



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2156 OF 2015

JOHN ODONGO SASI.....CLAIMANT

-VERSUS-

P.J FLOWERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th June, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 04.12.2015 through Namada & Company Advocates. The claimant's case is that the respondent employed him on 13.06.2013 as a General Manager and on 12.09.2015, without forewarning, notice or cause, he was handed a letter dated 08.09.2015 dismissing him from employment. His further case is that the allegations levelled against him in the dismissal letter were false and were hatched up to justify the dismissal. It is his case that he was dismissed without due process and genuine reason. He claimed for:

- a. Unpaid contracted house allowance for 27 months of service at Kshs. 5,000.00 per month making Kshs.135, 000.000.
- b. One-month salary in lieu of termination notice Kshs. 50,000.00.
- c. Pay in lieu of leave untaken for 2 years and 3 months served at Kshs. 50,000.00 per year Kshs.112, 500.00.
- d. Pay for duties undertaken on public holidays for 2 years being 20 holidays at double pay rate Kshs. 50, 000.00/30 x 20days making Kshs.66, 700.00.
- e. Service or gratuity at 15 days for every completed year of service since no provident fund payment was ever made 15/30 x Kshs. 50,000.00 x 2 making Kshs. 50,000.00.
- f. Compensatory damages on account of unfair, illegal and unlawful dismissal calculated at 12 months' gross salary thus 12 x Kshs.50, 000.00 making Kshs. 600,000.00.
- g. Total claim Kshs.1, 014, 200.00.

The claimant prayed for judgment against the respondent for a declaration that the dismissal from employment was unlawful and unfair; payment of Kshs.1, 014, 200.00; interest; and costs of the suit.

The respondent filed the statement of defence on 01.04.2016 through Kwengu & Company Advocates. The respondent denies that it employed the claimant as a General Manager at Kshs. 50,000.00 per month. The respondent's case is that the claimant was unable to supply his credential to support his employment and the credentials were a mandatory requirement of various bodies regulating flower industry and further the claimant had misrepresented that he was qualified for the job. The respondent's further case is that the claimant is not entitled to the claims and remedies prayed for. Further the claimant's suit is fatally defective, incompetent, misconceived, an afterthought, vexatious, and otherwise an abuse of court process. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was the respondent's Managing Director one Elizabeth Wambui Thande. The Court has considered the pleadings, the evidence and the submissions filed for the parties. The Court makes findings as follows.

First, the evidence is that parties were in a contract of service. The letter for the employment contract exhibited for the claimant and not

dated shows that the claimant was employed by the respondent as a General Manager and effective 03.06.2013. The agreed monthly pay in that letter was Kshs.50, 000.00. The respondent has exhibited a letter dated 23.04.2014 showing that the claimant was employed by the respondent as a Farm Manager at 35, 000.00 per month with salary increments (upon one-year performance) at the respondent's discretion. In the same letter exhibited for the respondent it is stated in the clause on salary that should the claimant accept the offer, he would be paid a consolidated gross salary of Kshs 45,000.00 (typed then crossed in hand to indicate Kshs. 35,000.00 and countersigned on 23.04.2014 by a signature appearing like that of RW who also signed the letter) and the letter was accepted by the claimant on 23.04.2014 (and the date is changed in hand on 23rd and on 2014 which appears to have been 2013).

RW confirmed that the respondent employed the claimant from 13.06.2013 to 18.11.2013 and the employment contract was as per exhibit by the claimant on the claim bundle. Further RW testified that the salary was Kshs. 50,000.00 per month. Per the letter, the claimant was further entitled to 10% house allowance. Thereafter, RW testified that the respondent through her as Managing Director never gave the claimant another contract of service. Again, RW further testified thus, **"I see respondent's list of further documents filed 29.06.2017. I also gave him the contract of 23.04.2014."**

RW further testified that at time of interview for employment the claimant failed to provide his certificates or credentials. The claimant then worked from 13.06.2013 to 18.11.2013 but he had absconded duty when he asked for 7 days to attend to his private issues. RW testified that the claimant had disappeared for 5 months (during which time RW suspected the claimant had gone for alternative employment) and when he resurfaced he pleaded and she re-engaged him as Farm Manager.

The Court has carefully revisited the evidence. The claimant offered no explanation about the two letters of appointment one exhibited by himself and the other exhibited for the respondent. In the circumstances there is no reason to doubt the explanation by RW that the claimant had disappeared for 5 months and when he resurfaced he was re-engaged by the letter dated 23.04.2014 as a Farm Manager. The salary payment vouchers exhibited for both parties show that the claimant earned Kshs.45, 000.00 per month with no deductions. The Court returns that the claimant's last position was as Farm Manager at a consolidated salary of Kshs. 45, 000.00 per month.

Second the Court returns that the claimant was terminated by the letter dated 08.09.2015 on account of failure to provide answers, as the Farm Manager, to queries raised in the audit which commenced in February, 2015. The letter further stated, **"It was perhaps appropriate that this audit was necessary which has exposed your lack of complete knowledge of growing flowers for export. However, notwithstanding this observation it is now clear that we can no longer have you as the Manager of this farm. On receipt of this letter hand over any company record or other item to Mr. Mutiso/Miriam as we make arrangement to pay any money due to you to your Bank account. We wish you all the best in your next job. Kindly acknowledge content of this letter on the copy hereof."** The letter was signed by RW.

Thus the Court returns that the claimant was dismissed on account of failure to answer certain audit queries and in particular lack of complete knowledge of growing flowers for export.

Third, was the dismissal unfair for want of due process and valid reasons? The Court has found that the reason for termination was mainly that the claimant failed to provide credentials or certificates necessary for his role as a Farm Manager. The lack of such certificates or credentials had been exposed by the audit that commenced in February, 2015. RW testified that lack of the certificates hampered the respondent's operations because they were required by the relevant regulatory authorities. In particular, RW had served the claimant the internal memorandum dated 30.03.2015 stating that looking at the claimant's file the claimant had not furnished the respondent with his credentials and the claimant was notified that the same were required for forwarding to the Horticulture Crop Directorate for the respondent to obtain export license. It further stated that the Professional Association – Kenya Flower Council, needed proof of qualifications of the management of all member companies to ascertain their capability to supervise the compliance process of the industry. The memo noted that the claimant had failed to supply his certificates when he accepted the employment and he was being reminded to provide them to ease the licence process and auditing as the respondent prepared for its Silver Standard conducted by Kenya Flower Council. RW testified that the claimant had failed to provide the certificates as required leading to his termination. Further the claimant had failed to go to Egerton University and to bring the certificates as he had promised to do.

On his part the claimant testified that he had received the internal memorandum of 30.03.2015. While alleging that he provided his certificates at employment, he did not furnish the same in his evidence in Court. He confirmed that he was aware of the audit about the general operations of the farm. He further stated that he had knowledge of export matters and he was not aware of losses to the respondent. The Court finds that as at termination the claimant knew that he was required to provide his certificates and he had failed to do so at employment and after the internal memorandum of 30.03.2015. The Court considers that he had sufficient time to answer the audit query in issue which was whether he had certificates that were required and whether he had supplied them. The Court finds that he failed to provide the certificates as was required and therefore he fully contributed to the subsequent termination of the contract of service. As submitted for the respondent, the respondent has established (as per section 47(5) of the Employment Act, 2007) that as at termination there existed a valid reason for termination per section 43 of the Act and Article 4 of the ILO Convention 158 thus, **"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."**

The claimant lamented that the termination was without notice but the Court returns that in view of the time allowed for him to comply but he failed to provide the certificates, the claimant is not entitled to any compensation under section 49 of the Employment Act, 2007. The Court finds that the established reason for termination was valid in terms of sections 43 and 45 of the Act and further that the claimant fully (at 100%) contributed to his termination and is thereby not entitled to compensation as prayed for.

Fifth, is the claimant entitled to the other remedies as prayed for. The Court makes findings as follows:

1. The claimant has prayed for pay in lieu of annual leave throughout a service of 2.5 years. The Court has found that there is no reason to doubt RW's evidence that the claimant broke from service for 5 months (November 2013 to April 2014 after which the parties entered the second contract of service dated 23.04.2014). The claimant admitted to taking some leave days which is clearly inconsistent with his claims and prayer. The respondent has filed the claimant's request for 4 days of leave from 22.05.2015 to

26.05.2015 and the leave was approved on the relevant leave form. The Court returns that the claimant cannot be trusted in his claims for leave days and prayer in that regard and the prayer will fail as unjustified. While making that finding the Court has as well reckoned that the claimant was away for 5 months' break per RW's evidence.

2. The evidence is that the respondent terminated the employment suddenly. It was after several months since the respondent issued the internal memorandum requiring the claimant to avail the certificates. The respondent had worked with the claimant for a long time without the claimant complying and the Court finds that in the circumstances the respondent appears to have condoned the claimant's failure in that regard. Thus the Court considers that nothing stopped the respondent from issuing the relevant termination notice. Indeed, RW testified that it was for the failure to provide the certificates but otherwise the issue of termination would not have arisen. Consequently, the Court finds that the claimant was entitled to a termination notice and is awarded one-month salary in lieu of the contractual termination notice at **Kshs.45, 000.00**.

3. The claimant did not provide evidence that he worked on public holidays and further the evidence was that parties agreed upon a consolidated monthly pay for the claimant who was serving in the managerial cadre. The claim for pay for work on public holidays will therefore fail as not justified especially that the prayer was also inconsistent with the 5 months' break in service as per RW's evidence.

4. The claimant was a member of the National Social Security Fund (NSSF). His claim for gratuity or service pay will fail in view of provisions of section 35 of the Act. Further if NSSF dues were not remitted for any reason, then it was open for the claimant to pursue the respondent within the provisions of the NSSF Act.

5. The second and last contract of service provided for a consolidated pay. As submitted for the respondent the prayer for house allowance was unfounded in view of the consolidated pay per section 31 of the Act and per the holding in **Dorcas Kemunto Wainaina –Versus- IPAS [2018]eKLR** that the express provisions of section 31 of the Act applied.

6. In view of the parties' margins of success the respondent will pay the claimant part costs of the suit now fixed at **Kshs. 25,000.00**.

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

1. Payment of **Kshs. 70,000.00** by 01.08.2020 failing interest to be payable thereon at Court rates from the date of filing this suit till the date of full payment.

2. In view of the prevailing Covid 19 situation, there be stay of execution herein until close of 01.08.2020.

Signed, dated and delivered in court at **Nairobi** this **Friday, 19th June, 2020**.

BYRAM ONGAYA

JUDGE