



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 705 OF 2013

JOSEPH WANJOHI WAMBUGU.....CLAIMANT

VERSUS

PAWS AFRICA SAFARIS LIMITED.....RESPONDENT

JUDGEMENT

Introduction

1. By a Statement of Claim dated 14th May 2013, the Claimant has sued the Respondent for unfair termination of employment, salary underpayment and accrued salary arrears. The Respondent filed a Memorandum of Response on 13th November 2013.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Director, George Allan Murimi. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 7th January 2008 in the position of General Manager at a net salary of Kshs. 100,000 plus a fuel allowance of Kshs. 10,000. He claims that he was not paid his full salary and that he was underpaid. He further claims that he was unfairly terminated on 26th May 2010. He now seeks the following:

- a) Salary for 26 days in May 2010.....Kshs. 93,707
- b) Salary arrears from December 2009 to April 2010.....548,400
- c) Salary underpayments from January 2008-November 2009...1,832,872
- d) 3 months’ pay in lieu of notice.....299,040
- e) General damages for breach of contract
- f) Certificate of service
- g) Costs plus interest

The Respondent’s Case

4. In its Statement of Response dated 6th November 2013 and filed in court on 13th November 2013, the Respondent states that the Claimant's salary was subject to statutory deductions. The Respondent avers that the termination of the Claimant's employment was lawful and fair. Further, the Respondent denies the Claimant's claim for salary arrears or underpayment.

5. The Respondent states that due to a slump in business occasioned by the 2008 post-election violence, the Claimant's salary and fuel allowance was with the Claimant's consent, reduced by 25% to Kshs. 84,102.50 with effect from January 2008 and by 50% to Kshs. 48,705.25 with effect from September 2008, which he continued to earn until May 2010 when his contract was terminated.

6. Regarding the termination, the Respondent states that the Claimant was guilty of willful neglect of duty as well as careless and improper performance.

Findings and Determination

7. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

8. On 26th May 2010, the Respondent wrote to the Claimant as follows:

"TERMINATION LETTER

After the BOD meeting held on 11th May 2010 regarding your letter dated 28th April 2010, the decision was to terminate your employment contract. The outcome on your letter was mostly based on putting responsibility on others other than facts and does not

demonstrate a commitment to doing what you had to do/had to be done to get your job fully done. As a result, that level of negligence has costed (sic) the company money to a tune of over 4 million in court cases and loss of business and that is in the face of low cash flow that you show most concern about. This has therefore left the management with the same stand that your work was not satisfactory and thus rendering you a non performer in the duties allocated to you as a General Manager.

Based on the above your employment has been terminated from the date here off (sic). We therefore are giving you a 3 month notice, during this time you will not be required to be present in the office. Do come back on the 27th August 2010 to collect your dues.

We take this opportunity to thank you for your services rendered and to wish you well in your future endeavours.

Yours Faithfully

(Signed)

Diana Murimi

Human Resources & Personnel Manager

Paws Africa Safaris"

9. According to this letter, the Claimant's employment was terminated on account of poor performance. While this is one of the grounds for termination of employment recognized under the Employment Act, there is a procedure to be followed.

10. In *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR* this Court held that a verdict that an employee is a poor performer must be preceded by an objective performance review. Further as held by **Rika J** in *Kenya Science Research International Technical and Allied Workers Union (KSRIWU) v Stanley Kinyanjui and Magnate Ventures Limited (Cause No 273 of 2010)* the employee must be allowed reasonable time to improve.

11. In the instant case, the Claimant was sent on a one week compulsory leave from 15th April 2010. On 21st April 2010, the Respondent wrote to the Claimant citing several instances of underperformance. The letter states inter alia:

“As per the previous letter given and dated 15th April 2010, the BOD decided to meet in your absence. They did your work analysis since the day you were recommended by P.P.D and therefore employed by Paws Africa Safaris on the 7th August 2008. Their conclusion was that your work has NOT been satisfactory thus under performance based on the following facts...”

12. From this letter, it is evident that the Respondent evaluated the Claimant's performance and drew an adverse conclusion without involving him. Upon receipt of the Claimant's response dated 28th April 2010, the Respondent decided to send him on a one month leave. The Board met again on 11th May 2010, in the Claimant's absence, and decided to terminate his employment.

13. Cumulatively, the Court finds that the procedure adopted by the Respondent in effecting the termination of the Claimant's was unlawful and unfair as the Claimant had no chance to explain himself. He is therefore entitled to compensation for unfair termination.

Remedies

14. In light of the foregoing, I award the Claimant three (3) months' salary in compensation for unfair termination of employment. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. The Claimant is also entitled to three (3) months' salary in lieu of notice as per his contract of employment.

15. The Claimant's salary as at the time of termination is in contest. On the one hand, the Claimant states that the Respondent unilaterally slashed his salary, first by 25% and subsequently by 50%. The Respondent on the other hand pleads that due to a depressed economic environment triggered by post-election violence in 2008, it was unable to sustain the obtaining staff salaries. The Respondent adds that all employees, including the Claimant agreed to take a pay cut, as a way of navigating through the tough economic times.

16. The Claimant told the Court that he did not agree to a pay cut. In this regard, he denied having signed a letter dated 15th January 2008 assenting to a 25% salary reduction. The Respondent produced letters signed by other employees agreeing to a 25% salary reduction. These letters were witnessed by the Claimant, in his capacity as General Manager of the Respondent. The Court therefore found it strange that the Claimant would feign ignorance of the decision taken by the Respondent to reduce staff salaries by 25%.

17. Consequently, the Court has reached the conclusion that the 25% salary reduction was effected with the full knowledge and acquiescence of the Claimant and he cannot now turn around and make a claim for withheld salary on account of this reduction. Regarding the 50% reduction however, the Court found that this was a unilateral decision taken by the Respondent, which is hereby overruled and reversed.

18. In the upshot, the Court determines that as at the time of leaving employment, the Claimant's salary

was Kshs. 82,500 factoring in a 25% reduction. The Claimant states that his employment contract provided for a net salary. A proper reading of Clause 4 of the contract however reveals that his salary was subject to statutory deductions.

19. In the end, I enter judgment in favour of the Claimant in the following terms:

- (a) 6 months' salary in compensation.....Kshs. 495,000
- (b) 3 months' salary in lieu of notice..... 247,500
- (c) Salary for 26 days in May 2010 (82,500/30x26).....71,500

Total814,000

20. Regarding the claims for salary arrears and underpayment, I direct that the Advocates for the parties will, within the next 14 days from the date of delivery of this judgment, jointly tabulate the applicable figures based on the direction given by the Court on the allowable salary deduction of 25%. The

Court found no basis for the claim for breach of contract which is therefore disallowed.

21. The cumulative award amount, which is subject to statutory deductions, will attract interest at court rates from the date of delivery of judgment until payment in full.

22. The Claimant is also entitled to a certificate of service and costs of the case.

23. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI

THIS 26TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Okemwa for the Claimant

Mr. Waweru for the Respondent