



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 100 OF 2018**

**PETER KIMANTHI MBUVI.....CLAIMANT**

**VERSUS**

**MOMBASA WATER SUPPLY &**

**SANITATION COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> December, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.03.2018 through M/s Njeru & Company Advocates. The claimant claimed against the respondent for:

- i. Payment in lieu of notice 3-months' salaries Kshs. 1, 364, 283.00.
- ii. Unpaid salary for remainder of the contract period of 14 months December-January 2019 Kshs. 454, 761 x 14 months Kshs. 6, 366, 654.00.
- iii. Gratuity payment for entire contract period up to 30.11.2019 Kshs.3, 917, 241.00.
- iv. Accrued but unutilised 55-working leave days up to 30.11.2017 Kshs. 1, 154, 217.00.
- v. Accrued and unpaid travel allowance in the contract year 2017 Kshs.354, 761.00.
- vi. Travel allowance for unexpired period in contract year 2018 Kshs.354, 761.00.
- vii. Payment for annual medical benefit (estimated premium) for unexpired period 2018/19 Kshs. 319, 682.00.
- viii. 12-months gross salary compensation for illegal and unfair termination Kshs.454, 761 x 12 making Kshs. 5, 457, 132.00.

The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal of the claimant from employment was unfair and unlawful and that the claimant is entitled to his terminal dues and compensatory damages.
- b) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs. 19, 288, 731.00 as claimed.
- c) Interest on (b) above from the date of filing till full payment.
- d) Costs of the suit plus interest thereon.

The respondent's memorandum of response was filed on 30.04.2018 through Messrs Miller & Company Advocates. Except for terminal dues as offered in the letter of termination, the respondent denied the claimant's claims and prayed that the suit be dismissed with costs.

On 15.07.2021 the Court ordered by consent of the parties that the only outstanding issue is whether termination was unfair and issues of

compensation and costs. Again at the hearing on 09.11.2021 it was ordered thus, **“By consent only claim pending determination is on claim 19(viii) of the statement of claim as all other claims have been compromised or abandoned.”**

There is no dispute that the respondent employed the claimant as Managing Director for a contract period of 3months running from 01.02.2016 and his last gross monthly pay was Kshs. 454, 761.00. The claimant received a letter dated 31.08.2017 being notice to proceed on compulsory leave. The letter conveyed that following the board meeting held on 31.08.2017 it had been decided that the claimant proceed on compulsory leave until further notice. During the compulsory leave, the letter stated that the claimant would be paid monthly entitlements as per clause 4A (a) of the employment contract. The letter directed the claimant to hand-over office to one Dr. Paul Oduwo Nyangasi, who had been appointed Acting Managing Director with immediate effect. The claimant acknowledged receipt of the letter and as required by signing on 04.09.2017. The claimant pleads that the letter did not disclose a reason for sending him on compulsory leave. The claimant's further case is that prior to that letter he had done nothing wrong to warrant that decision and he was not under any investigation. The claimant handed-over and proceeded on leave as advised and expected to be given reasons for the compulsory leave. The letter was signed by the chairman of the board one Nick Munyi.

The claimant's further case is that on 17.11.2017 while on compulsory leave he received a call from an officer of the respondent informing him that there would be a performance contracting workshop on 20.11.2017 at Taita Hills Sarova Game Lodge organised by the respondent and he was invited to attend. Further, the claimant pleaded that he was informed that the respondent's board chairman and the Chief Officer of the Department of Water, Mombasa County Government (who was also the acting Managing Director for the respondent) would be present at the workshop and the two wished to meet the claimant separately. The claimant's case is that he attended on 20.11.2017 when the respondent's board chairman and the Chief Officer of the Department of Water, Mombasa County Government, without any preceding discussion, told him point blank that his services were no longer needed at the respondent company and that he should willingly resign from the respondent company so as to be paid his terminal benefits and, if he failed to resign, he would be terminated and would lose all his benefits. Further, it is the claimant's case that he refused to resign as he had done nothing wrong and no reason had been advanced to warrant his resignation. The claimant's case is that a week later he received a termination letter dated 27.11.2017 and no reason for termination was given. His case is that as at termination he had worked for 22 months and he had 14 months unexpired term of the fixed term contract of 3 years.

