



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2465 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 28th October, 2019)

THIERRY POUSSARD.....CLAIMANT

-VERSUS-

BRADLEY LIMITED.....RESPONDENT

JUDGEMENT

1. Vide the contract dated 22nd December 2016, the Claimant was offered employment as the Head of Sales and Distribution of the Respondent, on a 3-year contract. He accepted the offer and reported to work on 1st February 2017.

2. He served the Respondent for 8 months when his services were terminated on 14th September 2017. Aggrieved with the decision, the Claimant filed the suit herein on 15th December 2017 seeking the following reliefs:-

- a. THAT the Honourable Court be pleased to declare that the termination of the Claimant by the Respondent was unlawful.*
- b. THAT the Honourable Court be pleased to declare the termination of the Claimant by the Respondent was unfair.*
- c. In the alternative, the Honourable Court be pleased to declare that the termination of the Claimant by the Respondent amounted to wrongful dismissal.*
- d. THAT the Honourable Court be pleased to order that the Respondent do pay to the Claimant 3 months' salary in lieu of notice amounting to KShs. 1,800,000.00.*
- e. THAT the Honourable Court be pleased to order that the Respondent do pay to the Claimant unpaid school fees benefit for 36 months amounting to KShs. 1,440,000.00.*
- f. THAT the Honourable Court be pleased to order that the Respondent do pay the Claimant unpaid travel reimbursement as under clause 26 of the Employment Contract amounting to KShs. 329,175.00.*
- g. THAT the Honourable Court be pleased to award the Claimant general damages for mental anguish amounting to KShs. 5,000,000.00.*
- h. THAT the Honourable Court be pleased to award the Claimant maximum compensation for the wrongful and unlawful termination amounting to KShs. 25,369,175.00.*
- i. The Respondent do issue a Certificate of Service in favour of the Claimant.*
- j. THAT the Honourable Court be pleased to award the Claimant exemplary damages.*
- k. THAT the Honourable Court be pleased to award the Claimant interest on the sums claimed above from the date of filing this Cause in Court.*

3. It is the Claimant's case that he was to be paid a gross salary of Kshs. 600,000.00 and a monthly bonus of Kshs. 100,000.00, payable

quarterly on attainment of agreed KPIs. He avers that he served the Respondent with dedication, determination, commitment, goodwill and in accordance with the terms of his contract.

4. The Claimant avers that on 25th August 2017, he was sent on compulsory leave a day after he returned from his annual leave. He further avers that he was invited for a meeting at the Respondent's offices where he was issued with a termination letter on the grounds of poor performance, gross insubordination and failure to comply with the employment contract and he denies committing the offences.

5. It is the Claimant's position that the termination of his employment was unlawful, unfair and violated clause 28 of the contract, the Employment Act as well as the principles of natural justice.

6. Further, he was not taken through any disciplinary process, issued with any form of warning or informed of the charges against him. He avers that there is a danger of him being unemployable because the Respondent failed to issue him with a certificate of service.

7. The Claimant testified as CW1 and adopted his witness statement dated 11th December 2017. It was his testimony that he worked for the Respondent for 9 months. It was also his testimony that he was paid his salary up to the time he worked. He stated that the flight ticket that he was seeking refund of Kshs. 329,175.00 was in respect of the trip he took to France.

8. During cross-examination, he testified that he was supposed to be issuing the CEO with reports. He admitted that he could not go on leave or be absent without the CEO's approval. It was his testimony that his leave was approved by the Respondent but the leave forms were not given to him. He stated that he was issued with a termination letter but never responded to it. It was his lawyer who wrote to the Respondent. He conceded that he had never received a bonus and that he did not obtain a work permit but contended that the Respondent was supposed to do that for him.

9. During re-examination, it was his testimony that he issued the CEO with WhatsApp reports. It was also his testimony that he was never served with any letters for failing to submit the reports. He maintained that the CEO approved his leave and that the Human Resource was the custodian of the leave documents. It was his testimony that his bonus was to be paid after a year.

10. CW2, Caroline Kiambi, adopted her witness statement dated 11th December 2017. She testified that she was employed by the Respondent as the head of Human Resource in May 2016. It was also her testimony that the Claimant's performance was good and that his leave was approved by the Human Resource and the CEO.

11. Upon cross-examination, it was her testimony that the final approval of the Claimant's leave was by the CEO but conceded that she did not have the form in Court. She also testified that she had sued the Respondent.

12. The Respondent filed a Reply to the Claim seeking to have the claim dismissed with costs, for want of merit or any basis in law.

13. The Respondent contends that the Claimant's termination was lawful. They aver that the Claimant was dismissed for gross insubordination, inability to perform the duties of his position and absenteeism from office without any reasonable explanation. In particular, they aver that in August 2017, the Claimant was absent from work for 16 days for purportedly being on leave.

14. Further that he failed to write the required reports, refused to respond to the Respondent's communication, failed to perform his duties as stipulated in the contract, gave misleading information, was reckless and failed to submit the relevant documents such as his work permit, which was essential for confirming his employment status.

15. The Respondent avers that despite several reminders, the Claimant failed to discharge his duties thus necessitating his dismissal. They contend that the discussions with the Claimant's advocates were on a without prejudice basis hence cannot be used to grant the prayers sought. It is the Respondent's position that the claim is a mere afterthought and lacks basis in law.

16. RW1, Paul Muchene Kinuthia and the CEO of the Respondent, adopted his witness statement filed on 1st February 2019. He testified that the Claimant never submitted any reports to him as was required. It was also his testimony that the Claimant went on unapproved leave in his absence. He stated that as per the contract, the Claimant was supposed to secure his own work permit. He further testified that the Claimant never issued them with an invoice or documents to indicate that he had a child in school.

