand submitted that the Facebook posts by the Claimant on Bravo Mike Forum were not only insulting but injurious to the image of the Respondent since they implied that –

a) The Respondent (HRD) Human Resource Department act against the interests of the Respondent's employees and made a fortune from their suffering as opposed to protecting them:

b) The Respondent's senior management officials from the Luhya Community do not reason:

c) Promotions at the Respondents are based on ethnicity:

d) Respondent's management officials were from the Luhya community.

24. That the posts by the Claimant amounted to gross misconduct since they painted the Respondent negatively which risked its relationship with employees as well as existing and prospective clients.

25. It was further submitted that the Claimant admitted having made the posts but alleged that they were addressed to the Sacco which was not the case.

26. Section 44(d) of the Employment Act was relied upon as the ground for summary dismissal. That a post to the effect that the Respondent Company did not belong to the mothers of senior officials was undoubtedly insulting.

27. It was submitted that the reason for dismissal was not only valid but fair as required by Section 43, 44 and 45 of the Employment Act.

28. In response to the Claimant's allegations that he was not given any charges and/or opportunity to defend himself, it was submitted that he admitted having attended a meeting which discussed the postings and he apologised for the same. Reliance was made on page 31 of the minutes of the proceedings. That in the premise, the Claimant was given a chance to make his representations and the same were considered before the decision was made.

29. On show cause letter or charges being served, it was submitted that a disciplinary hearing cannot be expected to be a trial in court of law. The decision in **George Musamali v G42 Security Services Kenya Ltd [2016] eKLR** was relied upon for this proposition. The decision in **Jeremiah Ngige Mungai v Equity Bank Ltd [2015] eKLR** was also relied upon to reinforce the argument.

30. It was also submitted that the Facebook posts were abusive and the Claimant was given audience on 4th August 2015.

31. On failure to pay terminal dues, it was submitted that the Claimant's dues were processed and included days worked in August 2015, overtime earned, leave pay for 12 days and suspended off day and the sum due was remitted to the Claimant's account at CFC Loan Account, the Claimant's salary account.

32. On reliefs, the Respondent submitted that the Respondent was not entitled to the 3 months' notice pay pleaded since the letter of appointment provided for one (1) month's notice and the reason for dismissal was valid.

33. That the Claimant was not entitled to compensation since the dismissal was justifiable and he was invited to a disciplinary hearing on 4th August 2015 and responded to the issues raised. The decision in **Anthony Odhiambo Ogola & another v Kenya School of Government (Formerly Kenya Institute of administration) [2015] eKLR** was relied upon to urge the Court to find as was found in that case that the employer had valid and justifiable reasons for terminating the Claimant's services and had followed a fair procedure and the claim was dismissed with costs.

34. On unpaid leave, it was submitted that the Claimant had on cross examination confirmed that he had taken all leave days except for the last year of employment for which he was paid for 12 days.

35. On service pay, it was contended that the Claimant was a member of NSSF and had confirmed the same. Section 35(6) of the

Employment Act was relied upon to show that the Claimant was excluded from claiming service pay. The decision in **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR** was also relied upon to buttress the argument.

36. The Respondent prayed for dismissal of the suit with costs.

Analysis and Determination

37. After careful consideration of the pleadings, evidence on record and submissions, the issues for determination are:-

- (a) Whether the Claimant's termination was unfair;
- (b) Whether the Claimant is entitled to the reliefs sought.

38. Section 45 of the Employment Act provides that –

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

39. Section 41 of the Act provides that –

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

40. These provisions underpin the requirements for substantive

fairness in termination of employment contracts. A termination of employment is invariably unfair if it does not meet the threshold for substantive and procedural fairness. The reason(s) for termination must not only be valid but fair as must be the procedure employed by the employer to effect the termination.

41. Courts have variously applied and elaborated the essence of these provisions. In **Naima Khamis v Oxford University Press (E.A) Ltd [2017] eKLR** the Court of Appeal held that –

“... termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”

42. In **Kenafric Industries Limited v John Gitonga Njeru [2016] eKLR** the Court of Appeal held that –

“Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the

termination of employment.”

43. On the import of Section 41 of the Act, the Court is also guided by the holding of Radido J. in **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR** –

“In my view, an employer must demonstrate as a matter of fact that it:

(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination

(ii) 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) Heard and considered any explanations by employee or his representative

(iv) 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.

Reason for Termination

44. In the instant case, the letter of termination dated 11th September 2015 stated that –

“Management has noted with concern that on various dates between the months of January 2015 to July 2015, you posted derogatory, defamatory and unsubstantiated allegations against the Company and senior management staff. Your actions were aimed sabotaging company operations and amounted to incitement, contrary to the company code of conduct. In light of the above, management has approved your dismissal from employment with immediate effect in line with the Employment Act 2007.”

45. It is not in dispute that the Claimant made several posts on the Facebook forum christened “Bravo Mike” and did not contest any of them other than stating that the one dated on 1st April 2015 was a fool’s day plunk, something the Court found as an afterthought since it was not in his written statement. In addition, the minutes of the alleged disciplinary committee state that the Claimant tendered an apology for the posts.

