



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1746 OF 2015

SYLVANUS ASANGA BARAZA

CLAIMANT

v

STAR TIMES MEDIA (KENYA) LIMITED RESPONDENT

JUDGMENT

1. Sylvanus Asanga Baraza (Claimant) was offered employment as Human Resource Officer, Kisumu by Star Times Media (Kenya) Ltd (Respondent) through a letter dated 3 August 2012. The contract was to run for 1 year subject to renewal.
2. On 28 February 2014, the Respondent offered the Claimant another contract as Human Resources Manager. The contract was to run until 4 February 2015.
3. On 20 July 2014, the Respondent notified the Claimant of the termination of his contract and the reason given was *unsatisfying performance*.
4. The Respondent indicated that it was exercising the option under clause 15.0 of the contract to terminate the Claimant's employment.
5. The Claimant was not satisfied and on 30 September 2015 instituted these legal proceedings alleging unlawful and unjustified termination of employment, and breach of contract.
6. The Respondent filed a *Reply to the Memorandum of Claim* on 5 January 2016 prompting the Claimant to join Issue on 2 February 2016.
7. The Cause was heard on 30 October 2019. The Claimant testified and was cross-examined while the Respondent opted to close its case without leading any evidence.
8. The Claimant filed his submissions on 14 November 2019 while the Respondent filed his submissions on 4 December 2019 (should have been filed by 29 November 2019).
9. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as examined hereunder.

Unfair termination of employment

10. The Respondent sent an email to the Claimant notifying him that his contract had been terminated.
11. In Court, the Respondent indicated that it relied on a contractual provision to terminate the Claimant's employment while in the submissions it cited the case of *David Kipkosgei Muttai v Green Palms Academy* (2014) eKLR for the legal proposition that an employer can terminate an employment contract under section 36 of the Employment Act, 2007 without citing any reason.
12. The Employment Act, 2007 has made serious inroads in the employment relationship and pursuant to section 41 of the Act, it is mandatory for an employer to afford the employee an opportunity to make representations before the termination of the contract if the grounds for such decision are anchored on *misconduct, poor performance or physical incapacity*.
13. In the same vein, sections 43 and 45 of the Employment Act, 2007 places a burden upon the employer to prove the reasons for terminating an employment contract, and that the reasons were valid and fair (the decision cited by the Respondent did not consider the legal import of sections 43 and 45 of the Employment Act, 2007 and is therefore distinguishable).
14. The ground given by the Respondent in terminating the Claimant's employment was *performance*. It did not dispute that a written notice

as contemplated by section 35(1)(c) of the Employment Act, 2007 or hearing as envisaged under section 41 of the Act was not conducted.

15. Since the Respondent did not afford the Claimant a hearing, the decision was procedurally unfair.

16. The Respondent did not present any evidence as required by sections 43 and 45 of the Employment Act, 2007 to discharge the burden of proving that the Claimant's *performance* was not satisfactory.

17. The Court can, therefore, conclude that its decision was not for valid and fair reasons as required by statute.

Compensation

18. Compensation is discretionary. The Claimant served the Respondent for about 2 years. His contract was ended with about 7 more months to go. He had a legitimate expectation to serve the full tenure of the contract.

19. Considering the above factors, the Court is of the view that the equivalent of 7 months' gross salary as compensation would be fair and appropriate (gross salary according to May 2014 payslip was Kshs 75,850/-).

Pay in lieu of notice

20. The Respondent did not give the Claimant notice as envisaged under section 35(1)(c) of the Employment Act, 2007.

21. The Respondent, however, offered the equivalent of 2 months' basic salary as dues, and the Court will allow the same as there was no evidence it was paid to the Claimant.

Leave

22. Annual leave is a statutory entitlement. The Claimant sought Kshs 83,465/- on account of leave for the period 2012-2014. Copies of payslips he produced show that he used to take leave.

23. The Respondent offered to pay the Claimant 6 outstanding leave days. It did not compute or disclose the amount in Court, and the Court orders that should compute and pay the same to the Claimant.

Unpaid salaries

24. The Claimant sought Kshs 39, 568/- being unpaid salaries from 21 January 2015 to 4 February 2015.

25. Considering that the separation was effective 20 July 2014, the Court is unable to find that the Claimant was entitled to salaries after the termination of contract.

Conclusion and Orders

26. The Court finds and declares that the termination of the Claimant's contract was unfair and awards him

(a) Compensation Kshs 530,950/-

(b) Pay in lieu of notice Kshs 106,200/-

TOTAL **Kshs 637,150/-**

27. In addition to the above the Respondent to compute and pay an equivalent of 6 leave days.

28. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 6th day of December 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Matheka instructed by Wandai Matheka & Co. Advocates

For Respondent Mr. Kazungu instructed by Ashitiva & Co. Advocates

