



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 98 OF 2010

(Before Hon. Lady Justice Maureen Onyango)

JOHN WANJOHI WAKAHORA

CLAIMANT

VERSUS

LINKSOFT COMMUNICATIONS SYSTEMS LIMITED

RESPONDENT

JUDGMENT

Vide his statement of claim dated 3rd February, 2010 and filed in Court on 9th February, 2010, the claimant herein avers that his employment was wrongfully and unfairly terminated by the Respondent, a registered limited liability company.

His case is that he was employed by the respondent on or about 1st June, 2006 in the position of Chief Technical Officer. That under his Contract of employment he was entitled to a gross salary of Kshs.277,702 among other benefits as stipulated in his letter of appointment dated 6th April, 2006.

The Claimant further contends he worked diligently and to the Respondent's satisfaction and rose to the position of Managing Director, Nigeria with effect from 1st November, 2007 earning a gross salary of USD 5,625 and other benefits as highlighted in his letter of offer dated 29th October, 2007.

The Claimant stated that he continued holding this position until 1st February, 2009 when his employment was terminated by the Respondent on allegation of absconding duty at his work station in Abuja, Nigeria.

The Claimant averred that the Respondent was aware about his absence from his duty post in Abuja, Nigeria and the reasons behind his return to Nairobi.

The Claimant further averred that the termination of his employment was therefore wrongful and unfair. He further averred that the same was illegal, null and void *ab initio*.

In his Memorandum of Claim, the Claimant seeks the following reliefs:

- a) A declaration be issued to declare that the Claimant's dismissal from employment was wrongful.
- b) An order that the Respondent issues the Claimant with a certificate of service.
- c) Payment as follows:
 - i. Unpaid five (5) months' salary amounting to Kshs.2,109,375.00
 - ii. Three Months' Salary in lieu of notice Kshs.1,265,625.00
- d) The costs of this suit.
- e) Interest on prayers (c) and (d) herein above at Court rates from the date of filing this suit until payment in full.

The Respondent in its Replying Memorandum dated 21st April, 2010 and filed in Court on 22nd April, 2010 admits having engaged the Claimant as pleaded in his Memorandum. The Respondent however denies having wrongfully and unfairly terminated the claimant's services and contends that the Claimant absconded duty at its Nigeria office without availing any explanation and for no justifiable reason.

The Respondent contended that it was forced to terminate the Claimant's services summarily and that due process was followed as provided under Section 44 of the Employment Act, 2007. It is further the Respondent's assertion that it tried to reach out to the Claimant during the period of his absence from duty seeking his explanation but calls from its Chief Executive

Officer went unanswered.

It is on this basis that the Respondent contends that the Claimant was terminated procedurally and is therefore not entitled to the reliefs sought in his Memorandum of Claim. The Respondent further contends that in the circumstances the Claimant cannot rely

on the provisions of Section 49 of the Employment Act, 2007.

The Respondent further avers that save for the Certificate of Service, all the declarations and orders sought by the Claimant are not applicable in his case.

The Respondent urged this Court to dismiss the instant Claim with costs to the Respondent.

The matter proceeded for hearing on 26th October 2010, 29th March 2011, 24th November 2011 and 26th February 2019. The Claimant testified on his own behalf and the Respondent called one witness to testify on its behalf.

Parties thereafter filed and exchanged written submissions.

Claimant's Case

The claimant testified that he started working in the Respondent's Nairobi Office as its Chief Technical Officer with effect from 1st June, 2006. That he held the position until September 2006 when he was assigned to set up similar operations for the Respondent in Tanzania. He further testified that once the said office was set up and got its manager he returned to the Nairobi Office.

The claimant testified that he was tasked to set up a similar office in Abuja Nigeria from April 2007 and was forced to relocate to Abuja. That in July 2008 the Respondent was forced to lay off some of the staff members in Abuja due to financial constraints.

The claimant testified that as they were laying off staff he received threats on his life from one of the members of staff at the Abuja Office. The staff member threatened that if he was laid off he would come to the office with a gun. He took the threat seriously and communicated his concerns about the threats to Nairobi office through emails.

The claimant further testified that it was as a result of these threats that he decided to return to Nairobi. That he did communicate via email with the Nairobi office expressing his intention to return to the Nairobi office. He testifies that he did not report the threats to the police in Nigeria as he believed that the Director he was dealing with in Nigeria was very influential and it would have been risky for him to report.

He further testified that despite informing the Respondent of this issue he was not called to any meeting between October 2008 and February 2009. He stated that he was not served with any show cause letter. He urged this Court to allow his Claim as prayed.

