



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 695 OF 2015

STEPHEN KIMANI MUTHONI CLAIMANT

VERSUS

THIKA COFFEE LIMITED RESPONDENT

JUDGMENT

1. The claimant brought this suit on 28/4/2015 claiming terminal dues plus compensation for unfair termination of his employment contract by the respondent on 18/2/2013. He alleged that the reason cited for the termination was invalid and he was not accorded an opportunity to defend himself before the abrupt termination. He therefore prayed for Kshs.1,128,400 made of accrued leave, salary in lieu of notice plus compensatory damages.

2. The respondent denied the alleged unfair termination and averred that the termination of the claimant's services was done for a valid reason and after being accorded a chance to defend himself in writing. She further counter claimed against the claimant the sum of Kshs.243,832.21 being outstanding loan balance plus Kshs.3,079,470 being the loss in coffee sales due to the claimant's poor performance of his duty.

3. In his answer to the defence and counterclaim, the claimant denied that he was serving in the position of "cherry in charge" and contended that his position was Field Officer. He further denied responsibility for the alleged loss in coffee sales and put the respondent to strict proof.

4. The issues arising from the pleadings herein are whether the termination of the claimant's contract of service was unfair and whether the reliefs sought by both parties should be granted. In answer thereto, both parties tendered evidence and filed written submissions.

Claimant's case

5. The claimant testified as CW1. He adopted his written statement and produced as exhibits the documents annexed to his pleadings. In brief, he stated that he was employed by the respondent as Audit Assistant on 1/5/2003 and rose through the ranks to become Field Officer earning Kshs.80,600 per month. He relied on the letter dated 3/10/2012 to support the said last deployment and appointment.

6. He further stated that he served with dedication and loyalty despite lack of clear job description (JD) until 18/2/2013 when he was served with termination letter accusing him of misconduct and poor performance. He denied the alleged misconduct and poor performance and contended that no performance appraisal or review was done before the termination. He further stated that he was not accorded any hearing before the dismissal contrary to Section 41 of the Employment Act nor was he served with prior notice. He also contended that the termination was not in accordance with justice and equity. He therefore urged the court to grant him the reliefs sought plus certificate of service.

7. In cross examination, he admitted that he was served with warning letter dated 1/9/2011, and another letter dated 1/3/2010. Thereafter he was promoted and commended for good performance by the letter dated 3/10/2012 which also re-deployed him to the position of field officer. He further admitted that he was served with letter dated 20/12/2012 and show cause letter 21/2/2013 from the MD and responded by email using the official address which contended that he no longer had any access.

8. He contended that as Field Officer, his role was coffee administration while the role of delivery of coffee from farmers was by procurement officer and receiving clerk, Mrs. Munene Nyaga and Patrick Njeru respectively. He stated that the said two officers were the ones serving Usawa Limited at Mukurweini. He maintained that his JD as Field Officer was yet to be given to him as at the time of the termination despite the letter of re-deployment having promised that he would be provided with the same after reporting to the new station.

9. He admitted that as at the time of the separation he had a loan balance of Kshs.243,382 but he stopped servicing it. He further admitted that in August 2013, he got another job at Windsor Gold Hotel but the same was terminated in September the same year after the respondent

disowned recommendation letter by Mr Bernard Sitati dated 18/2/2013. He admitted that Mr Sitati had served 30 days resignation notice dated 1/2/2013 but maintained that, he had not yet left the company at the time of writing the said recommendation letter. He contended that Mr Sitati had authority to write the said letter and the company had no policy on giving of recommendation letters.

Defence case

10. Mr Titus Machanga testified for the respondent as RW1. He relied on his written statement filed in court on 29/3/2019. He stated that at all material times to this suit he was employed by the respondent and Accounts Assistant. He further stated that the claimant was employed by the respondent as Accounts Assistant and rose through the ranks to become the Cherry Project Account. That as the Cherry in Charge, the claimant was supposed to record the coffee received for pulping and milling and then use the record for paying farmers.

11. RW 1 further stated that by the letter dated 21/1/2013, the claimant was asked to explain the inordinate delay in payment for the delivered coffee but he failed to respond. That thereafter the MD served him with a show cause letter requiring him to explain why disciplinary action should not be taken against him for failure to maintain the farmers records and for absconding his duty but again he failed to respond. Thereafter his services were terminated by letter dated 18/2/2013 citing the reason for the termination as failure to manage proper records of farmers which resulted in the collapse of the cherry project.

12. RW1 further stated that as at the time of the termination, the claimant had a company loan balance of Kshs.243,382.21 accruing interest at 16% per annum. He relied on the claimant's payslip for February 2013 to prove the said loan balance. He further stated that the claimant obtained a recommendation letter from Mr Bernard Sitati who had resigned from employment by letter dated 1/2/2013.

13. In cross examination he admitted that the resignation letter by Bernard Sitati gave termination notice of 30 days from 1/2/2013 and as such he was able to give a proper recommendation letter to the claimant on 18/2/2013. He further admitted that the claimant qualified for a loan of Kshs.180,000 but he was given Kshs.450,000. On being shown the letter dated 3/10/2012, RW1 admitted that the claimant was re-deployed from Finance to serve as Field Officer. He contended that the claimant was the one to collect data of the coffee received for purposes of payment but was not able to prove that by JD. He contended that Mr Munene Nyaga was also a Field Officer. He concluded by maintaining that the claimant addressed emails to his colleagues as the Cherry in Charge.

Claimant's submissions

14. The claimant submitted that the claim for the loan balance in the counter claim was filed 3 years after the separation and as such it is time barred and the court lacks jurisdiction. He relied on section 9.0 of the Employment Act and **Francis Karimi Mugo Vs Nairobi City Water and Sewerage Company Limited [2018]eKLR**.

15. He further submitted that the termination was unfair by dint of section 45 of the Act because the termination was without any valid and fair reason. He contended that he was not the Cherry in Charge but a Field Officer where he was re-deployed by the letter dated 3/10/2012. That after the re-deployment, he was never given any JD as promised and as such his duties were not specified.

16. He further submitted that he was not taken through any performance appraisal before the termination. He relied on **Jane Samba Mukala Vs Ol Tukai Lodge Limited [2013]eKLR** to argue that that employer is under a duty to show how he measured the performance of the employee before terminating his services for poor performance. He maintained that his performance was good and that is why he was promoted and given a recommendation letter.

17. On the other hand, he submitted that the termination did not comply with the procedure provided under section 41 of the Employment Act. He contended that the termination was done before inviting the claimant to make his representations in defence against the alleged poor performance in the presence of another employee of his choice. He relied on **Geoffrey Gikonyo Mathu Vs Intex Construction Company Limited [2017]eKLR** to argue that even where the employer has a valid reason for terminating the employee's services, the termination is unfair if the employee is not given a fair hearing.

18. As regard the reliefs sought, he prayed for 31 days leave days, one month salary in lieu of notice plus 12 months compensation for unfair termination considering the difficulties he has faced in securing another job after the respondent repudiated a lawfully given recommendation letter. He relied on **Kenfreight (EA) Limited Vs Benson K. Nguli [2016]eKLR** to urge the court to award the maximum compensation of 12 months salary. He concluded by asking the court to dismiss the counter claim and award him costs of the suit.

Respondent's submissions

19. The respondent submitted that the termination of the claimant's services was fair within the meaning of section 45 of the Act and argued that the instant case is distinguishable from the authorities cited by the claimant in his submissions. He contended that the reason for the termination was valid namely; insubordination and absconding duty. He further contended that the claimant was not a field officer as alleged but the cherry-in-charge in the accounts department and as such duty bound to do reconciliation of farmers' coffee.

20. She further submitted that the MD requested for reconciliation of the farmers' coffee, the claimant failed to do so. That he further failed to respond to the show cause letter dated 28/1/2013 requiring him to explain his failure to adhere to the registration and documentation process as well as why he had absconded from work on 28/1/2013, but again he failed to respond to the letter. He therefore submitted that in such circumstances, the procedure provided under section 41 of the Act was followed because the claimant was accorded a fair hearing by being invited to respond to the show cause letter which cited the reason for the intended termination.

21. Finally the respondent submitted that an employer has the right to terminate the contract of service by a notice of 28 days under section 35 of the Act or by paying salary in lieu of notice.

22. As regards the reliefs sought, the respondent submitted that the claimant is not entitled to the reliefs sought in suit because he did not prove that the termination was unfair or that he had any accrued leave. He however prayed for counter claim to be allowed as prayed. He contended that the claim for loan balance is founded on a continuing injury or damage, denied that it was time barred under section 90 of the Act. He prayed for interest on top of the loan balance. He relied on Mohammed Abdikadir Vs Sammy Kagiri and another [2016]eKLR to argue that a party who wishes to invoke or rely on the defence of Limitation must specifically plead it in his defence or any subsequent pleading. He further submitted that the authority cited by the claimant is distinguishable from the instant case because in that case the issue was overpayment and not a loan which is accruing interest continuously.

Analysis and determination

23. There is no dispute that the claimant was employed by the respondent in various positions until 18/2/2013 when he was served with a letter terminating his services for a cause. There is also no dispute that as at that time of the separation, the claimant was servicing a loan advanced to him by the employer.

The issues for determination has already been set out herein above and I now proceed to deal with them as hereunder.

Unfair termination

24. Termination of employment is unfair if the same is not grounded on a valid and fair reason related to the employees conduct, capacity and compatibility or based on the employer's operational requirement, and if it was done without following a fair procedure namely according the employee a prior hearing and issuing him/her with a certificate of service. That is the meaning of section 45 of the Employment Act which bars employers from terminating their employee's contract of service unfairly.

25. Under section 47 (5) of the Act, the burden of proving unfair termination lies with the employee who alleges that he was so terminated while the burden of justifying the reason for the termination lies with the employer. The burden of proof shifts to the employer once the employee establishes a prima facie case that the ground cited for the termination was not valid and fair and that he was not accorded a chance to air his representations before the termination.

26. In this case, the claimant has contended that the reason for the termination was invalid and he was not accorded a fair hearing as contemplated under section 41 of the Act. He contended that he was dismissed for poor performance and misconduct in relation to a function which did not fall within his job description as a Field Officer. He contended that by the letter dated 3/10/2012 he was deployed to the position of Field Officer whose JD was to follow upon reporting to the new duty station. However, no JD was ever given to him and going by the termination letter dated 18/4/2013, the claimant had notified the management that his roles as Field Officer had not been specified.

27. On the hand, the claimant contended that he responded via email to all the letters from the management about his inability to prepare the records of received coffee for purposes of payment to the farmers. He contended that the responses were via his official email address which he lost access after the termination. He maintained that the use of email was accepted way of official correspondences.

28. As regards the procedure followed he contended that he was not allowed any oral hearing in the presence of a fellow employee as required by section 41 of the Act and the termination letter never accorded him the right of appeal. Considering the foregoing contentions, the court is satisfied that a prima facie case of unfair termination has been made out which calls for a rebuttal from the employer to prove by evidence that the termination was grounded on a valid and fair reason and that a fair procedure was followed.

Reasons for termination

29. The reason for the termination was captured in the termination letter dated 18/2/2013. The letter is duplicated herein below:

"Mr Stephen Kimani

18th February 2013

RE: NOTICE OF TERMINATION OF EMPLOYMENT

I refer to our various discussions we have held with you regarding your role in this organization.

I have sought clarity from you regarding your functions as the cherry-in-charge and you have informed me on various occasions including in the presence of the chairman, that you are now assigned to the field but under an unspecified role.

As a result of your abdication of responsibilities, the Company's designed cherry programme has fallen into shambles and we have observed that there has been significant disorganization in the registration and management of our records for coffee cherry delivered.

I find that despite having been entrusted with this important role, you have allowed it to fall apart and the resultant crisis that we are facing as a company can be attributed to your apathy and refusal to do your job.

Owing to the foregoing, I have made the decision to terminate your employment with Thika Coffee Mills Limited and have given you notice as required from today's date the 18th February 2013.

Please hand over any functions that you were handling to Mr Maina by 20th of February 2013, and thereafter proceed on terminal leave.

I wish you all the best in your future endeavours.

DAVID WAFULA

MANAGING DIRECTOR”

30. The reasons for the termination discernible from the above letter is apathy and abdication of responsibilities.

This in my view fall within the meaning of poor performance of duty under section 44 (4) (b) of the Employment Act which provides for summary dismissal if:

“(b) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.”

31. The question that begs is whether the employer herein has proved that the claimant was the Cherry-in-Charge and that it was his responsibility under his contract of employment to record coffee received from farmers and to reconcile the records for purposes of company accounts. It is common knowledge that the claimant disputed that the said responsibility was his’ under the contract and maintained that he was a Field Officer whose JD was never given to him after his redeployment by the letter dated 3/10/2012.

32. The respondent has not produced any letter appointing the claimant to the position of the Cherry-in-charge or any other position whose JD specified that he was in charge of cherry and recording and reconciling records of coffee received from the farmers. Consequently I find that the respondent has failed to prove on a balance of probability that the claimant was the cherry-in-charge with role of registration and management of the company records for coffee cherry delivered and that he had refused to do that job or had done it carelessly or improperly to the detriment of the company.

33. The re-deployment letter dated 3/10/2012 stated as follows.

“3rd October 2012 Dear Mr. Kimani

RE: RE-DEPLOYMENT

Further to our meeting this morning, this is to advise you that you have been re-deployed as a Field Officer in the Mt Kenya Region. This is based on the realization of your unique strength and abilities, which we believe would be crucial to the enhancement of the company’s efficiency and profitability.

You will arrange to hand over in writing to the undersigned and report to your new place of work on Monday 8th October 2012.

You will undergo an induction programme after which you shall be furnished with your revised job description. I wish you all the best in your new assignment.

Yours faithfully

THIKA COFFEE MILLS LIMITED”

34. The chairman of the company has not testified herein to deny that the claimant complied with the re-deployment letter by giving him a written handing over report. I therefore dismiss the respondents submissions from the bar that by failing to properly handover to the chairman, the re-deployment of the claimant never took effect.

35. In view of the foregoing therefore, it is clear that the claimant’s re-deployment from office work in the Finance department to Field Officer took effect on 8/10/2012. The other question that begs is whether he underwent induction and thereafter furnished with revised job description. The burden of proving that the induction was done and revised job description furnished to the claimant rests with the respondent. However, no evidence was adduced towards discharging the burden. Consequently I find and hold that the respondent herein has failed to prove on a balance of probability that it was claimant’s responsibility under the contract of employment, more specifically the JD, to organize the registration and management of the company’s records for coffee cherry delivered by farmers and he refused to do the job as alleged in the termination letter dated 18/2/2013.

36. In view of the foregoing, I return that the respondent has failed to prove on a balance of probability that there existed a valid and fair reason to justify the termination of the claimant’s contract of service as required under section 43, 44 and 45 (2) of the Employment Act. Section 43 provides that the reason cited for the termination must have been in existence at the time of the termination and must be the one which caused him to terminate the contract of service of the employee.

37. In this case, it is clear that the claimant notified the MD and the CEO of the respondent that his role as field officer was not specified and they did nothing to make the claimant aware of his role. I therefore find that it was not a valid ground to terminate the claimant for failing to do or improperly doing a role he was not made aware of and even inducted on how to do it. In my view, the change of role from Finance to

Field Officer was a substantive one and even if the claimant accepted the same, it was incumbent upon the employer to ensure that he understood his new role and procedurally appraised periodically within some agreed reasonable targets before terminating his engagement on ground of poor performance or abdicating of duty.

38. In **Jane Samba Mukala Vs Ol Tukai Lodge Limited [2013]eKLR Mbaru J.** held that:

“It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.”

Procedure followed

39. The respondent contended that the claimant was accorded a chance to defend himself via a show cause letter dated 28/1/2013 but failed to respond. The claimant has on the other hand contended that he responded to the letter via email which he cannot retrieve because he has no access to his respondent’s official email address. He further contended that he was not accorded an oral hearing in the presence of another employee as required under section 41 of the Employment Act.

40. I have carefully considered the evidence and the submissions presented and I am of the view that the claimant responded to the show cause letter and other letters written to him by the management on his role in coffee cherry records.

41. The foregoing view is fortified by the termination letter dated 18/2/2013 which confirmed that the claimant had on various occasions told the MD in the presence of the chairman that his role as a field officer had not been specified. Such queries or show cause letter did not however in my view constitute fair hearing within the meaning of section 41 of the Employment Act.

42. Section 41 of the Act requires that before terminating employees contract of service on ground of misconduct poor performance or physical incapacity, the employer must first explain the reason to the employee in a language he understands, and in the presence of a fellow employee or union official of his choice, and thereafter invite the employee and his chosen companion to air their representation which must be considered by the employer before the termination is decided.

The said procedure is mandatory and the employer has no option otherwise the termination is unfair.

43. The foregoing view is fortified by ***Geoffrey Gikonyo Mathu Vs Intex Construction Company Limited [2017]eKLR*** where the Court of Appeal held that:

“But even if the reason advanced by the respondent had been valid, the dismissal herein would stand impugned for want of a hearing in line with section 41 (2) of the Employment Act set out herein above. We note that the appellant was merely asked to provide a written account of the events of the material date to his supervisor Munene, who in turn served him with a letter informing him of the decision to dismiss him summarily. Would the foregoing action amount to a hearing? We think not as the said approach ought to be in addition to and not in substitution to a hearing as envisaged in section 41 of the Employment Act.

.....accordingly, we find and hold that the appellant was not given a fair hearing which would have attached the stamp of legality to the termination of the appellant’s employment for cause.”

44. In view of the finding herein above that the respondent has failed to prove on a balance of probability a valid and fair reasons for terminating the claimant’s employment, and that a fair procedure was followed, it is my duty to return that the termination of the claimant’s contract of service by the letter dated 18/2/2013 was unfair within the meaning of section 45 of the Employment Act.

Reliefs sought

45. In view of the finding that the termination of the claimant’s contract of service was unfair, I award him one month’s salary in lieu of notice plus 6 months gross salary compensation for unfair termination. In awarding the said compensation.

I have considered the fact that the claimant served the respondent for over 10 years, and that he was able to secure another job 7 months after the separation. Finally I have considered the fact that the employer has not proved that the claimant contributed to the termination through misconduct.

46. I further award the claimant 31 leave days as prayed since the respondent has not proved by leave records that either the claimant utilized all his leave days or he encashed the same.

Counter claim

47. The respondent prayed for Kshs.243,382.21 outstanding “company” loan balance plus interest at 18% per annum. The claimant admitted that as at the time of the separation he had a loan balance which he stopped servicing after the termination. He contended that the debt became payable upon termination of his services and as such the debt being founded on employment relationship became time barred after the lapse of 3 years from 18/2/2013 when the separation occurred. The respondent has however contended that the claim was in the nature continuous injury because the same continued to attract interest.

48. After further consideration of the evidence and submissions, I find that the claim for the company loan was separate contract that never was terminated by the end of the employment contract. The loan contract remain binding on the party for the limitation period provided for loan debts under section 4 of the Limitations of Actions Act Cap 22 Laws of Kenya which is 6 years. The counterclaim was filed on 16/8/2016 which was after a period of 31/2 years and therefore the claim is not time barred. Consequently, award the claim for Kshs.243,382.21. The respondent has not proved that she was authorised by the law to change interest on loans advanced by her to her employees and as such I decline to award interest at 18% as prayed.

49. As regards the claim for 3,079,470, I decline to grant the same because the respondent did not prove that the said loss indeed occurred and that the claimant was the one responsible for the same.

Conclusion and disposition

50. I have found that the termination of the claimant's contract of service was unfair both substantively and procedurally. I have further found that the claimant is entitled to the reliefs sought in his suit, and also allowed the respondent counter claim of outstanding company loan balance of Kshs.243,382.21. Consequently I enter judgment for the claimant in the following terms:

Notice	80,600
Compensation	483,600
Leave	80,000
Total	644,800
Less loan	243,382.21
Net payable	401,417.79

The said award is subject to statutory deductions but the claimant will have costs and interest at court rates from the date hereof.

Dated and delivered this 20th September, 2019

ONESMUS O. MAKAU

JUDGE