



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1353 OF 2016

PAUL OTIENO NDEGE HONGO.....CLAIMANT

-VERSUS-

AIRTEL NETWORKS KENYA LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 13.07.2016 through Clive Mshweshwe Advocates. He prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was un-procedural, wrongful, unfair and unlawful.
- b. The claimant be reinstated in his employment with the respondent in the capacity of Credit Control Manager in the Finance Division without loss of employment benefits, seniority, or service.
- c. All salaries and allowances, collection incentives and emoluments which the claimant has lost as result of the unfair termination should be paid back to him in full from the date of dismissal to the date of the judgment.
- d. In alternative to (a) and (b) damages in the sum of Kshs.5, 065,500.00 for unfair and unlawful termination of the claimant's employment by the respondent equivalent to 12 months gross salary of the claimant at Kshs.422, 125.00.
- e. In alternative to (a) and (b) and further to (c) above, severance pay for each completed year of service amounting to Kshs.1, 055, 312.50 and calculated at 15 days' salary for every year worked (5 years).
- f. Interest on the monies payable under items (b) (c) (d) and (e) above at court rates of 12 % per annum from the date of judgment till full payment.
- g. Costs of the suit together with interest thereon at court rates of 12 % per annum from the date of judgment till full payment.
- h. Certificate of service.
- i. Any other relief the Honourable Court deems fit.

The respondent is the successor to Celtel Kenya Ltd which employed the claimant on 06.08.2010. The claimant rose from the position of Finance Specialist to the position of Credit Control Manager in the Finance Division. He worked up to 11.12.2015 and the last gross monthly pay was Kshs.422, 125.00.

On 21.01.2015 the claimant was suspended on full pay and on account of facilitating investigations into alleged irregularities of an E1 connection and usage for the Capwell Two Capwell Ltd Account. The claimant attended the disciplinary hearing. He was subsequently terminated from employment. The letter of termination dated 11.12.2015 stated that the respondent had found that:

- a. The claimant failed to follow procedure in granting a waiver to Capwell Two Capwell as there was no records of the granted waiver signed by the authorising person as requested so that the waiver was granted irregularly.

b. In granting the waiver irregularly the claimant gained as an individual since he was a director of Capwell Two Capwell and which amounted to a conflict of interest.

The termination was effective from 11.12.2015 with payment of salary to that date; accrued leave days to that date; 2 months' pay in lieu of notice; and prorate leave as at 30.11.2015.

The claimant's case is that the termination was unfair.

The respondent filed a statement of response on 11.10.2016 through Hamilton Harrison & Mathews Advocates. The respondent prayed that the claimant's suit is dismissed with costs.

There is no dispute that the respondent employed the claimant.

To answer the **2nd issue** for determination the Court returns that the procedure and reasons for termination were not unfair. The claimant testified that he was a director of Capwell Two Capwell and he gave instructions for the E1 connection in issue to be processed. The bills with respect to that connection were never received and respondent lost revenues with respect to that connection. The vetting for the connection had been done by the staff working under the claimant and upon the claimant's instructions. In his own evidence the claimant admitted that his conduct was in breach of the respondent's ethical code that bound him. The Court returns that the claimant failed to disclose his involvement with Capwell Two Capwell as a director and it is clear that his involvement in the E1 connection in issue amounted to a conflict of interest. The reason for termination was valid as per section 43 of the Employment Act, 2007.

The claimant testified that he was fully paid throughout the suspension period, he was invited for disciplinary hearing, he was heard and he was subsequently terminated with full payment as promised in the termination letter. The Court finds that the procedure was fair as per section 41 of the Act requiring a notice and a hearing. The claimant lamented that the suspension was longer than the 30 days prescribed in the respondent's policies at clause 3.3 of the Employee Policy Handbook. But the Court finds that with the full pay while on suspension, no manifest injustice has been established in that regard. It is true that suspension was on 21.10.2015 and the disciplinary hearing on 02.12.2015 long after the prescribed 30 days had lapsed but the claimant was fully paid so that he was placed in a position that the contract of service was fully executed by the respondent during the suspension period.

The claimant's prayer for a certificate of service will succeed and on that account each party will bear own costs of the suit. The respondent stated that the certificate would issue subject to clearance but no counterclaim was made in that regard.

In conclusion judgment is hereby entered for the parties for:

- a. The declaration that the termination of the contract of service was not unfair.
- b. The respondent to deliver the claimant's certificate of service in 7 days.
- c. Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 8th November, 2019**.

BYRAM ONGAYA

JUDGE