46. It is on record that the posts make extensive reference to the Respondent and its senior management, some of which appear derogatory and undoubtedly unsolicited. Indeed a post dated 31st May 2015 cautioned the Claimant against being “*aggressive, abusive n angered especially on this page.*”

U might be misquoted.”

47. Evidence on record show that this was a public forum accessible to all those invited to join and the postings may have been read by persons who were not employees of the Respondent. Some of the posts exemplify discontentment while others border incitement.

48. Although the freedom of expression is a constitutional imperative and the Claimant had the right to exercise it as robustly as he may wish, the same must be exercised within the beacons of the law. In this case, the employer believed that the Claimant had gone beyond the limit.

49. The validity of the reason for termination of employment is tested against Section 43(2) of the Employment Act which provides that –

(3) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

50. In the instant case, the Respondent genuinely believed that the Claimant’s posts on the Bravo Mike Forum on Facebook from January to August 2015 were injurious to the reputation of the organisation and its senior management. Relatedly, the Claimant led no evidence to demonstrate the reasons for the postings or that he had raised these issues with the Respondent and no action had been taken.

51. In view of the foregoing, the Court is satisfied that the Respondent had a valid reason to terminate the Claimant’s employment on 11th September 2015.

Procedure

52. Sections 41 and 45 of the Employment Act and the decisions cited above show that in addition to a valid and fair reason for termination of employment, the procedure employed by the employer must be fair.

53. In the instant case, the Claimant confirmed on cross examination that he attended a meeting with Mr. Michieka and four other persons, that he was the fifth. That Mr Michieka raised the issue of the posts and was very harsh and intimidating to the Claimant.

54. On re-examination, he testified that he was invited to the meeting alone.

55. RW1 Mr. Michieka confirmed that the Claimant was invited to the office sometime in August 2015 but was unable to explain or justify the postings. Although the witness alleged that two shop stewards a Mr. Kalakacha and a Mr. Anunda had been invited, none of them attended the meeting as the minutes on record show. He confirmed that the Claimant did not appeal the decision to dismiss him.

56. On cross examination he confirmed that minutes of the disciplinary meeting were recorded by the Secretary, whose attendance was not recorded. The minutes were signed by the Human Resource Officer, Mr. Ochuku. He also confirmed that Mr. Uchuku was the Chairman of the meeting. The witness was unable to explain why the minutes did not capture the Claimant's responses at the meeting other than the apology. He maintained that the Claimant was accorded an opportunity to defend himself and did so.

57. Although the Claimant admitted that he was invited for a meeting by word of mouth, he was not given any notice of the meeting or its agenda and was not informed of the right to be accompanied by a fellow employee of shop floor representative to the meeting as required by Section 41 of the Employment Act.

58. The suspension letter dated 6th August 2015 made no reference to a disciplinary hearing or right to bring a representative to the meeting. Similarly, the letter does not set out the specific allegations made against the Claimant since not all postings were offensive to the Respondent. He also testified that Mr. Michieka was very intimidating and harsh during the meeting.

59. For the above reasons, it is the finding of the Court that the absence of a notice setting out the specific allegations made against the Claimant and inviting him to a disciplinary hearing coupled with the right to bring a representative of his choice, the procedure employed by the Respondent did not meet the threshold prescribed by Section 41 of the Employment Act.

60. Consequently, termination of the Claimant's contract of employment was procedurally unfair.

61. Turning to the reliefs, the Claimant prays for the following:-

(a) Three (3) months' salary

62. The contract of employment on record dated 2nd October 2001 provides for one month's notice or salary in lieu of notice. The claim for three months' salary has no contractual justification. The Court awards one month's salary in lieu of notice **Kshs.20,545.65/=**.

(b) Unpaid leave for 19 years worked Kshs.390,367.35

63. The Claimant confirmed on cross examination that he proceeded on leave for all the previous years except 2015. For 2015 the accumulated 12 leave days were remunerated at Kshs.468/= per day and the Claimant was paid Kshs.5,616. The claim is **declined**.

(c) Service pay – one month's salary for each year worked Kshs.390,367.35

64. The Claimant led no evidence to establish his entitlement to service pay. More significantly, he confirmed on cross examination that he was a member of the National Social Security Fund (NSSF). See **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR**. The claim is **declined**.

(d) Salary compensation calculated at 5 years Kshs.102,728.25

65. Having found that the Claimant's termination was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the Employment Act. The Court has considered the following factors –

- (i) The Claimant worked for the Respondent for 19 years and wished to continue,
- (ii) The Claimant had no previous disciplinary issues,
- (iii) The Claimant did not appeal the decision of termination,
- (iv) The Claimant substantially contributed to his termination.

66. Taking into account these factors, the Court is satisfied that the equivalent of two (2) months' pay is fair **Kshs.41,091.30**.

(e) General damages for wrongful dismissal

67. This claim was not proved and is **declined**.

68. **In conclusion, judgment is entered for the Claimant for the sum of Kshs.61,636.95.**

69. **The Claimant is awarded costs of this suit.**

70. **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