



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 348 OF 2018

BETWEEN

JOHN KAWA ILUME.....CLAIMANT

VERSUS

CLARKSON INSURANCE BROKERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Birir & Company Advocates for the Claimant

Musyoka Murambi & Associates, Advocates for the Respondent

JUDGMENT

1. In his Amended Statement of Claim filed on 7th June 2018, the Claimant states, he was employed by the Respondent as its Branch Manager at Mombasa. He initially worked as an Assistant Branch Manager at Malindi between 18th February 2016 and 28th October 2016. He was transferred on the latter date to Mombasa as the acting Manager. On 30th August 2017, he became the Branch Manager Mombasa.

2. He was summoned to Respondent's Head Office at Nairobi on 18th May 2018. He was asked to resign by the Managing Director. No reason was given to the Claimant, to justify resignation. The Claimant declined resignation. The Respondent sent an e-mail to the Claimant introducing one Ephraim Mutua as the Mombasa Branch Manager. There was no notice of the changes issued upon the Claimant. No notice of transfer or termination issued. On 28th May 2018, the Respondent terminated Claimant's contract. There was no hearing. His last salary was a rate of Kshs. 100,000 a month.

3. The Claimant prays the Court to grant Judgment in his favour on the following terms:-

- a) Declaration that termination was unfair.
- b) 1 month salary in lieu of notice at Kshs. 100,000.
- c) Annual leave over a period of 2 years at Kshs. 200,000.
- d) Compensation for illegal and unlawful termination at Kshs. 18,000,000.
- e) Severance pay.
- f) Costs.
- g) Interest.

4. The Respondent filed Reply to Amended Claim, on 19th February 2019. Its position is that the Claimant was not its Mombasa Branch Manager. His terms were not permanent and pensionable. It is true that he declined resignation. He was given proper notice and chance to improve. He failed to improve. He was reckless and disloyal. He failed to meet production budget; failed to meet debt level; failed to send mandatory Branch Reports to his Supervisor; and presided over low customer satisfaction at the Branch. He was issued proper notice of termination. The Respondent prays that the Claim is dismissed with costs to the Respondent.

5. The Claimant gave evidence and rested his Claim, on 2nd July 2019. The Respondent failed to call evidence or cross-examine the Claimant, and hearing was marked as closed, on 2nd July 2019. The dispute was last mentioned in Court on 20th September 2019, when Parties confirmed the filing of their Final Arguments.

6. The Claimant adopted in his oral evidence, his Witness Statement on record; Documents filed on 8th May 2018; and Supplementary Documents filed on 14th June 2019. His first posting was Malindi, where he served as Assistant Branch Manager effective 18th February 2016. He was appointed Branch Manager Mombasa through a letter dated 30th August 2017. Effective date for his appointment at Mombasa was 1st September 2017. His salary was reviewed to Kshs. 100,000 basic salary, transport allowance of Kshs. 20,000, and airtime allowance of Kshs. 4,000. He received a gross monthly salary of Kshs. 124,000. The letters of appointment are exhibited.

7. He received an e-mail and a WhatsApp message from the Human Resource Manager, on 22nd May 2018, asking him to report to the Head Office. He travelled to Nairobi where he met the Managing Director. The Managing Director told the Claimant he had decided to overhaul the Mombasa Branch. He asked the Claimant to write a letter of resignation. The Claimant was perplexed and did not oblige. The Human Resource Manager and the Accountant took the Claimant aside to the Boardroom and tried to convince him to resign. He did not resign. On his way back to Mombasa, he saw an e-mail disclosing there was already a new Manager at Mombasa. The Claimant was asked to hand over. He replied to the Managing Director saying he would not hand over. He found the new Manager at Mombasa. The Claimant asked the new man to leave, because the Claimant had not resigned. On 30th May 2018, the Claimant received a letter of termination through e-mail. It was backdated 28th May 2018.

8. The Claimant did not fail to meet production targets. Co-Employees had been sacked, and the Claimant was for some time, serving the Branch singly. He did not at any time fail to file Reports. He did not fail to provide the Branch with leadership. He had risen through the ranks by his own effort. There were no complaints against the Claimant all through. He intended to work until retirement. He was 46 years old at the time he gave evidence. He was not able to get alternative employment, as the insurance industry was aware of the dispute between him and the Respondent. He never went on annual leave. He was not heard and did not have a notice of termination.

The Court Finds:-

9. First the Court must reject the position taken by the Respondent, at paragraph 3 of its Reply to the Amended Claim, which is that the Claimant was not Respondent's Branch Manager at Mombasa. The Claimant exhibited a letter of appointment dated 15th February 2016, appointing him as the Assistant Branch Manager Malindi, and exhibited also, a letter dated 26th October 2016, appointing him as the acting Branch Manager Mombasa. The last letter dated 30th August 2017, confirmed the Claimant as the Branch Manager Mombasa. The authenticity of these letters has not been questioned. The Court is satisfied the Claimant worked as Branch Manager Mombasa.

10. The issues in dispute are as crafted by the Claimant, in his list filed in Court on 13th November 2018: was termination unfair; and is the Claimant entitled to the remedies sought?

11. The letter of termination dated 28th May 2018, gave 5 reasons justifying termination: -

- Failure to meet production budget.
- Failure to manage debt.
- Failure to file Mandatory Branch Reports with the Supervisor.
- General lack of leadership at the Branch.
- Low customer satisfaction levels.

12. The Claimant was not presented with specifics of these generalized accusations. There were no production targets placed before the Court, which the Claimant failed to meet. It is not stated what debt the Claimant failed to manage, within a specified period. No records were filed by the Respondent showing that the Claimant did not achieve production targets or that he failed to manage debt levels at Mombasa. A document filed by the Claimant titled 'Review and Evaluation of Strategic Plan 2014-2018' suggests the entire Clarkson Insurance Brokers Limited, performed poorly on account of failure to achieve revenue targets and on account of increase in operational expenses. Failure involved more than just the Mombasa Branch. The role played by the Claimant in this overall failure, was not made clear by the Respondent in this Claim.

13. The Claimant told the Court that he always forwarded monthly Reports to his Supervisor. There is no evidence adduced by the Respondent to contradict the Claimant on this. The last 2 charges against the Claimant contained in the letter of termination are generalized accusations which were not validated. What is general lack of general leadership? How is one to show he does not generally lack general leadership? What is low customer satisfaction, and where is the evidence from customers? These are generalized accusations which the Respondent did not establish as is required under Section 43 of the Employment Act.

14. The Claimant was employed on 18th February 2016. His contract stipulated that it could be terminated summarily, if the Claimant failed to meet 85% of his performance targets. In October of the same year, he was moved to Mombasa and placed at the helm of the Branch in an acting capacity. In August of the following year 2017, he was confirmed as the Branch Manager. This would not have been done if the

Claimant had failed to meet whatever targets had been set for him. His salary was raised.

15. It boggles the mind why after this climb-up, the Claimant would about 7 months later, in April 2018, be placed on Performance Improvement Plan [PIP], for a period of 60 days. The letter from the Respondent communicating PIP to the Claimant is dated 26th April 2018. He was advised there would be a review on 30th June 2018. But the letter of termination issued on 28th May 2018, even before the PIP period ended.

16. The Claimant was called to Nairobi Head Office. He did not have the charges against him. The Managing Director attempted to compel the Claimant to resign. Other Officers at the Head Office were enlisted to aid in the endeavour at having the Claimant accede to forced resignation. The Claimant declined. Even before the Claimant could return to Mombasa, a replacement Manager was put in office.

17. The Respondent did not act fairly. No reason was established, justifying termination under Sections 43, 45 and 47[5] of the Employment Act 2007. Procedure was manifestly unfair under Sections 41 and 45 of the Act.

18. The Claimant had worked for 2 years. He told the Court he was 45 years at the time of termination and expected to work until retirement. He did not tell the Court what was the retirement age. He had moved up the corporate ladder, and there is no reason to doubt his expectation of service with the Respondent, for many more years. He did not leave employment for any reason attributable to his discipline or performance. ***The Court awards him equivalent of 7 months' salary in compensation for unfair termination, at his gross monthly rate amounting to Kshs. 868,000.***

19. His assessment of compensation at a staggering amount of Kshs. 18 million has no foundation or precedence, and is declined.

20. He did not leave employment on account of redundancy. Severance pay under Section 40 of the Employment Act is not grantable.

21. ***Notice is merited and granted at his monthly remuneration of Kshs. 124,000.***

22. His contract entitled him 21 days of annual leave. There is no evidence from the Respondent showing that the Claimant utilized his annual leave, or was paid in lieu of utilization. ***He is allowed 42 days of annual leave over the period of service, at Kshs. 200,307.***

23. ***Costs to the Claimant.***

24. ***Interest allowed at 14% per annum from the date of Judgment till payment is completed.***

IN SUM, IT IS ORDERED:-

a) It is declared that termination was unfair.

b) The Respondent shall pay to the Claimant: equivalent of 7 months' salary in compensation for unfair termination at Kshs. 868,000; notice at Kshs. 124,000; and annual leave at Kshs. 200,307- total Kshs. 1,192,307.

c) Costs to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment, till payment is completed.

Dated and delivered at Mombasa this 25th day of October, 2019.

James Rika

Judge