



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 170 OF 2014

JOSEPH KIMANI KIGOTHO

CLAIMANT

v

DIANI FLOWERS & LANDSCAPING LTD RESPONDENT

JUDGMENT

1. Joseph Kimani Kigotho (Claimant) was initially offered employment as a Deputy Head Groundsman by Diani Flowers & Landscaping Ltd (Respondent) through a letter dated 2 January 2009.
2. The Respondent subsequently renewed the contract(s) severally and the last formal contract being dated 1 January 2011 to run up to 31 December 2012.
3. At all material times to the contract, the Respondent had a contract with the Ministry of Sports, Rwanda for the maintenance of Amahoro Stadium. The contract with the Ministry was to lapse around 30 November 2012.
4. Around 9 June 2010, the Respondent sent the Claimant to Rwanda to be in charge of maintenance of Amahoro Stadium as the employee who had been in charge had left employment.
5. On 15 March 2013, the Respondent issued to the Claimant a notice referenced *Clarification Required*.
6. The notice called upon the Claimant to respond to certain allegations/offer explanations as to: *whether he had submitted a tender parallel to the one by the Respondent in respect of maintenance of Amahoro National Stadium; why he had not reported equipment failure; why the stadium was full of weeds and why he had absconded from the workplace/failed to be at the workplace.*
7. The Claimant responded on the same day and followed the response with an email on 18 March 2013.
8. The Respondent was not satisfied with the explanations by the Claimant, and on the same day (15 March 2013), it wrote to the Claimant to inform him of his summary dismissal.
9. As a consequence, the Claimant instituted these proceedings against the Respondent on 12 February 2014 alleging *unfair termination of employment and breach of contract*.
10. The Respondent filed a *Response to the Statement of Claim* on 27 March 2014 together with documents.
11. The Claimant filed a witness statement on 31 July 2015 while the Respondent's Managing Director filed a witness statement on 2 December 2015.
12. The hearing commenced on 14 July 2015 before Mbaru J and continued on 15 January 2016, when the Claimant closed his case.
13. The Respondent's case was taken on 30 March 2016 and resumed on 18 February 2019, when I took over because Mbaru J had been transferred from the station.
14. An attempt by the Respondent to secure an adjournment during the resumed hearing on the ground that the advocate who had been handling the case had left the employment of the advocate firm on record was declined, and the Court stated that it would give the reasons in this judgment.
15. The Court declined to grant the request for adjournment by the Respondent because when the hearing date was being fixed on 16

November 2018, the Respondent's advocate was well aware of the state of its preparedness in light of the advocate handling the brief having left employment, and because it was not the first application for adjournment by the Respondent.

16. The Claimant filed his submissions on 5 March 2019 while the Respondent filed its submissions on 21 March 2019 (it is regrettable the parties filed voluminous documents, most of which were not relevant or material to the issues in dispute).

17. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as proposed by the Claimant in his submissions.

18. The Issues were identified as

- a) Whether the Claimant's dismissal was fair.
- b) Whether the Claimant is entitled to US \$ 34,900.
- c) Whether the Claimant is entitled to costs.

Unfair termination of employment

Procedural fairness

19. Unless it is a case of summary dismissal, an employer is under an obligation in terms of section 35(1)(c) of the Employment Act, 2007 to issue a *written notice of termination of employment* of at least 28 days if the employee is paid by the month.

20. Because the Respondent characterised the instant case as one of *summary dismissal*, the provisions of section 36 as read with section 41(2) of the Employment Act, 2007 would apply.

21. Section 41(2) of the Act makes it a mandatory imperative that an employer should hear and consider any representations by an employee before *summary dismissal*.

22. In the case before Court, the Respondent did not unambiguously inform the Claimant that the termination of his employment was under consideration.

23. The letter of 15 March 2013 simply called for explanations without indicating that the explanations were part of a disciplinary process. The explanations could even have been part of a routine audit or investigative in nature.

24. Although it may be argued that the Claimant may have been aware of the allegations which led to the summary dismissal, the process taken by the Respondent did not meet the threshold envisaged by section 41(1) and (2) of the Employment Act, 2007.

25. The Court therefore finds that the summary dismissal of the Claimant did not meet the procedural fairness test of section 41 of the Employment Act, 2007.

Substantive fairness

26. Having come to the conclusion that the dismissal did not meet the procedural fairness test, which was mandatory, it is not necessary for the Court to examine whether the Respondent met the burden imposed on it by sections 43 and 45 of the Employment Act, 2007.

27. However, the Court notes and finds that the evidence that the Claimant incorporated a company to compete with the Respondent in tendering for the maintenance of the Amahoro stadium was not rebutted.

28. The name of the incorporated company was also eerily near similar to one of the names of the Respondent's Director.

29. The Claimant was not only in conflict of interest with the interest of his employer, but acting dishonestly.

Breach of contract

Debt due

30. The Claimant sought US \$ 34,490 on account of debt arising from expenses incurred in the course of work, and which were not reimbursed.

31. The Respondent's witness admitted under cross examination that a reconciliation carried out by its Accountant had shown that the Claimant was owed US \$ 14,090 in reimbursements.

32. Although the witness attempted to disown the reconciliation on basis of further reconciliation, the said further audit/reconciliation was not filed in Court within the window given for filing and exchange of documents.

33. The Court will therefore allow the reimbursement in the amount as reconciled.

Salary for February 2013

34. The Claimant was dismissed on 15 March 2013 and would be entitled as of right to salary up to date of dismissal.

35. The Claimant sought Kshs 72,600/- as salary for February 2013.

36. The Respondent did not produce any records to show the February 2013 salary was paid and the Court finds the Respondent in breach of contract.

Salary for March 2013

37. The Claimant would equally be entitled to salary up to date of dismissal, and he computed the same as Kshs 36,300/-. The Court will allow the head of claim.

Unpaid National Hospital Insurance Fund remissions

38. The Claimant contended that *National Hospital Insurance Fund* remissions for December 2008 to March 2013 were not paid to the Fund.

39. However, he did not produce copies of pay slips if any to show deductions and/or a statement from the *National Hospital Insurance Fund*.

40. It was upon the Claimant to prove this head of claim but he failed.

41. If at all some of the deductions were not remitted, the Court notes that the Act establishing the Fund has mechanisms of addressing this type of claim with the Fund, at the first instance.

Leave earned

42. On account of leave, the Claimant asserted that he had not taken earned leave from 2009 to 2013 and sought in lieu thereof Kshs 203,280/-.

43. Section 28(4) of the Employment Act, 2007 circumscribes the period in respect of which leave can be carried forward to 18 months, and unless there is agreement to the contrary, the Court can only find in favour of the Claimant in respect of leave for 18 months prior to March 2013.

44. However, the Claimant did not even suggest that he applied for leave and was denied or that the Respondent requested him not to take leave because of the exigencies of duty.

45. The Respondent cannot be blamed in such circumstances.

KRA Pay as You Earn fines

46. The Claimant sought Kshs 450,000/- as Pay as You Earn fines and penalties.

47. This head of claim is in the nature of special damages and without records from the Kenya Revenue Authority, the Court finds it was not proved.

Compensation

48. The Court has concluded the dismissal was procedurally unfair.

49. Compensation is however a discretionary remedy.

50. In the view of the Court this is not a suitable case to award compensation because of the Claimant's conflicted interest and dishonest role in the tender process, which led to the separation.

Pay in lieu of notice

51. Section 36 as read with section 44(1) of the Employment Act, 2007 contemplate(s) payment of salary in lieu of notice in cases of summary dismissal.

52. The Claimant did not have a formal contract by time of separation, but was paid by the month, and therefore the Court will allow pay in lieu of notice equivalent to 1 month salary.

Certificate of Service

53. A *certificate of service* is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

54. The Court finds and declares that the dismissal of the Claimant was procedurally unfair, and that the Respondent was also in breach of contract and awards the Claimant

(b) Pay in lieu of notice Kshs 72,600/-

(c) Salary February 2013 Kshs 72,600/-

(d) Salary up to 15 March 2013 Kshs 36,300/-

(e) Reimbursement/Debt US \$ 14,090

55. Respondent to issue Certificate of Service within 15 days.

56. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 29th day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Maruti instructed by Makhanu, Odhiambo & Co. Advocates

For Respondent Mr. Njuguna/Ms. Kihenjo instructed by L.M. Kambuni & Associates Advocates

Court Assistant Lindsey