



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 798 OF 2012

MARK EKALE EKUAM.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Memorandum of Claim dated 9th May 2012 for the unfair and unlawful termination of his employment. He avers that the Respondent engaged him on 30th August 1993 or thereabouts as a Technical Trainee at a basic salary of €1,551 per annum and that his employment was on permanent and pensionable terms. The Claimant avers that he served the Respondent in various capacities, received exceptional and yearly bonuses and was recognised and severally awarded, including a long service award for the 15 years of service. The Claimant asserts that as a result of his exceptional service, he was transferred to head the Respondent's biggest and busiest retail outlet in the Orange Kenya operations as a shop Manager. He avers that the Respondent had a system of preferred partner credit facility which allowed partners to draw cheques of up to 1.9 Million shillings and obtain stock against the cheques. The Claimant avers that the shop would on a daily basis receive about 200 to 500 cheques from both normal and "walk-in" customers and partners and that sometimes movement of the cheques from the shop to the treasury would take long. That this would result to the shop not being timely informed when a cheque for example bounces and is not paid and create a situation where a partner may be served twice even though they issued a bouncing cheque. Further, due to this poor cheque tracking system by the Respondent and inaccessibility of bank statements by the shop managers, a partner would draw two different cheques and receive service before the shop noticed that the previous cheques had bounced. The Claimant avers that the shops were also not privy to the financial positions of the partners they served and that they would only know that a partner was preferred when they came over to the shop with the respective account manager/regional managers asking to place orders. The Claimant avers that at that time the Respondent did not have a system of detecting defaulting partners and blacklisting them and the shops did not thus have full visibility of the Return to Drawer (RD) Cheques. That the Respondent also had a system of awarding varying commission structures to different partners and that the anomalies would require the shop manager to inform the IT department to do adjustments as per the commission structures in place at the time. It is the Claimant's averment that he had numerous requests through his line managers for assistance in managing the Mega Shop which handled an average of over Kshs. 250 Million in various services and products and the staff were overwhelmed with work. The Claimant avers that he took all precautions to ensure everyone in the shop operated within the policy guidelines and followed all procedures and that no stocks were lost within the shop as a result of staff fraud since the shop stock management process was well documented. The Claimant avers that the variances in stock management was a normal occurrence because the Respondent was operating on both manual and online records systems which did not tally at all times and therefore required harmonization through a variance report analysis. The Claimant avers that as shop manager he carried out a total of 21 stock-take exercises and forwarded all reports as required through the Finance Representative to Manager Stocks at the Finance Headquarters, together with all variance analysis reports. That during the month of May 2011 or thereabout, Deloitte Kenya carried out a FY 2011 HI External Stock Audit for a period of two (2) days and when a variance report analysis was done, no issues arose as regards stock variances. He avers that the Respondent issued him with a warning letter dated 7th April 2011 citing alleged negligence of duties and that an audit team visited the Mega Shop on 7th and 8th September 2011 to carry out an audit exercise. The Claimant contends that this said audit was carried out unprocedurally because the stock count was carried out on normal business hours while all the systems were operational whereas normal procedure would demand shutting down the shop for uninterrupted stock count and verification of the shop's online and manual systems. Further, the audit team did not share the audit report with him for his response.

2. The Claimant avers that on 19th October 2011, the Respondent's Chief Officer Mass Market/Customer Care called him into his office and informed him that the Audit report had raised issues about the Mega Shop and proceeded to suspend him with immediate effect even though they had both not seen the said report. The Claimant avers that the Respondent's Compliance team gave him a power point presentation extract purported to be the Audit report, to rely on in preparing his defence before the disciplinary committee and he notes the audit report cited stock variances dating back between 2009 and 2011 September implying that 3 years of audit was purportedly carried out in the three days audit exercise. That during the disciplinary committee hearing on 24th and 30th November 2011, he was not given a fair chance to defend himself as he did not have all the information he needed to make his defence. The Claimant avers that the Respondent also intimidated his witnesses threatening them with disciplinary action and made some of them withdraw their statements in support of the Claimant. The Claimant avers that vide a letter dated 1st December 2011, the Respondent's Chief Human Resources Officer purported to terminate his employment with immediate effect and that at the time of the termination he was earning a monthly gross salary of Kshs.

