



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 945 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

DICK WEKESA WASWA.....CLAIMANT

VERSUS

GSI KENYA LIMITED.....RESPONDENT

JUDGMENT

Vide a Memorandum of Claim filed on 20th June 2013 the claimant avers that his dismissal by the Respondent was unlawful, discriminatory and without valid and justifiable reason. He avers that there was no procedural fairness in the manner the respondent dealt with him and that there were no valid grounds against him which would have led to his dismissal.

He seeks the following reliefs:

1. A declaration that the summary dismissal was wrongful, unfair and adversely discriminatory and the Respondent be injected from publishing the Claimant's details in any local daily newspaper.
2. The equivalent of 18 years' salary being damages for wrongful dismissal (322,100.00 x 12 x 18) Kshs.69,573,600
3. 3 months' salary in lieu of notice Kshs.996,300
4. 3 months pension employer GSI Kenya Contribution to Octagon in the sum of Kshs.96,630
5. 11 days worked in June 2013 Kshs.118,103
6. 15 days worked (1.5 years) 15+7.5 Kshs.241,575
7. Leave allowance 2013, 12 days, January-June Kshs.161,050

Tax of Item Nos. 3-7 above

PAYE Tax Kshs.533,612.33

Net after tax Kshs.1,372,146.00

Deduction Dollar at Kshs.87 (Money owed to respondent by the Claimant)

Los Angeles Trip Accommodation Refund Kshs.155,730

PDM 10 Days Kshs.69,600

Transport in Los Angeles Kshs.30,000

Total Owed to GSI Kenya Kshs.255,330

Final Net Payment on Item Nos. 3-7 above plus benefits not paid to the Claimant to date Kshs.1,116,816

Club membership as per Terms and Conditions for the

Year 2012 Registration and 2013 subscription Kshs.300,000

Phone allowance 2 months May/June Kshs.12,000

Total dues inclusive benefits and Items

Nos. 3 -7 above **Kshs.71,002,416.00**

The Respondent filed its Response to the Memorandum of Claim on 16th May 2014. It avers that the Claimant's dismissal was carried out in accordance with the terms of the contract of employment and the provisions of the Employment Act. It further avers that it has been ready to pay the Claimant his dues.

Claimant's case

The Claimant, testified that he was employed on 1st January 2012 as the Respondent's Chief Executive Officer and confirmed to that position on 19th July 2012. He testified that his salary was Kshs.305,000 and he was eligible for 10% pension contribution, medical cover, transport allowance of Kshs.20,000 and club membership at Royal Nairobi Golf Club. He testified that either party was to issue 3 months' notice prior to termination.

He testified that in May 2013 he received an email at midnight informing him of a board meeting and that the following morning he called the Chairman and told him that they needed to agree on the agenda of the meeting. He testified that the Chairman informed him that the agenda would be communicated.

He testified that he did not attend the meeting as he was travelling to Western Kenya. That vide a letter and an email dated 7th May 2013 he was informed that the Board had suspended him from 7th May 2013 for 2 weeks. That he wrote an email on 15th May 2013 seeking clarification on the allegations made against him but there was no response to his email.

He testified that he went to the office 22nd May 2012 seeking to end his suspension but was informed that he was on compulsory leave. He was invited for a hearing on 24th May 2013 and was required to show cause but there were no charges in the letter against him. That he wrote a letter to the Chairman on 24th May 2012 seeking clarification on the charges and was informed of the allegations in the letter dated 27th May 2013. The letter had 5 allegations among them, that he had registered new members to influence the outcome of the GSI elections.

He responded to the allegations by letter dated 27th May 2013. He thereafter received a summary dismissal letter dated 11th June 2013.

He testified that he was not issued with a warning letter and that he had a good work record. He further testified that he was not accorded a hearing and that there was malice in not responding to his letters.

It was his testimony that he was not paid his terminal dues and that he ought to have been issued with 3 months' notice. Further, that Mr. Otieno handled the disciplinary hearing yet he was the complainant.

In cross-examination the claimant testified that he was not aware of a counter-proposal of Kshs.1 million that he was offered to settle the matter and that he saw the letter dated 27th February 14 for the first time in court. He further testified that he was not aware of an offer of Kshs.5 million.

He testified that he was offered one month's salary in lieu of notice yet he was entitled to 3 months in accordance with the terms of the contract. That he was not aware of any verbal complaints against him. He maintained that he was not called to any hearing and further that he did not walk out of the hearing.

He testified that he received a letter dated 22nd May 2013 inviting him for a hearing on 24th May 2013 and that in his letter he stated that certain members of the board were not paid up.

He testified that he only stated that he was not comfortable with the board chair who was sitting at the panel as the claim had indicated he wanted to fix the claimant.

In re-examination, he testified that the board membership was 21 and was thereafter cut down due to the Respondent's guidelines. That the board was unhappy with the restructuring. He further testified that there was a discrepancy in membership fees.

Respondent's case

PETER OTIENO the Respondent's Manager testified as RW1. He confirmed that the Claimant was employed as a CEO for one year. That the claimant's employment was terminable by 3 months' notice. That the reason for the termination was that the claimant registered members contrary to the rules and failed to make full disclosure to the Board. He testified that the Board called the Claimant for a hearing before a

Select Committee, that the claimant appeared before it and left. He testified that the Claimant stated that RW1 ought not to have been present at the meeting. He testified that the Claimant was paid his dues of Kshs.261,555.

In cross-examination, he testified that the Claimant was suspended after investigations of several issues and that the suspension was for 21-30 days. He testified that during suspension period the Board called for a special committee to investigate the claimant's conduct. That the Claimant was informed of the reasons for his suspension on the day of his suspension. He however could not recall the Claimant's letter requesting for reasons for suspension which the respondent did not respond to.

He testified that the Claimant appeared before the Board and was asked to step aside. That the claimant was invited to the show cause meeting which was held on 24th May 2013. That during the hearing, the Claimant did not ask for the reasons for being subjected to the hearing. That the Claimant was dismissed on the day of the committee meeting because he did not appear. That the claimant was given an opportunity to appear with a witness.

He testified that prior to 7th May 2013 the Claimant had not received any warning.

He testified that the Claimant was wrong in registering associate members which he did on his own as the board was not aware of the registration until investigations were conducted. That the management had power to register members and associate members. He however did not know if the Claimant personally benefitted from registering the members. That the respondent's performance during the term of the Claimant was good as there was a slight improvement in revenue.

In re-examination, he maintained that the registration of associate members was suspicious. That at the time of the Claimant's termination, the issues of board members was not in question.

He testified that Minute 23/2013 confirms the reasons for suspension and termination of the Claimant and that he was given a hearing.

Claimant's Submissions

The Claimant submits that the termination of his employment was unfair and unjustifiable as no reasons were availed for his suspension and no specific allegations were availed to him despite attending the meeting on 24th May 2013. It was his submission that it took over 20 days for the Respondent to come up with the reasons for suspension.

He submits that the manner in which his case was handled confirmed that indeed the Respondent had no justification to terminate his services. He further submits that there was no procedural fairness. That the court has settled on the factors to be met before an employer relieves an employee of his/her employment as was decided in the case of ***Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd.***

It is his submission that he was not accorded an opportunity to present his defence in accordance with Section 41(1)(i) of the Employment Act. He further submits that no reason was advanced against the claimant to justify the summary dismissal as envisaged under section 44 of the Employment Act. He submits that he was unfairly and wrongfully dismissed. He relies on the case of ***CMC Aviation Ltd v Captain Mohammed Noor Civil Appeal No. 199/2013 (UR)***.

He submits that he had proved this claim against the Respondent and urged the Court to allow his claim for 3 months' salary in lieu of notice, pay for 11 days and leave allowance for the year 2013. He further submits that he is entitled to 12 months' salary as provided under Section 49(i)(c) of the Employment Act and a certificate of service.

Respondent's Submissions

The Respondent submits that the Claimant's summary dismissal was lawful and in accordance with section 44 of the Employment Act as the Claimant was fundamentally in breach of his obligations. It avers that there was no breach on its part. It submits that the Court in ***Erick Karanja Gakonyo & ano v Samson Gathimba [2011] eKLR*** held that summary dismissal usually connotes dismissal of an employee without giving notice to which an employee is entitled to.

It submits that the procedure followed by the Respondent's board in summarily dismissing the Claimant was fair and upheld the tenets of natural justice. It submits that the Claimant was informed of the allegations against him and he responded to the same before he was dismissed. It further submits that the Board was properly constituted.

It submits that the claimant's conduct prevented the satisfactory continuance of the employer-employee relationship between him and the Respondent.

It is the Respondent's submission that the Claimant was not entitled to 3 months' notice prior to his summary dismissal because he had totally breached the trust that existed between him and the Respondent. It submits that the Claimant was paid a sum of Kshs.19,800 as his pension which was the amount that had been remitted to Octagon Insurance as at that time.

It submits that the Claimant is not entitled to damages for wrongful dismissal as the dismissal was proper and fair. It further submits that the claimant claims for 11 days' salary arrears and leave allowance were paid through a cheque dated 19th June 2013.

It submits that severance pay is payable to employees who are terminated on account of redundancy thus the claimant is not entitled to the same as he was summarily dismissed due to gross misconduct.

It submits that the Claimant is not entitled to club membership fee and is also not entitled to telephone allowance since he was suspended from employment for 2 months and was not acting for the Respondent. It urged the court to find that the claim has no basis in law.

Determination

The issues for determination are whether the claimant was wrongfully dismissed and whether he is entitled to the reliefs sought.

Section 41 of the Employment Act provides:

(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.”

In the letter dated 22nd May 2013 from RW1 addressed to the Claimant stated thus:

“The GSI Board yesterday 21st May 2013 met to consider the investigation panel’s report. Pursuant to the deliberations therein, the board resolved to invite you for a hearing to be held on Friday 24th May, 2013 at the Intercontinental Hotel Nairobi at 10.00 am.

Noting that your suspension was for two weeks, the Board resolved to send you on compulsory leave with immediate effect pending the conclusion of the investigation.”

The Claimant in his letter dated 24th May 2013 informed the Respondent’s Chairman of his dissatisfaction with the process through which he had been suspended and sent on compulsory leave. He further stated;

“Immediately after the suspension was officially communicated, I requested the Chairman for particulars and specific details on the allegations to enable me prepare a response in good time to ensure a fair hearing, which the Chair assured me of in the suspension letter.

On the contrary, I note the following;

Despite my several request to the Chairman, to date I have received no formal written allegations of the reasons for suspension which has now changed to compulsory leave, yet I am expected to attend a hearing for the same. What am I supposed to be answering to?”

It is not until 27th May 2013 that the Respondent through its Company Secretary informed the Claimant of the allegations made against him and further required him to respond to those allegations by 31st May 2013. The Claimant responded through his letter dated 29th May 2013 in which he informed the Company Secretary that he needed documents to enable him respond to the allegations. The Claimant was thereafter dismissed on 11th June 2013 for reasons that the Board had lost trust in him and that his actions amounted to gross misconduct.

RW1 testified that there were reasons for suspending and dismissing the Claimant as stated in Minute 23/2013 of the meeting held on 10th June 2013. It is at this meeting that the Board discussed the Investigation Committee’s Report and resolved to summarily dismiss the Claimant on grounds that the allegations made against him led to a deterioration of trust between the CEO and the Board and it was not feasible to retain the Claimant in office and still have the organisation run smoothly.

The reasons set out in the suspension letter dated 7th May, 2013 and in the letter dated 27th May, 2013 centred around the registration of new members and the claimant’s conflict with the Board. The Investigation Committee’s Report leading to the Claimants summary dismissal was not produced in Court. Further, the Claimant informed the Respondent that he needed several documents to respond to these allegations which were never supplied to him.

RW1 testified that the Claimant was invited to a show cause meeting on 24th May 2013 and that at the said meeting he did not ask for reasons for the disciplinary hearing. This meeting could not be a disciplinary hearing as the claimant was not made aware of the allegations he was expected to respond to. It is not until 27th May 2013 that the Respondent informed him of specific allegations that he was to respond to. The Respondent has not proved that after the Claimant sought information on 27th May 2013 a disciplinary meeting was convened for him to respond to the allegations set out in the letter dated 27th May 2013.

In *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* the Court held:

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee

is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets.”

Section 45 of the Employment Act provides:

- (1) No employer shall terminate the employment of an employee unfairly.***
- (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.***

Flowing from the above, I find that the Respondent has not proved that there was a valid reason for terminating the employment of the Claimant. Further the claimant’s response was not considered since he was not given the documents he requested to enable him adequately respond to the charges. The Claimant had further expressed his discomfort with the Chair of the board sitting in the panel.

Having failed to hear the claimant after he responded to the charges against him the termination of his employment was procedurally unfair. Further, the grounds of termination having been different from those in the show cause letter, there was no valid reason for termination.

Whether the Claimant is entitled to the reliefs sought

18 years’ salary for wrongful dismissal

The claimant sought 18 years’ salary for wrongful dismissal. The prayer for 18 years’ salary is not anchored in law. This Court in awarding remedies is guided by Section 12 of the Employment and Labour Relations Court Act and section 49 of the Employment Act. Section 49(1) of the Employment act provides:

- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—***
 - (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;***
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or***
 - (c) the equivalent of a number of months’ wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.***

The claimant can therefore only be paid compensation subject to

the maxims set under the Act. Taking into account the manner in which he lost his employment, the treatment he got from the respondent relevant to his position and all relevant factors as set out under Section 49(4) of the Employment Act, I award the claimant 6 months’ salary as compensation in the sum of Kshs.1,932,600.

3 months’ salary in lieu of notice

Having found the termination of the claimant’s employment unfair, he is entitled to notice as provided under Section 49(1) of the Employment Act.

The Claimant’s contract of employment provided that he was to be issued with 3 month’s termination notice. He is therefore entitled to 3 months’ salary in lieu of notice. His gross salary having been Kshs.322,100, I award him Kshs.966,300 in lieu of notice.

3 months’ pension contribution

The claim for Kshs.96,630.00 was not proved and the Claimant did not submit on this claim. It is therefore dismissed as the claim was not proved. The respondent however stated it owed the claimant Kshs.19,000 which it was willing to settle. I thus award the claimant the said

sum of Kshs.19,000.

11 days worked in 2013, service pay and leave allowance

The Respondent submits that it was willing to pay the Claimant the sums in respect of 11 days worked in 2013 but he declined to collect the cheque drawn in his favour for the sum of Kshs.261,555.14. I therefore find that this claim is payable by agreement of the parties.

Though the Claimant was a member of NSSF, the Respondent in its tabulation of dues payable to the Claimant offered to pay service pay in the sum of Kshs.161,050. I thus award the claimant the same.

Claims for other allowances and benefits

The Claims for other allowances and benefits fail as the claimant did not adduce any evidence to prove his entitlement to these claims. Further, it was his testimony that club membership and telephone allowance was not applicable since he was eligible to the benefits by virtue of his employment hence he was not entitled to these benefits upon separation.

In the ultimate I enter judgment for the claimant against the respondent in the following terms –

1. I find the summary dismissal of the claimant by the respondent unfair.
2. I award the **Kshs.3,340,505** as set out below –
 - (i) 6 months' salary as compensation Kshs.1.932,600
 - (ii) 3 months' salary in lieu of notice Kshs.966,300
 - (iii) Pension contribution admitted by respondent Kshs.19,000
 - (iv) 11 days worked in June 2013 Kshs.261,555
 - (v) Service pay Kshs.161,050
3. The respondent shall pay claimant's costs of the suit.
4. Decretal sum shall accrue interest at court rates from date of judgment till payment in full.
5. The respondent shall issue a certificate of service to the claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE