



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 452 OF 2019**

**JOSHUA MWANIKI.....CLAIMANT**

**VERSUS**

**ANDELA KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant instituted this claim 05.08.2019 to challenge the termination of his employment by the respondent. He avers that he was initially hired by the Respondent as a consultant but on 10.08.2015, he was employed as a Director of Operations before rising to become the Country Director in July 2016 earning monthly basic salary of KShs. 833,333.00 per month. In November 2017, he was issued with an equity award of 110,000 shares as a recognition of his outstanding performance.

2. However, on 22.02.2019, he was sent on suspension to pave way for investigations on financial impropriety. The investigations did not show any misconduct on his part and he was offered a draft mutual separation agreement which he declined. Nevertheless, he was summarily dismissed on 03.04.2019 for unsatisfactory performance and gross misconduct. A day after the termination of his employment, an article relating to the claimant's termination was published which, according to him damaged and continues to damage his reputation amongst his peers and the general public.

3. The Claimant avers that no disciplinary action had been previously taken against him, he was not issued with a warning letter or placed under a performance improvement plan (PIP). Further, the grounds outlined in his termination letter had not been the subject matter of his suspension and, that the Respondent has denied him the opportunity to be heard, and to delete his personal files from his assigned computer contrary to the company procedure. He, therefore seeks the following reliefs from this Court-

- a. That the Honourable Court be pleased to declare the termination of the Claimant by the Respondent unlawful.
- b. That the Honourable Court be pleased to declare that the termination of the Claimant by the Respondent was unfair.
- c. The Honourable Court be pleased to declare that the Respondent did engage in unfair labour practices and this Honourable Court do award the Claimant compensation in that regard.
- d. In the alternative, the Honourable Court be pleased to declare that the termination of the Claimant by the Respondent amounted to wrongful dismissal.
- e. That the Honourable Court be pleased to award the Claimant compensation for unfair, unlawful termination or wrongful dismissal of 12 months' salary being the sum of KShs. 13,064,520.00.
- f. That the Honourable Court be pleased to order that the Respondent do pay the Claimant 3 months' salary in lieu of notice being the sum of KShs. 3,266,130.00.
- g. That the Honourable Court be pleased to order that the Respondent do pay to the Claimant his gratuity pay being the sum of KShs. 2,177,420.00.
- h. That the Honourable Court be pleased to order that the Respondent do pay the Claimant his accrued leave days (43 days) being the sum of KShs. 1,560,484.33.

- i. That the Honourable Court be pleased to order the immediate valuation of Andela Incorporation for purposes of ascertaining the monetary value of the Claimant's entitlement under Employee Share Option (ESOP).
- j. That the Honourable Court be pleased to order that the Respondent do pay the Claimant the market value of his total share options.
- k. In the alternative, the Honourable Court be pleased to order that the Respondent do pay the Claimant compensation for his entitlement under Employee Share Option (ESOP).
- l. That the Honourable Court be pleased to order that the Respondent do pay the Claimant for 3 days worked prior to the termination notice in the sum of KShs. 108,871.00.
- m. That the Honourable Court be pleased to order that the Respondent do pay the Claimant an *ex gratia* amount equivalent to his to his salary for 3 months being KShs. 3,171,000.00.
- n. That the Honourable Court be pleased to order that the Respondent do issue the Claimant with his Certificate of Service.
- o. That the Honourable be pleased to order that the Respondent pay the Claimant an award for loss of office in lieu of reinstatement.
- p. That the Honourable Court be pleased to award the Claimant general damages as well as exemplary damages.
- q. Costs of this cause plus interests from the date of filing the suit.

4. On 28.08.2019, the Respondent filed a defence and a counterclaim. She contended that the Claimant's performance as a Country Director plummeted in the second half of 2018 with no material improvement and he was made aware of these concerns; that the Claimant committed her to paying USD 10,000.00 for professional services offered to her landlord in lease extension negotiations which were never concluded thus occasioning her a loss; that the Claimant caused the Respondent to incur an additional expense of KShs. 147,946.00 for failing to factor installation costs in the repair costs; and that the Claimant kept making variations in the St. Catherine Project that resulted in budget overruns of USD 145,000.00.

