



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 334 OF 2016

GODFREY JOBBA.....CLAIMANT

VERSUS

COASTAL BOTTLERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim was triggered by termination of the Claimant's employment on 16th December 2015. The claim is captured in a Memorandum of Claim dated 21st April 2016 and amended on 9th November 2018.
2. The Respondent's defence is by way of Memorandum of Response dated 12th July 2016 and amended on 9th January 2019.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Chief Executive Officer, Ibrahim Khoury. The parties then filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent in the position of General Sales Manager, vide a fixed term contract running for two (2) years effective 5th February 2015. He earned a monthly salary of Kshs. 400,000.
5. The Claimant worked for the Respondent for a period of ten (10) months from 5th February 2015 until 16th December 2015. He states that his employment was unlawfully terminated on account of poor performance by way of an e-mail from the Respondent's Chief Executive Officer dated 5th February 2015.
6. The Claimant claims that there was no sufficient cause for termination of his employment. Further, he was not given an opportunity to defend himself.
7. The Claimant contends that there was no evaluation of his performance to justify the allegations of unsatisfactory performance made against him by the Respondent. He was not subjected to any performance appraisal/review meeting prior to termination of his employment.
8. Additionally, no warning letter and/or notice to show cause was issued to the Claimant nor was he accorded a fair hearing as regulated by law.
9. The Claimant further states that when he took over the position of General Sales Manager, the business registered growth in market share. He avers that the sales team had improved morale and was performing much better compared to the team before his arrival.
10. The Claimant goes on to state that the drop in performance, if at all, was a drop in general performance by the Respondent and not by the Claimant alone. The Claimant adds that the Respondent as the employer was under a duty to provide the necessary support and tools of work to enable him achieve set targets.
11. The Claimant avers that poor performance in sales in the Respondent Company started way before his employment by the Respondent. He claims that his predecessor, one Kimathi Mithika had had his employment terminated on the ground of non-performance.
12. The Claimant asserts that it is only upon receiving an email from one Benjamin Ontunya that he was made aware that his fate was sealed and thus opening the way for this cause of action.

13. By his email dated 17th December 2018, the Claimant responded to the Chief Executive Officer's email terminating his employment.
14. After termination, the Claimant was paid Kshs. 487,660 and was issued with a certificate of service. He however states that he is entitled to further terminal dues and benefits under his contract of employment and the law.
15. The Claimant submits that the certificate of payment filed by the Respondent cannot absolve the Respondent from its statutory obligations nor preclude the Court from inquiring into the fairness of the termination of the Claimant's employment.
16. The Claimant states that his employment was for a fixed term of two (2) years from 5th February 2015 but the employment term was cut short by 14 months following his unfair termination on 16th December 2015. He claims that he had a legitimate expectation to continue working for the Respondent for the remainder of the contract period and to continue earning a salary until the expiry of the contract term.
17. The Claimant's case is that the termination of his employment was unlawful and unfair. He cites the following particulars in this regard:
- a) The Respondent had no valid cause for terminating the Claimant's employment;
 - b) The termination was communicated by way of an email;
 - c) The procedure adopted by the Respondent was not fair in that the Claimant was deprived of an opportunity to show cause why his employment should not be terminated;
 - d) The Respondent disregarded the fact that the Claimant had no previous warnings;
 - e) The Respondent failed to comply with the provisions of the law on fair hearing before terminating the Claimant's employment;
 - f) The Respondent disregarded the Claimant's diligent service of 10 months and terminated his services for reasons of poor performance in which the expected standard was never stipulated;
 - g) The Respondent failed to afford the Claimant a fair administrative action as mandated by the Constitution of Kenya;
 - h) The Respondent failed to afford the Claimant a personal hearing to defend himself as outlined in Section 41 of the Employment Act;
 - i) The Respondent acted in breach of Articles 41 and 47(1) of the Constitution of Kenya as well as Section 45 of the Employment Act.

