



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1118 OF 2015

HENRY AGANDA.....CLAIMANT

-VERSUS-

FREIGHT IN TIME LIMITED....RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent herein seeking the following reliefs:-

- (a) The dismissal was wrongful and/or unfair
- (b) In the alternative the actions of the respondent amounted to constructive dismissal
- (c) The dismissal and the actions of the respondent connected to it were harsh
- (d) The respondent is liable for general damages
- (e) The respondent is liable to the claimant for loss of current earnings and future earnings
- (f) The respondent is liable to the claimant for unpaid salaries and benefits plus other special damages including loss resulting from withholding claimant's dues and entitlements and claimant's inability to pay his bills and debts in time
- (g) The motor vehicle belong to the claimant who only owes the respondent in respect of the outstanding loan
- (h) The respondent be stopped from taking possession of the Motor Vehicle KBW 480M until this matter is determined.
- (i) Costs of this suit
- (j) Interest on the damages general and special and on the costs of the suit and application
- (k) Any other relief as the court deems fit.

2. The Respondent has filed defence and counterclaim denying the reliefs sought by the claimant and claiming from him Kshs. 760,000/- being the outstanding loan advanced to him to purchase a car.

3. Both parties tendered evidence during the hearing and thereafter filed written submissions.

Claimants Case

4. The claimant testified as Cw1 and told the court that he joined the respondent on 21.6.2014 as a Sales Manager earning Kshs. 100,000 per month. That due to his good performance he was promoted, on 1.9.2014, to become the Business Development Manager earning Kshs. 180000/- per month.

5. On 25.5.2015, he was due to present the routine weekly report to the Group Business Development Manager Mr. Sultani and the General Manager Mr. Thuo. at 9.00 a.m. but he was kept waiting till 2.00 p.m when was called into the meeting which lasted for only one minute. He

contended that all what happened was that Mr. Thuo told him that his services have been terminated and that he should go to the HR office for clearance. No reason was communicated to him for the dismissal and there was no previous warning. He was also not allowed to say anything and he was not given any prior notice that his dismissal was to be discussed in the meeting.

6. The claimant further testified that he went to clear with the HR Manager, Ms. Kate Kamau but she declined stating that she was unaware of the dismissal. On 27.5.2015, Ms. Kamau called him to inform him that her boss Mr. Desai, the Finance Director wanted to see him on 29.5.2015 and he complied. On the said day he met Mr. Desai, Mr. Sultani and Ms. Kamau whereat Mr. Desai apologised and told him that the termination of his employment was done by the boss Mr. Shammit Shah and he could not rescind the same. In addition Mr. Desai told him that his car loan repayment would not be interrupted and instructed Ms. Kamau to receive all the company property from him.

7. The claimant further testified that he handed over all the company property to Ms. Kamau who told him to return after one day to collect an acknowledgement that he had handed over all the company property. He contended that when he returned on 29.5.2015, he was given a termination letter signed by Mr. Thuo but he declined to pick and sign it because it contained a clause requiring him to undertake that he would not sue the company.

8. After rejecting the letter, Ms. Kamau referred him to the Financial Controller Mr. Elijah to assess his terminal dues and Mr. Elijah promised to email the same. The computation was emailed on 2..6.2015 but he disagreed with the same because it also required him to undertake not to seek legal redress. He observed that one of the items in the computation was salary in lieu of notice which according to him was evidence that he was not to blame for the termination and that he did not abscond duty as alleged by the respondent.

9. He admitted that he requested for a loan of Kshs. 825,000/- to buy a car and the respondent advanced the loan to him. The terms of car loan were that the car would be registered in the name of the respondent until he cleared the loan at monthly instalments of Kshs. 55000.

10. He contended that before the dismissal he paid a total of Kshs. 330000 made up of 165,000 cheques and Kshs. 165,000 cash payment leaving a car loan balance of Kshs. 495,000. He further contended that the loan was not to attract any interest.

