



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1339 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 3rd July, 2019)

JULIUS GITHAIGA MWANGI.....CLAIMANT

VERSUS

ULTRA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Julius Githaiga Mwangi, filed a Statement of Claim dated 31/07/2015 on 04/08/2015 for wrongful and unfair termination and seeking payment of terminal benefits against the Respondent, Ultra Limited.

2. He avers that he was employed by the Respondent as an Accounts Assistant via an appointment letter dated 28/04/2014 earning a monthly salary of Kshs. 15,000/=. That on or about 15/04/2015, he received a letter from the Respondent terminating his contract immediately with effect from 16/04/2015 and that he had not been paid his salary and salary arrears amounting to Kshs. 91,478/= as at the date of termination. That he was issued with two cheques **No. 000672** of Kshs. 20,000/= and **No. 000183** of Kshs. 67,000/= as part payment of the said salary arrears but only received clearance for cheque No. 000672 upon presenting the same for payment. That cheque No. 000183 of Kshs. 67,000/= was returned unpaid with the bank advising him that the reason was for suspected criminal activity and that as a result of this dishonoured cheque, his account was debited with Kshs. 2,200 being bank charges.

3. He avers that the termination of his employment was illegal and unlawful as it was without any justification or explanation and goes ahead to list the particulars of this illegality including: arbitrarily bringing his contract to an end; failing to pay his benefits as at the date of termination; acting in disregard to employment laws; failing to inform him the reasons of termination; and failing to give him the requisite notice or any notice whatsoever. That as a result, he has suffered loss and damages and thus claims for general and special damages and terminal benefits as follows:-

<i>i) Salary of one month in lieu of notice</i>	<i>Kshs. 15,000.00</i>
<i>ii) Unpaid leave days</i>	<i>Kshs. 15,000.00</i>
<i>iii) Unpaid salary arrears</i>	<i>Kshs. 71,478.00</i>
<i>iv) Charges of unpaid cheque</i>	<i>Kshs. 2,200.00</i>
<i>v) 12 months' salary being damages for wrongful dismissal</i>	<i><u>Kshs. 180,000.00</u></i>

Kshs. 283,678.00

4. The Claimant avers that despite demand and notice of intention to sue, the Respondent has failed/ ignored and/neglected to compensate him and prays for judgment against the Respondent for a declaration that his termination was wrongful and unfair; a sum of Kshs. 283,678/= as enumerated above; costs of the suit plus interest at court rates until payment in full; and any other relief this Court may deem fit to grant.

5. He also filed his Witness Statement dated 31/07/2015 stating that the Respondent company never used to pay their salaries in full despite being entitled to the same and that they would be paid in bits of Kshs. 2,000/=, 1,000/= or even 500/=. That being the Assistant Accountant, he was aware the company was capable of paying the employees their full salaries but which was not done by the Managing Director, Sumeet Walia and that union officials used to visit the company to intervene on the issue of unpaid salaries but in vain.

6. That the said Managing Director had approached him in mid-April and told him that he would be releasing some employees to avoid further accumulation of salary arrears and that his last working day with the Respondent was 16/04/2015. That he continued going to the Respondent to demand his dues until 29/04/2015 and that the MD even sent him Kshs. 1,000/= via mpesa which he said was to help him contact him through calling as he understood he did not have any money.

7. That the issue of the dishonoured cheque tarnished his name because the Managing Director had claimed it was a stolen cheque and this was a criminal activity according to the bank. He states that he was not given a chance to be heard before he was terminated and neither did the Respondent follow the laid down procedure under the law and that he has suffered because he was forced to leave employment without being paid his salary and salary arrears.

8. The Respondent filed its Memorandum of Defence dated 01/10/2015 averring that the Claimant's termination was to take effect on 15/05/2015 but the Claimant opted to leave earlier to take advantage of an available job opportunity. That it served him with a termination notice and made it clear to him that it was not possible to retain his services because of its financial constraints and denies issuing the Claimant with cheque No. 000183 stating that the Claimant should instead be explaining how he was in possession of a cheque that had gone missing when he left employment. It also denies receiving any demand or notice from the Claimant and prays that his claim be dismissed with costs.

9. The Claimant then filed his Reply to the Defence dated 12/10/2015 denying that he opted to leave employment earlier than the termination date to secure a job opportunity and further denied that he was in possession of the missing cheque which was dishonoured by the bank. He prays that the Respondent's defence is dismissed.

10. The Respondent filed its List of Documents together with the Witness Statement dated 25/03/2019 by Sumeet Walia, who states that the Respondent reached a mutual agreement with the Claimant on 30/04/2015 to waive the remaining 15 days of the notice of termination on the grounds that the Claimant was leaving for a job opening.

11. That upon termination, the Claimant received a cheque of Kshs. 20,000/= as part settlement of his dues and that the dues as computed were never approved by the Respondent's Human Resource and Finance heads.

12. That the Claimant went ahead to unilaterally sign the computations which made them invalid and that the Respondent cancelled cheque number 000183 because it was believed to have been lost. She states that it is apparent the Claimant intended to defraud the Respondent since the missing cheque was in his possession and prays that this Court enters judgment in favour of the Respondent as pleaded in its defence

Evidence

13. The Claimant, CW1 testified in Court that he would like to rely on his filed Statement and documents as his evidence. While production of document marked JGM-3 was objected to by the Respondent's advocate, the Court ruled that it was late in the day to object to the production of that document and allowed the documents to remain as filed.

14. CW1 continued to testify that the bank statement of the Respondent showed substantial withdrawal from the bank account such as: in the month of June 2014 date 11, Kshs. 315,375/= was withdrawn; on 18/06/2014, Kshs. 550,000/= was withdrawn; on 15/06/2015, Kshs. 500,000/= was withdrawn; and on 16/06/2015, Kshs. 100,000/= was withdrawn.

15. That the Respondent also had other accounts with CBA and Equity banks and that he was not explained to the selection used to terminate people and neither does he know if other people were terminated. That he was given the two said cheques by the Director and that no complaint was made to the police on purported loss of the cheque said to have been lost/allegedly stolen or that he wanted to defraud the company.

16. In cross-examination, CW1 confirmed that as an accountant, he only did invoices but did not do any payments to third parties or hold any cheques. He confirmed that he wrote the cheque of Kshs. 67,000/= himself and presented it for signing and that the HR was aware of his final dues computation.

17. Further, he confirmed he did not have the Respondent's financial report or call logs to show he has been following up on his payments. In re-examination, he reiterated that the computation form was signed and stamped by Human Resource.

18. RW1, Sumeet Walia stated in Court that he wished to rely on his filed Statement and documents as his evidence and denied that the Claimant was dismissed unfairly. He testified that the computation form marked JGM-3 was neither signed by the HR or him and is therefore not authentic and that he only realised the cheque in question was lost when the bank called him about it and he stopped its payment. That at page 7 of the statement, cheque numbers 182,184 and 185 are dated 27/06/2014 whereas the Claimant left the company in April 2015 and that at page 5, the cheque numbers were 690, 695, 713, 714 dated 18/06/2015.

19. In cross-examination, he stated that the bank had withdrawn credit and they could not borrow and that the suppliers were also refusing to supply. He also confirmed that he had not filed their financial statement and that he never filed a complaint to the police about the said cheque or the Claimant wanting to defraud them with it. In re-examination, he stated that when he gave the Claimant a month's notice, the Claimant responded with a handover letter.

Claimant's Submissions

20. The Claimant submits that in the case of ambiguity such as that in the Respondent's letter dated 15/04/2015 on his termination taking

effect on the next day, the *contra proferentum* rule finds application and that the said termination letter should be interpreted against the Respondent to mean that termination was immediate. That this rule was applied in the case of **Mwangi Ngumo –v- Kenya Institute of Management [2012] eKLR** where the Court opined that:-

“...I do agree with the Claimant that any ambiguities in the contract should be construed against the party who drew the contract and that party is the respondent. This is what has been construed as the contra proferentum rule and which was applied in the case of Horne Coupar v Velletta & Co. 2010 BCSC 483 relied on by the Claimant.”

21. He submitted that the Respondent failed to prove that it was in financial hardship and that an examination of the bank statements it produced revealed it had enough money to pay him since they were large withdrawals. Further, the fact that the Respondent admitted to having bank accounts with CBA and Equity but failed to produce statements therefrom proves that its allegations of financial constraints were a smokescreen.

22. That since the Respondent failed to prove all the elements required under **Section 45(2) of the Employment Act** in terms of valid reasons and fair procedure, the termination was thus unfair and he relies on the Court of appeal case of **Kenafic Industries Limited –v- John Gitonga Njeru [2016] eKLR**.

23. That the procedure to declare him redundant as contained in the Employment Act should have been followed in his case and that the Court in the ***Kenafic case*** set down the said procedure as under **Section 40(1) of the Employment Act**.

24. Further, that the Respondent’s director admitted in cross-examination he did not avail any document to him showing the selection criteria and that none of the two notices contemplated under Section 40(1) of the Act were issued to him. That the ELRC has had a chance to comment on the issue of notices in the case of **Charles Nyangi Nyamohanga –v- Action Aid International [2015] eKLR** stating in paragraph 16 that there is first the one month notification of the reasons and extent of the intended redundancy and secondly, termination notice under the employee’s terms of employment. Further in paragraph 17, that the two notices cannot be issued simultaneously because redundancy ought to be treated with soft gloves.

25. It is submitted by the Claimant that the Respondent attempted to limit its liability after unfairly terminating his services by requiring him to write a letter stating that he was leaving the company free of liability, which was done under duress.

26. That the cheque was issued to him as a commitment to pay him in good faith and that no form of discharge can cure the illegality in a termination of employment.

27. He submits that he is therefore entitled to an award of 12 months’ salary as damages and a month’s salary in lieu of notice. That the fact no complaint was made to the police on the alleged cheque theft leads to a conclusion that the Respondent’s director had issued the disputed cheque and that whether he filled in the amounts in the cheque is irrelevant as the director appended his signature.

28. That he is therefore entitled to salary arrears and the bank charges for the unpaid cheque as prayed in his claim and that since the Respondent admitted in the termination letter that he had outstanding leave days, the same should be paid to him.

Respondent’s Submissions

29. The Respondent submits that the second paragraph of the termination letter clearly indicates that it gave him a month’s notice and further stated that his last day of work would be 15/05/2015 and that the Claimant was very aware of the reasons for terminating his services.

30. That the Claimant did not produce any evidence to show he was forced to write the handover letter wherein he acknowledged that the Respondent had financial constraints or that he was leaving before end of the notice. It cites the case of **Tailors and Textiles Workers Union –v- Summit Fibres Ltd [2018] eKLR** where Rika J dismissed a claim by the claimants stating that since the claimants had been notified by the respondent that the company was in financial constraints, were given sufficient notice and were paid, due process was followed.

31. That in this case, it followed the procedure as per **Sections 40(1) (b) and Section 43(2) of the Employment Act** and fairly terminated the Claimant’s employment and prays that this Court finds so. That Justice Ndolo in dismissing the strict application of the contra proferentum rule in the case of **Eunice Kamau –v- AAR Insurance (K) Limited [2017] eKLR** stated that:-

“Radido J in Mwangi v Kenya Institute of Management [2012] eKLR....I do not think however that this rule provides an escape from the real intention of the parties. Indeed as held in The National Bank of Commerce Ltd v Nabro Ltd & Anor [2008] eKLR 1 EA 432, the contra proferentum rule is only applicable in cases of ambiguity or where other rules of construction have failed.”

32. It submits that the Claimant did not plead duress in his statement of claim or in the particulars thereof, just raised the issue during hearing and admitted that he indeed wrote the handover letter. That this Court should be persuaded by the finding of Onguto J in **Mamta Peeush Mahajan [suing on behalf of the estate of the late Peeush Premal Mahajan] –v- Yashwant Kumari Mahajan [sued personally and as Executrix of the estate and beneficiary of the estate of the late Kriishan Lal Mahajan [2017]** and find that there was no duress while writing the said letter.

33. That the Claimant had nothing to show his salary was in arrears and that he is therefore not entitled to all the reliefs he seeks in his claim. That the Claimant wants to benefit from an illegality by claiming bank charges for a cheque he wrote himself and which had gone missing from its offices. It relies on **Peter Masila Ngengya –v- Meya Agri Traders Limited [2018] eKLR** where Mbaru J dismissed a Claimant’s case after finding he was a party to an illegality.

34. I have examined the evidence and submissions of both Parties. The Claimant was on 28/4/2014 employed by the Respondent as per his Appendix JGM 1. He was terminated on 15/4/2015 vide a letter dated the same date indicating that the effective day of leaving work was 15/5/2015. The reasons assigned to the termination were financial constraints on Respondents part, which would connote a redundancy situation.

35. Section 40 of Employment Act provide that redundancy can be effect after due notice and also upon payment of requisite dues. In case of the Claimant, he was issued the requisite 1 month notice. The Respondent then paid him 20,000/= by cheque. He avers that he was also owed salary arrears of 67,000/= which was never paid.

36. The Respondent have averred that the cheque issued to the Claimant had gone missing. There is no indication that the same was forged. No report had been made to the police about its loss. The Respondent also aver that Appendix JGM 3 indicating Claimant's dues was forged.

37. The document is however signed by the Respondent's employee and stamped with the Respondent's rubber stamp, which Respondent never objected was their stamp.

38. In view of this position and the fact that the Respondent actually issued a cheque of 67,000/= to the Claimant which bounced, I find that the Respondent intended to pay this amount to the Claimant as part of his terminal dues and they did not pay it.

39. Given that there was ample notice given to the Claimant who understood the reason for the termination was redundancy and which position the Claimant knew existed being an accountant and who was owed money in salary arrears, I find that the redundancy was justifiable and procedural.

40. The only remedies the Claimant is entitled to is payment of 67,000/= in bounced cheque, 2200/= in bank charges over the rejected cheque, leave pay for 1 year = 15,000/= plus costs of this suit. The total costs to 84,200/= plus costs and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **3rd day of July, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngethe holding brief for Wainaina for Claimant – Present

Maragia holding brief for Respondent – Present