



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1590 OF 2015**

**AUGUSTINE OPONDO OYENGA.....CLAIMANT**

**-VERSUS-**

**SALAMA FIKIRA GROUP LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

**JUDGMENT**

The claimant filed the memorandum of claim on 09.09.2015 through Ngugi Mwaniki & Company Advocates. The claimant prays for judgment against the respondent for:

- 1) Pay for leave days Kshs.70, 000.00.
- 2) Damages for unlawful termination at 12 months' pay Kshs.840, 000.
- 3) Total claim Kshs.910, 000.00.
- 4) A certificate of service.
- 5) Costs of the suit plus interest.

The claimant's case is that the respondent employed him as a CCTV Operator in 2014 at Kshs. 70,000.00 per month. The claimant pleads that he worked until 28.05.2015 on account that as the Control Room Supervisor the claimant failed to execute his duties with diligence and to the standard required by the claimant. The letter of termination dated 28.05.2015 stated that the claimant failed to take appropriate action against officers he supervised and he failed to report them for disciplinary action when it was necessary to make such report. Investigations had been taken and the letter stated that the claimant had failed to make justifiable cause for his conduct. The letter stated that the claimant was being terminated with immediate effect with full pay for days worked and a month's pay in lieu of notice which would have lapsed on 27.06.2015. The letter reminded the claimant about the contractual confidentiality and non-disclosure of information agreement and applicable after the separation. The claimant's case was that he had performed his duties and the dismissal had been unfair and malicious.

The respondent filed the statement of response on 17.11.2015 in person. The respondent admitted that it employed the claimant but denied the claimant earned Kshs.70, 000.00. The respondent further pleaded that as per the letter of termination the claimant performed his duties carelessly and he failed to perform duties as per his job description. The respondent's client at whose premises the claimant was deployed as the CCTV Supervisor complained in writing about the claimant's poor performance. The respondent states that a disciplinary hearing took place on 13.04.2015 and the claimant wrote to apologise and requested for a second chance. The claimant's employment was terminated by due notice and a certificate of service was issued. Further the respondent's case is that the claimant was paid terminal dues including Kshs.53, 528.00 pay in lieu of notice; days worked Kshs.44, 974.00; accrued leave Kshs.13, 117.00 and he signed acknowledgement and discharge. The respondent therefore prayed that the claimant's suit be dismissed with costs.

The amended statement of response was filed on 11.05.2016. Later the respondent appointed Anne Babu & Company Advocates to act in the suit and changed the advocates to Eshiwani Ashubwe & Company Advocates.

The Court has considered all the material on record and makes findings as follows.

**First** the Court returns that the parties are in agreement that the respondent employed the claimant per the written contract of service on record.

**Second** there is no dispute that the claimant's employment was terminated by the letter dated 28.05. 2015.

**Third** issue for determination is whether the termination was unfair. The claimant testified that he was promoted to head the CCTV Control Room. While he was on off duty on 28.03.2015 a theft occurred at the premises he had been deployed to serve. When he resumed duty, he carried out investigation and made a report so that the CCTV Controller on duty at the time of the theft was dismissed by the respondent. The claimant testified that in May 2015 he was summoned at the respondent's head office and the Project Manager held him in a room from 9.00am to 5pm and asked him to put in writing why action should not be taken against him in view of the theft of 28.03.2015. The claimant testified that he wrote his letter of 20.05.2015 apologising for the things that happened in March 2015 and asking to be given one more chance. Thereafter he was asked to handover office keys and another person was employed in his position. After 2 weeks he had not been recalled and he went to the office in Karen and he met the General Manager. He was told to go away to return the following day which was 28.05.2015 and when he so returned he was given the termination letter. He was paid until that 28.05.2015. He had worked from 31.03.2014 to 28.05.2015 being one year and 2 months and he prayed for pay of Kshs.70,000.00 in lieu of leave.

The respondent did not call a witness and failed to file final submissions as directed by the Court.

The Court has considered the evidence. Parties engaged at a meeting culminating in the claimant's letter of apology dated 20.05.2015. The claimant referred to instances of failures on the part of his staff such as sleeping on duty but for which he had no evidence; failure by his staff to report to him instances of the access card not being activated and the claimant learning about it belatedly at monthly meetings and imposing "verbal" warnings against the culprit; and that he had made his report about the theft of 28.03.2015 with appropriate recommendations. He complained about the reporting lines that made it difficult for him to effectively perform his duties because he reported to Unilever Manager as directed and not the respondent's Project Manager. He requested for one more chance.

The Court finds that it is clear that during the service at Unilever there were numerous events that happened and the claimant admits that he may not have effectively reported the same due to difficulty in the reporting channels. To that extent the claimant appears to have had a valid grievance that may mitigate his dismissal. However, the claimant also asked for a second chance and apologised in view of the case that confronted him. In view of that apology and request for second chance the Court finds that the claimant clearly led the respondent to confirm the allegations so that as at the time of termination the respondent had a valid reason to terminate as was stated in the letter of termination. The Court finds that the claimant's contribution in that regard was significant and it disentitles the claimant from compensation under section 49 of the Employment Act, 2007 as no compensation is awarded.

It was submitted for the claimant that the termination was unfair for want of notice and a hearing under section 41 of the Employment Act, 2007. The Court considers that the respondent set out to pay the claimant in lieu of the notice and he was paid and the claimant admitted that he had a meeting with the Project Manager and he wrote the letter on apology and second chance. The Court has considered that evidence and returns that section 41 of the Act on notice and hearing was substantially complied with.

As submitted for the claimant he is entitled to the leave days under section 28 of the Act and in absence of any other material on record, the Court finds that he has established that annual leave was due but not taken. He will be paid the **Kshs.70, 000.00** (less PAYE) as prayed for. While making that finding the Court further finds that the payslip for May 2015 clearly shows that the claimant's monthly basic pay was Kshs.70, 000.00.

The claimant laments that the certificate of service was for CCTV Controller instead of Head or In-Charge of CCTV Control Room or CCTV Supervisor. The job title in clause 2 of the employment contract is CCTV Controller. The termination letter refers to CCTV Supervisor. The Court returns that a proper certificate of service should issue showing that the claimant worked initially as CCTV Controller and later as CCTV Supervisor.

The Court has considered the parties' margins of success and returns that the respondent will pay the claimant's costs of the suit.

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

- 1) Payment of **Kshs.70, 000.00** (less PAYE) by 01.05.2020 failing interest at Court rates to be payable thereon from the date of filing the suit till full payment.
- 2) Delivery to the claimant within 30 days from the date of this judgment of a proper certificate of service showing that the claimant worked initially as CCTV Controller and later as CCTV Supervisor.
- 3) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday, 6th March, 2020**.

**BYRAM ONGAYA**

**JUDGE**