



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT BUNGOMA

CAUSE NO. 38 OF 2017

(FORMERLY CAUSE NO. 199 OF 2016 KISUMU)

JOSEPH MWALATI INJENDI.....CLAIMANT

VERSUS

IMARA HOLDINGS LIMITED....RESPONDENT

JUDGEMENT

1. The Claimant by the claim dated 1st July, 2016 seeks the following reliefs:-

a. Certificate of service from the Respondent.

b. A declaration that the purported termination offends the constitution of Kenya 2010 and particularly Articles 41, 47 and 50 thereof, the Employment Act 2007, and fair Labour practices and consequently unlawful, unfair and wrongful and that and that the Claimant is entitled to the most appropriate redress.

c. An order of compensation in damages for unfair, wrongful and or unlawful, termination of Employment to the tune of Kshs.346,667/-.

d. Cost of the claim herein and interest on (b) above.

2. The Claimant together with the claim filed verifying affidavit sworn on 13th July, 2016, list of documents dated 1st July, 2016, claimants statement dated 13th July, 2016 and attached a bundle of documents marked "JMI 1 " to JMI 7".

3. The Respondent filed response through its advocates M/S AKWALA & Co. Advocates dated 30th August, 2016 filed on 6th September 2016, filed defendant's list of documents dated 26th September 2016, and the witness statement of Rodgers Mulemi for the Respondent filed in court on the 24th September, 2018.

4. The case was heard interparties on the 29th May, 2018 for Claimant case which was heard by Justice N. Nduma. I heard the Respondent's case on the 7th October, 2021.

5. The Parties filed written submissions as directed by court. The Claimant's submissions are dated 1st November 2021 and attached authorities.

The Respondent submissions are dated 29th October, 2018.

The Claimant's case

In brief the Claimant states he was terminated for employment unfairly for lack of hearing. The Claimant told the court that he was first employed by the Respondent on the 6th May, 2016 as Distribution Management Trainee for a 3 months period at a monthly salary of kshs. 2000 initially on probationary terms ("JMI I"). thereafter the appointment was confirmed after 3 months ("jm1 2 ") on a 1 year contract commencing 23rd July, 2015.

The Claimant was suspended for two weeks without pay vide a letter dated 23rd March 2016 on 5 grounds stated in the letter. Under the said suspension letter the Claimant was required to show cause why his services should not be terminated all together. The Claimant told the court that he responded vide a letter ("JMI 4"). The Respondent denied receipt of the letter and the said exhibit does not have a date or any indication it was delivered to the Respondent either through evidence of receipt or email address it was delivered. The court finds the said letter to be of no weight and makes a finding that the Claimant did not respond to the show cause under the suspension letter which he admits to have received.

The Respondent terminated the Claimant letter vide letter dated 10th April 2016 ("JMI 5") on reason stated that " the management undertook a forensic audit of your activities as a senior manager. It has come to our notice that you deceitfully misappropriated cash/stock amounting to kshs. 163,000/- . this is very unethical behaviour that raises integrity issues on your character. The Claimant told the court he was not given the audit report.

The Respondent's Case

In brief is that the Claimant worked as a distribution manager trainee and he was never given any promotion or engagement in another contract. That the termination was preceded by warnings for complaints against claim and laxity at work, negligence in executing his duties, fraud, failure to respond to the suspension letter. The Respondent's witness during cross examination told the court there was no evidence of trade or loss amount or audit reports exhibiting the loss incurred by the Respondent. The Respondent did not file evidence of the alleged loss of 163,000/- stated in the letter of termination of the services of the Claimant, he confirmed that in the suspension letter written there was nowhere indicated the Claimant took 3 days off and the letter did not have a hearing date of the Claimant's case.

The Respondent witness testified that he never received any response from the Claimant and the court has also found that that as true. It was the Respondent's case that the recommendation letter did not emanate from the Respondent as the Claimant never worked as its Distribution Manager and Human Resources Manager for both Imara Holdings Kakamega, Chavakali and Amanarose distributors positions which the Claimant never had.

The court notes exhibit "JMI 2" is not signed. The court also takes note that the suspension letter dated 23rd March 2016 refers to the Claimant as Senior Manager.