17. During cross-examination, he conceded that he never issued the Claimant with warning letters. He testified that the Claimant had applied for his annual leave verbally but he did not approve it. He conceded that no investigation was done. He also conceded that the Claimant was entitled to a 3 months' notice. He admitted that the Claimant issued him with a receipt of the trip to France but it was not reimbursed as it was against company policy.

Submissions by the Parties

18. In his submissions filed on 27th March 2019, the Claimant submits that the termination of his employment was unfair, wrongful and unlawful as there were no sufficient reasons to warrant his termination. He submitted that he was a diligent employee who submitted his reports and that the Respondent failed to adduce evidence to prove that he had failed to submit reports. As such, the Respondent has failed to prove the reason for termination as required under Section 43 of the Employment Act.

19. The Claimant submits that due process as stipulated in Section 41 of the Act was not followed. He was not accorded an opportunity to defend himself neither were the charges communicated or the reasons for his termination explained to him. He relies on the cases of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR, John Rioba Maugo vs. Riley Falcon Security Services Limited**

[2016] eKLR, Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR, Daniel Kiplagat Kipkeibut vs. Smep Deposit Taking Micro Finance Limited [2016] eKLR and Gilbert Mareira Makori vs. Equity Bank Limited [2016] eKLR.

20. The Claimant submits that he is entitled to the reliefs sought as he has proved that his employment was unlawfully terminated. He submits that he is entitled to payment for the remainder of the contract period and relies on the case of **Emmanuel Joshua Wafula vs. Chairman BOG Nawanga Girls High School & Another [2017] eKLR.**

21. He also submits that he is entitled to 3 months' notice pay as his employment was terminated without the issuance of the notice or notice pay. He submits that he is entitled to reimbursement of his ticket fare and school fees benefit as stipulated in clause 18 of his contract. The Claimant submits that costs should be awarded to him and relies on the case of **Jasbir Singh Rai vs. Tarlochan Singh Rai & 4 Others [2014] eKLR.**

22. In their submissions filed on 9th April 2019, the Respondent submits that the Claimant performed his duties poorly and absconded duty without reason which was very prejudicial to the Respondent's business. This justified his summary dismissal. The Respondent relies on the cases of **Judicial Service Commission vs. Gladys Boss Shollei [2015] eKLR, Banking Insurance & Finance Union (K) vs. Barclays Bank of Kenya Limited [2014] eKLR and CMC Aviation Limited vs. Mohamed Noor [2015] eKLR.**

23. The Respondent also submits that the Claimant failed to procure a work permit, a fact, which he conceded during trial. This made his contract unenforceable *ab initio*, as such, the Court cannot enforce an illegal contract. They rely on the case of **Kenya Airways Limited vs. Satwant Singh Flora [2013] eKLR.**

24. The Respondent further submits that the Claimant was still on probation and never submitted any evidence proving that his employment was ever confirmed hence the provisions of section 41 still applied to the Claimant. Lastly, the Respondent submits that the claim herein has no merit on the available facts and applicable law hence should be dismissed.

25. I have examined all the evidence and submissions submitted before this Court by both Parties.

26. From the termination letter dated 14th September, the Claimant was terminated due to his poor performance, gross insubordination and failure to comply with the employment contract.

27. Several instances were cited in the said letter to point to poor performance, insubordination and failure to comply with the employment contract.

28. It is the Claimant's case that he had never been subjected to any adverse performance ratings and that he was terminated without any valid reasons.

29. The Respondents on the other hand have indicated that they had valid reasons to terminate the services of the claimant in that he had absented himself from duty for 16 days in August 2017 purportedly on leave.

30. The Claimant avers that he proceeded for his annual leave after he was cleared. The Respondent's RW1 testified in Court and in cross-examination, that the Claimant had applied for his annual leave verbally and he was informed he could not go on leave. The Claimant then sent an email to the company indicating that he was on leave.

31. The Claimant had been given an employment contract, which showed that he was entitled to 21 days annual leave. The leave was to be taken at the time convenient to the company.

32. There is however no indication that the Claimant applied for leave, which was then approved. It means therefore that the Claimant proceeded to take an unproved leave which is tantamount to insubordination or absconding duty and he was thereafter summarily dismissed vide a letter dated 14.9.2017.

33. As to poor performance, there is no indication that the Claimant was subjected to a performance review and his performance was found wanting.

34. It is therefore my finding that all the reasons cited for summarily dismissing the Claimant were not proved and are not valid.

35. As to due process, the process envisaged is found at Section 41 of Employment Act which states as follows:-

1) "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

36. There is no indication that the Claimant was taken through this process.

37. Under Section 45(2) of Employment Act:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

38. In case of the Claimant, therefore I find his dismissal was unfair for want of due process and valid reasons as stated in the dismissal letter.

Remedies

39. The Claimant sought various remedies against the Respondent. From the employment contract, the contract would have been terminated after issuance of 3 months' notice. I therefore find for Claimant and award him as follows:-

1. 3 months' salary as notice = 3 x 600,000= 1,800,000/=.

2. I also award Claimant compensation equivalent to 6 months' salary for the unfair termination = 6 x 600,000= 3,600,000/=.

3. Claim for school fees reimbursement and air ticket not proved. No school fees receipts were produced in Court and neither were the air tickets to prove travel produced in Court.

4. The Claimant is also awarded 28 months' salary for the remaining part of the contract this being a fixed term contract = 16,800,000/=

Total awarded 22,200,000/=

Less statutory deductions

5. The Claimant be supplied with a Certificate of Service.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 28th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ms. Githinji for the Claimant – Present

Respondent – Absent