



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 475 OF 2014**

**DEEPAK KATARIA.....CLAIMANT**

**VERSUS**

**CENTUM LEARNING LIMITED.....RESPONDENT**

*(Before Hon. Lady Justice Maureen Onyango)*

**JUDGMENT**

The Claimant, Deepak Kataria filed a Memorandum of Claim dated 24<sup>th</sup> March 2014 against the Respondent, Centum Learning Limited seeking to be reinstated back to his employment, payment of all benefits under his contract and damages for unlawful termination of his employment. He avers that on or about 6<sup>th</sup> October 2010, he was employed by the Respondent company in Band M5 as Vice President-Airtel Business Solutions-Africa at a remuneration of Indian Rupees 4,000,000/- per annum. That *Clause 10* of his employment contract/assignment letter dated 11<sup>th</sup> October 2010 stated that the said contract would be governed and construed in accordance with the laws of India. That in a further employment contract dated 11<sup>th</sup> July 2011 the Respondent having its registered office in New Delhi transferred him to Nairobi in the capacity of Distribution Effectiveness Head from 1<sup>st</sup> July 2011. That *Clause 14* of this second employment agreement provided that the contract had replaced all previous agreements and gave the Kenyan Courts the jurisdiction. The total gross salary was stated as Kshs.1,255,908/=. That he was issued with a work permit by the Immigration Office in Nairobi under R.1579613 Class D with effect from 6<sup>th</sup> February 2013 valid for 2 years.

He avers that the Respondent terminated his employment by a letter dated 18<sup>th</sup> March 2014 on the allegation that he was involved in an “act of receiving gratification/commission from company empanelled vendor”. That he was not given an opportunity to defend himself in a hearing and was denied the right to inquire what the alleged acts were. That the termination of his employment was unlawful and an infringement of his rights under **Article 31(d) of the Constitution**. He contends that *Clause 8.4 of the Letter of Assignment* states that he must be guilty of misconduct or negligence but which was irregularly used to hound him out of his employment. He avers that he lost the following benefits as stated in the letter dated 6<sup>th</sup> October 2010 being Special Damages of:

- a) Furnished accommodation
- b) Car with driver
- c) Education for children
- d) Medical Insurance for himself and his family
- e) Home leave travel for self and family once a year
- f) Lose his work permit which will be quantified at the time of hearing of this suit against the Defendant.

He prays that this Court orders that the letter of termination is unlawful and cancels the same; that the Claimant is reinstated back to his employment together with all the benefits under the contract; a permanent injunction against the Respondent from interfering with the Claimant’s employment and right to quiet employment; and costs of this suit. In his Statement, the Claimant states that the Respondent recognised his achievements in a letter dated 1<sup>st</sup> June 2012 which enhanced his salary from Kshs.1,117,167/= to Kshs.1,169,431/= and also communicated to him that he was eligible for annual performance bonus of Kshs.1,748,136/=. He attached exhibits marked **DK1(a) to DK1(j)** states that he had been given notice to vacate his residence where he was residing with his family.

The Respondent filed its Amended Statement of Response and Counterclaim dated 15<sup>th</sup> July 2014 admitting the terms of employment of the Claimant and his transfer to Nairobi. That it processed and secured a Work Permit from the Immigration Department at Kshs.400,000/= to enable the Claimant undertake his duties and that the said permit was to be in force from 28<sup>th</sup> June 2013 to 6<sup>th</sup> February 2015. That the Claimant breached *Clause 7* of his employment contract which outlined the Company's Code of Conduct by directly and or indirectly engaging himself in complicity matters of receiving monetary gratification/ commission from the company empanelled vendor which was not only criminal but unethical. That it therefore invoked provision *Clause 8.4* of the contract of employment and summarily terminated the services of the Claimant lawfully and fairly. That when it issued the termination letter to the Claimant, he refused to accept it and they were forced to deliver the same to his house through a recognised Courier as shown in *App CLL-3*. That this behaviour in itself amounted to insubordination and disobedience of lawful instructions as envisioned by **Section 44(e) of the Employment Act** and that it forms a basis for summary dismissal of such an employee.

The Respondent further states that as a result of the Claimant's misconduct, it has suffered damage to its reputation, economic loss and loss of business in the market. It thus counterclaims damages from the Claimant for breach of contract and injury to its reputation and further enumerates the particulars of loss as follows:

i... Refund of the monies paid towards the

Claimant's work permit..... Kshs.400,000

ii.. Refund of monies received on account of car hire costs from the

Car Vendor (Kshs.38,000 x 16.5 months)..... .Kshs.627,000

iii. Refund of Air ticket discount

iv.. Loss of business to a rival company due to the Claimant's actions

v... Recovery of rent for April 2014 when the Claimant occupied the

house after termination..... Kshs.200,000

vi.. Deduction from the security deposit given to the earlier landlord

(Aziz Realtor) of the company house as a result of the damage caused by the Claimant together with interest accruing to date..... Kshs.37,500

**Total Kshs.1,274,500**

In a Further Statement dated 11<sup>th</sup> June 2014, the Claimant denies that Mr. Hussain would give him any commission and further denies to have been part of any discussion or to have participated in any enquiry as alluded to by Mr. Caroli. That the decision to dismiss him was premeditated and that he was just given the termination letter without any further explanation. The Claimant then filed a Reply to the Amended Statement of Response and Counterclaim dated 31<sup>st</sup> July 2014 stating that the Respondent is not entitled to the sum of Kshs.1,274,500/= or any other sum enumerated in the Counterclaim.

### **Evidence**

CW1 testified in court that the respondent refused to meet him or take his

calls. He denied that he ever received any warning whether verbally or in writing. He testified that he served the respondent for about 3 years and 6 months. That he still seeks reinstatement because he was a best performer in the company. That he paid the house rent himself until 20<sup>th</sup> April 2004. That he was paid salary until March 2014 and that since his letter read October 2011, he has worked for about 2 and ½ years. That he was wrongly accused of receiving a bribe.

RW1, KAROLI MUKUNGA testified in court for the respondent. He confirmed that the Claimant was in employment from 11<sup>th</sup> October 2011 and that the Claimant was entitled to medical cover for self and family; a pension scheme; car allowance; and apartment allowance of over Kshs.140,000/= paid by the Respondent. That the Claimant had worked for only 1 and ½ years under the work permit and that they are claiming a refund of the work permit as he did not serve them for the entire period. He stated that he did not have the investigation report or minutes of the hearing of the claimant's disciplinary case. He denied that they sacked him to avoid paying him benefits and promoting him on 30<sup>th</sup> March 2014. He stated that the claim for the car hire charges is the amount of the bribe paid to the Claimant by the vendor. He confirmed that the bribe was not reported to the police.

### **Claimant's Submissions**

The Claimant submits that Section 44(3) of the Employment Act provides that an employment may be terminated by the misconduct of the employee. That while the Respondent relies on Clause 8.4 of his contract which expressly states that notice should be given including in the case of misconduct, the Respondent failed to issue any notice to him prior to 18<sup>th</sup> March 2014. That there was no evidence proving guilt on his part and that Mr. Caroli confirmed in Court that he could not produce an investigating report implicating the claimant of the allegations

pleaded by the Respondent. That it is noteworthy that Mr. Caroli tried to sneak in hearsay evidence of Mr. Hussein to which is inadmissible. That the Counterclaim lacks merit and should be dismissed with costs.

He submits that since his work permit would have expired on 28<sup>th</sup> June 2015, his employment was terminated 15 months earlier and he was effectively still in employment under the conditions of the work permit. That therefore in assessing damages, his employment was unlawfully interfered with by the Respondent by 15 months (being the enhanced salary of Kshs.1,315,109 x 15 months=Kshs. 19,726,635) to which he is entitled. That he is also entitled to the Annual Performance Bonus of Kshs.1,748,136 as per a letter by one Uttam Ghosh annexed at DK 1(h) at paragraph four and that this is the reason why the termination letter had to be given before 1<sup>st</sup> June so that he is deprived of the bonus. That in the final analysis, the total claim is Kshs. 21,474,771/= for which he urges this Court to enter judgment in his favour with costs and interest. The Claimant relies on the case of Mukhwana –v- National Hospital Insurance Fund (2012) 3 KLR at page 30.

#### Respondent's Submissions

The Respondent submits that it informed the Claimant of the reports it had received following the tender of the taxi services and that it gave him an opportunity to defend himself which he was unable to do. That he refused to collect the notice to show cause and stormed out of the meeting. That it therefore complied with the procedural requirements of Section 41 of the Employment Act. That the orders sought by the Claimant are not available to him because of the time bar of 3 years for reinstatement. That the other prayers are misconceived and unjustified. The Respondent relies on the following cases:

ELRC Cause No. 503 of 2015: James Njenga Wacuka –v- DPL Festive Bakery Ltd where the court dismissed the claimant's case on the basis that there was a valid reason for termination and that the case lacked merit.

C.A No. 198 of 2011: Jared Aimba –v- Fina Bank Ltd where the Court of Appeal upheld a dismissal order issued by the employment court on establishing that the termination was valid and in accordance with the contract of employment executed by both the employee and employer.

ELRC Cause No. 1681 of 2014: Robert Mofat Odhiambo –v- Harambee Sacco Ltd where the court found that the claimant's dismissal was regular and procedural and awarded the employer Kshs.981,057.70 as pleaded in the Counterclaim.

#### Determination

The first issue for determination is whether the Claimant was unfairly dismissed from his employment by the Respondent. The second issue for determination is whether the Claimant is entitled to the reliefs sought in his Claim. The third issue for determination is whether the Respondent is entitled to the reliefs sought in its Counterclaim.

While the Respondent has averred that it followed due procedure as required by law in terminating the Claimant's employment, the claimant on the other hand has contended that no notice was issued to him and which was mandatory under his employment contract. **Clause 8.4 of the Letter of Assignment** provides that:

***“Subject to applicable laws the Company has the right to give immediate notice before terminating your services if you are guilty of misconduct or negligence or breach of any of the terms of this letter or the Letter of Employment.”***

The applicable laws that the respondent was supposed to follow before terminating the employment of the claimant is the Employment Act. Section 44 thereof provides for summary dismissal for gross misconduct. Section 41 provides that before summary dismissal of an employee under Section 44(4) for gross misconduct the employer must comply with the provisions thereof. Section 41 provides that an employee is to be informed of the charges against him and given an opportunity to respond to the charges and that the employee has a right to be accompanied by a fellow employee of his choice. The Section further provides that an employee is to be dismissed only after he and his representative have been heard.

In the instant case the claimant was called to the Office of the Chief Operations Officer on 24<sup>th</sup> March 2014 and issued with a letter of termination dated 18<sup>th</sup> March 2014. RW1 admitted that by the time the claimant was called, he had already been terminated. He was thus only called to receive the letter.

No hearing took place to give the claimant an opportunity to be heard. The reasons for termination stated in the defence were never given to the claimant either at the time of termination or in the letter of dismissal which states the reasons for dismissal as follows –

*18<sup>th</sup> March 2014*

*Mr. Deepak Katana*

*Emp. 40196*

*Practice Head – Distribution Effectiveness, Africa*

*Immediate Termination Notice*

*Dear Deepak*

*This is regarding your employment with Centum Learning Limited dated October 11, 2011 read with letter of assignment to Centum Learning Limited, Kenya Branch ("Company") dated October 11, 2011.*

*Regretfully it is to be said that management is having credible and unimpeachable piece of evidence showing your direct involvement and complicity in the act of receiving monetary gratification/commission from Company empanelled vendor.*

*You being a senior employee of the Company, your involvement in such unethical act's are against the spirit of Company's Code of Conduct and have shaken the conscience of management. Our act amounts to sheer violation of Clause 7.1 of aforesaid letter of assignment.*

*In view of the foregoing, the Company in exercise of its power under Clause 8.4 of letter of assignment terminates your services with the Company by way of this immediate termination notice. Your last day of working with the Company is 24<sup>th</sup> March 2014. You are advised to completely hand over your charge to Mr. Dipankar Paul, Director (Delivery and Operations) and submit all Company' assets/documents in your possession to Mr. Dipankar Paul, Director (Delivery and Operations) in Kenya office of the Company.*

*You full and final statement shall be processed as per the Company's policy.*

*This letter is being issued without prejudice to any other rights/remedies of the Company under the contract and/or applicable law.*

*For Centum Learning Limited*

*SIGNED*

*Thomas Mathew*

*Authorised Signatory*

*Cc Dr. Raj David*

*COO, Africa*

*Centrum Learning Limited"*

The evidence on record is a clear manifestation of an unfair termination in contravention of Section 41, which provides for a fair hearing and Section 43, which provides for proof of grounds for termination. I thus declare the termination unfair.

#### **Remedies**

The claimant prayed for cancellation of letter of termination and reinstatement. He was dismissed on 24<sup>th</sup> March 2014 and the remedy of reinstatement is no longer available to him. Further his working permit expired in February 2015 and he is no longer eligible to work for the respondent.

The claimant further prayed for a permanent injunction against the respondent's interference with his work. A blanket permanent injunction cannot be issued against an employer from interfering with the terms of a contract which in itself provides for termination of employment. In any event, the contract having been terminated on 24<sup>th</sup> March 2014, an injunction cannot issue.

The claimant prayed for general damages at paragraph 14 of the Memorandum of Claim. Having found that the claimant cannot be reinstated, it is within the power of the court to award the claimant compensatory damages in terms of Section 49(1) of the Act as an alternative to reinstatement. In the submissions the claimant has assessed damages payable to him at Kshs.21,474,771 with costs and interest on the basis that his employment was in force until 28<sup>th</sup> June 2015. This is not correct as his employment was terminated on 24<sup>th</sup> March 2014 by letter dated 18<sup>th</sup> March 2014. Section 49(1) only permits compensation to a maximum of 12 months' salary.

Taking into account the length of service of the claimant, the fact that he was a foreigner on a tour of duty and the manner in which his employment was terminated, the sudden withdrawal of all his very generous benefits which included a furnished house, a chauffeured vehicle, medical for himself and family, fees for his children, overseas leave and annual bonus, it is my opinion that compensation in the equivalent of 8 months' gross salary is reasonable. I thus award him Kshs.10,520,872.

The respondent shall pay costs of the suit and the counterclaim, and interest shall accrue from date of judgment at court rates.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**