88,000/- plus commissions. He contends that in terminating his contract of employment, the Respondent has breached and flouted its own laid down Policy together with the Claimant's rights and expectations. He thus prays for judgment against the Respondent for:

- a. Salary inclusive of allowances and benefits for the remainder of the period the Claimant would have worked until lawful retirement.
- b. Awards in addition to (a) above to be determined by Court taking into account promotions and salary increments for remainder of period the Claimant would have worked until lawful retirement.
- c. Severance pay.
- d. Costs.
- e. Interest on (a) (b) and (c) until payment in full.

3. The Respondent filed a Replying Memorandum dated 26th July 2012 averring that under the employment contract, either party could terminate the contract at any time or by payment of one month's salary in lieu of notice. It avers that under its said preferred partner credit facility system, the preferred partners would pay for the stocks through a cheque drawn in favour of the Respondent and could only purchase new stocks after the previous cheque issued by the said partner had cleared. The Respondent avers that it also had internal control measures since it had employed an Area Accountant who was fully aware of the transactions involving the preferred partners and could ascertain whether the partner's cheques had cleared or not. The Respondent averred that the Claimant was thus at all times required to liaise with the Area Accountant for purposes of confirming whether a preferred partner's cheque had cleared before they could purchase additional stock on credit, but which procedure the Claimant failed to adhere to. It further avers that it also had a system that automatically distinguished preferred partners from other customers such that when a preferred partner approached the Respondent for purposes of making a purchase, keying in their details into the said system would automatically give their credit percentage and identify whether they were a preferred partner. The Respondent avers that the Claimant was thus able to establish whether a preferred partner had been blacklisted but despite knowing that one of the preferred blacklisted partners, Bravo Communications was blacklisted, he negligently proceeded to approve purchases from the said customer that led to further loss to the Respondent. It is the Respondent's averment that the audit carried out in September 2011 in the Mega Shop managed by the Claimant revealed major stock shortages from the sale of airtime cards, laptops and devices and discrepancies as a result of non-adherence to mandatory financial regulations and stocks management procedures. The Respondent avers that it subsequently conducted an investigation which ascertained the cause of the shortage to issuance of bad cheques by preferred and non-preferred partners which cheques had not been replaced and the investigation report attributed the cause of the shortages to the Claimant's negligence in carrying out his duties. That it thus suspended the Claimant from duty to pave way for investigations in accordance with its Human Resource Policy manual. It further avers that the audit process was carried out during normal working hours to enable the auditors have a full picture of how the Mega shop operates and for them to identify any anomalies in the procedure employed at the shop. It asserts that the Claimant was furnished with a copy of the audit report prior to his disciplinary committee hearing and that he was given sufficient time to prepare his defence presentation for the charge of gross negligence of duty. The Respondent avers that it considered both the Claimant's written defence and presentations at the disciplinary committee meeting but found the same to be unsatisfactory and thus issued him with a letter terminating his services.

4. The Respondent denies that it intimidated the Claimant's witness stating that his witness indeed made representations in the meeting as seen in the minutes and further denies the particulars of malice and bad faith set out in the Claim. It also denies that the Claimant is entitled to salary inclusive of allowances and benefits up to his retirement as alleged averring that the alleged computation of terminal dues would not apply in any instance and is against all known laws. The Respondent avers that the Claimant is not entitled to severance pay because his employment was terminated on grounds of gross negligence which it was entitled to summarily dismiss him for. That as the Claimant has no justifiable cause of action against the Respondent the Claim is an abuse of the Court process and should be dismissed with costs.

5. Claimant's Submissions

The Claimant submits that the two Claimant's witnesses confirmed in their evidence that the issues of preferred partners and bounced cheques was completely out of the Claimant's control and could not form a basis for his termination as alleged and/or at all. He urges the Honourable Court to apply necessary weight on his testimony and that of the witness as they were extremely honest with the court and were consistent and calm even during cross examination by the Respondent which cross examination only confirmed their grievance before the Court. It is the Claimant's submission that the Respondent's two witnesses on the other hand confirmed they had never seen the full audit report which formed the basis for terminating the Claimant's employment and that they did not participate in the preparation of the said audit report. He submits that notably, neither the full and signed copy of the audit report was availed to the Court nor any of the persons who participated in the alleged audit process called to testify and clarify to the Court the matters in the report. He urges this Court to thus dismiss the Respondent's witnesses' testimony for being unreliable and unhelpful to the Court and after reviewing the Claimant's evidence, conclude that he has proved his case within a balance of probabilities and is deserving of the remedies sought herein for the unfair and unlawful termination of his employment. It is submitted by the Claimant that he has fully satisfied the pre-conditions set for proof of unfair termination as provided for under Section 45(2) of the Employment Act, 2007. The Claimant relied on the Court of Appeal decision in the case of **Kenfreight (EA) Ltd v Benson K. Nguti [2016] eKLR** where the Learned Judges held that termination of employment will be unfair if the court finds that in all the circumstances of the case it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair. The Claimant submits that the Respondent has failed to meet its burden of proof set in Section 45 of the Act, that it terminated his employment on valid reasons and that it adhered to due process. The Claimant submits that Section 43 of the Act also affirms that the employer needs to prove the reasons that informed the decision to terminate the services of an employee. It is the Claimant's submission that he has demonstrated that during the course of his employment he did all he could reasonably do to mitigate the challenges associated with the Mega Shop and that as such the reasons advanced by the Respondent were out rightly malicious and only meant to damage his reputation and stellar performance over the years. That no evidence has been tendered before Court by the Respondent linking him to the loss of cash and that the charges preferred against him and which he responded to were different to the reasons given by the Respondent for the termination. That as such the reasons for the termination cannot be said to be sufficient and valid, more so in the absence of any solid demonstration of existence of the alleged audit report. On procedure, the Claimant submits that as due process was not followed

in the termination of his employment as pleaded, the same is unfair and he relied on the Court of Appeal cases of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** and **Geoffrey Ajuong Okumu & Anor v Engineers Board of Kenya & 4 Others [2021] eKLR**. He further urges the Court to note that the investigator's report used to prefer the charges against him was not signed by the maker and no good reason and/or explanation has been offered by the Respondent and that this casts more doubts on the authenticity of the report and the maker of the same. The Claimant relies on Article 41 of the Constitution of Kenya, 2010 which provides that every worker has the right to fair labour practices and Article 47 which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Claimant submits that the remedies due to him are provided for under Section 49 of the Employment Act and that the Court should consider that he dutifully and faithfully served the Respondent for 18 years without any disciplinary charges being preferred against him whatsoever, was promoted to various key positions and his efforts duly recognized and awarded. It is the Claimant's position that the claim for the award of anticipatory monetary sums is founded on the principle that a person should be placed in the position they would have been if the unprecedented unlawful and unfair termination of employment had not been effected. The Claimant submits that despite the recent decision of the Court of Appeal in **D K Njagi Marete v Teachers Service Commission [2020] eKLR**, application of the same would drive him away from the seat of justice and that the correct position would be to mirror the merits of the decision to the circumstances of this case. The Claimant submits that the Court should also consider the illegal and unprocedural circumstances that led to his termination and exercise its discretionary powers to award him the anticipatory earnings as so prayed. He further submits that he is entitled to service pay considering his long service to the Respondent, as under Section 35(5) of the Employment Act. He submits that further, Clause 5.2(i) of the Respondent's Human Resource Policy Manual in part provides that employees who have rendered long meritorious and distinguished service shall also be awarded through cash bonuses which include "15 years' service-half months". The Claimant submits that the Court of Appeal in **Bamburi Cement Limited v William Kilonzi [2016] eKLR** held that where the dismissal of an employee is not justified and is wrongful, the employee will be awarded gratuity if it is provided for in the contract of employment. The Claimant finally submits that the Respondent should bear the costs of litigation as he was unfairly and unlawfully terminated.

6. Respondent's Submissions

The Respondent submits that under the Respondent's Human Resource Policy, it could dismiss an employee for serious negligence of performance of their duties and responsibilities or for inadequate performance and also for gross negligence of duty resulting in loss of funds and/or property. The Respondent submits that whereas the role of the Shop Manager required keenness, due diligence and application of best practices, the Claimant failed in discharging these obligations and caused financial loss to the Respondent and that it relies on the case of **Laureen M Nzau v Kenya Revenue Authority [2021] eKLR**. The Respondent further submits that in view of the foregoing, the Court should find and hold that the Respondent had valid and lawful reasons to institute and undertake disciplinary proceedings against the Claimant, and to ultimately terminate his employment and that it complied with the provisions of Sections 43 and 45 of the Employment Act. That the Court should also find and hold that the Respondent complied with the requirements of Sections 41 and 45 of the Employment Act as the Claimant was taken through a fair disciplinary process before his termination. The Respondent submits that Sections 49 and 50 of the Employment Act do not contemplate an award of salary for the remainder of the period until retirement as sought by the Claimant and which was affirmed by the Court of Appeal in **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR** upholding a decision by Onyango J. in **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR**. It further submits that under Section 40(1)(g) of the Employment Act, severance pay is made pursuant to a termination by redundancy which is not the case herein and should thus not be payable and that the same was similarly reiterated in the case of **Kennedy Nyamwaya Bundi v Instra Products (EPZ) Limited [2021] eKLR**. It is the Respondent's submission that considering the termination was not unlawful and unfair as alleged this Honourable Court ought to dismiss the Claimant's claim with costs.

7. The dismissal of the Claimant followed the disciplinary hearing which was precipitated by an audit where the Respondent states it found the Claimant had been negligent in his service. The Claimant asserts that the issues of preferred partners and bounced cheques was completely out of his control and could not form a basis for his termination. There was an audit report referred to by the Respondent. However, even the Respondent's two witnesses confirmed in testimony that they had never seen the full audit report which formed the basis for terminating the Claimant's employment. They also confirmed that they did not participate in the preparation of the impugned audit report. Notably, neither the full and signed copy of the audit report was availed to the Court nor any of the persons who participated in the alleged audit process called to testify. It was therefore not clear what the participation of the Claimant was in the matters in the report. The Respondent had a burden to show that there was reason for the Claimant's termination from employment.

8. The termination being found to have lacked basis, the Claimant would be entitled to recover some relief. He seeks to be paid for the remainder of his term. In the case of **D K Njagi Marete v Teachers Service Commission [2013] eKLR**, Rika J. held that

"26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act, 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate (sic) double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round." (emphasis supplied).

9. The Claimant has not been rendering service to the Respondent and there is no reason as to why his case is exemplary to allow for the grant of salaries to the lawful retirement of the Claimant. The claim for salary inclusive of allowances and benefits for the remainder of the period the Claimant would have worked until lawful retirement is unmerited. As regards the prayer for an award in addition to the foregoing to be determined by Court taking into account promotions and salary increments for remainder of period the Claimant would have worked until lawful retirement also does not lie. He is not entitled to severance pay as his claim was not one for redundancy. He failed to seek any alternative relief and as such will recover nothing. Suit is dismissed as there are no orders the Court can grant the Claimant. Suit dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021

NZIOKI WA MAKAU

JUDGE