The letter of notice of termination of services dated 27.11.2017 referred to the letter of compulsory leave dated 31.08.2017, referred to meeting of 20.11.2017 at which the intention of the board to terminate the claimant's employment was communicated to the claimant by the board chairman and the acting Managing Director - and at which the claimant was given an opportunity to make representation. The letter stated that the board had decided to terminate the claimant's employment in line with Clause 8 of his employment agreement dated 30.11.2017. His salary and allowances was to be paid up to including 30.11.2017 and thereafter, payment would cease. The letter enumerated terminal benefits including 3-months' gross pay in lieu of termination notice; gratuity for 22 months; leave travel allowance for year 2017; nil leave days; and certificate of service. The sum of terminal dues stated in the letter was Kshs. 3, 955, 731.76. He was to be paid after handing over and the letter concluded thus, **“We sincerely thank you for your services to MOWASSCO and wish you success in your future endeavours.”**

The claimant's case is that he subsequently discovered that the compulsory leave and subsequent termination was as a result of external political influence or pressure on the respondent despite the respondent being a body corporate with its own rules and regulations. The claimant's further case is that the termination was unfair, unlawful and illegal and was against the Constitution, the Employment Act, 2007, the Fair Administration Action Act, the principles of natural justice and the tenets of good and fair labour practices.

The respondent has pleaded as follows:

- a) The claimant was informed about the reasons for compulsory leave being his poor performance per board meeting of 31.08.2017 wherein the acrimonious relationship between the claimant and the GM-HRM that had adversely affected the respondent's service delivery was discussed. At that meeting the respondent decided to send both the claimant and the GM-HRM on compulsory leave per the respective letters dated 04.09.2017. In particular, the claimant had issued a letter to show-cause dated 15.02.2017 against the GM-HRM; and, letter dated 23.02.2017 by the claimant to the GM-HRM. The letters issued by the respondent to the claimant and the GM-HRM were both dated 31.08.2017. The respondent's further case is that the issue in contention between the GM-HRM and the claimant was how to manage the respondent's human resource stemming from the claimant's conduct, capacity and compatibility in the operations of the respondent and since the claimant left the respondent has an approved organisational structure, revised human resource manual 2018, and, both developed using internal capacity and amounting to serious indictment on capability of the claimant to the role of Managing Director for which he had served for 22 months.
- b) The claimant was sent on compulsory leave when his tenure was tumultuous one marked with a drop in revenue collection and acrimonious working relationship.
- c) The respondent denies that the claimant was threatened that if he did not resign he would be terminated with loss of benefits. At the meeting at Sarova Taita Hills the claimant was advised about the respondent's intention to terminate his employment and the decision had been arrived at after his performance had been appraised and found not to be satisfactory.
- d) The respondent admitted that the employment came to an end by letter dated 27.11.2017 and the claimant had worked for 22 months and he had a balance of 14 months on his contract of service and the claimant handed-over as required and was given a clearance certificate.
- e) The termination on 27.11.2017 was not illegal and unfair and was procedurally apt and justified by the claimant's poor leadership and management style that had led to staff unrest and a drop in revenue collection.
- f) The parties had filed in Court a consent settling the claimant's terminal dues as offered in the letter of notice of termination.

The claimant testified to support his case. The respondent's witness (RW) was Amos Dhadho Galole, General Manager, Human Resource and Administration. Final submissions were filed for the parties. The Court has considered the material on record and makes findings as follows.

The **main agreed issue** for determination is whether the termination of the claimant was unfair. The Court has considered the evidence. As submitted for the claimant and confirmed by RW's testimony, the contract of service between the parties did not provide for indefinite compulsory leave. To that extent, the Court finds that the compulsory leave as imposed upon the claimant was in breach of or outside the terms and conditions in the contract of service. The Court finds that the compulsory leave amounted to unfair procedure leading to the claimant's termination. Second, the Court finds that while alleging poor performance in the pleadings and evidence, the respondent failed to provide evidence of such poor performance on employee unrests, poor leadership skills, and diminishing revenue collections. In any event the correspondence per the letter of compulsory leave and notice of termination did not refer to poor performance. The Court finds that the respondent's pleading and the evidence was incoherent and cannot be trusted. As submitted for the claimant, if the respondent had valid allegations of poor performance, then the correct procedure was by way of a notice and a hearing as provided for in section 41 of the Employment Act, 2007. The Court finds that the procedure was unfair if at all poor performance were to be the ground for the termination. Third, the evidence by the respondent was that the claimant issued the letter to show cause dated 15.02.2017 against the GM-HRM one Juma Mzee Mbaya on account that he had refused to undertake the compulsory induction or orientation prescribed for new staff; overstepping his mandate and usurping the claimant's authority by convening a staff meeting and despite the claimant having cancelled it, the GM-HRM had proceeded to convene the meeting and attacked senior managers at the meeting; alleging senior managers and the claimant were sabotaging him without any ground; redeploying an officer without recommendation of the Staff Advisory Committee and the approval by the claimant; and failure to act professionally – amounting to acts of gross insubordination and misconduct. It appears that the respondent's board then met on 31.08.2017 and decided to place the claimant and the GM-HRM on compulsory leave. The minutes of the board meeting of 31.08.2017 are not exhibited. The Court has considered the evidence. The claimant's job description included, **"8. Nurture the organization's human resource and ensure that appropriate management structures and policies are developed and implemented."** The further evidence was that the GM-HRM reported to the claimant as Managing Director. The Court returns that the claimant's issuance of the letter to show cause against the GM-HRM was within his role as employed and it cannot be said that the same was outside the claimant's capacity or compatibility and, the respondent's operational requirements. The Court returns that it was not genuine and valid to impose the unprocedural compulsory leave as it appears to have been based upon the claimant's performance of duty and role as employed as Managing Director. Fourth, as submitted for the respondent, either party could terminate the contract of service per section 36 of the Employment Act, 2007 by giving to the other three months' notice in writing of the intention to terminate or in lieu of such notice, and subject to statutory deductions, paying three months' gross salary and the stated accrued benefits. While the parties agreed accordingly, the Court finds that in terms of section 43 of the Act, it was not open and a valid reason for the respondent to invoke the said clause 8 to terminate the contract in view of the respondent's alleged and levelled poor performance – as pleaded and which pleadings must bind the respondent. The reason for termination is equally found to have been invalid. The Court finds that the termination was unfair both in procedure and substance. While making that finding, the Court has considered the respondent's submission that the main reason for termination was the wrangles between the claimant and the GM-HRM and returns that the wrangles were never established by relevant evidence (the evidence being the claimant within authority had initiated disciplinary action against the GM-HRM) and by that submission, it is established that invoking the termination clause 8 was not a genuine reason. The claimant's case that he was terminated for no reason at all and unfairly so is upheld.

The Court has also considered the respondent's submission that the claimant had failed to exhibit an extract of the minutes of board meeting of 31.08.2017 and returns that per section 43 and section 47(5) of the Act, the respondent was required to show that the reasons for termination existed and were valid or genuine as at the time of termination, and, the respondent carried the burden of justifying the grounds for the termination of employment, respectively – and the respondent cannot shift that burden as purportedly submitted. The Court finds that the respondent having failed to exhibit the minutes, the evidential burden as imposed by the Act was not discharged by the respondent.

The Court has also considered its opinion against the principle of soft landing in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR where in the judgment it was stated thus, **"The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."**

The Court returns that in the instant case it was not open for the respondent to conceal the alleged poor performance by invoking the cited termination clause 8 by paying in lieu of notice - but the respondent ought to have subjected the claimant upon a disciplinary process and in event of culpability, considered the soft landing as appropriate. Thus, the termination by payment in lieu of notice is found to have been improperly invoked on account of soft landing as was urged for the respondent.

The **2<sup>nd</sup> issue** is whether the claimant is entitled to the 12 months' compensation as claimed and prayed for. The Court has considered the guiding principles in section 49 of the Act. The claimant made no specific submissions in view of the prescribed factors and to guide the Court in award as claimed. The Court has considered the respondent's mitigating submissions that it entered the consent to pay terminal dues and the claimant never protested the indefinite compulsory leave. The Court considers the claimant's failure to protest the compulsory leave (which was not agreed upon as an available action to be imposed by the respondent) to have amounted to contributory factor by the claimant towards his predicament. The Court has considered that the claimant had 14 months of unexpired tenure and the Court has further considered the amount he would otherwise have earned had he not been unfairly terminated. The Court has considered the amount of terminal dues paid under the disputed termination under the contractual clause 8 on termination notice of 3 months or pay in lieu thereof. The Court has also considered the aggravating factor that the respondent appears to have terminated the claimant following the claimant's performance of his duty when he initiated disciplinary action against the GM-HRM. To balance justice for the parties, the claimant is awarded 6 months' gross salaries in compensation for the unfair termination making Kshs.454, 761.00 x 4 thus **Kshs. 2, 728, 566.00** payable less PAYE. The Court

has considered the consent and mediation proceedings under which the respondent compromised the dispute substantially and further considered all circumstances leading to the dispute and returns that the respondent will pay 50% of the costs of the suit.

The respondent made submissions on the claim for unexpired tenure but the same had been surrendered by reason of the consent on the issues for determination. In any event, after the termination and as submitted for the respondent, nothing attributable to the respondent chained the claimant from mitigating his circumstances by engaging in alternative gainful activities.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the contract of service by the respondent was unfair.
- b) The respondent to pay the claimant a sum of **Kshs. 2,728, 566.00** (less PAYE) by 01.02.2022 failing interest to run thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's 50% costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17TH DECEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**