



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1873 OF 2016**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2020)**

**RICHARD KIMEU MUTHAMA.....CLAIMANT**

**VERSUS**

**SYSTECH LIMITED KENYA.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Richard Kimeu Muthama filed a Memorandum of Claim dated 9<sup>th</sup> September 2016 for the unfair termination of his services by the Respondent, Systech Limited Kenya.

2. He avers that the Respondent engaged his services as a Sales Executive on 4<sup>th</sup> May 2015 at a monthly salary of Kshs. 80,000/=. That he faithfully carried out his duties despite a lack of support from the Respondent who would refuse to fund LPOs attained by him and continuously frustrated his work.

3. He avers that on 29/03/2016, the Respondent served him with a letter giving him one month to improve his services failure to which his services would be terminated and on 28/04/2016, the Respondent terminated his services without giving him reason. That he was denied his rights to a fair hearing as required by law and the Respondent further failed to acknowledge all the efforts he used to serve it.

4. He contends that the Respondent used to make NSSF and NHIF deductions from his salary including tax to KRA but the said amount was never remitted to the said bodies. He avers that he is entitled to the following terminal dues in damages.

*a) Salary for April, 2016..... Kshs 80,000/=*

*b) Salary in Lieu of Notice.....Kshs 80,000/=*

*c) House allowance.....Kshs 144,000/=*

*d) Service pay.....Kshs 40,000/=*

*e) Damages for unfair termination equivalent to 1 year salary.....Kshs 960,000/=*

*Total.....Kshs 1,304,000/=*

5. The Claimant avers that he invited the Respondent, through the labour office, to appear for a conciliation meeting but the Respondent failed/refused to compensate him and he thus prays that this Court awards as follows:-

*1) An order for payment of the Claimant's dues s pleaded above.*

*2) An order for the Respondent to issue the Claimant with a certificate of service.*

*3) An order for the Respondent to pay costs of this suit plus interest thereon.*

*4) Any other relief as the Court may deem just.*

6. In his witness statement, the Claimant states that he had previously worked for the Respondent for 3 years and resigned due to lack of commitments and financing to his department and that he returned because he believed in the Respondent. That he later realised the management had not changed as he spent his own money in making his reports a success without any support from the Respondent. He contends he was never paid his salary and that the Respondent's HR rudely dismissed him when he tried to follow up on the same.

7. The Respondent filed a Memorandum of Defence dated 6<sup>th</sup> October 2016 averring that the Claimant's employment was predicated upon certain terms and conditions with regard to achieving set targets and deliverables which were acknowledged and accepted by the Claimant at the commencement of his employment. That the Claimant breached the said terms and conditions of his employment as he was unable to meet the set targets and that not even once for the one year he was in the Respondent's employment did he meet the sales target set for him.

8. That it notified the Claimant of the shortcomings by a letter dated 5<sup>th</sup> January 2016 and his supervisor also held several meetings with him with a view to getting him to improve on his performance but that did not result in any improvement. That it further served the Claimant with Notice to improve on his performance and contends that in the absence of any improvement, it lawfully terminated the Claimant's employment with effect from the 30<sup>th</sup> April 2016. The Respondent contends that it gave the reasons for termination and a hearing notice to show cause.

9. It avers that the Claimant's terminal dues were properly computed and paid to him after considering his liabilities and all factors relevant to the matter. That it also fully responded to all queries that were referred to the Labour Office and there being no proof by the Claimant of the allegations therein, he was and is still not entitled to any compensation. The Respondent prays for the Claimant's Statement of Claim to be dismissed with cost.

10. The Respondent also filed a Witness Statement dated 06/10/2018 made by its Head of Human Resource and Administration, Kaguai Tabitha who states that the Claimant was given a letter of appointment and that he was issued with his scope of duty, responsibilities and full job description on 05/05/2015 for which he duly signed. That the Claimant was given an opportunity to be heard on the reasons for his non-performance during the numerous meetings that were held with his supervisor but never made any improvements. That during one of the meetings called by his Manager, the Claimant acknowledged his poor performance and even agreed not to be paid for the months of March and April 2016 if he did not deliver on his work but out of compassion the Respondent paid him for March 2016.

11. She further states that the Claimant had already taken 17.5 days of requested leave before he had even completed a year of service with the Respondent and that he was also habitually absent from office on business not known to the Respondent. That the Claimant owed Shs. 20,000/= for a loan taken from the Manager which was recovered from his salary at the time of termination and that the Claimant also never made any proper handover.

12. The matter was disposed by way of Written Submissions.

### **Claimant's Submissions**

13. The Claimant submits that the Respondent terminated his services without affording him a hearing and that the Respondent is therefore liable for his wrongful and/or unfair termination. That the Respondent has failed to prove its allegations of poor performance against him, which burden has been placed upon it under **Section 43 of the Employment Act** with **Section 45** further obligating the employer to prove that the reasons for termination of employment are valid and fair. He relies on the case of **Pooroosotum Bheekhoo -v- Linksoft Group (2015) eKLR**, where Mbaru J held that:-

*"...in the event an employee is of poor performance, and this is alleged by the employer, the duty is upon such an employer to prove such poor record of performance. It is not just enough to cite poor performance."*

14. That Mbaru J in the above case went on to quote the case of **Frederick Owegi -v- CFC Life Assurance, Cause No. 1001 of 2013** where it was held that:-

*"The law now requires that before the termination of an employee the procedure applicable for termination be followed. This is what would amount to procedural fairness as outlined under section 41 and 43 of the Employment Act. Upon an enquiry by an employer of the misconduct, poor performance or capacity questions against an employee, fair procedure must be followed. Where the question regard to an employee performance, an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews. It is not just enough to say that any employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the statue required by an employer. [Emphasis added]*

15. The Claimant further submits that it is noteworthy that despite the Respondent attaching a copy of job description, they have not produced any exhibits of performance appraisal or poor performance that demonstrates the Claimant never met the set targets during his period of employment. He cites the case of **Jane Samba Mukala -v- Ol Tukai Lodge Limited [2013] eKLR** where the Court held that:-

*"This is important to note as where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance. Section 5 (8)(c) further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.*

*Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or*

*evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse." [Emphasis added]*

16. He urges this Court to find the Respondent's ground of poor performance as invalid for want of proof as was similarly held by this Court in the unfair dismissal case of **Thierry Foussard -v- Bradley Limited [2019] eKLR** where it was held that the Claimant was terminated without any valid reasons and having never been subjected to any performance appraisal ratings.

17. It is also submitted by the Claimant that procedural fairness as set out under **Section 41 of the Employment Act, 2007** on the procedure for handling cases of misconduct, poor performance and physical incapacity has been greatly emphasized by the Court. That in **Industrial Cause No. 146 of 2012, Alphonse Maghanga Mwachanya -v- Operations 680 Limited** Radido J stated that:-

*"...in order for an employer to meet the legal requirements of procedural fairness of section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following;*

*i. Explained to the employee in a language understood the reason why it was considering the termination.*

*ii. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reason.*

*iii. Heard and considered any explanation by employer or his representatives*

*iv. ...."*

18. That there is no evidence he was taken through the above formal process or evidence of such meetings as alleged by the Respondent and contends that the Respondent terminated his services without a proper notice as required under **Section 35(1) (c) of the Employment Act**. He further submits that the warning letter does not meet that threshold for a notice to show cause as was set out in the case of **Hosea Akunga Ombwori -v- Bidco Oil Refineries Limited [2017] eKLR**, where J Radido stated:-

*"To satisfy the requirements of Section 41 of the Employment Act, 2007, an employer issues what is called in ordinary parlance a show cause/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.*

*The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms" [Emphasis added]*

19. He urges this court to be persuaded by the court's holding in the **Jane Samba case above** and find that the Claimant's dismissal as unfair for want of due process and valid reasons. That since house allowance was not included in his salary during his period of employment while the Respondent has merely denied the same without showing any evidence that house allowance was paid to him, he is entitled to the same as under **Section 31 (1) of the Employment Act** calculated as  $15/100 \times 12 \times 80,000 = 144,000/=$ . He relies on the case of **Kiema Mwangangi -v- Rajani Engineering Limited (2019) eKLR** where Onyango J held that it is the duty of the respondent under Sections 10 and 74 of the Employment Act to prove by records that the claimant was paid house allowance.

20. The Claimant further submits that he is entitled to service pay and that even though he has attached evidence that he was a registered member of NSSF, it also clearly shows that the Respondent failed to remit monthly contributions. He cites the case of **Elijah Kipkoros Tanui -v- Ngara Opticians T/A Bright Eyes Limited (2014) eKLR** where the court in allowing the claim for service pay held that:-

*"Service pay is therefore payable under Section 35(5) only to employees who are not covered under the different social security mechanisms elaborated under Section 35 (6).*

*Basic membership to the National Security Fund or other schemes is not in itself a bar to an employee accessing service pay under section (35) (5). As the evidence in this Claim has shown, an employer could register an employee with the N.S.S.F, but fail to remit the monthly contributions, or remit irregularly. [Emphasis added]*

21. That the remedies for wrongful dismissal and unfair termination are provided for in **Section 49 as read with Section 50 of the Employment Act** and that **Section 49(4)** further sets out several factors which should be taken into account in deciding whether to recommend the remedies under Section 49(1). He relies on the case of **Joshua Otiego Apiyo -v- Modern Coast Express Limited [2019] eKLR**, where the court considered the period served and the claimant's desire to continue in employment and awarded damages for 12 months. That the Court further found that the respondent failed to follow the procedure under Section 41 and Section 43 of the Employment Act in that not only was the termination unfair for want of due notice and a hearing but also that the reasons for dismissal were not genuine.

22. The Claimant in the instant case submits that he is thus entitled to an award of 12 months' compensation for the unfair wrongful termination. That since the events in the current case were occasioned by the Respondent, it should bear the consequences.

### **Respondent's Submissions**

23. The Respondent submits that it responded to the labour officer by a letter dated 13/06/2016 and the county labour office found in favour of the Respondent. It submits that the Claimant did not bother to reply to the show cause letter dated 05/01/2016 and that he has also not challenged the evidence of poor performance that was presented to this Court. It refers this Court to the Respondent's bundle of documents, to the letters issued to the Claimant prior to his termination which evidence that the Respondent followed the due process in every stage in

terminating the Claimant's employment.

24. The Respondent submits that it has shown both the substantive justification and procedural fairness in terminating the Claimant's employment and pray that this Court finds that the said termination was lawful and valid as adduced in the evidence above. It cites the case of **WALTER OGAL ANURO -V- TEACHERS SERVICE COMMISSION (2013) eKLR**, where the Court held that:-

*"... For a termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."*

25. It is submitted by the Respondent that the letter of Notice dated 29/03/2016 clearly gave the Claimant one month notice and is therefore evidence that it issued the Claimant with a month notice of its intention to terminate his contract. It prays that the court finds that the Claimant is entitled to the reliefs stipulated under **Section 42 of the Employment Act** but the same having already been paid to him he is not entitled to any relief. That the Claimant admitted in the letter dated 06/10/2016 that his monthly salary would be net any medical benefits while commissions would be based on net target. That this clearly shows that housing allowance was included in the KShs. 80,000/- and only medical benefits and commissions were treated separately. That further, the Claimant's complaint to the labour office was only for unpaid salary for April 2016 and leave and that it is settled law that where it is shown an employee accepted a consolidated salary, no claim for house allowance would lie. It therefore prays that the claim for house allowance fails.

26. The Respondent further submits that the Claimant has not shown how he arrived at the amount he claims for service pay and that **Section 35(5) of the Employment Act, 2007** provides that service pay can only be paid where an employee has completed a year of employment. That the Claimant herein worked for only 11 months and is therefore not entitled to service pay and that even if he had completed a year of service, he is obligated by the rules of pleadings and evidence to plead for a specific formula for calculation of service pay and to justify the same. That in any event, the Respondent paid NSSF and so service pay ought not to be paid and it contends that had the Claimant obtained a statement for the period May 2015 to April 2016, the same would have shown that the Respondent duly remitted the NSSF when it fell due.

27. The Respondent submits that it has shown that the Claimant was not unfairly terminated from employment and therefore there can be no claim for damages for unfair termination. That for April 2016 salary, the same would have still been paid to the Claimant had he gone to the company for a proper hand over and urges the Court to direct that the Claimant goes for a proper hand over at the Respondent's offices and collects his certificate of service which is ready. That since costs follow the event, the Claimant's suit should be dismissed with costs.

28. I have examined the evidence and submissions of the Parties herein.

29. The Claimant was terminated vide a letter dated 28/4/2016 for poor performance. The letter does not indicate what constituted poor performance.

30. The Respondent is expected to demonstrate what he portrays as poor performance and this can only be tested by a demonstration of what was expected of the Claimant and what he actually achieved.

31. As was held by the Court of Appeal in the cited case of **Jane Samba vs Ole Tukai Lodge**, it is not enough for the Respondent to state that there was poor performance the same must be demonstrated. The onus of proving poor performance lies upon the Respondent but in this case, the Respondent failed to prove the same. In the circumstances, I find the termination of the Claimant was premised on invalid reasons.

32. The Claimant also averred that he was terminated without being accorded an opportunity to defend himself.

33. The Respondents have not indicated that any hearing was conducted. The hearing envisaged is as provided for under Section 41 of the Employment Act 2007 which provides as follows:-

*1) "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".*

34. The Respondents did not give the Claimant any opportunity to be heard and for that reason they terminated the Claimant unfairly.

35. Section 45(2) of Employment Act 2007 states as follows:-

*(2) "A termination of employment by an employer is unfair if the employer fails to prove:*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason:-*

- (i) related to the employee's conduct, capacity or compatibility; or*
- (ii) based on the operational requirements of the employer; and*
- (c) that the employment was terminated in accordance with fair procedure”.*

36. Given that there is no valid reasons established against the Claimant to warrant his dismissal and no due process was followed I find the termination unfair and unjustified.

37. In terms of remedies, I find for the Claimant and award him as follows:-

1. *1 month salary in lieu of notice= 80,000/=*

2. *Salary for April 2016 – 80,000/=*

3. *Service charge equivalent to 15 days salary for year served =  $\frac{1}{2} \times 80,000 = 40,000/=$*

4. *Compensation equivalent to 10 months' salary for unlawful termination = 800,000/=*

**TOTAL = 1,000,000/=**

*Less statutory deductions*

5. *The Respondent should pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in Chambers via zoom this 17<sup>th</sup> day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

**In the presence of:**

Gitari for Respondents – Present

Njau for Respondents – Present