



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 392 OF 2016

HARRISON MWARUMBA MBUI.....CLAIMANT

-VERSUS-

DIRECTLINE ASSURANCE COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by Kairu & McCourt Advocates as an Assistant Records Clerk on 2.2.2012 for a monthly salary of Kshs.25,000. On 1.2.2014, he was transferred to the Respondent in the same capacity and allegedly was promised a salary review after 3 months to Kshs.30,000 per month in harmony with the other Assistant Record Clerks at the respondent company. However, the salary was not increased as promised and he approached the HR Manager but she did nothing. He then approached the Registry Manager but again nothing was done.

2. On 21.10.2014, he reported back to the office from his annual leave and on arrival, he was served with a show cause letter to respond to the allegation of wilful neglect to perform work i.e retrieval and collection of files, which was one of his duties under his contract. He responded to the letter on the same day as required and the same day he was invited to a disciplinary hearing and thereafter served with a dismissal letter the same day.

3. The claimant was aggrieved and brought this suit on 14.3.2016 alleging that the termination of his employment was unfair and unlawful and prayed for the following reliefs:-

a. Breach of contract

(Kshs.25,000 pm x 27 months).....Kshs.675,000/=

b. 12 Months Salary as damages for unfair

termination (12 months x 25,000).....Kshs.300,000/=

c. Unpaid house allowance

(Kshs.3,750 pm x 34 months).....Kshs.127,500/=

d. Gratuity/Severance

(Kshs.25,000/26 x 15 days x 3 years).....Kshs. 43,269/=

e. General damages for discrimination

f. Interest on (a), (b), (c), (d), and (e) at Court rates from the day each payment fell due and payable until payment in full.

g. Costs of this suit.

4. The respondent filed her defence on 10.6.2019 denying the alleged unfair termination of the claimant's employment and averred that the claimant was dismissed for failure to perform his duty. She further contended that the claimant was given an opportunity to be heard before the dismissal. Finally she contended that after the termination the claimant was issued with a certificate of service and also paid his terminal

dues and signed a discharge voucher dated 26.11.2014. She therefore prayed for the suit to be dismissed with costs.

5. The main issue for determination is whether the claimant's employment contract was unfairly terminated by the respondent on 21.10.2014. To answer the foregoing question both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

6. The claimant testified as Cw1 and basically adopted the facts set out in the statement of claim and his written statement. He stated that although his salary was not reviewed from Kshs.25,000 to Kshs.30,000 as promised, he kept following up with the respondent's management but in vain. He further stated that he went for leave in October 2015, and when he reported back on 21.10.2015 he was served with a show cause letter to respond before the end of the day. He responded to the letter denying the alleged failure to perform his duties and he was summoned to a disciplinary hearing the same day.

7. He further stated that he was served with a dismissal letter the same day and termed the termination to be unfair because he was not given sufficient time to defend himself. He further contended that he was not allowed to be accompanied by another employee of his choice to the hearing or to call his witnesses to support his defence. He therefore prayed for the reliefs sought in the suit.

8. In cross examination he admitted that his contract of service provided for a consolidated salary of Ksh.25,000 per month. He further admitted that he did not have any documentary evidence to prove that he was promised salary review from Kshs.25,000 to Kshs.30,000 after transfer to the respondent. He further admitted that he was given a chance to defend himself in writing and thereafter called to an oral hearing at 2 p.m. the same day. He further admitted that he was heard before the dismissal but maintained that he was denied the right to call a witness.

9. He confirmed that he was dismissed together with his other colleagues on allegation of poor performance but he opined that the correct reason for the dismissal was the demand for salary harmonization with their colleagues at the respondent company after transfer from the law firm. He contended that his rights under the contract of service were violated by the hurry in which his disciplinary process was conducted and concluded.

Defence case

10. The Respondent's HR Manager M/s Fidelis Nyambura Mbagara testified as Rw1 by basically adopting her written statement and the exhibits filed by the respondent. She stated that the claimant was employed by the respondent on 1.2.2014 for a 3 years contract as an Assistant Records Clerk. His consolidated salary was Kshs.25,000 per month and the contract was terminable by a notice of 30 days. She denied that the respondent promised the claimant a salary review to Ksh.30,000 per month and contended the only change in the contract was done on 2.5.2014 by indicating that the respondent was to pay a sum equivalent to 10% of the claimant's gross salary into a pension scheme.

11. She further stated that on 18.10.2014, she received a complaint from the Registry Manager about the claimant's failure to perform his duty including failure to file requests, retrieval and collection as expected under his contract of employment. As a result, she served a show cause letter upon the claimant on 21.10.2014 and thereafter invited him to a disciplinary hearing on the same date.

12. After hearing the claimant and reading his written defence, the disciplinary hearing recommended that his services be terminated. On the same day, the claimant was served with a termination letter and issued with a Certificate of Service. Finally, she stated that the claimant was paid Kshs.33,952 on 26.11.2014 and signed a discharge voucher. She therefore contended that the termination of the claimant's employment was fairly and lawfully done and prayed for the suit to be dismissed.

Analysis and determination

13. There is no dispute that the claimant was employed by the respondent upto 21.10.2014 when his employment was terminated. The issues for determination arising from the pleadings, evidence and submissions are:-

- (a) Whether the termination of the Claimant's contract of service was unfair.
- (b) Whether he is entitled to the reliefs sought.

Unfair termination

14. Under section 45(2) of the Employment Act, termination of employee's employment contract is unfair if it is not grounded on valid and fair reason and if fair, procedure is not followed. A valid and fair reason is one, which relates to employee's conduct, capacity and compatibility, or based on the employer's operational requirements. On the other hand, fair procedure involves but it is not limited to according the employee a hearing before termination for a cause.

15. In this case, the reason cited for termination was failure to perform work, which was his duty to have performed under the contract of service. It was alleged that he refused to handle file requests, retrieval and collection of the same as expected under his contract. He was alleged to have spent a lot of time on his cellphone and avoiding the law firm team members. As a result of the said conduct there was backlog of unfinished work on his desk.

16. The claimant denied the alleged misconduct and maintained that the reason for his dismissal was his demand for salary harmonization to bring his pay at par with his colleague at the company.

17. I have considered the evidence adduced by the parties. Under section 43(1) and 45(2) (a) and (b) of the Employment Act, the burden of proving a valid and fair reason for the termination rest with the employer. In this case, Rw1 was not the supervisor of the claimant at the Registry. The Registry Manager or any other officer from the registry who witnessed the claimant's failure to perform his duty was not called to testify against the claimant herein. Consequently, the evidence by Rw1 remains hearsay and therefore incapable of proving that indeed the claimant failed to perform his duties as required under his contract of service.

18. The proceedings of the disciplinary hearing was also not sufficient evidence to prove the alleged offence because they do not indicate whether the disciplinary committee received any evidence from witnesses and also what the claimant stated in his defence. The alleged proceedings appear to be more of a report than evidence of what actually transpired at the hearing. I therefore return that the respondent has failed to prove that she had a valid and fair reason for dismissing the claimant from service. The foregoing is fortified by the fact that the claimant was never served with any warning letter for the alleged failure to do his job and always being on his cellphone instead of doing his job. Under section 43(1) of the Employment Act, failure by the employer to prove a valid reason for dismissing his employee renders the termination unfair within the meaning of section 45 of the Act, in *Nicholas Muasya Kyula Vs FarmChem Limited, Industrial Cause No. 1792 of 2011; (2012)eKLR* where the court held that:-

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

19. As regards the procedure followed, the claimant admitted that he was served with a show cause letter and thereafter invited to an oral hearing. He admitted that he was able to present his defence in writing and orally before the disciplinary committee. His only complaint was that the process was hurried through and he was not allowed to call his witness.

20. The speed with which the disciplinary process was conducted does not *per se* mean that the procedure followed was unfair. In my view, all that matters is that the employer explained the reason for which termination is being considered and that the employee is accorded an opportunity to present his defence freely to the employer. Lastly, it must be shown that employee's defence was considered before the termination was decided.

21. Although the proceeding produced by the respondent did not show how the hearing was conducted, I am satisfied that the claimant was given a fair hearing before the dismissal. First, he was served with a show cause letter inviting him to tender a written defence. Secondly, he was invited to tender his oral defence before a disciplinary committee. Third, his defence was considered by the disciplinary committee and found unsatisfactory before the decision to terminate his services was made. Finally, he was issued with a certificate of service as required by section 45 and 51 of the Employment Act.

22. Having found that the respondent has failed to prove that the claimant was dismissed for a valid and fair reason, I return that the termination of his employment was unfair and unjustified notwithstanding the fact that a fair procedure was followed before the termination

Reliefs

23. In view of the foregoing finding, I award the Claimant 4 months salary being Kshs.100,000 compensation for the unfair termination under section 49 (1) (c) of the Employment Act. In making the award, I have considered the fact that the respondent did not prove that the claimant contributed to the unfair termination through misconduct. I have also considered the fact that he did not secure another job within those 4 months after the termination. Finally, I have considered the fact that he had worked for the respondent for a fairly short period including the period before his transfer of service from Kairu & McCourt Advocates to the respondent.

24. The claim for salary for 27 months before the lapse of the contract of service is dismissed by dint of section 49(1) (c) of the Act which entitles an unfairly dismissed employee to a maximum of 12 months' salary compensation.

25. The claim for unpaid house allowances is also dismissed because clause 4(A) of the contract of employment provided for a consolidated salary of Kshs.25,000 per month.

26. Finally, the claim for gratuity/severance pay is dismissed. First, the contract of service did not provide for payment of gratuity but pension contribution by the employer. Second, severance pay is not tenable because the termination was not through redundancy but unfair dismissal.

27. In conclusion, I enter judgment for the claimant in the sum of Kshs.100,000 being compensation for unfair termination. The said sum is subject to statutory deduction but in addition to costs and interest at court rate from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 1st November day of October, 2019

ONESMUS N. MAKAU

JUDGE