18. The Claimant avers that the termination was malicious and unfair and the Respondent should compensate him adequately. He therefore claims the following:

- a) 2 months' salary in lieu of notice.....Kshs. 800,000.00
- b) 12 months' salary in compensation.....4,800,000.00
- c) Leave earned but not taken (25 days).....333,333.33
- d) Salary for the remainder of contract term.....5,600,000.00
- e) Salary for days worked in December 2015.....200,000.00
- f) House allowance.....600,000.00
- g) Costs plus interest

The Respondent's Case

19. In its Memorandum of Response as amended on 9th January 2019, the Respondent admits having employed the Claimant in the position of General Sales Manager, with effect from 16th February 2015.

20. The Respondent further admits that the Claimant's employment was terminated by letter dated 16th December 2015. The Respondent however asserts that the termination was for justifiable reasons, which had been made known to the Claimant, prior to the termination and reiterated in the termination letter as being on account of non-performance.

21. The Respondent contends that prior to issuance of the termination letter, the Claimant had, by an email of the same day, been informed that his exit was forthcoming but he merely acknowledged the email and left before a formal letter was issued.

22. The Respondent maintains that the Claimant was informed that the termination of his employment was because:

- a) Sales performance was not at the expected levels;
- b) He continued to give false excuses for non-performance;
- c) He had no vision or plans to achieve the volume of sales required;
- d) He had failed as a Manager and the sales team for whom he was in charge had lost interest in their work;
- e) He had to be fully blamed for the shortcomings as the Head of Department.

23. The Respondent cites the following events to support the allegations of non-performance made against the Claimant:

- a) On 6th July 2015, it was brought to the attention of the Claimant that the half year performance was below target. The Claimant promised to pay attention to the concerns but by the end of the year, the situation had not improved;
- b) As at 4th August 2015 there was a pile of unsold stock in the warehouse due to lack of sales in the Claimant's Department;
- c) The sales numbers were still falling as at 24th August 2015. The Claimant's promise to have the situation improved was not realised thereafter;
- d) Reports for the month of September continued to witness a decrease in sales as confirmed by email dated 17th September 2015;
- e) By an email dated 18th September 2015, the Claimant acknowledged that things were getting out of hand;
- f) A review of October sales did not show any improvement as confirmed by email dated 19th October 2015;
- g) The operation in the Claimant's Department remained disorganised as confirmed by emails dated 21st and 23rd October 2015;
- h) The poor performance in the Sales Department prompted the Chief Executive Officer to cancel December 2015 holidays for the sales staff.

24. The Respondent's case is that the circumstances leading to the termination of the Claimant's employment were brought to his attention and he was given an opportunity to improve but he failed to do so even after six months of consistent reminders.

25. The Respondent contends that evaluation of the Claimant's performance did not have to be through performance appraisals/review meetings but could be conducted by observing his performance of work real time.

26. The Respondent further contends that the Claimant's employment was regulated by his contract of employment and the Employment Act, 2007 both of which did not require a formal written warning letter to be issued. The Respondent's contention is that the cautionary communication addressed to the Claimant was sufficient to warn the Claimant on his poor performance.

27. The Respondent goes on to state that the bulk of its income is from sale of processed beverages. The Claimant's poor performance in sales therefore affected the Respondent's entire output.

28. The Respondent admits that poor performance had started before the Claimant's employment but adds that the Claimant made the Respondent believe that he could improve on sales and was employed on the agenda that he was to achieve such improvement. He however failed to measure up to that expectation.

29. The Respondent avers that to the extent that the Claimant was continuously cautioned about his poor performance and he was responding to those cautions, he received a fair hearing and there were no constitutional breaches of his rights.

Findings and Determination

30. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether by executing the Certificate of Payment dated 29th December 2015, the Claimant extinguished his right to bring a claim against the Respondent;
- c) Whether the Claimant is entitled to the remedies sought.

The Termination

31. On 16th December 2015, the Respondent's Chief Executive Officer, Ibrahim Khoury<khoury@coastalbottlers.co.ke> wrote the following email to the Claimant:

"It is very unfortunate that the sales performance is not at the expected level. I only get excuses and promises without any results. There is no proper vision or proper plans to reach our volumes. It is only reactions to situations. The sales structure at CBL is the best among all other bottlers. The gaps that I am discovering everyday shows (sic) that you as manager are not doing the right follow up and your team has lost interest. I do not have to state examples the results are very drastic. I have been very patient and gave you lot of chances but the results are the same. Being the head of this department you have to bear the consequences. I am very sorry to inform you that I have to terminate your contract effective immediately.

Benjamin,

Please execute

Kind regards,

Ibrahim El Khoury"

32. The Claimant<gjjobba@gmail.co>responded on 17th December 2015, as follows:

"IK,

The email sent by yourself to me yesterday terminating my employment with the company.

This is to formally put it on record that contrary to the allegation in the email that my contract was being terminated for poor performance, I have never been notified of any poor performance of my work and I have also never been required to explain any poor performance.

While appreciating the opportunity to work with the company, I feel it was not appropriate to terminate my contract without a notice or reasons for termination and I had expected that it would not be by way of an email but a formal letter just like my letter of appointment.

This mail is to record the manner of termination and indicate that at the time I was ready and willing to discharge my duties as always.

Regards

Jobba"

33. In an apparent response, the Respondent's Human Resource Manager, Benjamin Ontunya<ben.ontunya@coastalbottlers.co.ke> sent the following email to the Claimant on 18th December 2015:

"Dear Jobba

I recall when I was delivering some of your personal items to you that you left behind in your office, I gave you a white envelope addressed to you that you put in the black bag saying that you will read later. The letter was a formal communication on the termination of your contract. Accordingly, a copy of the same letter can be availed to you if need be.

This is because you were in a hurry to leave and despite my request that you wait for the formal exit process to be completed. The said letter addresses all the issues you have raised here below.

Please check again and confirm.

Regards,

Benjamin Ontunya

Human Resource Manager

Coastal Bottlers Ltd."

34. From the evidence on record, it is evident that the Claimant's employment with the Respondent came to an end on account of poor performance.

35. In his final submissions, the Claimant referred to the decision in **Kenya Science Research International Technical and Allied Workers**

Union(KSRITAWU) v Stanley Kinyanjui and Magnate Ventures (Cause No 273 of 2010) where my brother, **Rika J** outlined the following procedure for dealing with cases of poor performance:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

36. The procedure cited by my brother Judge, is in line with the following procedural fairness requirements set out under Section 41 (1) and (2) of the Employment Act:

41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor 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 have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

37. An employer cannot therefore circumvent due process by simply stating that an employee is a poor performer.

38. As held by my sister, **Mbaru J** in *Jane Samba Mukala v OITukai Lodge Limited [2013] eKLR*, an employer alleging poor performance as a ground for terminating employment of an employee is required to show the criteria used to assess the performance of the employee. The employer must also show the measures put in place to address the poor performance, including allowing the employee an opportunity to respond to the allegations of poor performance and to improve.

39. In its decision in *Lilian O. Ochang v KenolKobil Limited [2015] eKLR* this Court held that disciplinary action based on the ground of poor performance must be preceded by a capability hearing within the parameters defined in Section 41 of the Employment Act.

40. The Claimant testified that he was not given any opportunity to respond to the allegations of poor performance nor was he subjected to any performance appraisal or review meeting.

41. The Respondent relied on a trail of email correspondence addressing its performance. There were indeed were genuine concerns with regard to the declining trend in this regard.

42. The Claimant told the Court and the Respondent’s Chief Executive Officer, Ibrahim Khoury agreed that there was a general drop in the Respondent’s performance. Additionally, poor performance in sales had started before the Claimant’s employment.

43. An inference that the Respondent’s poor performance was not wholly attributable to the Claimant is therefore not farfetched. In order to arrive at a fair and objective decision, the Respondent should have subjected the Claimant to a specific performance appraisal. This did not happen; instead, there was an exchange of lamentations by way of emails as to how bad the situation was.

44. The Court could not therefore tell whether the Respondent’s declining fortunes were as a result of the Claimant’s incompetence or general market forces.

45. What is more, it would appear that the Claimant first got to know that his employment had been terminated by way of an email from Ibrahim Khoury dated 16th December 2015. There was no evidence the termination letter of even date was ever served on the Claimant.

46. In light of the foregoing, I find and hold that the termination of the Claimant’s employment was unlawful and unfair.

Certificate of Payment

47. I will now deal with the effect of the Certificate of Payment dated 29th December 2015, which the Claimant executed on 30th December 2015.

48. The relevant part of the said Certificate of Payment states:

“I Godfrey Jobba of ID No 000XXXX certify having received the sum of Kenya Shillings Four Hundred and EightySeven Thousand, Six Hundred and Sixty Only (Kshs. 487,660.00) being full and final payment due to me from Coastal Bottlers Limited.

I confirm that, I have no further claim against the Company whatsoever.

Signature.....”

49. It was submitted on behalf of the Respondent that by putting his hand to the Certificate of Payment, the Claimant waived his right to come to Court.

50. In addressing a similar matter in *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR* the Court of Appeal stated thus:

“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination.”

51. Ordinarily, departing employees are required to execute standard forms of discharge before they can access their terminal dues. I do not think however that such a discharge would cure an otherwise unlawful and unfair termination of employment nor can it act as an ouster of the jurisdiction conferred on this Court by the Constitution and statute.

52. My position on this issue is bolstered by Section 3(6) of the Employment Act which provides as follows:

(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish vary or amend the terms herein set shall be null and void[Emphasis added].

53. A similar provision is made under Section 26 of the Employment Act.

54. It seems to me therefore that any agreement, in whatever form, whose effect was to deny the Claimant accrued rights under the Employment Act was null and void.

55. Instructively, the discharge executed by the Claimant is contained in a Certificate of Payment setting out the terminal benefits payable to the Claimant. In my view, all the discharge confirmed was that the Claimant had received the benefits stated therein. It did not in any way extinguish the Claimant’s claim which is properly before the Court.

Remedies

56. Pursuant to the foregoing findings and conclusions, I award the Claimant three (3) months’ salary in compensation for unlawful termination of employment. In making this particular award, I have taken into account the Claimant’s length of service, coupled with the Respondent’s conduct in executing the termination.

57. According to Clause 14 of his contract of service dated 5th February 2015, the Claimant was entitled to two (2) months’ termination notice. The Certificate of Payment dated 29th December 2015 shows that he was paid one (1) month’s salary in lieu of notice. He is therefore entitled to an additional 1 month’s salary in notice pay.

58. Reading from the Certificate of Payment, the Claimant was paid 25 days’ leave pay as well salary for days worked in December 2015. These claims are therefore spent.

59. No basis was established for the claim for salary for the remainder of the contract period which consequently fails and is dismissed.

60. Clause 3 of the Claimant’s contract of service spells out that he was paid a monthly gross salary, which would ordinarily be inclusive of house allowance. The claim thereon is therefore disallowed.

61. In the end, I enter judgment in favour of the Claimant as follows:

- a) 3 months’ salary in compensation.....Kshs. 1,200,000
- b) 1 month’s salary in lieu of notice.....400,000
- Total.....1,600,000**

62. This amount will attract interest at court rates from the date of judgment until payment in full.

63. The Claimant will have the costs of the case.

64. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY JANUARY 2020

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JUDGE

Appearance:

Miss Kietifor the Claimant

Mr. Oburafor the Respondent