



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 318 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th October, 2019)

GEORGE MURIITHI MUTHEE.....CLAIMANT

VERSUS

C. MUTURI KIGANO T/A

KIGANO & ASSOCIATES ADVOCATES.....RESPONDENT

JUDGMENT

1. The Claimant filed this Claim on 2nd March 2016 challenging the termination of his employment by the Respondent. He is seeking the following reliefs:-

a. KShs. 74,000.00 plus interest thereon from the date of filing until payment in full as computed below:-

i. 1 months' salary in lieu of notice of termination of KShs. 60,000.00.

ii. Salary in lieu of accrued leave for 4 months worked (4x1.75/30 x 60,000) amounting to KShs. 14,000.00.

b. General damages for unfair and/or wrongful termination of employment plus interest.

c. Costs plus interest thereon.

2. It is the Claimant's case that he was employed by the Respondent on 1st October 2015, as an associate advocate earning a gross monthly salary of KShs. 60,000.00. Initially he was on probation but his contract was made permanent after the lapse of 3 months. He avers that his letter of appointment dated 14th October 2015 expressly stipulated as follows:-

a. That the Claimant's gross monthly salary would be KShs. 60,000.00.

b. That termination after probation would be by 30 days' notice in writing by either party or payment of one months' salary in lieu thereof by the party terminating the employment.

3. It is his case that he discharged his duties diligently, professionally and always acted in the best interests of the Respondent. However, the Respondent terminated his employment on 25th January 2016 without the issuance of a notice or payment of salary in lieu of notice. As such, the termination of his employment was unfair, illegal and wrongful.

4. The Claimant led evidence to the effect that although the reason for his termination was unsatisfactory performance, he was never issued with warning letters regarding the same. In cross examination, it was his testimony that when the Respondent asked about the impugned service, he admitted to taking the documents but not as a different advocate.

5. He denied being the author of the memo at page 8 and the fee note at page 11 of the Respondent's bundle of documents. It was also his testimony that he accepted service from Mr. Chaula because he was holding brief for another advocate. He denied getting instructions on the matter.

6. The Respondent filed a Response on 22nd March 2016 which was later amended on 23rd February 2018. The Respondent avers that on 16th October 2015, the Claimant accepted service of court documents on the Respondent's behalf in his own capacity rather than in the Respondent's name. He was issued with a notice to show cause dated 19th October 2015 detailing the incident and demanding an explanation of the same. The Claimant admitted to handling the matter and to forwarding briefs to other law firms.
7. It is the Respondent's case that further investigations were conducted and it was discovered that there were other letters and fee notes on other matters in the name of the law firm, which aggravated the issue. In light of these breaches, the Respondent lost confidence in the Claimant hence terminated his employment. The Respondent avers that the termination was justified as the breaches constituted fundamental repudiation of the terms of the contract of employment.
8. The Claimant filed his rejoinder denying the allegations set out in the Statement of Response while reiterating the contents of his Statement of Claim.
9. During cross examination, RW1 Clement Muturi Kigaro, admitted to not subjecting the Claimant to a performance review yet his employment was terminated based on unsatisfactory performance. His explanation was that he had just finished probation. He admitted to not giving the Claimant any notice before dismissing him from employment.
10. It was also his testimony that when the Claimant responded to the show cause letter, he maintained that the Muriithi referred to in the letter dated 3rd November 2016 was not the same as the Claimant.
11. On re-examination, he stated that at the time of the Claimant's termination, his probation period was not yet over.

Submissions by the Parties

12. The Claimant filed his submissions on 9th July 2019. The Respondent's submissions are not on record.
13. It is the Claimant's submissions that the issue of his misconduct was not raised in his termination letter. It is his view that pursuant to section 41 of the Employment Act 2007 and the holdings in Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR and Richard Otieno Mbewa vs. Milly Glass Works Limited [2014] eKLR, unsatisfactory performance does not warrant summary dismissal. This is because, pursuant to Section 43 (1) of the Act, the Respondent had the burden of proving the particulars of the unsatisfactory performance which he failed to. As such, the reasons for termination were not proved.
14. He also submits that he is entitled to the reliefs sought as the termination of his employment was unfair, he never took his leave days for the period he was in employment, and he was not issued with a termination notice.
15. I have examined all the evidence and submissions of both Parties filed herein. The Claimant was dismissed by his employer on account of poor performance which the Respondent attributed to his action of doing work for another law firm whilst employed by the Respondent. This, the Claimant did not deny.
16. The Respondent however admitted that they failed to accord the Claimant a hearing before terminating him which is in breach of Section 41 of Employment Act 2007 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”.

17. In view of this position, it is my finding that though the Respondent had some reasons to subject the Claimant to a disciplinary process, they failed to follow due process by not allowing him a chance to defend himself.

18. Section 45(2) of Employment Act 2007 provides as follows:-

(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”.***

19. In view of this position of the law, I find the Claimant's termination unfair. In terms of remedies, I find for Claimant and award him as follows:-

1. 1 Months' salary in lieu of notice = 60,000/=

2. 3 months' salary as compensation for the unfair termination = 60,000 x 3 = 180,000/=

Total = 240,000/=

(3) *The Claimant is entitled to costs of this suit plus interest at Court rates with effect from the date of this Judgement.*

Dated and delivered in open Court this 14th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Weru for Respondent – Present

Omwanza holding brief Joe Mwanthi for Claimant - Present