The Respondent's witness told the court that the Claimant failed to sign paternity leave forms and he only sought three days off. That the DWI could not confirm if the stamping on the Claimant notice was from his office. That it came to his notice that goods were taken out of the store without any payments being made by the retailers or wholesalers. The Respondent's witness said that the invoice to Mama Watoto supermarket had been generated but payment was never made to the Respondent. The witness confirmed that the employer had key performance targets but the Claimant had achieved targets. He did know how much they owed him.

Issues for determination

LEGAL ANALYSIS AND FINDINGS

1. The parties did not file the issues for determination. After carefully analyzing the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows: -

- i. Whether the termination from employment was lawful and fair
- ii. Whether Claimant is entitled to reliefs sought.

THE RELEVANT LAW

2. Section 45(i) of the Employment Act provides that no employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-

- a. 'That the reason or 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 Bases on the operational requirements of the employer was that the employment was terminated in accordance with fair procedures:'

3. Section 45 (4) of the Employment Act further states,

'A termination of Employment shall be unfair for the purposes of this part where :-

- '(a) The termination is for one of the reasons specified in section 46 or

(b) it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment.’

4. The Procedure for termination of the employment of an employee is defined under Section 41 of the Employment Act.

“ An employer shall before terminating the employment of an employee, on grounds of misconduct, prior 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 another employee or a shop floor union representative of his choice present during his explanation.’

5. The court of Appeal has held the provisions of section 41 of the Employment Act to be couched in mandatory terms. The court of Appeal in *Postal cooperation of Kenya -vs- Andrew K . Tanui (2019)* the court pronounced itself on procedural fairness as herein under:-

i. Four elements must thus be discernable for the procedure to pass muster:-...

ii. The reason or which the employer is considering termination

iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and

iv. Hearing and considering any representation made by the employee and the person chosen by the employee.’

It is against the above legal criteria this court proceeds to determine the instant claim.

6. ANALYSIS OF THE ISSUES AND FINDINGS

i. On whether there were valid and justifiable reasons to terminate the services of the Claimant.

7. The law as outlined above provides for the procedure for termination of employment under section 41 of the Employment Act, 2007 which the Court of Appeal in the postal corporation case (supra) had to be couched in mandatory terms.

8. In order to apply the above in the instant case the court has to establish the terms of the engagement of the Claimant by the Respondent . The Claimant states he was first engaged as a distributor Management Trainee for 3 months and later issued a contract as Distributor Manager (“JMI2”). ‘JMI2” later is not signed by the Respondent. The Claimant produced letter dated 6th May 2015 for employee called Harriet Kahai which was not signed by anyone. The Respondent said it was a soft copy.

9. Section 10 (7) places the burden on the responded as follows:-

“if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub section (i) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

The Claimant stated he was a Distributor Manager and produced employment letter dated 23rd July 2015 (exhibit “JMI 2”). The court takes this as unrebutted evidence of employment . The letter dated 6th May 2015 of Management trainee was for 3 (three) months and the offer of appointment contract is dated 23rd July 2015 upon lapse of the 3 months. On balance of probabilities the court finds the letter of 23rd July 2015 to be the contract of employment between the parties. Indeed in the suspension letter the Respondent referred the Claimant as Senior Manager.

10. In order to determine the issue of lawfulness and fairness of the termination procedure the court looks at the threshold under Article 41 and Sec.43.

i. Were there valid reasons to terminate the employment of the Claimant?

The Respondent relied on the reasons under the suspension letter.

i. In the month of January we incurred losses of kshs. 614,00 under your watch - no evidence of existence of this loss attributable to the Claimant was placed before court.

ii. You delivered stock worth Kshs. 30,636/- to a customer that is not clear to the business. That hinges on fraud. The Respondent produced in court autogenerated invoice (respondent document No. 2) The Claimant told the court that the allegation is not true. That this was anew client. That they filled the necessary forms (FSR) recruited clients approval system took one (1) week . The customer paid for the stock of kshs.30,636/-.

As at the time the suspension letter was issued the reason to say the invoice was a fraud existed as no evidence of payment existed. The Respondent proved this as a valid reason.

The Court found that there was no response to the show cause under the suspension letter. For that reason the Respondent reasons of proceeding on paternity leave without permission and of the unpaid invoice on balance of probabilities are valid.

11. Nevertheless the procedure under Article 41 for fair hearing must be complied with. The Respondent admitted there was no hearing. There was no evidence placed before the court of invitation to hearing before the termination of employment. The Claimant submits this was unlawful and unfair. The letter of termination of service (JMI 5) is clear there was no hearing. It refers to suspension letter and audit done during the suspension, the basis of the termination.

12. The court finds that the submissions by the Respondent that a notice to show cause can amount to fair termination process is far fetched. Section 41 of the Employment Act among others would require explanation to the employee in language they understand the reason the employment is contemplating the termination and the employee is entitled to have another employee or Shop Floor Union representative of his choice present during the explanation. It is the opinion of this court that this calls for actual hearing both parties present. A record of the minutes of the hearing is advisable as it is proof that the hearing occurred and the court can evaluate if the process was fair. This not the case in the instant case.

13. The court finds that the Respondent is in violation of Section 41 of the Employment Act 2007 thus the termination of services of the Claimant by the Respondent was unlawful and unfair.

Is the Claimant entitled to the Relief sought?

14. The court proceeds to address each relief as follows:-

a. On the claim for unpaid leave for 8 months worked for Kshs. 16,667/-. The Respondent did not dispute this claim or provide records on the Claimant's leave status as required under section 74 (1) (f) of the Employment Act which provides that the employer shall keep record of particulars of employee's annual leave entitlement days and days due as specified in section 28 of Employment Act. This position was upheld in the case of *Gilbert Mariera Makori -vs- Equity Bank Limited 2016 Eklr*. The Claimant is granted compensation for 8 months annual leave being $8/12 \times 25000$ total sum awarded of Kshs. 16,667/-

b. The Claimant having been unfairly terminated is entitled to Notice for one month of Kshs 25,000.

c. On claim for Compensation for unfair termination. The court found the termination was unlawful and unfair. The claimant states he is entitled to 12 months compensation total Kshs.280,000/- Section 49 (1) (c) of the Employment Act states where the dismissal is unlawful the Labour officer may recommend the employer to pay equivalent of salary not exceeding 12 months based on gross salary of employee at time of dismissal. Section 50 of the Employment Act provides that the court is to be guided by provisions of Section 49 in complaint of wrongful dismissal and unfair termination. The court already found the Claimant to have been unfairly terminated. He sought damages. Section 49 (4) provides that in considering the remedies under sub section (i) including damages the court is to take into account *inter alia* the wishes of the employee, the circumstances under which the termination took place, including the extent, if any to which the employee caused or contributed to the termination, the employee's length of service with the employer, reasonable opportunities available to the employee for securing comparable or suitable employment with another employer. The court found that there existed valid reasons for termination. He is likely to get a similar or suitable employment in the opinion of the court. The Claimant contributed to the termination and failed to respond to the show cause. Considering the above factors the court finds an award of 3 months compensation to be adequate compensation of the procedural unfairness in the termination. The total sum of Kshs 75,000/-(25000x3) is awarded as compensatory damages.

d. On the Claim for 2 months outstanding commissions the Respondent through its witness admitted the Claimant had met the targets though he did not know the amount. The employer has obligation to produce such records. It did not. The claim is granted as prayed for Kshs.25,000/-

CONCLUSION AND DISPOSITION

15. I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I now enter judgment for the Claimant against the Respondent in the following terms:-

a. Compensatory damages for 3 months at gross salary at dismissal of Kshs. 25000 x 3 total sum of Kshs. 75,000 the court awards the Claimant the total sum of Kshs. 75,000/- as compensatory damages.

b. Notice pay for 1 month salary the total sum of Kshs. 25000 is awarded

c. Accrued annual leave for as prayed is awarded for Kshs. 16,667/-

d. Outstanding commission of Kshs. 25000 is awarded

The award in (a) (b) (c) and (d) above is subject to statutory deductions.

e. I also award the Claimant interest on the award sum (a, b, c and d above) at court rates from the date of judgment until payment in full.

f. The Respondent shall pay costs of the claim to the Claimant

DATED , DELIVERED AND SIGNED THIS 16TH DECEMBER, 2021 AT BUNGOMA

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant- Brenda

For Claimant- Absent

For Respondent:-M/S Aligula