



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1856 OF 2014**

(Before Hon. Lady Justice Maureen Onyango)

**MARTIN ANYANGO ANYANGO.....CLAIMANT**

**VERSUS**

**INDO AFRICA FINANCE LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Martin Anyango filed this claim on 21<sup>st</sup> October 2014 vide a Statement of Claim dated 16<sup>th</sup> October 2014 alleging wrongful and unfair termination of employment by the Respondent, Indo-Africa Finance Limited. He avers that he was employed by the Respondent as Operations and Business Development Manager for 1½ years commencing 14<sup>th</sup> May 2012, earning a monthly salary of Kshs.60,000/=. That the Respondent’s Chief Executive Officer orally terminated his employment without any just cause or prior notice. He was asked to hand over all the company cash and property. He was not given any reasons for the said termination nor afforded an opportunity to answer any allegations that may have arisen prior to termination of his employment.

His claim against the Respondent is as follows:-

- a. Salary in lieu of notice..... Kshs.60,000.00
- b. Unpaid leave allowance..... Kshs.62,500.00
- c. Service pay at 15 days for 2 years..... Kshs.60,000.00
- d. Compensation on account of wanton and unfair dismissal  
(the equivalent of 12 months)..... Kshs.720,000.00

**Total Kshs.902,500.00**

The Claimant avers that despite demand and notice of intention to sue, the Respondent neglected, failed or ignored to make good his demands. He prays for judgment against the Respondent for:-

- a. The sum of Kshs.902,500.00 as particularised in paragraph 7 of the Claim.
- b. Costs of this suit.
- c. Interest on (a) and (b) hereinabove at court rates.

The Claimant filed his witness statement dated 16<sup>th</sup> October 2014 stating that under his employment agreement dated 14<sup>th</sup> May 2014 together with the statement of claim, he was entitled to annual leave and other benefits that accrue by virtue of the Employment Act. That he was serving his second year in employment with the Respondent when Mr. Leon Ndubai informed him on 20<sup>th</sup> November 2013 that he was no longer an employee of the Respondent. That he had never been informed of any misconduct on his part prior to termination of his employment and in his view the said termination was unjust and unfair considering he was being denied his source of livelihood without any reasons.

The Respondent filed its Memorandum of Response dated 10<sup>th</sup> March 2015 denying that the Claimant left service as a result of dismissal or that the termination was initiated or executed by the Respondent. It avers that the Claimant had a greater responsibility than an ordinary employee as he was both a manager and a leader but that he persistently began reporting to work late without any apologies/explanations, even before he had completed a year of service. For instance, on or around 2<sup>nd</sup> April 2013, the Claimant was scheduled to preside over a weekly board room meeting as the Branch Head in his work station but he showed up late and found his team waiting for him. That it issued him with a warning letter dated 3<sup>rd</sup> April 2014 for the lateness but the Claimant did not improve.

The respondent avers that on 3<sup>rd</sup> June 2013, the Claimant had in gross breach of his fiduciary duties written a recommendation letter using the company letterhead in respect of one Daniel Njiru Ngai, a former employee of the Respondent, without authority or mandate. That he had purported to suggest in the recommendation letter that the said former employee was diligent and competent when in fact the employee had left the company under unconventional circumstances. That it consequently issued to the claimant another warning letter on 19<sup>th</sup> June 2013 for the unlawful use of company letterheads without authority. That it issued him with yet another warning letter two months later for gross misconduct following his issuance of funds to a customer without following the correct policies and procedure.

The Respondent contends that due to the Claimant's irresponsible behaviour, the number of customers seeking loans went down and clients started pulling out savings accounts held with it. Additionally, the rate of bad debts increased yet the Claimant did not feel the need to redeem the potential and eminent downfall of a branch that was under his leadership. That this behaviour constantly occasioned the respondent loss, damage and bad reputation among financial institutions and potential customers and that the claimant was a potential risk and liability to the Respondent. That the Claimant also had a frosty relationship with his junior staff and the management often received complaints from staff at the Westlands Branch where the claimant worked on the wanting state of the branch leadership.

It avers that the Claimant decided to voluntarily resign from employment on or around 20<sup>th</sup> November 2013 after realizing he was involved in numerous activities that constituted gross misconduct at the work place. That on 4<sup>th</sup> December 2013, it deposited Kshs.44,000/= into the Claimant's Account No. 001110000850 held with the Respondent being his salary for 22 days worked in November 2013 and which the Claimant wholly withdrew the following day. On the claim for leave, it contends that on 22<sup>nd</sup> December 2012 the Claimant filled a form requesting for leave up to 6<sup>th</sup> January 2013, which leave he was not even qualified for as he had not completed one year of service and that it paid him cash for leave days taken. It denies that the Claimant is entitled to any of the reliefs sought in his Claim or at all since he voluntarily tendered his resignation. It attached annexures marked **IAF1** which it stated it shall be relying on. It prays for the Claimant's suit to be dismissed with costs to the Respondent.

The Claimant filed a Reply to Memorandum of Response dated 23<sup>rd</sup> April 2015 denying that he voluntarily resigned from the Respondent's employment and insisted he was casually and verbally dismissed from employment. He denies he was late for any of the meetings stating that the meetings could proceed without his personal presence anyway. He further denies receiving any warning letters on account of lateness or for any other reason. He avers that as a team leader at the company, he was responsible for issuance of recommendation letters and that the recommendation he gave to Daniel Njiru was deserved. On the allegation of unprocedurally issuing funds to a customer, he contends he followed due procedure in granting the loan and was involved because the loan in question was above the limit permissible for tellers. Further, that the loan was properly secured. He states he was entitled to 25 days leave at the time he left employment, that he had a good working relationship with the other employees and that he is entitled to all the prayers sought since he was wrongfully and unfairly dismissed from the Respondent's employment.

## **Evidence**

The Claimant relied on his witness statement. He testified that on 19<sup>th</sup> November 2013, he was assigned a loan file for Talanta Africa Limited to initiate loan recovery process which was part of his role. That he executed the directive and ended the day well. That the following day on 20<sup>th</sup> November 2013, his boss Leon Ndubai arrived ten minutes after him looking very furious, summoned him to the boardroom and asked whether he had spoken to the boss of Talanta to which the claimant answered in the affirmative. To his surprise, he was then sacked and sent off in about 20 minutes without being told what wrong he had committed. He testified that he was paid for the 20 days he had worked. He stated he had worked for 19 months and had accrued leave of 33 days. That he was praying for payment of the 25 pending leave days and the other orders as prayed.

Under cross-examination, the Claimant stated he knew of only one warning letter issued to him for writing a recommendation to Daniel Njiru Ngai and that as Daniel's boss he was best suited to write him a recommendation letter after he honourably resigned. In re-examination, he denied that his employment was terminated on the basis of the warning letters or because of his recommendation to Daniel.

The Respondent did not call any witness. The respondent's Counsel stated that the respondent was relying on the documents on record and submissions and closed the Respondent's case.

## **Claimant's Submissions**

The Claimant submits that termination of his employment was not only wrongful but unfair as there was no proper ground or reasons to warrant the said action and that his evidence remains unchallenged since the Respondent failed to call evidence to rebut his testimony. Further, that the procedure used in terminating his employment was wanting as due process was not followed. That he had proved a case of wrongful and unfair termination.

He submits that the Respondent's counsel seeks to introduce evidence from the bar in the submissions and descend to the arena of conflict, that since the said evidence is untested, it should be ignored. That the Respondent did not tender any evidence to support its allegation that he resigned from employment which contradicts the Respondent's previous submission that his employment was terminated on account of lateness, absconding duty and exceeding authority. He urged the court to consider awarding him the maximum compensation as prayed and that the Respondent should further be ordered to issue him with a certificate of service.

## Respondent's Submissions

The Respondent submits that the Claimant is not entitled to the orders sought as he did not adduce any evidence proving he was verbally terminated, that **Clause 5 of the claimant's Contract Letter** stipulated the hours of duty, terms of which the Claimant agreed to when he appended his signature on the contract letter. Further that the Claimant did not demonstrate to the court that it was within his job description to issue recommendation letters to his subordinate staff. That the Claimant voluntarily resigned without following the required procedure under the Contract Letter as follows:

“After satisfactory completion of the probationary period, your services will be confirmed as per the HR Policy. However, employment may be terminated by the calendar month's notice in writing provided that such notice, if given by you, shall be addressed to the Executive Office and shall be submitted through any other person under whose control you may be placed at the time.’

It submits that the Claimant did not issue any notice before tendering his resignation and as a result, his resignation was not acceptable. That the Claimant was therefore still considered an employee of the company but that he however chose to abscond duty from 20<sup>th</sup> November 2013. The Respondent relies the case of **Victor S. Agesa v Henkel Chemicals (E.A) [2017] eKLR** where Mbaru J. held that the foundation for the remedies sought by the Claimant was lost with the breach of his own employment contract and that the basis for notice pay, compensation, general damages and gratitude dues does not arise.

