



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2110 OF 2014

ANTONE OKOTH AWENDO.....CLAIMANT

VERSUS

BRIDGE INTERNATIONAL ACADEMIES LIMITED.....RESPONDENT

JUDGMENT

On 24th November 2014, the Claimant filed his Memorandum of Claim dated 19th November 2014 in which he is suing the Respondent for malicious and illegal termination of employment. He seeks the following reliefs:

1. Judgment be entered against the Respondent that the procedure and/or appraisal done leading to this termination was wrongful.
 2. One-month notice Kshs.162,360.00
 3. Payment for service for 3 years in employment Kshs.73,062.00
 4. Compensation for wrongful loss of employment and earnings Kshs.29,224,800.00
- Total Kshs.29,460,222.92**
5. Interests.

The Respondent in its Statement of Response dated 1st December 2014 and filed on 15th January 2015, prays that the claim be dismissed with costs.

Claimant's Case

The Claimant was employed by the Respondent on 29th December 2011 in the capacity of a logistics officer earning a gross salary of Kshs.162,360.00. He worked in different capacities until 28th January 2014 when his employment was terminated by a letter of even date.

The Claimant avers that the employment contract provided for periodical appraisal of employees' performance after they had been accorded a hearing. On 8th January 2014, the Claimant realized that his performance had been secretly appraised without his knowledge.

The Claimant in his witness statement dated 19th November 2014 and filed on 24th November 2014 avers that the said appraisal was conducted by his supervisor, who was on leave, and sent to HR for approval. The Claimant further avers that he was called for a meeting where he was presented with an appraisal letter to read. It is the Claimant's evidence that he requested the involvement of the HR Department in the meeting, which request was granted. However, he could not defend the allegations raised in the appraisal since the person who conducted the appraisal was absent. Consequently, he was issued with a termination letter. The letter stated that the Claimant would be paid for days worked up to and including the date of termination, one month's pay in lieu of notice and accrued leave days, if any.

The Claimant avers that the reason for his termination was not communicated, he was not issued with any invitation to a disciplinary hearing prior to the meeting and neither was he given the opportunity to defend himself. He also avers that after the termination, he had a meeting with the Supply Chain and Finance Manager and the HR Director but the matter remained unresolved.

It is the Claimant's position that the termination was illegal, unjustified and predicated by a malicious appraisal.

During trial, the Claimant reiterated the averment in his Memorandum of Claim and Witness Statement. He further explained that appraisals were conducted after a year and in the presence of the employee, based on key performance indicators that would enlighten the employee on their strengths and weaknesses. It was also his evidence that he had been appraised in 2013 and his performance found remarkable.

Respondent's Case

The Respondent denies the allegations set out in the Memorandum of Claim and further denies ever unfairly terminating the Claimant's employment. The Respondent avers that the Claimant absconded duty and terminated his employment with the Respondent.

There was no appearance for the Respondent during trial despite having been served with a hearing notice. As such, the court proceeded with the Claimant's case in the absence of the respondent.

Submissions by the Parties

The Claimant in his submissions dated 25th September 2018, isolates three issues for determination: whether the Claimant is an employee of the Respondent company, whether the Claimant was unlawfully and unfairly terminated and whether the Claimant is entitled to the remedies sought.

It is the Claimant's submissions that his employment was terminated unlawfully, un-procedurally and unfairly contrary to article 41 of the Constitution of Kenya, 2010 and sections 41(1) and 45 of the Employment Act. The Claimant relies on the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR** where the court held that the process under section 41 of the Act is mandatory and employment shall be deemed to be unfair where such procedure is not followed. The Claimant also relies on the case of **Margaret Auma Ingwe vs. Kenya Power and Lighting Company Limited [2015] eKLR** where the court held that an employee must be accorded sufficient time to prepare their defence.

The Claimant submits that the Response filed by the Respondent constitutes mere denials hence offend the provisions of paragraph 14 of the Industrial Court (Procedure) Rules 2010 and the Civil Procedure Rules. The Claimant relies on the case of **Daniel Kiplagat Kipkeibut vs. Smeep Deposit Taking Micro Finance Limited [2016] eKLR** where the Court found in favour of the Claimant because the Respondent's defence did not disclose any reasonable cause of action.

The Claimant submits that he is entitled to payment in lieu of notice since he was not issued with a termination notice. It is the Claimant's submission that he is entitled to service pay having worked for the Respondent for 3 years. He relies on the case of **Elijah Kipkoros Tonui vs. Ngara Opticians T/A Bright Eyes Limited [2014] eKLR**.

The Claimant submits that he is entitled to compensation for unlawful termination of employment pursuant to section 49 (c) of the Employment Act. The Claimant prays for costs.

The Respondent did not file its submissions.

Determination

The issues for determination are the following –

1. Whether the Claimant's employment was unlawfully and unfairly terminated.
2. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was unlawfully and unfairly terminated

Section 41(1) of the Employment Act requires an employer to explain to an employee the reasons for termination where the termination is on the grounds of gross misconduct, poor performance or physical incapacity. It was the Claimant's evidence that reasons for termination of his employment were not given to him. However, the wording of his letter of termination dated 28th January 2014 is –

“We regret to inform you that your employment with the company is being terminated. Your termination is the result of poor performance as outlined in the annual review.”

This is an indication that the reason was communicated to him. The claimant testified that he was not involved in the performance assessment that resulted in the termination of his employment. This was not rebutted by the respondent who did not present any evidence having been absent on the hearing date.

In the case of **Stephen Mbugua Chege vs. Nairobi City Water & Sewerage Company [2017] eKLR** the court held that:

“Workplace procedures, human resource policies must also not be used to justify a termination of employment which is otherwise a sham. Where the respondent board of directors met and assessed the claimant in his work performance and failed to document such a crucial process and then used the same to terminate his employment, such maladministration is apparent. To allow the decision by the respondents dated 17th August, 2017 to stand for one moment is to sanction an illegality. Such is to reward impunity.”

In the present case the response is a mere denial. In spite of the claimant having attached evidence of his employment with the respondent, all that is in the defence is denial of all allegation in the claim.

The claimant's employment contract is quite elaborate comprising 8 pages. There is no provision for performance appraisal therein.

The Claimant was scheduled for leave on 29th January 2014, yet his termination letter was dated 28th January 2014. The termination appear to have been predetermined and the Respondent had no intention of according the Claimant due process as required by section 41 (1) of the Act. The Claimant was not issued with sufficient notice to enable him prepare his defence and call witnesses.

No evidence was adduced to controvert these assertions. As such the Claimant has met the threshold set by section 47 (5) of the Employment Act 2007. I therefore find that Claimant has proved his case for unlawful termination and declare the termination of his employment unfair.

Whether the Claimant is entitled to the reliefs sought

The Claimant sought 5 prayers as set out elsewhere in this judgment.

The Claimant prayed for payment in lieu of one month's notice. The Claimant submitted that he was entitled to payment in lieu of notice since he was not issued with a termination notice. However, a closer look at the Claimant's letter of termination reveals that he was entitled to payment for days worked up to and including the date of termination, one month's pay in lieu of notice and accrued leave days, if any. There is no express statement by the Claimant in his pleadings, that the Respondent failed to make these payments. It would seem that the claim is sought based on the fact that a termination notice was to issue and not because of the Respondent's failure to make the payments.

I find that the claimant has not proved that he was not paid in lieu of notice as offered by the respondent in the letter of termination.

The Claimant prayed for service pay for the period of 3 years he was in employment. This claim fails because he was a member of NSSF at the time of termination and is not entitled to service pay in terms of **section 35(6) of the Employment Act 2007**.

The Claimant prayed for compensation for unfair termination. Having found that the termination was unfair, the Claimant is entitled to compensation. Taking into account the length of service and the manner in which the termination occurred, and further taking into account all relevant factors as set out under Section 49(4) of the Employment Act, it is my opinion that five months' salary is reasonable compensation. I therefore award the claimant **Kshs.811,800**.

The respondent shall pay claimant's costs for this suit and the decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE