



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 253 OF 2016

[As consolidated with 254 and 255 of 2016]

(Before Hon. Justice Mathews N. Nduma)

JEREMIAH MAKORE WETENDE.....1ST CLAIMANT

MICHAEL KARANI GAKUYA.....2ND CLAIMANT

JAMES MWANGI MUCHIRI.....3RD CLAIMANT

VERSUS

POPULATION SERVICES KENYA.....1ST RESPONDENT

SENIOR MANAGER, TRADE DEVELOPMENTS,

POPULATION SERVICES KENYA.....2ND RESPONDENT

JUDGMENT

1. The three causes no. 253, 254 and 255 of 2016 were consolidated and heard together firstly by Hon. Maureen Onyango and subsequently by myself.

2. The court shall evaluate the merits of each case separately and arrive at a distinct decision in respect of each claimant in the consolidated judgment.

Jeremiah Makore Wetende – 1st Claimant

3. The claimant filed suit on 2nd September 2016 praying for orders that the claimant's termination of employment was wrongful and unfair. The claimant further prayed for compensation, damages and costs for the alleged termination. Claimant testified as CW1 to the effect that he was employed by Population Services International (PSI) on 4th October 2000. On 22nd October 2013, the operations of the organization were taken over by Population Services Kenya (PS-Kenya), the 1st respondent. The claimant entered into a new contract with the 1st respondent on 1st January 2014. The claimant worked for the respondent for 16 years diligently and rose through the ranks from Motorcycle Sales Representative (MSR) to Trade Development Manager directly answerable to the National Sales Director.

4. That by the year 2015, the claimant surpassed the organization's average performance and was paid individual and team bonuses of Kshs. 97,594. That at the beginning of every year, the claimant conducted a self-appraisal on his performance for the year concluded ending 31st December and would submit to the 2nd respondent for evaluation and grading as per the year's objectives/targets.

5. In the year 2015, according to assessment by the 2nd respondent the claimant attained performance average of 3.4 against the average organization performance of 3.2.

6. To the claimant's surprise, the claimant received an internal memo dated 31st March 2016 from the Human resource Director informing the claimant that due to his poor performance during the period January to December 2015, which fell below the company average of 3.2, he was not eligible for a salary increment.

7. On 7th April 2016, claimant received another memo from Senior Manager, National Sales citing the claimant for poor performance in the

period between January to December 2015. Claimant was asked to show cause why serious disciplinary action should not be taken against him.

8. The claimant responded to the show cause letter on 13th April 2016. The claimant was invited to a disciplinary hearing on 30th May 2016. The claimant's employment was terminated on 7th June 2016 by a letter written by the Chief Executive Officer. The claimant was paid one month salary in lieu of notice and an ex-gratia payment of two months pay for the two years completed service with the 1st respondent.

9. The 1st respondent then put up an announcement on its website, accessible to most players in the sales and marketing industry titled 'PS Kenya changes in June and July' in which they informed the public that the claimant's employment was terminated on account of poor performance making it difficult for the claimant to secure alternative employment. The claimant claims compensation for the loss of employment and damages for degradation of character and ability to get another job. The respondent further refused to provide the claimant with a certificate of service. The procedure in the Human Resources manual was not followed to the letter. The termination of employment was actuated by malice aimed at destroying the claimant's career. That the claimant suffered psychological trauma and mental stress from the time the charges were raised and by disruption of his livelihood.

10. Respondent filed a statement of defence on 8th February 2017 with list of documents in support of the defence.

Michael Karani Gakuya – 2nd claimant

11. The claimant filed the suit on 2nd September 2016 seeking declaration that termination of his employment was wrongful and unfair and also prayed for compensation for the wrongful dismissal and award of damages and costs. The claimant testified that he was first employed by Population Services International on 10th November 1997 and on 22nd October 2013, operations of Population Services International were taken over by the 1st respondent. The 2nd claimant entered into a new employment contract with the 1st respondent on 1st January 2014. The 2nd claimant had served the organization for about 19 years. The claimant rose to the rank of Retail Sales Force Supervisor reporting directly to trade Development Manager. In the year 2015, just like other years, the 2nd claimant surpassed the organization's average performance and was awarded both individual and team bonus of Kshs. 102,000 for the period 2015.

12. 2nd claimant conducted self-appraisal for himself at the beginning of every year ending 31st December and submitted to the 2nd respondent for evaluation and grading. In the 2015 period, the 2nd respondent rated performance of the 2nd claimant at 3.1.

13. The 2nd claimant received a memo dated 31st March 2016 from Human Resource Director informing him that he was not eligible for a salary increment owing to his poor performance during the period January to /December 2015.

14. On 7th April 2016, the 2nd claimant received a memo from the Senior Manager, National Sales citing him for Disciplinary action for poor performance for the period January to December 2015. The 2nd claimant was asked to show cause why serious disciplinary action should not be taken against him. 2nd claimant responded on 13th April 2016. 2nd claimant attended a hearing on 30th May 2016 and he received a letter of termination on 7th June 2016. Similar announcement as in the case of 1st claimant was put on the website. The 2nd claimant did not also receive a certificate of service. The claimant states that the termination was orchestrated maliciously by the 2nd respondent. That the 2nd claimant be awarded compensation for loss of employment and damages for the psychological trauma and diminution of ability to get alternative employment.

15. The 1st and 2nd claimants also allege discrimination and breach of employment contract and the law.

Defence

16. Similar defence was filed against the 2nd claim by the defendant on 8th February 2017 in which the claim is denied.

James Mwangi Muchiri – 3rd Claimant

17. The 3rd claimant filed his suit on 2nd September 2016. He seeks a declaration that termination of his employment was unlawful and unfair and seeks compensation, damages and costs.

18. The 3rd claimant was employed by PSI on 3rd October 2000 and was taken up by the 1st respondent on 22nd October 2013. The claimant entered a new contract with 1st respondent on 1st January 2014. He had served the respondent for 16 years. The claimant rose through the ranks as Motor Cycle Sales Representative to Development Manager directly reporting to 2nd respondent. The claimant surpassed performance target in the year 2015 above the respondent's average performance. The claimant self-appraised himself for the year ending 31st December every year and submitted same to the 2nd respondent for evaluation and grading.

19. In the 2015 period, the 3rd claimant was rated by the 2nd respondent at 3.1 and not 2.9. On 31st March 2016, the claimant received an internal memo from the Human Resource Director informing the 3rd claimant that owing to his poor performance in the period January to December 2015, he was not eligible for a salary increment. On 7th April 2016, the 3rd claimant received a show cause letter why action should not be taken against him for poor work. On 13th April 2016, the 3rd claimant responded to the show cause letter. On 30th May 2016, the 3rd claimant attended a disciplinary hearing and on 7th June 2016, the 3rd claimant received a letter of termination for poor work. Just like other claimants, the 3rd claimant was paid one month salary in lieu of notice and an ex-gratia payment of two months pay for the two

years completed service with the 1st respondent.

20. The 3rd claimant as in the case of the 1st and 2nd claimants attributes the termination to malice and discrimination by the 2nd respondent. That he suffered loss and damage, was not given certificate of service. The termination for poor performance was maliciously publicized in the 1st respondent's website. The claimant suffered psychological trauma, mental stress and financial loss and prays for compensation for the job loss and damages for discrimination and diminution of prospects of employment.

Defence

21. The respondent filed a similar defence as in the case of the 1st and 2nd claimants on 8th February 2017 in which the claim is denied.

Defence testimony

22. RW1 Timothy Wambugu Kariuki, Senior Manager in charge of National Sales testified that he joined the 1st respondent in September 2015. RW1 recorded a witness statement dated 26th July 2018 which he adopted as his evidence in chief. RW1 testified that the three claimants worked in his team in the year 2015 and were reporting to the Senior Manager Trade development who in turn reported to RW1. That he was hands-on due to the nature of the team work and interacted with the claimants closely. That the sales incentive for the salesmen is product based and is paid monthly depending on achievement of sales targets. That financial element of a sales works annual appraisal constitutes about 25% on overall objectives.

23. In the case of Jeremia Makore, he did not achieve his sales targets in all the months of 2015, except in March when he did 124%. That in January, he had 11%; April 12%; May 25%; August 19% and September 18%.

24. With respect to Michael Karani, he achieved targets only in the months of March and July at 162% and 108% respectively. In June he had 5%; August 5%; September 45%; October 30%; November 57% and December 24%.

25. In respect of Muchiri, he only achieved set target in February at 146%. In January he had 25%; 60% in November and 69% in December.

26. RW1 testified that his direct interaction with the claimants and his assessment of their performance in the trade led him to recommend a review of their appraisal by their line manager to reflect their actual performance after he got the team review from the Human Resource department.

27. RW1 stated that he had no access to the claimants' individual appraisal forms as this was only available to their line manager. RW1 also had no access to the log in details of their line manager. That the line manager made the review and re-submitted the appraisal forms.

28. RW1 Allan Mulaki, the Human Resource Director testified that the three claimants were guilty of poor work performance in violation of Section 9 of the Human Resource Manual of the 1st respondent. The claimants failed to meet agreed objectives and set targets in particular Section 9.0.0 and 9.1.4 which deal with the offences committed by the claimants.

29. RW2 admitted that clause 9.0.0 has procedure for warnings. Whereas clause 9.1.4 has a straight procedure for dismissal. RW2 testified that the charges against the claimants were not specific to either of the clauses. That the claimants were notified of the charges vide notices to show cause to which they responded and were thereafter heard in a disciplinary hearing on 30th May 2019. That their explanation was not satisfactory hence the termination. That the final evaluation score for all the claimants was 2.9. That the previous evaluation which had rated them above 3 was erroneous. RW1 admitted that there was no procedure for review of a final rating given by a supervisor in the Human Resource Manual. RW2 admitted that the claimants got bonus for the year under review, being 2015, in respect of which they were subsequently terminated for poor performance. RW2 admitted the respondent had by a letter dated 18th January 2016 congratulated the claimants for their good performance in the year 2015.

30. RW2 admitted that appraisals are done by the appraisee and the supervisor and there was no provision for review. He said this was a Human Resource function. RW2 admitted that no objections had been raised by the Human Resource department on the rating the claimants had been given by their supervisor. RW2 stated that review was subsequently done to reflect the true scenario on the ground. The respondents pray the suit be dismissed with costs.

Determination

31. The issues for determination are:

(a) Whether the performance of the three claimants for the period January to December 2015 was a valid reason for the termination of their employment.

(b) Whether the claimants are entitled to the reliefs sought.

Issue (a)

32. The three claimants appraised themselves for the year ending 31st December 2015 and submitted their self-appraisal to their immediate supervisor for evaluation and grant of final score.

33. It is not in dispute that the supervisor of the claimants upon evaluation rated the claimants as follows:

(a) 1st claimant – 3.4

(b) 2nd claimant – 3.1

(c) 3rd claimant - 3.1

34. The claimants testified that the national performance average on sales for the period January to 31st December 2015 was 3.2. This was not contradicted by RW1 and RW2. It is also not in dispute that the claimants were commended for their performances during the period January to December 2015 and were awarded varying bonuses. The claimants produced in court letters of commendation.

35. RW1 and RW2 testified that for some reason, a review of the evaluation scores was ordered by the departmental head which led to down grading of the performance scores of the three (3) claimants to 2.9. It is not in dispute that the claimants were not involved in the said review. The supervisor was simply ordered to do so by the head of national sales and he proceeded to do so without any reference to the claimants.

36. The claimants were then ambushed with the downgraded score of 2.9 in the show cause notices in which they were required to show cause why their employment should not be terminated for poor work performance.

37. The claimants explained that they had for many years performed well for the 1st respondent and previously for the present company. These facts were not contested. The respondent did not produce any adverse previous record of the claimants on performance before the year 2015. The claimants had not received any warning as mandated under clause 9.0.0 of the Human Resource Manual. The respondents were unable to explain why clause 9.0.0 was not followed which provides employee with opportunity to remedy their performance if indeed same was wanting.

38. The evaluation given to the claimants was above 3 and the respondent considered any performance above 3 to be good. The arbitrary grant of a figure of 2.9 to all the claimants without any input from them was not a true reflection of their performance. It was unprocedural, oppressive and applied without according the claimants a fair hearing. The notice to show cause was not a proper procedural step in terms of the Human Resource Manual of the Respondents prior to giving them opportunity to remedy their scores on the grounds. In any event, the 2.9 score was dropped from the hat and no basis was given for it.

39. Accordingly, the respondents have failed to demonstrate that there was a valid reason to terminate the employment of the claimants. The respondent did not follow their own Human Resource Manual in dealing with a first case of alleged poor performance. The evaluation itself was flawed and wrongful and amounted to unfair administrative action with adverse consequences on the claimants. The claimants have discharged the onus placed on them under *Section 47(5) of the Employment Act, 2007* to demonstrate on a balance of probabilities that termination of their employment was wrongful and unfair.

40. The respondents violated *Sections 43 and 45 of the Employment Act 2007*. Therefore the termination of the Employment of the three (3) claimants was unlawful and unfair.

41. The claimants have not proved that the 2nd respondent bore any liability individually for the termination of their employment by the 1st respondent.

42. The 1st respondent bears the liability for the unlawful and unfair termination of the employment of the claimants.

Remedies

43. In answer to issue (b) the claimants having lost their employment contrary to *Sections 43 and 45 of the Act*, are entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*.

44. The claimants served in similar capacities and for similar long periods firstly for the present organization which later transferred their services to the 1st respondent. The 1st claimant served for 16 years, the 2nd claimant served for 19 years and 3rd claimant served for 16 years. They lost their employment under similar circumstances unlawfully and unfairly. The three did not contribute to their termination. The three were humiliated after scoring well in their performance only for the scores to be arbitrarily revised to their loss and detriment. The claimants were paid terminal benefits and were each given two months salary as ex-gratia payment for the loss of their employment. The respondent maliciously published their name in a public website indicating that they had lost their jobs for poor work performance, which was not true. The respondents also unfairly failed to provide the claimants with certificates of service to help them get alternative jobs. The claimants suffered psychological trauma and mental stress. They lost means of livelihood abruptly and sustained loss and damage as a result.

45. The case is visited by the above aggravating circumstances. The court was referred to the case of **Esther W. Kiege and another vs Kenya forest Service and another (2018) eKLR** in which the court awarded Kshs. 3,000,000 as general damages for discrimination.

46. The claimants have not proved the particulars of discrimination in this matter but the manner in which the claimants were treated by their employer after many years of loyal service has invited the court to consider and award equivalent of ten (10) months salary in compensation to each of the three (3) claimants as follows:

(a) 1st claimant – Kshs. (103,480x10) 1,034,800

(b) 2nd claimant – Kshs. (109,903x10) 1,099,030

(c) 3rd claimant – Kshs. (114,990x10) 1, 149,900

The claimants did not pray for payment in lieu of leave days not taken in their statements of claim and none is awarded.

(d) Interest at court rates from date of judgment till payment in full.

(e) Costs of the suit.

(f) 1st respondent to provide the claimants with certificate of service within 30 days of this judgment.

Judgment Dated, Signed and delivered this 4th day of November, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Maloba for Claimants

Mr. Ouma for Respondents.

Chrispo – Court Clerk