



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 692 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PETER NDERITU WACHIRA alias

PETER NDERITU WACIRA.....CLAIMANT

VERSUS

MECOY CONSULTANTS LIMITED.....RESPONDENT

JUDGMENT

On 1st April 2011, the Claimant was employed by the Respondent as an assistant manager – finance and project monitoring for a probationary period of one year and thereafter confirmed on permanent terms, at a gross salary of Kshs.62,850.00 which was later increased to Kshs.68,295.00.

The Claimant was summarily dismissed on 26th March 2014 after reporting from his compulsory leave. He was not paid any terminal dues, which had still not been paid by the time he instituted this suit on 30th April 2014. He seeks the following remedies-

a. A declaration that the Claimant was wrongfully and unlawfully

dismissed from employment.

b. An order for release of his certificate of service.

c. A total of Kshs.1,100,040.00 tabulated as follows-

i. 12 months' salary compensation for loss of employment as provided under Section 49 (1) (c) of the Employment 2007

Kshs.68,295 x 12 = Kshs.819,540.00

ii. One months' salary in lieu of notice of Kshs.68,295.00.

iii. Gratuity as per clause 7 of the confirmation letter dated 28/3/2011 of Kshs.131,145.00.

iv. Severance pay (2,276.50 x 15 days x 2 years) totaling to Kshs.68,295.00.

v. Unpaid leave days (2,276.50 x 10 days) amounting to Kshs.22,765.00

d. Interest on (b) (sic) above.

e. Costs of this suit.

f. Any other/further relief that the Court may deem appropriate.

The Respondent filed a response on 3rd June 2014, denying the allegations set out in the claim. The Respondent contends that the Claimant had been disrespectful at a meeting held on 13th March 2014 by insisting on the particularization of his duties which was difficult because the

finance department had no limitation of duties. The Respondent further contends that the payment of the Claimant's terminal benefits was subject to his concurrence which was never communicated. Nevertheless, it was willing to pay the Claimant his dues.

The Claimant's Case

The Claimant avers that at 12:00 pm on 13th March 2014, he was summoned to the managing director's office where he was asked to give a general overview of his experience at the company and the challenges he had encountered, which he did. He avers that he requested to have his duties confined to those under his contract.

His view at the time was that the meeting had been fruitful. However, upon arrival at his work station he found that he had been blocked from accessing the company's system and his stationery confiscated. At around 3:00 pm the same day, he was summoned back to the managing director's office where he was notified that he was being sent on a 7-day compulsory leave. He was requested to hand over any company documents that he had been working on and take any personal items that he had in the premises.

He went on leave and when he resumed work on 25th March 2014, his employment services were terminated without him being furnished with the reason(s) for his termination or being paid. On 26th March 2014, he wrote a letter to the managing director requesting him to cite the reasons for the claimant's termination and his refusal to allow the Claimant to prepare a handing over report for a smooth transition. The same did not illicit a response.

The averments made in the claim were reiterated by the Claimant in his witness statement and examination in chief save that the only dues paid to him was his March salary and that he was never issued with a certificate of service which was always a requirement whenever he sought employment.

At cross examination, the Claimant admitted that his leave applications were never denied. It was his testimony that his termination was effective from 1st April 2014.

On re-examination, the Claimant contended that the leave forms annexed by the Claimant did not reflect any leave days from November 2013 to March 2014.

The Respondent's Case

Amos G. Mambo, the Respondent's Managing Director, testified on behalf of the Respondent as RW1. He adopted his witness statements filed in the matter. In the witness statement dated 30th May 2014, RW1 associated himself with the averments made in the response. His supplementary witness statement reiterated the averments made in the response save that the Claimant's letter of 23rd March 2014 had indicated that the reason for termination was redundancy.

On cross examination, he testified that at the meeting of 13th March 2014, the Claimant's declining performance from 4th July 2013 to 13th March 2014 had been discussed. However, RW1 conceded that there was no evidence to prove that the claimant's performance had been discussed or a performance appraisal produced to prove the Claimant's declining performance.

He further conceded that the Claimant's letter of 13th March 2014 and his termination letter did not mention the issue of his performance. He admitted that the tabulation of the Claimant's salary was never done but contended that this was because the Claimant pursued other legal options. He admitted that there had been no leave application by the Claimant in 2014.

At re-examination, he reiterated his evidence in chief. The Respondent closed its case. Thereafter, parties filed their respective written submissions which have been taken into consideration by this Court.

Analysis and Determination

I have carefully considered the pleadings, evidence and submissions filed by the parties. The issues for determination are whether the termination of the Claimant's employment was justifiable, lawful and fair and whether he is entitled to the reliefs sought.

Before proceeding to the determination of this matter, it is important to address the issue of redundancy which was raised by the Respondent's witness in his supplementary witness statement and during his examination. The issue of redundancy was not pleaded in the Respondent's response to claim. In fact, the Respondent contended that the Claimant was not entitled to severance pay at paragraph 16 of the same.

Since parties are bound by their pleadings, the same cannot be considered as an issue for determination before this Court. Nevertheless, even if the same had been pleaded in the response; the same was not given as the reason that led to the termination of the Claimant's employment hence is not in issue.

Termination

Section 41 of the Employment Act requires an employer who intends to terminate the services of their employee on account of poor

performance and gross misconduct to explain to them the reason(s) they are considering such termination in the presence of a colleague or a shop floor union representative, and give them the opportunity to present their case. Further, Section 43(1) of the Act places the burden of proving the reason(s) for termination on the employer and where they fail to do so, the termination shall be deemed unfair within the meaning of section 45.

Further, Section 45(1) prohibits the unfair termination of an employee. Sub-section (2) elaborates that unfair termination arises where an employer fails to prove that the reasons for termination were valid, justified or fair and where an employee was not subjected to fair procedure before their employment was terminated.

There have been various interpretations of the Claimant's termination letter hence the necessity to reproduce the same which reads as follows

"Date: 23rd March 2014

Our Reference: MCL/Admin/35

Your Reference:

Attention

Peter Nderitu Wachira,

P.O. Box 53649 – 00200

NAIROBI

Dear Sir,

REF: TERMINATION OF SERVICE

- 1. Our letter of 13th March 2014 refers.*
- 2. Further, this is to advise you that the Company will not be able to continue with your services with effect from 1st April 2014.*
- 3. In view of the above and prevailing circumstance, your terminal benefit will be evaluated in accordance with the letter of appointment within 30 days subject to your concurrence of the same.*
- 4. The company has granted you additional leave until 31st March 2014.*
- 5. We thank you for the services rendered and time you have been with the company.*
- 6. Further we wish you all the best and success in future endeavours..."*

The letter of 13th March 2014 referred to in the termination letter read as follows-

"Date: 13th March 2014

Our Reference: MCL/Admin/35

Your Reference:

Attention

Peter Nderitu Wachira,

P.O. Box 53649 – 00200

NAIROBI

Dear Sir,

REF: LEAVE

This is to advise you that it has been decided that you proceed on leave with effect from 14th March 2014 to 24th March 2014, both dates inclusive...

From the foregoing, it is clear that the Claimant was not issued with reason(s) for the termination of his employment as required by Section 41 of the Employment Act. The leave letter could not be a reference point for his termination as it did not relate to the termination of his employment.

The Claimant's poor performance and his poor attitude towards management were neither discussed in the meeting of 13th March 2014 or mentioned in his termination letter. Further, no performance appraisal was adduced as proof of the Claimant's poor performance nor was the Deputy Managing Director present at that meeting presented in court to corroborate RW1's testimony that the same had been discussed.

In the absence of any reason(s) for terminating the Claimant's employment, the Respondent has failed to prove the reason(s) for termination of the Claimant's employment as required under Section 43(1) of the Employment Act, and for this reason alone termination is deemed to have been unfair within the meaning of Section 45.

The Respondent's account of events and its failure to adduce evidence of a disciplinary hearing is conclusive proof that the Claimant was not accorded a hearing as required by section 41 of the Employment Act and which is mandatory before any termination is effected as held in the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR**. As such, the termination of his employment was procedurally unfair.

Remedies

The Claimant sought 12 months' salary as compensation for loss of employment. I have considered the circumstances outlined in Section 49(4) of the Employment Act award him 6 months' compensation for the unfair and unjustified termination of employment.

The Claimant is also awarded one months' salary in lieu of notice by dint of clause 2 of his employment confirmation letter of 20th April 2012. I have also considered the fact that the Claimant was only granted 6 days' notice and the provisions Section 44(2) which prohibits an employer from terminating a contract of service with less notice than that which they are entitled to by any statutory provision or contractual term.

The Claimant is awarded gratuity pursuant to clause 7 of his employment confirmation letter which reads as follows-

"7. Upon confirmation on permanent terms, for every year completed successfully, you will qualify for one-month net salary as the terminal benefit. Payment may be considered bi-annually subject to the company approval.

The Claimant was confirmed as a permanent employee on 20th April 2012 and his employment terminated on 1st April 2014. Unlike the appointment letter, the confirmation letter did not indicate the effective date of the permanent employment terms so it is presumed that it took effect from the date of employment and the right accrued upon confirmation. As such, the Claimant is entitled to gratuity from 1st April 2011.

The Claimant sought compensation for his unpaid leave. The last annual leave application form adduced by the Respondent at page 45 of its Bundle of Documents, shows that the Claimant had 11.5 days left. No other leave application form was adduced to show that he had utilized all or some of those days. However, I note that the Claimant was granted 6 leave days in his termination letter which were not taken for lack of clarity as to whether it was paid or unpaid leave as explained in his letter of 25th March 2014. Since the Respondent did not clarify this fact, the Claimant is awarded the 10 days unpaid leave as prayed.

This Court declines to make an award for severance pay having already established that the same was not in issue in this claim. The Respondent is ordered to issue to the Claimant with a certificate of service whose particulars are in line with those outlined in Section 51(2) of the Employment Act.

In summary therefore, the termination of the claimant's employment is declared unfair and judgment entered for the claimant against the respondent as follows –

1. One month's salary in lieu of notice Kshs.68,295.00
2. 6 months' salary as compensation Kshs.409,770.00
3. Gratuity for 3 completed years of service at one month's salary per completed year of service Kshs.204,885.00
4. Pay in lieu of 10 days annual leave Kshs.26,267.30

Total Kshs.709,217.30

5. Certificate of service.
6. Costs.

7. Interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE