



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 154 OF 2014

ALAN VICTOR TIMBWA.....CLAIMANT

VERSUS

MATHS TRADING COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9^h April, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 11.02.2014 through Mukele Ngacho & Company Advocates. The amended memorandum of claim was filed on 02.12.2015. The claimant prayed for judgment against the respondent for:

- a) A declaration that the summary dismissal of the claimant by the respondent on 07.01.2014 is illegal, null and void.
- b) Two months' salary in lieu of notice amounting to Kshs.280, 000.00.
- c) An order that the claimant be reinstated to employment by the respondent. In alternative:
- d) 12 months' salary in compensation for unfair termination amounting to Kshs.1,680, 000.00.
- e) Costs of the suit.
- f) Any other relief that the Honourable Court may deem fit and just to grant.

The memorandum of response was filed on 30.06.2014 through Robson Harris & Company Advocates. The respondent prayed that the claim be dismissed with costs. The reply to the response was filed for the claimant on 24.09.2014.

To answer the **1st issue** for determination the Court returns that there is no dispute that at all material times the parties were in a contract of service. By the letter dated 15.02.2013 the respondent employed the claimant to the position of Imports, Exports and Logistics Head at Kshs.140, 000.00 per month. The contract was for 2 years renewable.

To answer the **2nd issue** for determination the evidence is that the respondent terminated the claimant's employment by the letter of summary dismissal dated 20.12.2013. The letter referred to the disciplinary hearing held on 10.12.2013 and the issues discussed were listed in the letter as follows:

- a) The claimant's failure as the logistics manager to conduct due diligence on companies that were seeking to be transporting the company materials.
- b) Engaging in employment with the respondent as a logistics manager yet the claimant stood in a fiduciary position with a related company that was involved with transportation of company consignment.
- c) Violation of terms of the contract of employment.
- d) The claimant's negligence and laxity thereby exposing the company to colossal financial and operational losses.

e) The claimant's failure to protect the company's commercial reputation due to inefficiency in the department of logistics.

The letter further stated, "**During the meeting, your answers thereof to the above queries were found to be unsatisfactory based on your area of assignment.**" The letter concluded that by the claimant's actions and omissions the respondent had entered into contracts with a dubious clearing and forwarding company; the claimant was guilty and culpable of related third party transactions and conflict of interest contrary to the terms of employment and the unchallenged evidence was that the claimant engaged in other business namely, Quick Pick Forwarders Limited where he held majority shareholding of 600 shares out of 1000 shares; he had led to colossal and substantial losses to the respondent in the process of clearing the respondent's goods at the port of Mombasa; and had brought the company's name into disrepute especially in delays in servicing customers' orders. The claimant was therefore found guilty of gross misconduct and dismissed without notice or pay in lieu of notice and he was paid only the days he had worked.

Prior to the dismissal the claimant had been suspended from duty by the letter dated 25.11.2013 for 14 days to pave way for investigations surrounding the respondent's financial loss of colossal and substantial money leading to near auction of the respondent's property in Mombasa. The letter stated that the loss was linked to the claimant's conduct. He was notified by that suspension letter to report back on 10.12.2013 at 2.30pm for an all-round meeting with the respondent's management and he was advised to bring his representative at the meeting.

The **3rd issue** for determination is whether the termination was unfair. The claimant's case is that it was unfair because he was not given a show-cause notice; the reasons for termination were not valid; and the termination was backdated in the letter dated 20.12.2013 so that he was to be paid only for the days he had worked (up to 25.11.2013, the date of suspension). The respondent's case was that the termination was not unfair or unlawful because the claimant was negligent in his duty by failing to ensure timely clearance of the respondent's containers at the port; failing to ensure that Kshs.18, 000,000.00 paid as duty by the respondent was accounted for; and colluding with respondent's clearing and forwarding agent to defraud the respondent. Further the respondent pleaded that the claimant breached the contract by engaging in a business whose activities were identical or similar to or competing with those carried out by the respondent. The claimant was invited to the disciplinary hearing, he never objected to the disciplinary panel and he participated at the hearing. Subsequently he was summarily dismissed.

The claimant testified to support his case. The Court has considered the evidence, the pleadings and the submissions filed for the claimant. The evidence is that in the suspension letter the claimant was notified about the disciplinary hearing which he subsequently attended. The Court finds that the respondent complied with the procedure for a notice and hearing as provided for in section 41 of the Employment Act, 2007.

The respondent offered no evidence to establish the reasons for termination as envisaged in section 43 of the Act. The claimant testified thus, "**Quick Pic Forwarders Ltd is a company I know. Am part owner of the company. I hold shares in that company. At material time I did no business with that company. It was dormant. I disclosed its existence as I joined the respondent. It was not in writing. I informed the management.**" The Court returns that the respondent has failed to discharge the burden to show that the reasons for termination were valid as at the time of termination. The contract provided, "**You will not be allowed to engage in any other remunerative activity outside the company without written permission from the management.**" There was no evidence that the claimant as a shareholder in Quick Pic Forwarders Ltd engaged in a remunerative activity or that the company was in competition with the respondent in any manner. Accordingly the termination was unfair for want of a fair and genuine reason as envisaged in section 43 as read with section 45 of the Employment Act, 2007.

The **3rd issue** is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The Court returns that the claimant is entitled to a declaration that the summary dismissal of the claimant by the respondent on 07.01.2014 was unfair.

b) Since the termination was unfair the claimant is awarded two months' salary in lieu of the contractual termination notice amounting to **Kshs.280, 000.00**.

c) The claimant prayed for an order that the claimant be reinstated to employment by the respondent. The claimant gave no evidence or submissions on practicability of implementing reinstatement. The Court has considered the circumstances of the separation and returns that the relationship has broken down irretrievably. Further time has run and it is over the statutory 3 years under section 12 of the Employment and Labour Relations Court Act, 2011. Accordingly, the Court returns that reinstatement is not an appropriate remedy.

d) The claimant prayed for 12 months' salary in compensation for unfair termination amounting to **Kshs. 1,680, 000.00**. The Court has considered that the claimant had over 12 months of unexpired contractual term of service and he otherwise had a clean record of service. He clearly desired to continue in the respondent's employment. The aggravating factor is that the unfair dismissal was retroactive with no pay for the period of suspension. In the circumstances, the Court finds that the claimant will be awarded the maximum compensation under section 49 of the Employment Act, 2007 and as prayed for.

e) Costs follow the event and 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) The declaration that the termination of the claimant's contract of employment by the respondent was unfair for want of a valid reason.

2) The respondent to pay the claimant **Kshs.1, 960, 000.00** by 01.07.2020 failing interest at court rates to be payable thereon at from

the date of this judgment till the date of full payment.

3) The respondent to pay the claimant's costs of the suit.

4) In view of the prevailing COVID 19 pandemic there be stay of execution of the decree herein until 01.07.2020.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 9th April, 2020**.

BYRAM ONGAYA

JUDGE