11. He denied the alleged poor performance on his part contending there were no agreed targets and no performance appraisal was done before the dismissal. He further denied that the meeting held on 25.5.2015 was to dismiss his performance and contended that no documentary evidence has been adduced by the respondent to support that allegation.

Respondent's case

12. Mr. Elijah Kiva, the respondent's Financial Controller testified as RW1. He confirmed that the claimant was employed by the respondent and that on 29.10.2014 he wrote a letter requesting for a car loan of Kshs. 400,000 but later he enhanced the request to Kshs. 825,000. He further confirmed that the request was granted considering the claimant's role of Business Development which was very critical to the respondent's business.

13. He testified that the claimant signed an agreement with the respondent stating that the vehicle was to remain as property of the respondent until he completed his loan repayment. He however admitted that the car belonged to the claimant and all what the respondent was entitled to was the loan balance. He further admitted that the claimant was not paid his terminal dues because he refused to sign the computation form.

14. Mr. Jesse Thuo, the respondent's General Manager, testified as RW2. He stated that he was the claimant's supervisor and contended that when the claimant was given the new role of Business Development Manager, he became uncooperative and a poor performer. He delayed his weekly reports and the reports he presented were poorly done forcing him to correct the same on the claimant's behalf.

15. As a result of the said poor performance a meeting was scheduled between the Group Business Development Manager and the claimant but the meeting was delayed until 12 p.m. when it started. He contended that due to the said delay, the claimant was annoyed and after the meeting he decided to exit the company and the following day went to hand over to the HR Manager. He denied that the claimant was dismissed on 25.5.2015 and averred that he was only told to see the HR Manager to work out on the technicalities of how to achieve the key performance indicators.(KPIs)

16. He admitted that he never attended the meeting on 28.5.2015 between the claimant, Finance Director and the Group Business Development Partner but confirmed that after the meeting the claimant went to hand over company property and he was told to sign a document for the claimant. He further admitted that after handing over, the claimant was served with a schedule of his terminal dues including one month salary in lieu of notice. He also admitted that the claimant was never served any resignation letter before the separation.

17. He confirmed that the claimant was required to sign a discharge voucher agreeing not to make any further claim against the respondent. He further confirmed that the claimant's performance was not appraised before the separation because he had not completed one year of service.

Issues for determination

18. I have carefully considered the pleading, evidence and the written submissions by both sides. There is no dispute that the claimant was employed by the respondent from 21.6.2014 to 25.5.2015. There is also no dispute that during his employment he sought and was advanced a car loan of Kshs. 825000 by the respondent. The issues for determination are :

- (a) Whether the claimant deserted his employment or was he dismissed by the respondent on 25.5.2015
- (b) If the answer to (a) above is dismissal, whether the same was unfair and unlawful.

(c) Whether the claimant is entitled to the reliefs sought in his claim.

(d) Whether the respondent is entitled to the reliefs sought in the counter claim.

Desertion or dismissal

18. The respondent contended that the claimant deserted his employment from 26.5.2015 after his attempt to clear with the company on false allegation that he had been dismissed on 25.5.2015 was rejected by the HR Manager. However, the claimant contended that he was dismissed on 25.5.2015 in a meeting between him, Rw2 and the respondent's Group Business Development Partner. He further contended that the said dismissal was confirmed in a meeting between him and the Finance Director, Group Business Development Partner and the HR Manager on 28.5.2015 whereat the Finance Director stated that his dismissal came from the Boss and he could not rescind the same. None of the participants in the meeting testified in this case except the claimant. The said termination was corroborated by the fact that the claimant was directed to hand over on the same day and he did so to the HR officer and RW2 signed the documents. RW2 confirmed that the claimant did not serve any resignation letter to the respondent. In addition, Rw1 and Rw2 confirmed that after the handing over, the claimant's terminal dues were computed including one month salary in lieu of notice. It follows therefore that the inference one can draw from the foregoing facts is that the claimant did not desert his employment but he was dismissed by the respondent.

Termination was unfair

19. Under section 45(2) of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the operational requirement of the employer; and a fair procedure was followed.

The reason for the termination

20. Section 43 of the Act provides that in any legal proceedings challenging the termination of employment by the employee, the employer has the burden of proving the reason that justified the dismissal. The section further defines the reason to mean the matters which were in existence at the time when the dismissal was decided and which led the employer to dismiss the employee.

21. In this case RW1 and RW2 denied that the claimant was dismissed but RW3 contended that the claimant was performing his duties poorly. The claimant's contention that Mr. Desai stated that the decision to dismiss the claimant was done by the company's boss was not rebutted. Mr. Desai did not state the reason for the dismissal. Consequently the court returns that the respondent has failed to discharge her burden of proving a valid reason that justified the dismissal of the claimant as required under sections 43 and 45 (2) of the Employment Act.

Procedure Followed

21. Section 41 of the Employment Act provides that before terminating services of an employee on grounds of misconduct, poor or physical incapacity, the employer shall explain to the employee the reason for the intended termination, and the employee is entitled to be accompanied by a fellow employee or shop floor union official of his choice, and the two are entitled to air their representations which must be considered before the termination is decided. In this case the said mandatory procedure was not followed and I return that the respondent has failed to discharge her burden of proving that fair procedure was followed as required under section 45 2(c) of the Employment Act.

25. Having found that the employer herein has failed to prove that the dismissal of the claimant was substantively and procedurally fair as required under section 45 of the Employment Act, I proceed to hold that the termination of the claimant's contract of service was unfair within the meaning of section 45 of the Act.

Reliefs

26. In view of the foregoing finding that the termination of the claimant's employment was unfair. I make further finding that under section 49 of the Employment Act, the claimant is entitled to a salary in lieu of notice and compensation for unfair termination. The respondent admitted that in computing claimant's dues, she included one month salary in lieu of notice. Clause 12 of the appointment letter provided for termination notice of one month. Consequently, I award him one month salary in lieu of notice being Kshs. 180,000. Considering the claimant's short service of about 11 months I award the claimant 2 months salary compensation for unfair termination equalling to Kshs. 360,000.

27. In addition, I award the claimant the terminal dues computed by the employer after the separation being salary for 25 days worked in May 2015 equalling to Kshs. 173,076.92 and accrued leave of 3.5 days equalling to Kshs. $180,000 \times 3.5/26 =$ Kshs. 24,230.77. I further grant the prayer that the motor vehicle KBW 480M belongs to the claimant and the respondent is restrained from repossessing it. The reason for the foregoing is that the defence witnesses confirmed that the vehicle belongs to the claimant subject to paying the outstanding car loan balance.

28. The Claim for loss of current and future earnings is dismissed because it is not grounded on law or the contract of service. Likewise the claim for special damages occasioned by withholding of terminal dues is dismissed for lack of particulars and evidence.

Counterclaim

29. RW1 admitted in evidence that the claimant borrowed a loan of Kshs. 800,000 and he paid back Kshs. 330,000 leaving a balance of Kshs. 470,000.000. However, the claimant admitted that the car loan was for Kshs. 825,000/- and that he paid back Kshs. 330,000.000. It follows that the outstanding loan balance is Kshs. 495,000.00 as admitted by the claimant. Consequently, I allow the counterclaim to the

extent of Kshs. 495,000.

Conclusion and Disposition

28. I have found that the claimant was unfairly dismissed by the respondent on 25.5.2015. I have found that he is entitled to some of the reliefs sought. Finally, I have allowed the counter-claim to the tune of Kshs. 495,000 in favour of the respondent. Consequently, I enter judgement for the claimant as follows:

Notice.....Kshs. 180,000.00

Compensation.....Kshs.360,000.00

Salary for 25 days.....Kshs. 173,076.92

Leave 3.5.days.....Kshs. 24,230.77

Total.....Kshs. 737,307.69

The said sum is subject to statutory deductions, and thereafter the net will be paid less the Kshs. 495,000.00 awarded to the respondent as counter-claim. The net payable to the claimant will attract interest at court rate from the date of the judgement. Finally, each party shall bear his/her own costs because both of them succeeded in their respective claims.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE