



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 920 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th April, 2020)

LAWRENCE MUKEKA.....CLAIMANT

VERSUS

ZANAAFRICA GROUP LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Memorandum of Claim on 16th May, 2016, in which he seeks compensation for wrongful and unfair termination of his employment by the Respondent herein as well as failure by the Respondent to pay his terminal dues owed to him.
2. The Claimant states that he was employed by the Respondent a limited liability company on or about 18th January, 2016 in the position of Finance Officer earning a monthly gross salary of Kshs. 90,000/-, which amount was later graduated to Kshs. 140,000/-.
3. The Claimant averred that he performed his duties diligently and to the Respondent's satisfaction until 30th March, 2017 when his employment was verbally and un-procedurally terminated by the Respondent on alleged account of poor performance contrary to the express provisions of Section 41 of the Employment Act, 2007.
4. The Claimant maintained that his termination was maliciously done following his discovery of improprieties by the Company's C.O.O one Caroline Gitau and the Respondent's Management and his subsequent pointing out of the financial risks exposed to the Company.
5. Aggrieved by the decision of the Respondent to terminate his services the Claimant filed this Claim seeking the following reliefs:

1. A declaration that the termination of his employment was unfair, unlawful and in breach of Sections 41 and 45 of the Employment Act and the Respondent's HR & Employment Manual.

2. Award of Kshs. 418, 082/- on account of terminal dues owed to him comprising of the following:

i. One Month's pay in lieu of notice = Kshs. 140,000/-

ii. Accrued leave (20 days) Kshs. 138,082/-

iii. Gratuity Pay per the HR Manual & PolicyKshs.140,000/-

Total Kshs. 418,082/

3. Damages for unlawful termination of Employment to the tune of Kshs. 1,680,000/- representing 12 months' salary.

4. An Order of issuance of Certificate of Service by the Respondent to the Claimant.

5. Costs of the suit and interest thereof.

6. Any other or further relief as this Honourable Court may deem fit and just.

6. The Respondent in its Statement of Response and Counter Claim dated 14th June, 2017 and filed in Court on 16th June, 2017, admits having engaged the Claimant herein. However, it denied the assertion by the Claimant that he was wrongfully and/or unfairly verbally terminated contending that the Claimant's performance was not satisfactory and that his supervisor had received complaints regarding the Claimant's performance from other members of the Respondent's Senior Management Staff.

7. The Respondent further contended that the Claimant's performance did not improve and by its letter dated 4th October, 2016 was issued with the first warning letter. The Claimant was further informed that his services would be terminated if there was no improvement.

8. The Respondent maintained that the Claimant's performance did not improve prompting it to hire an intern to carry out duties which he had failed to accomplish throughout the year. The Respondent further averred that the Claimant's performance continued to decline and as a result, the Respondent terminated his services on 30th March, 2017.

9. The Respondent further maintained that the Claimant's termination was justified and procedural as his poor performance was a ground for summary dismissal.

10. The Respondent further averred that the Claimant absconded duty as from 30th March, 2017 after receiving his pay for the month and has infact not cleared with it.

11. It is on this basis that the Respondent stated that the Claimant is not entitled to the reliefs sought in his Claim and urged the Court to dismiss the same with costs to the Respondent.

12. The Respondent avers in its counterclaim that it has suffered loss as a result of the Claimant's poor performance as follows:-

a) The Claimant failed to remit NSSF deductions in a timely manner leading to a penalty of Kshs. 750,000/- being levied against it.

b) Following the reconciliation exercise undertaken during the audit, the Claimant could not account for the sum of Kshs. 200,000/- which had been disbursed.

13. A result thereof the Respondent prayed that Judgment be entered in its favour as against the Claimant herein in the sum of Kshs. 950,000/-.

14. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim with costs and enter Judgment in its favour in terms of its counterclaim.

15. In his reply to the Statement of Response and Counterclaim filed in Court on 28th June, 2017 the Claimant denied the allegation levelled against him by the Respondent and reiterated the averments made in the Amended Memorandum of Claim.

16. He further averred that the intern hired was not appointed for purposes of supporting his services but was rather a relative of the Chief Operating Officer. He maintained that he performed his tasks in a professional manner and that there was no case of incompetency as alluded by the Respondent herein.

17. He further maintained that there was no evaluation conducted or a final letter issued and that the assertion by the Respondent on the same is only meant to mislead this Honourable Court.

18. The Claimant further denied the allegations levelled against him in the Counter Claim and maintained that his work was above per. He further stated that the alleged penalty for Kshs. 750,000 is rather exaggerated and unfounded.

19. He therefore urged this Court to dismiss the Counterclaim with costs.

20. The matter was thereafter fixed for hearing on 14/10/2019 and 22/10/2019 with the Claimant testifying on his own behalf and the Respondent calling one witness to testify on its behalf.

Claimant's Case

21. On 14th October, 2019, the claimant (CW1) sought to have his witness statements dated 12th May, 2017 and a further witness statement dated 8th October, 2019 adopted as his evidence in chief.

22. He further sought to have the List and Bundle of Documents filed in Court on 16th May, 2016 adopted as exhibits in this matter, both requests were allowed by this Court. In his statement, the Claimant reiterated the averments made in his Amended Memorandum of Claim.

23. CW1 further testified that he was verbally terminated by the Respondent. he further averred that he was not taken through the disciplinary process prior to his termination. He further stated that the disciplinary process as provided under the Respondent's Human Resource Manual was equally not followed.

24. CW1 averred that he was qualified to fill his position with the Respondent as he went through the process of interview and placement.

CW1 maintained that with regards to his performance, there was no evaluation carried out and consequently no feedback on the same.

25. He further averred that the warning letter annexed at page 39 of the Respondent's bundle was never issued to him.

26. CW1 maintained that he performed his duties diligently and to the Respondent's satisfaction. He further stated that he was aware of the audit conducted but was however, not given a chance with the auditor to highlight the instances of misappropriation but that management to point them out to the auditor.

27. CW1 urged the Court to allow his Claim in terms of the reliefs sought therein.

28. On cross-examination, CW1 stated that he was not in charge of the Finance Department. He further stated that he was not issued with a job description.

29. On further cross-examination, CW1 confirmed that he joined the Respondent Company following his successful application to join as bookkeeper. He further averred that his employment was subject to meeting deliverables, which he maintained that he duly met.

30. CW1 further admitted that he did not follow the whistle blower policy, which was part of the Respondent's Human Resource Manual.

31. CW1 further confirmed that he was not aware how long his probation period was to take. He further stated that he did not receive any letter extending his probationary period.

32. On further cross-examination CW1 maintained that his work was above board and that the allegations levelled against him on poor performance were not true.

33. On re-examination, CW1 confirmed that he met all the deliverables expected of him by the Respondent and that he worked under immense pressure and managed to respond to all issues raised.

34. CW1 further maintained that his relationship with the Chief Operations Officer (C.O.O) deteriorated when he questioned the misuse of funds and company resources.

35. He further maintained that he did not take part in the performance evaluation attached to the Respondent's documents. He further maintained that if such an evaluation was done it failed to adhere to the Human Resource Manual.

36. On further re-examination CW1 insisted that he was on probation for a period of three months and was later confirmed in April, 2016 and was included in the Respondent's medical scheme.

37. CW1 maintained that he is entitled to the reliefs as sought in his Claim therefore urging this Court to allow the same as prayed.

38. The Respondent's case proceeded on 22/10/2019 with its witness (RW1), Megan White Mukuria, the Founder and Chief Executive Officer of the Respondent testifying on its behalf.

39. RW1 sought to have his witness statement dated 16th September, 2019 and filed in Court on 19th September, 2019 adopted as his evidence in chief, the request was allowed by this Court. In his statement, RW1 reiterated the averments made in the Response filed in this matter.

40. RW1 further averred that the Claimant's performance was poor and that as a result his probation period was extended.

41. He further testified that the Claimant's performance did not improve but he was however confirmed to the position in July, 2016. He further confirmed that the Claimant was issued with several warning letters on his performance but there was no improvement.

42. RW1 maintained that due to the Claimant's negligence it incurred losses in terms of fines imposed on it and as a result filed the Counter Claim herein urging the Court to allow the same as prayed.

43. On cross-examination, RW1 confirmed that the Claimant possessed the requisite academic qualifications to fill the position.

44. He further maintained that the Claimant absconded duty from 30th March, 2017. He further confirmed that there was no evidence of any complaint with regards to the Claimant's performance.

45. RW1 further confirmed that payment of gratuity was pegged on a grant and that there was no indication that the same was availed.

46. Parties thereafter agreed to file and exchange their written submissions.

Submissions by the Parties

47. It was submitted by the Claimant herein that his termination failed both the substantive and procedural fairness as the Respondent failed to comply with the mandatory provisions of Section 41, 43 and 45 of the Employment Act, 2007 and its' Human Resource & Employee

Manual.

48. The Claimant further maintained that his performance was above per and that the Respondent's assertion of poor performance could not be ascertained as his salary was increased and his position confirmed following his good performance.

49. The Claimant maintained that his termination on alleged account of poor performance was therefore unfair and unlawful. To fortify this argument the Claimant cited and relied on the Court of Appeal decision in the case of **Postal Corporation of Kenya Vs Andrew K. Tanui (2019) eKLR** where the Court held that *the onus was on the appellant to show that the dismissal was justifiable. The Court went on to state that the employer must prove the reasons for termination/dismissal (Section 43); prove the reasons are valid and fair (Section 45); prove that the grounds are justified (Section 47 (5) amongst other provisions.*

50. For further emphasis the Claimant cited the cases of **Lillian Ochang Vs kenol Limited (2005) eKLR** and **National Bank of Kenya Vs Samuel Nguru Mutunya (2019) eKLR.**

51. The Claimant further maintained that he was not informed of his right to appeal any adverse decisions made against him contrary to the provisions of the Human Resource Manual and therefore his termination was unfair. For emphasis, the Claimant cited the cases of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** and **Daniel Ouma Okuku Vs Kenya Plantation and Agricultural Workers Union & Others, Civil Appeal 85 of 2017.**

52. On the counter claim raised the Claimant submitted that the late payments were done in April 2016 after he had left the Respondent's employment and could therefore not be blamed on the same.

53. He further submitted that there is no provisions in the Respondents Human Resource Manual that allows for surcharging him for any losses incurred by the Company. He maintained that surcharging him would be tantamount to unfair labour practice, which this Court should not entertain.

54. The Claimant urged this Court not to allow the Counter Claim and have the same dismissed with costs.

55. The Claimant maintained that he has proved his case on a balance of probabilities and that he is therefore entitled to the reliefs sought therein. For emphasis the Claimant cited the Authority of **Alphonse Maghanga Mwachanya Vs Operation 680 Limited (2013) eKLR** where the Court awarded a Claimant compensation equivalent to 12 months' salary for unfair termination.

56. In conclusion, the Claimant urged this Honourable Court to allow his Claim in terms of the reliefs sought therein.

Respondent's Submissions

57. The Respondent on the other hand submitted that it had reason to terminate the Claimant's services on account of poor performance. It relied on the provisions of Section 41 of the Employment Act, 2007 that allowed for termination on account of poor performance.

58. The Respondent further maintained that it had proved that the Claimant's performance was poor and that it communicated the position to him through written and verbal communication.

59. The Respondent further submitted that it has tendered in evidence the said communication pointing out the Claimant's area of weakness in his performance. To fortify this argument the Respondent cited and relied on the case of **Abraham Gumba Vs Kenya Medical Supplies Authority (2014) eKLR** where the Court held that *poor work performance is an allegation that should be supported by evidence of specific performance targets, appraisals of performance, with specific results.*

60. The Respondent further maintained that it has discharged its burden of proving that the Claimant's termination was justified and had sufficient grounds. For emphasis the Respondent cited the case of **Alfred Nyungu Kimungui Vs Bomas of Kenya (2013) eKLR** where the Court was of the view *that the Employment Act does not intend that Courts should take away managerial prerogatives from employers.* It contended that the Claimant's termination was on account of poor performance and on account of the Respondent exercising its managerial prerogative.

61. The Respondent further submitted that the Claimant absconded duty on 30th March, 2017 and is therefore not entitled to the reliefs as sought in his Memorandum of Claim.

62. The Respondent further submitted that the Claimant's action is contrary to the provisions of Sections 35 and 36 of the Employment Act, 2007. For emphasis, the Respondent cited the case of **James Chucha Gathere Vs Nation Media Group Limited (2013) eKLR.**

63. The Respondent further submitted that the Claimant's allegations of financial impropriety by some of its members as alluded by the Claimant has not been proved contrary to the provisions of Section 107 of the Evidence Act, and therefore urged this Court to disregard the same as the same remain unproven.

64. The Respondent maintained that the Claimant is not entitled to the reliefs sought in his Claim and therefore urged the Court to dismiss the same with costs to the Respondent.

65. On the Claim for one month's salary in lieu of notice, the Respondent submitted that the Claimant is not entitled to the same having absconded duties on 30th March, 2017.

66. On the issue of accrued leave days, the Respondent submitted that no evidence was adduced by the Claimant on his entitlement to the same. It further submitted that the Claimant did not make any effort to compel it to produce any leave records. The Respondent submitted that this relief therefore lacked any basis and therefore urged this Court to dismiss the same.

67. On the Claim for gratuity the Respondent averred that the same is only payable where it is provided for in the employment contract as was held in the Court of Appeal decision in the case of **Pathfinder International Kenya Limited Vs Stephen Ndegwa Mwangi (2019) eKLR** where the Court held that:-

“For an employee to claim gratuity, it must be provided in the contract or in the collective bargaining agreement or a statute. Suffice to state that the Employment Act, 2007 does not make it mandatory for the employers to pay gratuity...”

68. The Respondent maintained that there was no express provision in the Claimant’s contract that provided for payment of gratuity and therefore urged this Honourable Court to dismiss the Claim.

69. The Respondent further submitted that the Claimant is not entitled to compensation for unfair termination as prayed and urged this Court to be guided by the provisions of Section 49 as read with Section 50 of the Employment Act, 2007.

70. The Respondent cited several decisions among them the Court of Appeal decisions in the cases **Abraham Nyambane Asiago Vs Barclays Bank of Kenya Limited (2019) eKLR** and **Ol Pajeta Ranching Limited Vs David Wanjau Muhoro (2017) eKLR**.

71. The Respondent further submitted that it is entitled to the Counter Claim as prayed having been penalized by KRA as a result of the Claimant’s negligence.

72. In conclusion, the Respondent urged this Honourable Court to find that the Claimant’s termination was lawful and justified thereby dismissing his Claim in its entirety with costs to the Respondent and to further allow its Counter Claim as prayed.

73. I have examined all the evidence and submissions of both Parties. The Claimant has submitted that he was not accorded both substantive and procedural fairness. He avers that the reasons advanced for his dismissal were not justified.

74. The Respondent submitted that they had valid reasons for termination of the Claimant being poor performance.

75. Section 43 of the Employment Act 2007 states as follows:-

1) “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

76. The law therefore envisages that before dismissal the employee must have valid reason before termination.

77. Even in cases where the employer alleges poor performance the onus of proving the poor performance lies upon the employer.

78. In the case at hand, the poor performance of the Claimant was expected to be tested against his duties as provided for in his job description vis a vis how he had actually performed.

79. There is no indication that this was ever done because he was not taken through any disciplinary process as envisaged under Section 41 of the Employment Act 2007 which provides as follows:-

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”.

80. Indeed a disciplinary hearing process is mandatory before termination or dismissal and in this case, the Respondent failed to adhere to the provisions of the law.

81. The Respondent also counter claimed against the Claimant for what they termed the loss emanating from his poor performance. This, the Respondent also failed to prove due to lack of subjecting the Claimant to a disciplinary hearing, which would have given him an opportunity to explain himself away. The counter claim is therefore dismissed.

82. In the circumstances of the case, I find the dismissal of the claimant unfair and unjustified for lack of establishing presence of valid

reasons and also for lack of a fair disciplinary process as provided under Section 45 (2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

83. In terms of remedies, I find for the Claimant and I award him as follows:-

(1) 1 month salary in lieu of notice = 140,000/=

(2) Accrued 20 days leave = $20/30 \times 140,000 = 93,333/=$

(3) Gratuity as provided under the Human Resource Manual as 13th salary = 140,000/=

(4) 8 months' salary as compensation for the unlawful termination = $140,000 \times 8 = 1,120,000/=$

Total – 1,493,333/=

Less statutory deductions

(5) *The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in Chambers via Zoom on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Respondent

Maingi for Claimant – Present