5. The Respondent further averred that after the conclusion of the investigations as to the financial anomalies in the St. Catherine's project, several employees presented complaints against the Claimant for bullying and intimidation. She contended that the claimant was presented with a mutual separation agreement on a without prejudice basis but the same failed prompting the termination of his employment for poor performance and misconduct.

6. The Respondent further averred that the Claimant's basic salary was reviewed upwards to KShs. 1,081,497.00 as at the time of his exit and he was also granted options to purchase stocks including 16,373 options in May 2016, 26,366 options in July 2016, 110,000 options in November 2016 and 5,729 options in May 2018 but did not purchase the same within the prescribed period. She further averred that as at the time of his exit, he had 71,027 vested options which he was to exercise within a 3-month period after the termination of his employment by signing a stock option exercise notice and paying USD 157,454.63 to acquire shares in Andela Inc but again he did not.

7. The Respondent counterclaimed against the Claimant seeking return of her laptop which she had allocated to him for official use.

8. Both parties tendered evidence during the hearing and thereafter filed written submissions. Before closing his case, the claimant returned the said laptop to the respondent and the counterclaim was withdrawn.

### **The Claimant's Case**

9. During trial, the Claimant testified as CW1 and basically reiterated the facts set out in his pleadings above and echoed in his written statement. Upon cross examination, he denied a decline of his performance in 2018, there being discussions about his budget overruns the alleged bullying of staff, and contended that Thatcher resigned for being subjected to a PIP while Martin resigned voluntarily after a 6-month PIP. He further denied that the said resignation came up in the discussions with his supervisor and contended that only procurement matters were discussed.

10. He testified that the CEO was the one who committed the company to the USD 10,000.00 and he only executed the commitment. He further stated that the said matter was never discussed in his performance review but admitted that his overall performance was 2 meaning that he did not meet the expectation. He denied there budget overruns of USD 145,000.00 or at all and contended that the same was not brought to his attention.

11. As regards his claim for stock and shares, he admitted that the same was optional and that he never exercised the option by paying money for the vested shares during his employment or within 3 months after separation. He further admitted that the option to purchase the shares was lost if his services were terminated for a cause. Finally, he contended that he was entitled to one months' notice before termination and prayed for salary in lieu of notice or leave.

12. On re-examination, he contended that he was not issued with a contract but maintained that as all his employment documents including his contract were in his official laptop which had been switched off by the respondent. He denied signing the contract dated 2015 relied upon by the Respondent and contended that the signature thereon was given to the respondent in 2016. He contended that the Respondent's failure to provide pay slips for the year 2015 is proof that his salary for that year was not KShs. 504,750.00.

13. He further contended that he was not put on PIP on account of his poor performance and stated that there was no prior communication about the alleged bullying which he denied all the same. It was his testimony that he was not issued with a show cause letter or taken through a disciplinary hearing. His position was that the share option of 71,207 had vested before his termination but stated that he was never paid any dividends.

### **The Respondent's Case**

14. Mr. Tahir Omoseni Sulyman, the respondent's Africa Manager, testified as RW1. He told the court that the Claimant was employed by the respondent and from 2017 he became the Country Director in Kenya. He further testified that from May 2018, the claimant started to report to him and upon mid-year performance review, the claimant scored 3 and during the end of year performance review, he scored 2 overall which was below expectation, and he notified the claimant that he was under performing.

15. He further told the court that the respondent gives her employees the option to purchase stocks and could sell them when the company was in problems. However he denied the attempt to equate a stock option to shares and contended that shares were purchased by an employee at any time the stocks were vested or within 3 months after exiting the company. He contended that as the Country Director the claimant had the duty to train and explain to the other employees about the optional stocks and shares. He further contended that the claimant's claim for stocks is baseless because he never exercised the option of purchasing the same by signing the necessary documents.

16. On cross examination, RW1 contended that he conducted the Claimant's performance review in December 2018 but submitted the report in February 2019. He admitted that he never put the Claimant under PIP which was contrary to the Respondent's regulations. He stated that the Claimant was verbally informed of his suspension on 22.2.2019 while they were in Rwanda which was later formalized through email.

17. He contended that the investigations revealed that there had been managerial lapses by the Claimant as the Country Director but admitted that no evidence of fraud or dishonesty was found against him. He admitted that the email by the Head of HR dated 11.03.2019 to the Claimant did not mention poor performance or the allegations of bullying and that the Claimant had learnt of the latter through his termination letter. He further admitted that he had no evidence of the alleged bullying, or any other evidence of poor performance other than that of the performance review. It was his testimony that the Claimant was issued with a termination letter after he rejected the mutual separation agreement and admitted that the Claimant was never taken through any disciplinary proceedings.

18. He maintained that an employee must purchase the stocks from the dashboard within 3 months after termination for no disciplinary issue and contended that the Claimant lost his ESOP rights because he was terminated for bullying.

19. Ms. Olushiola Osinubi and the Respondent's Director of Legal Operations testified as RW2. She told the court that the import of clause 6 of the Stock Option Plan was that an employee had no ownership of the stock if they had not signed the agreement. She contended that an employee had the option of purchasing stocks and not shares, which is exercised by paying money to Andela Inc.

20. On cross-examination, she stated that an employee terminated for a cause lost their right to exercise the stock option. She admitted that the Claimant had vested shares of 71,027, valued at USD 10.28 per share before his exit and could exercise the right to pay for the shares during his service or within 3 months after termination of employment which he never did.

### **The Claimant's Submissions**

21. The Claimant submitted that the termination of his employment was unfair because it lacked substantive justification and procedural fairness, was malicious and in bad faith. He contended that he was not accorded any hearing before the termination on ground of poor performance, further he was never put under a performance improvement plan for alleged poor performance as required by the Company Exit Policy hence the termination of his employment was unlawful and unfair. He relied on the case of **Jane Samna Mukala vs. Ol Tukai Lodge Limited [2013] eKLR** where the Court held that an employer must show the measures adopted to assess an employee's performance and the measures taken to address the poor performance once the evaluation system has been applied.

22. He further contended that he was not subjected to disciplinary proceedings to defend himself from the alleged gross misconduct and poor performance as required by the Respondent's Employee Handbook. He further contended that no evidence was adduced by the complainants to support the alleged of bullying, and the procedure to be followed where an employee had been harassed was not followed in this instance.

23. The Claimant submitted that since his employment was terminated for a cause he had no chance of exercising his share options after receiving his letter. However, he urged that he was entitled to his vested share options as they are absolute benefits fully owned by him at the day of vesting. He relied on the case of **Peter Gachanja Kimuhu vs. KenolKobil Limited [2014] eKLR** where the Court found that the vested units became an absolute, complete and consummated benefit fully owned by the Claimant on their vesting day and ceased to be held contingent upon any condition.

24. The Claimant also submitted that he was entitled to dividends by dint of clause 13.3 of Andela Inc. Stock Option Agreement and contended that under clause 7.2, there is no option for consideration in order to receive shares.

25. He submitted that he is entitled to general and exemplary damages as the Respondent was malicious and discriminative against him for terminating his employment for financial impropriety but failed to suspend the procurement and financial managers. He contended that he is also entitled to 12 months' compensation for unfair termination since the termination of his employment was substantively and procedurally unfair.

26. He further contended that he is entitled to 3 months' salary in lieu of notice per his contract contained in his email correspondences; 43 accrued leave days arguing that the Respondent has failed to produce his leave records; an order for payment of his ESOP at market value; declaration that termination of his employment was unfair and unlawful; a certificate of service and an award for loss of office in lieu of

reinstatement.

