



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 473 OF 2018

BETWEEN

VINCENT KEBARI.....CLAIMANT

VERSUS

STEPHEN GIKERA & PUNIT VADGAMA

t/a GIKERA & VADGAMA ADVOCATESRESPONDENT

Rika J

Anaya & Company Advocates for the Claimant

Muthee Kihiko Soni & Associates LLP, Advocates for the Respondent

JUDGMENT

1. The Claimant is an Advocate of the High Court of Kenya. The Respondent is a Firm of Advocates. Through his Statement of Claim filed on 20th August 2018, the Claimant avers he was employed by the Respondent as an Associate Advocate, on 7th March 2017.
2. His gross monthly salary would be Kshs. 207,377, with a net monthly salary of Kshs. 150,000. Between March 2017 and January 2018, the Respondent unlawfully deducted Kshs. 150,250 from the Claimant's salary. He was summarily dismissed by the Respondent on 26th January 2018. He avers, he was not given reasons to justify termination; there was no investigation leading to the decision; and he was not given a fair hearing. He prays for Judgment against the Respondent for: -
 - a. Unpaid end year [2017] bonus at Kshs. 228,114.
 - b. Unspent 15 days' leave at Kshs. 95,192.
 - c. Damages for wrongful dismissal at Kshs. 2,523,500.
 - d. The Respondent is compelled to remit N.S.S.F, N.H.I.F and PAYE to the relevant statutory bodies.
 - e. Certificate of Service to issue.
 - f. The Respondent is compelled to remit statutory deductions. [repeated]
 - g. Damages for discrimination.
 - h. Unpaid house allowance from March 2017 to January 2017 [?] at Kshs. 247,500.
 - i. Reimbursement of Practicing Certificate renewal fees at Kshs. 16,560.

j. Salary deductions at Kshs. 150,250.

k. Costs of the Claim.

3. The Respondent filed its Statement of Response on 12th September 2018. It is conceded that the Claimant was employed by the Respondent, as a Litigation Advocate. His terms and conditions of service were contained in a letter dated 6th February 2017. Termination of his contract was fair and lawful. It was carried out in accordance with Respondent's Human Resource and Office Manual, as read with Section 35 [1] [c] of the Employment Act.

4. The Respondent was not obligated to finance Claimant's Practice Certificate; his contract was terminable by either Party through notice or payment of salary in lieu of notice; the Respondent did not make any unlawful deductions from the Claimant's salary; his salary was consolidated; he was not entitled to bonus; he was not owed annual leave days; and the reason for termination was given in the letter of termination. His Certificate of Service has always been ready for collection at the Respondent's chambers. He was paid all his dues on termination, which included notice pay. The Respondent asks the Court to find all the prayers, except the prayer for Certificate of Service, to be without merit.

5. Mr. Kebari gave evidence on 8th July 2019 and 1st October 2019 when he rested his Claim. Emma Ochieng, an Advocate who manages Respondent's Mombasa Office, gave evidence on 19th February 2020, when the hearing closed.

6. The Claimant told the Court he was previously employed at Nairobi and was pursuing a Master's Degree in environmental law. He was offered a lucrative package by the Respondent after a competitive recruitment. He worked at Mombasa. There were 15 Interviewees. The Claimant emerged top.

7. The contract was part written, part oral. The net salary was Kshs. 150,000 monthly. The Respondent offered health insurance cover, inpatient of Kshs. 1 million and outpatient of Kshs. 100,000. He was entitled to house allowance. The written contract did not capture everything.

8. He reported on 16th March 2017. He was taken through orientation by Mr. Tony Odera Advocate. The Respondent has Offices in Nairobi, Mombasa and Nanyuki. He was placed on 3 months' probation. He completed probation successfully and was confirmed after appraisal on 15th July 2017. He continued to work diligently, without a single complaint from Respondent's Clients, or from his Professional Colleagues. He scored 75% on appraisal. He exceeded expectation. He was supposed to receive bonus at the rate of 110% at the end of 2017. He was to be paid 10 % salary increment at the same time. Nothing was paid.

9. While in a seminar at Nyali Hotel, on 26th January 2018, the Claimant received e-mail from the Respondent referenced 'termination.' He was issued 1-month notice of termination. No reason was given for the decision. He was the best Advocate in Mombasa. He was in shock. He had scheduled matters at the Malindi Law Courts on 29th January 2018. The Claimant reported to the Office and was advised he had been logged off. His Supervisor Tony Odera, who was visiting Mombasa at the time, informed the Claimant he did not have anything to do with the decision to terminate Claimant's contract. The Claimant was not assigned any work during the notice period. He was not paid terminal dues on leaving. This was paid later, on 10th March 2018. He was paid Kshs. 184,539 after deductions.

10. He was not paid house allowance as promised. Health cover was given 2 months after employment, rather than immediately. His salary of Kshs. 150,000 was not paid in full. He was not given details of deductions made. He was told that some deduction was made to cater for the cost of mediation training. He was denied terminal dues and discriminated against. The Respondent failed to pay for his Practicing Certificate. All other Colleagues had theirs financed by the Respondent. Colleagues who left the Respondent on redundancy were consulted. The Claimant was not. He was the only one logged out of the system. His terminal dues were paid late, unlike that of his Colleagues.

11. Cross-examined, the Claimant told the Court he is an Officer of the Court, and a Certified Professional Mediator. He was offered the position of Litigation Advocate. He accepted the offer in writing. The terms and conditions of service were set out in the letter of employment. It did not allude to an oral contract. He signed the Human Resource Manual. The Claimant described himself as an impeccable Lawyer, who did not have disciplinary issues. He discharged his duties diligently. He received termination letter via e-mail. He expressed his gratitude to the Respondent and promised to cooperate. He was summarily dismissed, although he received notice of 30 days. The letter cited the law upon which the decision was based. He did not remember how many annual leave days were owed to him. It was 3 of 4 days. He was paid 7 days of annual leave. He did not exhibit N.S.S.F, N.H.I.F and PAYE Statements of Account. There were wrongful deductions made on his salary from March to October 2017 of Kshs. 37,300. The Parties had agreed the Claimant would foot part of the bill for his mediation training. Kshs. 37,300 went into refund of the money paid by the Respondent on mediation training. He was required to hand over during the notice period. This included handover of files. The process was part manual. He did this and was cleared. He was paid a net sum of Kshs. 184,000. The Claimant's Colleagues were not Witnesses in the Claim. They were not part of his contract-making. He was admitted to the bar in 2016. Kshs. 150,000 monthly was thrice the salary the Claimant received in his previous employment.

12. Redirected, the Claimant told the Court, his salary was not consolidated. Balance of annual leave was 27.5 days. Total fee payable for mediation training was Kshs. 50,000. The Respondent deducted Kshs. 37,500 from the Claimant without giving details.

13. Ms. Ochieng' told the Court that the Claimant's contract was terminated through the letter sent to him by e-mail. He confirmed receipt. The Respondent communicated to the Claimant, the provision of the law, and clause in the Human Resource Manual, under which his contract was terminated. The Manual is transmitted to Employees on recruitment. The Claimant expressed his gratitude on termination. He filled Clearance Form. His dues were tabulated. He was paid Kshs. 184,538 through a cheque dated 9th March 2018. He did not challenge tabulation.

14. In March 2017, he worked half month, explaining why he was paid Kshs. 75,000. He attended mediation seminar at a total cost of Kshs.

50,000. He negotiated with the Respondent, who offered to pay up to the cost of 3 CPD trainings at Kshs. 13,500. The Claimant would meet the balance at Kshs 37,500. The Respondent paid Kshs. 100,000 deposit for the seminar for 2 Advocates- the Claimant and Ochieng,' as shown in deposit slip exhibited by the Respondent. The Claimant was paid the balance of his salary at Kshs. 116,782. In February 2018, he received full salary of Kshs. 150,000. EmployeeS had a welfare kitty, where they contributed Kshs. 1000 monthly. Kshs. 200 was utilized for social issues, while Kshs. 800 was retained by the Respondent, to be refunded at end of service. The Claimant was paid Kshs. 8,000 by Respondent's Accountant, via m-pesa, in refund from the welfare kitty, after termination. He worked from March 2017, to end of February 2018. His pending leave was paid.

15. The Respondent did not discriminate against the Claimant. Advocates negotiate their own terms. He was not discriminated against with respect to Practicing Certificate. Bonus was entirely at the discretion of the Respondent. Advocates could perform well, but bonus was at the discretion of the Respondent's Partners, and depended on Respondent's financial performance. An Employee on notice of termination could not be allowed access to official e-mail. Litigation is sensitive. Logging off the Claimant was based on standard security precaution. There was no guarantee of endless employment. The Claimant accepted the terms and conditions contained in his contract.

16. Cross-examined, Ochieng' told the Court that the Respondent aspires to be a leading Law Firm. It goes for the best legal minds in the market. Ochieng' sits in the Partners' Committee. It is a top decision-making organ of the Respondent. The Claimant's contract was subject to the Employment Act and the Human Resource Manual. Clause 9.1. of the Manual is on retention of capable staff. There would be investigation before termination of capable staff's contract. Claimant was confirmed after probation. Appraisal was good. There was no question about his performance. The Respondent has not shown that there was investigation before termination. No other instrument, beyond the Employment Act and the Manual was invoked in justifying termination. The Claimant was logged off, from as early as January 2018. This was not unique to the Claimant. Geoffrey, Arama, Esther and Kautela left on redundancy. They were not Advocates and were not logged in. Deduction from April 2017 on, related mostly to welfare. Respondent's Supplementary Documents, at page 11 show a leave balance of 27.5 days. Certificate of Service is available. The Claimant received all terminal dues. Bonuses were discretionary. Performance Management Outcome document, at page 3 of Claimant's Supplementary Documents, did not characterize bonus as discretionary. The Claimant was not allowed access to his e-mail during the notice period.

17. Redirected, Ochieng' testified that Clause 9.1. of the Human Resource Manual is subject to the provisions of the law on termination, under Section 35 of the Employment Act. Fred, Esther and Geoffrey were not Advocates; they were Support Staff. They did not have personal computers. Performance Management Outcome document, does not show that payment of bonus was obligatory.

The Court Finds: -

18. The Claimant was employed by the Respondent as a Litigation Advocate, through a letter of employment dated 6th February 2017. Effective date of employment was 16th March 2017. His net monthly salary was Kshs. 150,000. The gross monthly salary was Kshs. 207,377. He worked at Respondent's Mombasa Office. He was to serve on probation for 3 months, which he successfully did, being confirmed on 15th July 2017. The Claimant accepted the contract by appending his signature to the document on 7th March 2017.

19. The Parties' relationship was also regulated by Respondent's Human Resource and Office Manual, which the Claimant received upon recruitment. It was subject too, to the Employment Act 2007.

20. The Claimant's contract was terminated through a 30-day notice, issued on 26th January 2018, which became effective on 26th February 2018. The Respondent gave no reason for its decision, only invoking Clause 9.2. of the Human Resource Policy which is worded as follows:

“Employment with GVA [Respondent] may be terminated by either party giving notice in writing, or payment in lieu of notice as specified in the contract of employment or appointment letter of the employee.”

Also invoked was Section 35 [1] [c] of the Employment Act 2007, which states:

’where the contract/ employment is to pay wages or salary periodically, at intervals of or exceeding one month, the contract is terminable by either party at the end of the period of twenty-eight days, following the giving of notice in writing.’

21. On 10th March 2018, the Claimant received from the Respondent a cheque for Kshs. 184,539 in terminal dues. He signed a Discharge Voucher the previous day, 9th March 2018, which indicates he received notice of 1 month at Kshs. 207,377 and annual leave of 7 days at Kshs. 48,387 –total Kshs. 255,764. The net sum paid and acknowledged, was Kshs. 184,539.

22. The Court is not persuaded, once the Claimant executed discharge voucher, indicating receipt of **all** his terminal dues, that his prayers for further amounts in terminal dues, are sustainable. Lawyers understand discharge vouchers well, and in particular, their legal effect on claims lodged after their voluntary execution. If the Claimant's salary was unlawfully deducted during his service, he ought to have made his demands for refund, before discharging the Respondent. The Court in any event is satisfied that the deductions were lawfully made, in enforcing welfare and training obligations.

23. Bonus if any, ought to have similarly been claimed before the Claimant discharged the Respondent. There is no evidence provided by the Claimant showing that bonus payment was obligatory. Bonus is ordinarily paid at the discretion of the Employer, depending on the financial performance of the business. There is no clause in the Claimant's contract or Human Resource Manual, which compelled the Respondent to pay bonus. The Performance Management Outcome document, exhibited by the Claimant in his Supplementary Documents filed on 26th September 2018, does not establish that the Claimant was entitled to bonus as claimed.

24. The Claimant clearly acknowledged the balance of his leave days, on termination, was 7 days. He at first, testified that he did not know

what his leave balance was, stating equivocally that it was “ 3 or 4 days.” He was paid Kshs. 48,387 for 7 days. His prayer for unspent 15 days, has no foundation in light of his execution of the discharge voucher. There is no contractual support for airtime allowance, CDP seminar costs, Practising Certificate renewal fees and food [hot lunch] allowance. These items are claimed to be part of Claimant’s gross salary. Neither the contract, nor the Human Resource Manual, alludes to any obligation on the part of the Respondent to shoulder these largely professional obligations, on behalf of the Claimant.

25. The letter of employment described the Claimant’s salary of Kshs. 150,000 as net salary. Net salary is the take-home salary an Employee receives after all deductions. The gross salary was shown at Kshs. 207, 377 in the discharge document. The net pay was not inclusive of house allowance. The reference is to salary after deductions, rather than in addition to any allowances. Deductions of Kshs 57, 377 monthly cannot have had any relationship with the housing requirement. The Court could have granted the prayer for house allowance, but it is hampered in doing this, by the discharge voucher executed by the Claimant, acknowledging he received “ *all my terminal dues.*”

26. The claim for unremitted statutory obligations is a benefit, best pursued under the legal regimes governing the respective collecting bodies. KRA has a tax dispute settlement mechanism. N.S.S.F and N.H.I.F have mechanisms for enforcement. The Claimant ought to revert to these mechanisms, if there are outstanding statutory obligations, owed by the Respondent.

27. Was the Claimant treated discriminatively and does he merit damages for discrimination? The comparators whose names were given in Claimant’s evidence, were not Advocates but Support Staff. The Claimant did not establish discrimination based on different treatment accorded to his peers- Advocates serving the Respondent. It was necessary to log him off from the Respondent’s computer system, during the period of his notice. The Witness for the Respondent explained quite eruditely, that taking the Claimant off the system was a professional precaution. The Claimant also alluded to Employees who left on redundancy, and who according to him, were consulted by the Respondent, while he was not consulted. The Claimant did not leave on redundancy. His contract was terminated under Respondent’s Human Resource Manual, Clause 9.2 and Section 35 [1] [c] of the Employment Act 2007. There is absolutely no evidence of discrimination. The comparators were non- Lawyers. They left employment through a different route from the Claimant. The prayer for damages for discrimination has no basis.

28. The last issue as understood by the Court is whether termination was wrongful and/ or unfair? Is the Claimant entitled to damages/ compensation?

29. Performance appraisal indicates the Claimant worked well for the 11 months he served the Respondent. He left employment in Nairobi, at the promise of a productive professional practice at Mombasa. He worked well, was confirmed and everything was looking up. Whereas he suffered immodesty, by describing himself in Court, as the best Advocate in Mombasa, he certainly was a good, young and promising Advocate. His performance appraisals speak to this.

30. He was told while attending a seminar, that his dream was over. His contract had been terminated. No justification, outside Clause 9.2. of the Human Resource Manual and Section 35 [1] [c] of the Employment Act, was availed to the Claimant. He was not encountered with allegations of poor performance or disciplinary lapses.

31. Section 35 [1] [c] is not a standalone provision. It must be read with Section 43 of the Employment Act, calling for validity of reasons, in justifying termination. It is not enough to say that the contract, or a provision of the law, allows for termination of the contract at will. The law states that the contract is terminable. Section 43 demands that when it is terminated, there is valid reason. Section 35 [1] [c] read alone would result in reversion to the concept of termination at will – which was a concept the Employment Act 2007 was crafted to remove from out employment law, and establish fair-dealing, between Employers and Employees on termination.

32. Clause 9.1 of the Manual [Staff Retention and Exit], recognizes the need to justify termination. It requires the Respondent to investigate capable Staff, prior to invoking termination policies and procedures. It is not contested that the Claimant was a capable Employee. The Manual aims to ensure that the Respondent, is in line with good employment practice and complies with statutory requirements. It is not correct to submit that the requirement in the Manual is superseded by Section 35 of the Act. The standards of employment in the Employment Act, are minimum standards, and any terms and conditions of service agreed upon by the Parties, which are more advantageous to the Employee, must be upheld. In this case, the view of the Court is that Section 35 is not a standalone provision; it must be read with Section 43, and by extension, Section 45 of the Employment Act. Even were the Court to find that Section 35 is a standalone provision, with the meaning attributed to it by the Respondent, the Respondent would still be under obligation to adhere to Clause 9.1 of its Manual.

33. There was no investigation of any form, carried out with regard to the Claimant, before termination. If the performance assessments are to be viewed as ‘investigations’ carried out under Clause 9.1., the end result would have been in Claimant’s favour.

34. Termination was unfair.

35. The Claimant deserves compensation.

36. He is a young Advocate, admitted to the bar in 2016. He was barely one year in practice, when the Respondent invited him to work in Mombasa. He was promised certain benefits, which he testifies, were never availed. He was paid a net monthly salary of Kshs. 150,000 with promises of review based on good performance, under the Human Resource Manual. He did not have any performance –related, or disciplinary complaints. He held up high, the ethos of the Respondent Law Firm, and the ethics of his calling. He did not in any way contribute to the circumstances leading to termination. The Respondent seems to have experienced some operational hurdles necessitating departure of Staff. The Court was told about non-Lawyers who left on redundancy. The Claimant appears to have been caught up in these hurdles. He was however asked to leave under the outmoded doctrine of termination at will.

37. It is noted that he was paid 1-month salary in lieu of notice, and was at the same time, issued a written notice of termination of 1 month. His contract, after probation was indefinite. He intended to go on working for the Respondent. His career was severely disrupted at a very

formative stage. He worked from 16th March 2017 to 26th February 2018, a period of 11 months.

38. ***He is allowed compensation for unfair termination, equivalent of 5 ½ months' gross salary at Kshs. 1,140,573.***

39. ***Costs to the Claimant.***

40. ***Certificate of Service to issue.***

IN SUM, IT IS ORDERED: -

a. It is declared that termination of the Claimant's contract was unfair.

b. The Respondent shall pay to the Claimant compensation for unfair termination, equivalent of 5 ½ months' gross salary at Kshs. 1,140,573, together with costs of the Claim.

c. Certificate of Service to issue.

Dated and delivered at Mombasa this 29th day of September 2020

James Rika

Judge