



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 677B OF 2014

SYLVESTER ODUOR OYILE.....CLAIMANT

-VERSUS-

PRIMEFUELS (KENYA) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant filed the statement of claim on 28.04.2014 through Atonga Miyare & Associates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant by the respondent is unjustified, irregular, unfair, callous, malicious, and unlawful.
- b. A declaration that action by respondent in withholding the claimant's dues and the claimant's certificate of service is unjustified, irregular, unfair, callous, malicious, unlawful, and violation of the claimant's rights under Employment Act, 2007.
- c. Kshs. 1, 691, 273.00 in withheld accrued dues (computed).
- d. The claimant be reinstated to his position of employ with the respondent.
- e. In alternative the claimant be paid the sum of Kshs.2, 026, 152.00 in compensation under the Act.
- f. Costs.
- g. Interest on (c), (e) and (f) above at court rates until payment in full.

The response to the memorandum of claim was filed on 26.05.2014 through A.T. Oluoch & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs to the respondent. The respondent changed its advocates to Ogola & Mujera Advocates per the notice of change of advocates filed on 06.05.2016.

To answer the **1st issue** for determination, the Court returns that the respondent employed the claimant on 01.11.1997 as a Maintenance Technician. The claimant successfully served a 6 months probationary term and confirmed in the position accordingly. It is not in dispute that the claimant had a clean record of service and earned promotions or salary increments due to the satisfactory service. At the time material to the suit it is not in dispute that the claimant had been promoted from the position of Road Transport Manager to that of Assistant Operations Manager, Western Kenya at a gross salary of Kshs.168, 846.00 per month.

To answer the **2nd issue** for determination, the contract of service between the parties was terminated by the respondent's letter dated 15.09.2011 thus:

“Dear Sylvester,

Subject: TERMINATION OF EMPLOYMENT WITH PRIMEFUELS

We regret to inform you that due to the restructuring of our business portfolio, the position of Assistant Operations Manager, Western Kenya has been removed by the Company. Your unwillingness to be transferred to DRC means that we cannot offer you an alternative position.

It is with regret that Management has taken the decision to discontinue your employment with the Company to allow you to look for more challenges out in the market. This separation will take effect from 19th September, 2011.

We will communicate to you the financial settlement from the Company and wish you all the best in your future endeavors.

Yours Faithfully,

Signed

James Morebu

Human Resource Manager

For: Primefuels Kenya Limited

The 3rd issue for determination is whether the termination of the contract of service was unfair and unlawful. The claimant pleads that he never refused to be transferred to Democratic Republic of Congo (DRC) as alleged in the letter of termination and the termination was without basis, was unfair, in bad faith, malicious and unlawful. The respondent pleads that the claimant was offered the DRC position but which he declined or refused to take. In the circumstances, the respondent's case is that the respondent had no alternative but to allow the claimant to seek employment elsewhere. Further the respondent's case was that it had the prerogative to restructure and to transfer the claimant to DRC. Further the claimant's refusal to take up the transfer to DRC amounted to gross misconduct or dereliction of duty for which the respondent was entitled to summarily dismiss the claimant but decided to terminate his services with benefits. Thus the respondent pleaded that the termination had not been without basis and was not unfair, in bad faith, malicious and unlawful as alleged for the claimant. The computed final dues now claimed had been settled as acknowledged in the judgment in cause No.340 of 2012 in this Court filed by the claimant against the respondent and which judgment was subsequently set aside. The record shows that the claim and proceedings in cause No.340 of 2012 were struck out and all subsequent orders set aside. Further the Court ordered that the claimant may file his claim which should be heard by any other Judge of the Court other than Mbaru J who had presided in the case.

The Court has considered the evidence on record. The claimant's evidence that he was never given instructions to go for transfer to DRC and the Court finds that the same has not been rebutted. Further the claimant's evidence that he was never given a warning letter or no disciplinary process took place in view of alleged misconduct of refusing to go for the alleged transfer to DRC has not been rebutted. The Court finds that the respondent has failed to establish that as at the time of termination, the claimant had been offered and refused to take the alleged transfer to DRC. Further the Court considers that in absence of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007, the respondent has failed to show that the alleged misconduct of refusal to take up the transfer or offer to work in DRC was a valid circumstance as at the time of the termination of the contract of service. The Court finds that there was no evidence that the respondent offered the claimant a transfer to DRC as was alleged. The evidence is that all transfers were in writing and there is no reason to doubt the claimant's evidence that no such transfer to DRC as stated in the letter of termination had been offered to him. The evidence was that the claimant had previously worked in DRC and on numerous occasions so that the Court as honest his evidence that if offered to work on transfer in DRC he had no reason to decline such an offer. The respondent's witness (RW) confirmed that she had not seen a document on the offer of transfer to DRC and she had not seen documentation on the position the alleged offer was all about. RW testified thus, **"I have not seen communication transferring the claimant to DRC. I do not know how offer was given to him. I was not there at the meetings. I cannot verify offer allegedly made verbally...."**

RW testified that the first time the claimant was told about the abolition of the office of Assistant Operations Manager, Western Kenya was at the meeting held between the General Manager and the claimant at the Mombasa Office and as confirmed in the termination letter. RW's evidence is similar to the testimony by the claimant that it was at that meeting that he was told by the General Manager about the abolition of the office and that it had been decided that the contract of service would be terminated. The Court finds that the claimant was terminated on account of alleged abolition of the office he held and in total contravention of the procedure on redundancy as provided for in section 40 of the Employment Act, 2007. The evidence of abolition of the office was not provided and the notices to the claimant and the local labour officer per section 40 of the Act were not issued at all. The Court finds that the termination was unfair both in procedure and substance.

The 4th issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a. The Court has found that the claimant is entitled to a declaration that the termination of the contract of service by the respondent was unjustified, irregular, unfair and unlawful.
- b. There is no dispute that the claimant is entitled to a certificate of service.
- c. The terminal dues computed by the respondent amounted to Kshs.1, 691, 273.00. The evidence and submission is that the respondent has since paid Kshs.1, 190, 981.00. The Court returns that the claimant is not entitled to the alleged outstanding Kshs.500, 292.80 because as per the final payslip, the amount now claimed was clearly the tax payable.
- d. The claimant prayed that he be reinstated to his position of employment with the respondent but the Court deems the prayer dropped as no submissions were made in that regard. The claimant was clear that he was seeking compensation and payment of terminal dues. In any event time has run and in the circumstances reinstatement would not be practicable remedy.

e. In alternative to reinstatement the claimant prayed to be paid the sum of Kshs.2, 026, 152.00 in compensation under the Act. The Court has considered the claimant's clean record and willingness to continue in the respondent's service. The Court has considered that the claimant did not contribute to his termination. The Court has considered that the alleged redundancy was unlawful as it was in breach of section 40 of the Act. The Court has considered the mitigating factor in view of the terminal dues paid to the claimant under the purported redundancy. The Court returns that to balance justice for the parties, 6 months' salaries at Kshs.168, 846.00 making **Kshs.1, 013,076.00** (to be paid less PAYE) under section 49 of the Act will meet ends of justice.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to deliver a certificate of service to the claimant in 30 days from the date of this judgment.
3. The respondent to pay the claimant a sum of **Kshs.1, 013,076.00** (less due PAYE) by 01.05.2020 failing interest at court rates to be payable thereon from the date of this judgment till the date of full payment.
4. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020**.

BYRAM ONGAYA

JUDGE