### **The Respondent's Submissions**

27. The Respondent submitted that the termination of the Claimant's employment on account of poor performance was fair as his performance was reviewed, he participated in the same, had follow-up meetings on his performance in the last two months of his employment and was aware of the performance evaluation system. She contended that the several follow up meetings held with the Claimant were adequate and relied on ***Jerotich Seii Houlding vs. International Rescue Committee (IRC) [2019] eKLR*** where it was held that subjecting the Claimant to a performance improvement plan was not the only measure that could be undertaken to aid him in improving his performance. It is the Respondent's submissions that the Claimant has not controverted the evidence relating to his poor performance.

28. She further submitted that the Claimant did not oppose his suspension or the reasons that led to his suspension hence his suspension was fair. She contended that the Claimant was made aware of the complaints of bullying against him and which complaints were reiterated during investigations. She further contended that the Claimant breached her Anti-Discrimination and Anti-Harassment Policy which required him not to interfere with other employees' ability to perform their duties. The termination of his employment for gross misconduct was therefore justified. She relied on ***Liz Ayany vs. Leisure Lodges Limited [2018] eKLR*** where the Court found the termination of the Claimant's employment for being abrasive and a bully, to be fair and justified.

29. She further submitted that this Court does not have the jurisdiction to determine the claim arising under the stock option plan as it is governed by the laws of the state of New York and relied on ***Raytheon Aircraft Credit Corporation & Another vs. Air Al Faraj Limited [2005] eKLR*** where the Court of Appeal allowed the appeal as it was of the view that where parties have bound themselves by an exclusive jurisdiction clause, effect should be given to that obligation.

30. She urged that the Claimant is not entitled to any benefit under the stock option plan because he never paid any consideration for the shares or signed any Stock Option Agreement or Stock Option Exercise Notice. She relied on ***Vela vs. Efora Energy Limited (385/2018) [2019] ZASCA 44*** where it was held that the Appellant's options had lapsed due to his failure to exercise them at the time of resignation.

31. The Respondent submitted that the Claimant is not entitled to 12 months' compensation for unlawful termination because his employment was terminated for poor performance and gross misconduct and therefore it was justified. She relied on ***Alois Makau Maluvu vs. Cititrust Kenya Limited & Another [2018] eKLR*** and ***Liz Ayany vs. Leisure Lodges Limited [Supra]*** to urge that in the event the termination is found to be unfair, the Court should not award the Claimant damages exceeding 6 months' salary because the termination was for poor performance and gross misconduct.

32. She further urged that since there is no clause relating to the notice period in the Claimant's contract, he is only entitled to one months' salary in lieu of notice by dint of section 35 (1) of the Employment Act as it was held in ***Dorcas Kemunto Wainaina vs. IPAS [2018] eKLR***. She submitted that the Claimant is not entitled to gratuity or *ex gratia* payment as the same lacks basis in the contract and relied on ***Joseph Sitati Nato vs. Kenya Ports Authority [2010] eKLR*** where the Court held that gratuity was not a right hence an employee could not expect to be thanked in the absence of such a contractual obligation.

33. According to the Respondent, the Claimant is only entitled to KShs. 993,432.24 being 21.04 days of untaken annual leave at the time of his termination. She maintained that this court lacks the jurisdiction to issue a valuation order against Andela Inc or make an order for payment of share options or compensation under the ESOP at market value since Andela Inc. is a foreign company and is not a party to these proceedings.

34. She admitted the claim for a certificate of service but denied the claim for payment for loss of office in lieu of reinstatement as there is no such remedy existing in law. She further denied the claim for general or exemplary damages contending that the same is not awardable for breach of contract, further, the Claimant has not established aggravating circumstances that would warrant an award for exemplary damages.

### **Issues for determination and Analysis**

35. I have carefully considered the pleadings filed by the parties, their evidence as well as submissions and it is not in contention that the Claimant was employed by the respondent as the Country Director until 3.4.2019 when he was summarily dismissed on account of poor performance and gross misconduct. It is also common ground that the Claimant was issued with Employee Share Options (ESOP) but he had not exercised the option as at the time of separation. The main issues for determination are-

- a. Whether the Claimant's employment was unfairly and lawfully terminated.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Unfair and unlawful Termination of employment**

36. 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 and that fair procedure was followed. A reason for termination is fair if it relates to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements.

### **Reason for the termination**

37. Under section 43 (1) of the Employment Act provides that, in any claim arising out of termination of a contract of employment, the employer is required to prove the reason(s) for the termination and where they fail to do so, the termination shall be deemed to have been

unfair within the meaning of section 45. In this case the reasons cited in the Claimant's termination letter dated 03.04.2019 are poor performance without improvement and misconduct in the nature of bullying the company staff.

38. As regards poor performance, it is now trite law that an employer cannot terminate the services of an employee without evaluating their performance and taking measures to mitigate their poor performance after such evaluation. The Respondent produced the Claimant's performance review report which indeed proved that the Claimant had performed poorly in that year with an overall score of 2 which meant that he did not meet the Respondent's minimum requirements. However, the Claimant contended that he was never put on a PIP for his poor performance as required by clause 5.6 of the Andela Exit Policy.

39. RW1 conceded that the Claimant was never put on a PIP for his poor performance as required under the company regulations but contended that he had several meetings with him to discuss his performance. The claimant disputed the alleged meetings but admitted that his overall score in the 2018 performance review was 2, meaning it was below expectation. Consequently, I find that the respondent has proved on a balance of probability that the claimant performed his duties poorly. Under section 44(4)(c) of the Employment Act, the employer is entitled to summarily dismiss his employee who willfully neglects to perform his work, or if he carelessly and improperly performs his work which was his duty under the contract to have performed carefully and properly.

40. As regards the alleged misconduct of bullying staff, no victim of the alleged bullying tendered evidence herein in support of that allegation. In addition, RW1 admitted that he had no evidence of the alleged bullying against the claimant. It follows therefore that the alleged misconduct of bullying was not proved on a balance of probability and as such, I return that it was not a valid and fair reason upon which to dismiss the claimant.

### **The procedure followed before the termination**

41. Section 41 of the Employment Act requires in mandatory terms that an employer who intends to terminate the services of an employee on account of poor performance or misconduct shall explain the reason to the concerned employee in the presence of another employee of his choice and thereafter give the employee and his chosen companion, an opportunity to make their representation which must be considered before the termination is decided. In this case, RW1 admitted in evidence that the claimant was dismissed without being accorded any hearing as required under section 41 of the Act and the respondent's Employee Handbook.

42. In addition, RW1 admitted that the Claimant was never put on a PIP for his poor performance as required under the company regulations but contended that he had several meetings with him to discuss his performance. The foregoing admission corroborated the evidence by the claimant that clause 5.6 of the Andela Exit Policy requires that a poor performing employee must be placed under PIP before termination. It follows that dismissing him summarily for poor performance without giving him a chance to improve as required under his contract was not procedurally fair.

43. In view of the finding herein above that the respondent dismissed the claimant for poor performance without first placing him under a PIP as required under her Exit Policy, and without according him a fair hearing as required under section 41 of the Employment Act, I return that the respondent has failed to prove that she followed a fair procedure before dismissing the claimant. Accordingly, I must hold that the said lapse rendered the termination of the claimant's contract unfair and unlawful within the meaning of section 45 of the Act.

### **Reliefs Sought**

44. In view of the foregoing matters, I make a declaration that the termination of the claimant's contract of service was unfair and he is entitled to salary in lieu of notice plus compensation for the unfair termination by dint of section 49 of the Employment Act. I award him one month salary in lieu of notice under section 35 of the Act because no evidence was tendered to justify salary of three months as prayed. In addition I award the claimant six months salary as compensation for the unfair termination considering that he contributed to the termination through poor performance of his duty under his contract.

45. The claim for gratuity and *ex gratia* payment fail as they lack justification in contract and in law. The Claimant is awarded payment for the 3 days worked in the month of April since there is no dispute that he was dismissed on 3.4.2019 and no evidence was adduced to prove that he was paid the same.

46. The claim for 43 accrued leave days is awarded as claimed. The Respondent did not produce any of the Claimant's leave records or show how she arrived at the 21.04 leave days. Section 74 (1) of the Employment Act requires an employer to keep a written record of all employees employed by him, with whom he has entered into a contract under the Act which shall contain the particulars of an employee's annual leave entitlement, days taken and days due. However, the claim for loss of office in lieu of reinstatement fails for lack of justification in law or contract.

47. As regards the claim for general damages for defamation, the defamatory article in question alleged that the Claimant's termination was on account of financial impropriety yet his termination letter clearly outlines the reason for his termination as poor performance and misconduct. However, although the statement was false I find that the Claimant has not satisfied one of the ingredients of defamation being that **the statement must be published by the defendant** or proved that it is the defendant who caused the defamatory article to be published. The offending article in issue was published by Kahawa Tungu and not the Respondent. Consequently, I find and hold that the claimants alleged defamation has not been proved and as such the claim for general as well as exemplary damages for defamation fails.

48. Regarding the claim for employee share option, Clause 4.2 of the Stock Option Agreement provides that for an employee to exercise that option, they were to do so vide an exercise notice whether electronic or written, digitally signed and authenticated by the participant and delivered to the company and must be accompanied by the full payment of the aggregate exercise price for the number of shares of stock being purchased.

49. The Claimant never produced such a document showing that he had opted to exercise the option. In fact, he admitted that he never filled the requisite forms and also never paid for the vested shares and stocks either before or after his dismissal. It is also common ground that an employee lost the right to exercise such an option if they were terminated for a cause like the claimant herein. As such, the Claimant is not entitled to any shares for failing to exercise that option at the proper time and also because he lost the right to the same upon being dismissed for a cause. I gather support from **Vela vs. Efora Energy Limited (385/2018) [2019] ZASCA 44** where the court held:

***“... the Appellant’s options had not been exercised at the moment of resignation and therefore they lapsed. This conclusion obviates any necessity to examine the alternative argument which is directed at damages that the appellant alleged he had suffered. This argument was predicated on the basis that the options have not lapsed.”***

50. In view of the foregoing, I see no need of examining the issue of jurisdiction of the court in that claim or ordering for the immediate valuation of Andela Incorporation for purposes of ascertaining the monetary value of the Claimant’s entitlement under ESOP.

51. Finally, the claim for a certificate of service was admitted and I therefore direct the respondent to forthwith issue the claimant with the same in line with the provisions of section 51 (2) of the Employment Act.

### **Conclusion and disposition**

52. I have found that the termination of the claimant’s contract of service by the respondent on 3.4.2019 was unfair within the meaning of section 45 of the Employment Act. I have further found that he is entitled to compensatory damages plus accrued benefits by dint of the said Act and his contract of service. consequently, I enter judgment for him against the respondent as follows:

a) Declaration that termination of his employment by the respondent was unfair.

b) Notice kshs 1,088,710

c) Compensation kshs. 6,532,260

d) Leave of 43 days kshs. 1560,484

e) Unpaid salary of 3 days kshs 108,871

**Total           kshs. 9,290,325**

f) Certificate of service to be issued forthwith.

g) Costs of the suit plus interest at court rates from the date hereof.

h) The award of damages is subject to statutory deductions.

**Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of July 2020.**

**ONESMUS N. MAKAU**

**JUDGE**