The Respondent also relies on the case of **Kenya Plantation & Agricultural Workers Union –v- Sotik Highlands Tea Estate Limited [2016] eKLR** where Njagi Marete J. held as follows:

“The respondent's case outweighs that of the claimant on the veracity of the evidence adduced. The evidence and case of the respondent overwhelms the claimant's by far. The claimant does not largely answer the respondent's case but insists on his. In as much as this appears to be a case of your word against mine, it all tilts in favour of the respondent on a test of preponderance of evidence. I therefore find a case of lawful termination of the employment of the claimant and hold as such.

On the above finding of the first issue for determination, the second issue dissipates into nothingness. The claimant would not be entitled to the relief sought having lost on a case of unlawful termination of employment.

I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim. This clears all the issues for determination.”

## Analysis and Determination

The first issue for determination is whether the Claimant voluntarily resigned or he was wrongfully and unfairly terminated from employment by the Respondent. The second issue for determination is whether the Claimant is entitled to the reliefs sought.

The Respondent submitted that the Claimant's resignation was not acceptable as he did not give any notice prior to tendering his resignation. It however did not produce any document showing it communicated the rejection of the alleged resignation to the Claimant. The argument on notice prior to resignation in any case does not hold as was held by the court in **Kennedy Obala Oaga -v- Kenya Ports Authority [2018] eKLR** at paragraph 25 that:

“In a recent decision of this Court, **Edwin Beiti Kipchumba v. National Bank of Kenya Limited [2018] eKLR**, it was held that resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.”

The Claimant has denied that he resigned from employment. The Respondent filed in Court the Claimant's alleged resignation letter dated and received by the Respondent on 20<sup>th</sup> November 2013. The said resignation letter from the Claimant was separately filed in court on 18<sup>th</sup> January 2018. The letter is reproduced below –

“28<sup>th</sup> November 2013

The Chief Executive Officer

Indo-Africa Finance Company Limited

Nairobi

Dear Sir

REF: RESIGNATION FROM DUTIES

I refer to our discussion held in your office this morning and the number of warning letters received from management.

Over the months I have served the company I have dedicated myself to improving business and services for Indo-Africa Finance. After reflecting on our discussion held in your office this morning, I feel I am no longer able to offer my services wholly and contribute meaningfully to this company. I therefore have come to the conclusion that I must hand in my resignation.

I am preparing to hand over the possession of the company to Head of Operation of branch.

My resignation is effective on the close of business this day.

Your Sincerely

SIGNED

Martin Anyango Anyango”

The respondent had in its defence specifically pleaded that the claimant resigned after receiving several warning letters. This was not specifically denied by the claimant in his reply to defence or in his testimony in court. He did not contest the authenticity of the letter of resignation.

Section 47(5) specifically requires the employee to prove unfair termination before the respondent is put on its defence to prove that there was valid reason and fair procedure.

In the present case the respondent relied on its documents filed in court which include its defence and documents filed therewith, among them the letter of resignation by the claimant.

Rule 21 of the Employment and Labour Relations Court Procedure Rules permit a party to rely on documents and submissions.

The claimant having failed to prove that the letter of resignation is not authentic, I find that he has not proved that his employment was terminated by the respondent. It is my finding that the claimant resigned from employment on 20<sup>th</sup> November 2013 vide his letter of resignation of the same date.

### **Remedies**

Having failed to prove unfair termination of his employment, the claimant is not entitled to compensation. He is also not entitled to pay in lieu of leave. On the contrary he is the one liable to pay the respondent in lieu of notice as his resignation letter states the resignation took effect immediately. He has admitted having been paid for days worked up to the date of resignation. The claimant further did not prove that he is entitled to service pay and the same is accordingly dismissed.

The claimant is however entitled to annual leave not taken of 25 days which the respondent failed to prove he took. The only leave form produced in court is for the period 22<sup>nd</sup> December 2012 to 6<sup>th</sup> January 2013. The respondent did not state out of these days, which ones were working days, this having been during the festive Christmas season with several public holidays and weekend(s) which are not part of annual leave.

I thus award the claimant the sum of Kshs.57,693.00/= on account of 25 days annual leave. The respondent will also issue a certificate of service to the claimant.

Having failed to prove unfair termination and the bulk of his claim, I will award the claimant only half of instructions fees.

Interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**