On cross examination the claimant stated that there was bad blood between himself and Babatunde Edon, a Director of the company in Nigeria who was acting Managing Director before the claimant was posted to Nigeria. He however stated that he had no documents to prove the same. He stated that he did report the threats to his life to the Respondent's Nairobi office.

The claimant stated that he continued working from Nairobi but was not paid for work done despite asking for his pay verbally. He further stated that in November 2008 he was not assigned any duties. He further stated that his letter of termination indicated that he would be paid for September 2008 but the same was never done.

He stated that the basis of asking for salary for October 2008 to February 2009 was that the Respondent is the one who failed to assign him duties. He further confirmed that his duties were never reassigned but rather he reported back to his appointing authority.

On re-examination, the claimant insisted that he returned from Nigeria in September 2008 and that on his arrival he held a meeting with Mr. Wahome, one of the Respondent's Directors at which explained the reason behind his exit from Nigeria. He further testified that the said director made him believe that he would be transferred to the Respondent's Ghana Office. He denied that he absconded duty.

Respondent's Case

RW1, ANTHONY WAHOME GITHINJI, the Respondent's Chief Executive Officer confirmed the claimant was employed by the

Respondent herein and was later seconded to its Nigeria office.

RW1 further testified that he was not aware of any bad blood between the Claimant and Babatunde as the issue was not raised with him. He

contended that the only issue with regard to the Nigeria office that he was aware about was the overdraft facility that was taken without authorization by the board.

RW1 testified that towards the end of September, 2007 the Claimant absconded work and all efforts to reach him via mobile phone or his residence were futile.

He confirmed that there was a meeting on 1st November, 2008 where the Claimant raised concerns and explained why he left his Nigeria Office citing threats from the 3rd Director, Babatunde. RW1 further testified that in the meeting the Claimant was given an opportunity to resume his duties in Nigeria, which offer the Claimant indicated he would accept if the 3rd Director was relieved of his duties at the said office.

On cross examination RW1 confirmed that Mr. Babatunde was in Nigeria at the time the Claimant was attached to the said office. He stated that he did not receive any complaint from the Claimant on any threats to his life as alleged by the Claimant.

RW1 further testified that the Claimant absconded duty in September 2008 and his calls and emails to the claimant went unanswered. He also confirmed that the Claimant failed to attend a board meeting despite being invited to attend.

On re-examination RW1 stated that the Respondent's Board did not recall the Claimant back to its Nairobi office and the Claimant absconded duty and all the respondent's efforts to trace him were futile.

RW1 further stated that there was no communication from the Claimant of the hostile relationship that may have existed between him and Babatunde. He insisted that the Claimant did not report to the Nairobi office after he left the Nigeria office.

RW1 reiterated that the Respondent did follow the law in terminating the Claimant's services and therefore he is not entitled to the reliefs sought in his Claim.

Submissions by the Parties.

The Claimant submitted that he did not abscond duties as alleged by the Respondent but rather reported back to Nairobi following threats to his life in Abuja Nigeria. He further submitted that he was justified to report back to his appointing authority tension having arisen in the Nigeria office rendering the working environment hostile. The Claimant contended that his rights as envisaged under Articles 41(2)(b) and 25(a) of the Constitution of Kenya, 2010 had been violated.

He submitted that he clearly communicated through email notifying the Respondent of his intention to return to Nairobi and that he was in fact reachable. He contended that the facts of his case do not support the Respondent's charge of desertion against him. The Claimant relied on the case of **Felistas Acheha Ikatwa Vs Charles Peter Otieno (2018) eKLR** where the Court cited the case of **Seabolo Vs Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** where it was held:-

"...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulate the intention not to return."

The Claimant also relied on the case of **Stanley Omwoyo Onchweri Vs Board of Management Nakuru YMCA Secondary School (2015) eKLR**.

The Claimant submitted that the termination was unfair and unlawful as he was not accorded a chance to be heard contrary to the rules of Natural Justice and Section 41 of the Employment Act, 2007. The Claimant relied on the cases of **Jared Aimba Vs Fina Bank Limited (2016) eKLR**, **Shankar Saklani Vs DHL Global Forwarding (K) Limited (2012) eKLR** and **Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR**.

The Claimant further submitted that the termination was unfair as the same was done contrary to the provisions of Section 43 and 45 of the Employment Act, 2007. He therefore contended that he was not terminated in a just and equitable manner.

The Claimant further submitted that the Respondent was at all times aware of his whereabouts' and can therefore not plead desertion. The Claimant relied on the Court findings in the cases of **Felistas Acheha Ikatwa Vs Charles Peter Otieno (2018) eKLR** and **James Okeyo Vs Maskant Flower Limited (2015) eKLR**.

The Claimant submitted that he is entitled to the reliefs sought in his Memorandum of Claim and urged this Court to award the same as prayed. The Claimant relied on the following decisions **Liz Ayany Vs Leisure Lodges Limited (2018) eKLR**, **Pillemon Oseni Kidavi Vs Brinks Security Limited (2018) eKLR** and **Fredrick Musembi Vs George Ndungu & 2 Others (sued on behalf of the Public Service Club) (2016) eKLR**.

Respondent's Submissions

The Respondent submitted that the Claimant's contract of employment was validly terminated for lawful and justifiable reasons, which was that he (the Claimant) absconded duties without notice, explanation or justification. The Respondent further submitted that this was tantamount to a fundamental breach of his employment

contract leaving the respondent with no other choice than to summarily dismiss him as provided under Section 44 of the Employment Act, 2007.

The Respondent further submitted that having followed the law, the instant Claim is devoid of merit and urged the Court to dismiss the same with costs to the Respondent.

The Respondent contended that the Claimant is not entitled to the reliefs sought in his Claim and relied on the cases of **Banking Insurance Finance Union (K) Vs Co-operative Bank of Kenya Limited (2019) eKLR**, **Vincent Abuya Obunga Vs Mast Rental Services Limited (2019) eKLR** and **Sophia Wambui Muthoni Vs Muramati Sacco Society Limited (2014) eKLR**.

Analysis and Determination

There is no dispute that the Claimant was employed by the Respondent from 1st June 2006 until 1st February 2009 when his employment was terminated as communicated in the Respondent's letter dated 1st February 2009. The issues for determination therefore

are:

1. Whether the Claimant was unlawfully terminated or he deserted duty;
2. Whether the Claimant is entitled to the remedies sought.

Unfair termination

The Claimant contended that his services were wrongfully and unfairly terminated by the Respondent as the reason for his intention to return to Nairobi was clearly communicated to the Respondent. The Claimant averred that he did communicate this threats to his employer and that this informed his decision to return to Kenya.

Black's Law Dictionary (Ninth Edition) defines desertion as:

“The willful and unjustified abandonment of a person's duties or obligations.”

In the South African case of **Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** the Court sought to distinguish desertion from unauthorized absence from duty as follows:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”

Was the Claimant guilty of desertion as contended by the Respondent?

From the evidence on record, the Claimant is not guilty of desertion as he clearly communicated his fears to the Respondent via email one such email being the one dated 22nd August that reads:

“All,

Current scenario creates a lot of discomfort and a sense of insecurity especially during a time like this when we have made structural changes and disciplinary actions affecting a number of staff.

After due consideration am making a trip back to Nairobi.

Best Regards

John Wakahora”

It is evident from the email that this is a person who is clearly under distress. He expressed genuine fear for his life thus the decision to return home. There appears to have been no response to the email. There is no evidence that the respondent was not aware that the claimant had left Nigeria or the reason for his exit from there. There is therefore no proof that he absconded duty.

Further, even if he had absconded, he is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support there having been a disciplinary process that was followed. There is further no evidence of notice issued prior to the termination with the allegation of absconding duty as raised by the Respondent. It was up to the Respondent to prove to this Court that it accorded the Claimant a hearing prior to the termination of his employment.

In the case of **Felistas Acheha Ikatwa Vs Charles Peter Otieno (2018) eKLR** the court held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the

termination.”

I find that the termination of the claimant’s employment was unfair as the Claimant was not issued with any notice nor was he accorded a hearing prior to termination.

Reliefs

From the foregoing the Claimant is entitled to the following reliefs:

- a) A declaration be issued to declare that the Claimant’s dismissal from employment is wrongful.
- b) An order that the Respondent issues the Claimant with a certificate of service by dint of Section 51 of the Employment Act, 2007.
- c) Payments as follows:

i. Unpaid Salary for 5 months’ amounting to 2,109,375

In my view the Claimant is not entitled to the same as he did not work for the said duration and thus awarding the same would amount to unjust enrichment by the Claimant. In the case of **D. K. Njagi Marete Vs. Teachers Service Commission – Industrial Cause No 379 of 2009** held:

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

I award him salary for one month as admitted in the sum of **USD 5,625**.

ii. 3 months’ salary in lieu of notice

The claimant’s contract provided for 3 months’ notice. I award him the same in sum of **USD 16,875**

iii. Compensation

Taking into account all relevant circumstances of this case, including the manner in which his employment terminated, the position he held and the length of service, I award the claimant 4 months’ salary as compensation in the sum of **USD 22,500**

Total award is USD 45,000.

The respondent shall pay claimant’s costs of the suit.

The decretal sum shall attract interest at court rates except of the prayer for salary for September 2008 which will incur interest from date of filing suit, having been due on the date of termination as admitted in the letter of termination.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE