



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 470 OF 2018

HENRY ABUGA BOSIRE ONGWAE

CLAIMANT

v

MING TRIBE INTERNATIONAL GROUP LTD

RESPONDENT

JUDGMENT

1. On 26 June 2018, Henry Abuga Bosire Ongwae (Claimant) filed some 4 *List of Issues* as arising for the Court's determination.
2. The Cause was heard on 6 March 2019 when the Claimant testified, and on 8 April 2019 when Loise Kimani, Quality Control/Human Resource Assistant with Ming Tribe International Group Ltd (Respondent) testified.
3. The Claimant filed his submissions on 3 May 2019 while the Respondent filed its submissions on 10 June 2019.
4. The Court has considered the pleadings, evidence and submissions, and will generally adopt the Issues as proposed by the Claimant.

Unfair termination of employment

Procedural fairness

5. Issues 1 and 2 as proposed by the Claimant addressed the propriety of termination of his employment through an email of 10 November 2017.
6. Section 35(1)(c) of the Employment Act, 2007 envisages *written notice of termination of employment* of at least 28 days, if the employee is paid by the month.
7. The notice dated 10 November 2017 informed the Claimant that the contract would stand dissolved effective immediately, and that he would be paid thereof 1 month salary in lieu of notice.
8. In terms of section 41(1) & (2) of the Employment Act, 2007, the Respondent was under an obligation to inform the Claimant of the reasons for the contemplated termination of employment, and afford him an opportunity to make representations preferably in the company of an employee of his choice, before taking the decision to terminate.
9. If a hearing as contemplated by section 41(1) and (2) of the Employment Act, 2007 was conducted, the date of such a hearing was not disclosed by the Respondent. Not even the venue or details of who attended the hearing were disclosed. Not even evidence that the Claimant was put on notice that termination was on the cards.
10. The Court finds the termination did not meet the statutory threshold for fairness.

Substantive fairness

11. The reason given for the termination of the Claimant's employment by the Respondent's witness was *performance*.
12. The Respondent's witness stated that it was the duty of the Claimant's Line Manager to evaluate the performance but the said Manager was not called to testify. Not even minutes or notes of any performance meetings held between the Manager and Claimant were produced in Court.

13. If the Claimant's *performance* was formally evaluated, no records of such evaluation or appraisal were produced in Court. Equally, if there were set or agreed *performance targets*, the same were not proved in Court.

14. The Court finds that the Respondent failed to establish the validity and fairness of the reasons for the termination of the Claimant's employment.

Unilateral variation of contract/breach of contract

15. The Claimant was initially employed as a Procurement Supervisor.

16. The salary was agreed as Kshs 250,000/-.

17. Prior to the termination of the Claimant's contract, he had been transferred by the Respondent to another role, and his salary reduced from Kshs 250,000/- to Kshs 75,000/-.

18. On 3 July 2017, the Respondent notified the staff that the Claimant (and another employee) would be transferred to new roles. The Claimant was assigned new role as a *Senior Service Associate*.

19. On 12 September 2017, the Claimant formally lodged a complaint on the reduction of salary, and sought to have the original salary reinstated.

20. There was no reply, and the Claimant sent a reminder on 16 October 2017. The Respondent's Human Resource Manager responded the same day to indicate that he was still under observation in the new role.

21. The Claimant was not satisfied, and he wrote to the General Manager on 1 November 2017 demanding the reinstatement of the salary by 14 November 2017 (the notice of termination followed shortly on 10 November 2017, before the deadline set by the Claimant).

22. The contract the Claimant signed provided for reduction of salary at clause 6.4, based on performance.

23. Section 10(5) of the Employment Act, 2007 requires an employer to consult with an employee before varying certain particulars of a contract, including job description and remuneration.

24. If the Respondent consulted the Claimant before varying the terms of contract (reduction of salary and new role), the details of such consultation were not disclosed. All that the Court was given was an email dated 3 July 2017 addressed to all staff. There was no evidence on what consultations preceeded the email notice. The Claimant's email of 2 November 2017 could not mean wholehearted acceptance of the variation.

25. The Respondent contended in its submissions that it was not the duty of the Court to re-write contract. The submission is largely true but employers to a contract must be alive to the prescriptions of section 10(5) of the Employment Act, 2007 when attempting to vary the terms of a contract.

26. The Court finds that although the contract allowed for variation, the variation as effected by the Respondent fell below the statutory requirements, and therefore constituted an unfair labour practice.

27. There was breach of contract/statute in reducing the salary which led to underpayment, of the Claimant's salary.

28. The Court holds that the Claimant is entitled to recover the underpayments totalling Kshs 700,000/- for period July to October 2017.

Leave

29. The Claimant sought Kshs 214,285/- on account of accrued leave for 2016 – 2017.

30. The Respondent did not rebut this head of claim by producing leave records as envisaged by sections 10(3),(7) as read with section 74 of the Employment Act, 2007, and the Court will allow the head of claim.

Unpaid wages for 8 months

31. The Claimant was on a fixed term contract which had 8 more months to expiry. He now seeks Kshs 2,000,000/- being the income lost as a result of the premature and unlawful termination of his contract.

32. The Court finds that this relief has no legal or contractual foundation, and would endorse as sound in our jurisdiction, the legal principle set out by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that

the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Pay in lieu of Notice

33. The Respondent paid the Claimant in lieu of notice using the reduced salary, and following on the holding that the variation was unlawful will award the Claimant the difference of Kshs 175,000/-.

Compensation

34. The Claimant served the Respondent for about 14 months and had a balance of 8 months to expiry of contract. He had an expectation to complete the full term of contract, and considering this, and the length of service, the Court is of the view that the equivalent of 2 months gross wages as compensation would be appropriate.

Certificate of Service

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

Conclusion and Orders

36. The Court finds and declares that the termination of the Claimant's employment was unfair, and that there was breach of contract.

37. The Claimant is awarded

(i) Balance notice	Kshs 175,000/-
(ii) Compensation	Kshs 500,000/-
(iii) Underpayments	Kshs 700,000/-
(iv) Accrued leave	Kshs 214,285/-
TOTAL	Kshs 1,589,285/-

38. The decretal sum to attract interest at Court rates from date of judgment, if not settled within 30 days.

39. Respondent to issue certificate of service within 15 days.

40. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 19th day of July 2019.

Radido Stephen

Judge

Appearances

Claimant acting in person

For Respondent Mr. Kaimenyi instructed by Mutuarendu Kaimenyi Mose & Co. Advocates

Court Assistant Lindsey