



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1735 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

DANIEL KAMAU NGAHU.....CLAIMANT

VERSUS

INVESTEQ CAPITAL LIMITED.....RESPONDENT

JUDGMENT

Vide his statement of claim dated 30th September 2014 and filed in Court on 7th October 2014, the claimant avers that his employment was unfairly and unlawfully terminated by the respondent, a registered limited liability company.

His case is that he was employed by the respondent on or about 3rd March, 2010 in the capacity of Head of Credit and Risk at a monthly salary of Kshs.125,000/- which amount was later increased to Kshs.145,000/- following his successful completion of the probation period of three (3) months. The Claimant further contends that his employment was based on the terms and conditions stipulated in his contract of service dated 3rd March 2010.

The Claimant contends that he worked diligently, faithfully and to the Respondent's satisfaction until 28th March 2013 when the Respondent issued him with a letter of suspension. That the respondent subsequently purported to pay the Claimant half of his salary during the period of his suspension, which was in blatant breach of the contractual terms of engagement.

The Claimant avers that the Respondent called him back from suspension on 24th July 2013 on which day his services with the Respondent were wrongfully and unlawfully terminated.

The Claimant avers that his dismissal was unlawful and contrary to his contractual, statutory and constitutional rights for the reason that he was not informed of the outcome of the investigations that led to the termination of his employment without notice contrary to the provision of Sections 35 and 41 of the Employment Act. He further avers that he was denied his right to fair administrative action as provided under Article 47 of the Constitution of Kenya.

It is the Claimant's contention that his termination amounted to unfair dismissal, contrary to the provision of Section 45 of the Employment Act, 2007.

In his Memorandum of Claim the Claimant seeks the following reliefs:

- a) Judgment in the sum of Kshs.2,273,812.50/- consisting of the following:
 - i. Payment of the sum of Kshs.300,000/- being 50% unpaid salary due to the Claimant during the suspension period in the Months of April to July;
 - ii. Payment of one month's salary in lieu of notice, being the sum of Kshs.145,000/-;
 - iii. Payment of accrued annual leave days being the sum of Kshs.88,812.50/-; calculated at 12.25 days;
 - iv. Twelve (12) months' compensation for unfair and unlawful termination of employment being the total sum of

Kshs.1,740,000/-.

- b) A declaration that the Claimant's termination of employment was unfair and unlawful.
- c) The Respondent be ordered to issue the Claimant with a certificate of Service in the form stipulated under the law.
- d) Damages for wrongful, unlawful and unjustified dismissal
- e) Costs of this Claim.

The Respondent in its Memorandum of Reply dated on 27th January 2015 and filed in Court on 13th March 2015 admits having engaged the Claimant from 3rd March 2010.

The Respondent contends that the Claimant's suspension vide its letter dated 28th March, 2013 was in strict compliance with the Claimant's terms of employment and for valid grounds as communicated to the Claimant on various occasions through both verbal and written warnings.

The Respondent further contends that the Claimant's suspension was lawful to pave way for investigations on fraudulent transactions that occasioned the Respondent loss. Further, that the Claimant's eventual termination was lawful and was done as per the provisions of his employment terms.

The Respondent avers that during the time of his suspension the Claimant was paid all his dues as provided under his contract of employment and that at the point of separation all the dues owing to him were duly paid.

In conclusion the Respondent contends that the instant Claim is bad in law and that the same ought to be dismissed with costs.

The matter was scheduled for hearing on 3rd April 2019. The Court however directed that the matter be disposed of by way of written submissions with the consent of the parties.

Submissions by the Parties

It is submitted on behalf of the Claimant that his termination from the Respondent's employment was wrongful, unfair and unlawful as he was neither informed of the reasons for termination nor given an opportunity to defend himself on any wrongdoing prior to his termination. The Claimant further submitted that his termination was contrary to the provisions of Sections 41, 43 and 45 of the Employment Act, 2007. To fortify this argument the Claimant cited and relied on the Authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where the Court held as follows:

“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

The Claimant contends that the termination of his services was in complete contravention of Article 7 of ILO Convention 158, concerning termination of employment. Further that there was no valid reason to terminate his services and that the Respondent failed to follow the rules of natural justice. To fortify this argument the Claimant relied on the cases on **Alphonse Machanga Vs Operation 680 Limited (2013) eKLR**, **Fred A. Odhiambo Vs Attorney General & Another (2013) eKLR** and **Paul Mwaura Mbugua Vs Kagwe Tea Factory Ltd and Another (2012) eKLR**.

The Claimant further contends that Section 47(5) of the Employment

Act has not been satisfied as the burden of proof on the employer has not been discharged and that the purported termination by the Respondent was without any justifiable reason and as such is unfair and unprocedural.

The Claimant submits that he is entitled to the reliefs sought in his

Memorandum of Claim. The Claimant contends that he is entitled to payment of his withheld half salary during suspension as he was never subjected to any disciplinary action. He relied on the Court's findings in the case of **Paul Ngeno Vs Pyrethrum Board of Kenya Ltd (2013) eKLR** which upheld an earlier decision in **Grace Gacheri Muriithi Vs Kenya Literature Bureau (2012) eKLR** to fortify this position.

The Claimant further cited and relied on the Court findings in the cases of **Joseph Mumali Wanga Vs Blessed T.C World Class Spares (2018) eKLR**, **Jones Yoya Vs Dup Investments Limited (2017) eKLR** and **Patrick Njuguna Kariuki Vs Del Monte (K) Limited (2012) eKLR**.

The Claimant contends that he is entitled to be issued with a Certificate of Service by dint of Section 51 of the Employment Act, 2007. To buttress this position the Claimant relied on the Authority of **Angela Wokabi Muoki Vs Tribe Hotel Limited (2016) eKLR**.

In conclusion the Claimant urged this Honourable Court to allow the Claim as drawn.

The Respondent on the other hand failed to file its written submissions.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited, the following are the issues for determination:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

Fair Termination

Section 41 of the Employment Act provides for the procedure for termination while Section 43 of the Employment Act provides that the employer must prove valid reason.

The Law

The law relating to fair termination is contained in Section 41, 43 and 45(2) of the Employment Act.

The Claimant submitted that the termination of his service was unfair as the Respondent failed to give any notice prior to the termination and neither was he invited for any disciplinary hearing.

The Respondent on the other hand in its Reply to the Claim stated that the Claimant had been issued with several warnings which included verbal and written warnings prior to his termination. The Respondent however failed to avail any evidence in terms of warning letters or disciplinary meeting minutes to substantiate this assertion. Similarly, the Respondent failed to call any witness to ascertain this position.

The statutory burden of proof for unfair termination of employment or wrongful dismissal is found in Section 47(5) of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

An employee therefore has the burden of proving that an unfair termination of employment has occurred.

As intimated above, the respondent did not submit any evidence to prove that there was a disciplinary hearing before the claimant's employment was terminated. The memorandum of reply generally refers to compliance with the claimant's terms of employment and valid grounds for both the suspension and subsequent dismissal. At paragraph 6 of the reply the respondent avers that the claimant's name featured in investigations by both the respondent and the Kenya Police but did it not file any bundle of documents in support of its claim. No disciplinary hearing is referred to in the reply.

In the case of *Walter Ogal Anuro -V- Teachers Service Commission (2013) eKLR* where the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

Further in the authority of *Francis Mbugua Boro -V- Smartchip Dynamics Ltd (2017) eKLR* where it was held:

"...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair."

The respondent thus failed to discharge its burden to prove valid reason for termination or compliance with Section 41 of the Act in respect of procedural fairness, with the result that both the suspension and summary dismissal of the claimant were unfair in terms of Section 45(2) and 45(4)(b). I thus find and declare the suspension and subsequent dismissing of the claimant unfair.

Whether the Claimant is entitled to the reliefs sought

In the absence of any evidence adduced by the Respondent to rebut

the averments by the Claimant, I find that the Claimant is entitled to the following reliefs:-

- i. Payment of one month's salary in lieu of notice, being the sum of Kshs.145,000/-

ii. Payment of accrued annual leave days, being the sum of Kshs.88,812.50/- being 12.25 days.

I further award the claimant 5 months' salary as compensation for unfair termination taking into account all the circumstances of the case including the length of service, the failure of the respondent to comply with fair procedure and the fact that he was not paid any terminal dues.

The claimant is further entitled to the salary withheld during suspension as his terms of employment did not provide for either suspension or withholding of salary during suspension.

Orders

In the final analysis I declare both the suspension and subsequent dismissal of the claimant unfair and award him Kshs.1,258,813 made up as follows –

1. Kshs.300,000 being 50% salary withheld during suspension.
2. Kshs.145,000 being one month's salary in lieu of notice.
3. Kshs.88,813 being pay in lieu of 12.25 days accrued leave.
4. Kshs.725,000 being 5 months' salary as compensation for unfair termination.

Total = Kshs.1,258,813.00/=

5. Certificate of service.
6. Costs.
7. Interest from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE