



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 170 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ELTON BARASA.....CLAIMANT

-Versus-

ONE ACRE FUND.....RESPONDENT

JUDGMENT

By statement of Claim dated 2nd June and filed on 16th July 2014 through Balongo & Company Advocates the Claimant alleges that his contract of employment with the Respondent was unfairly and unprocedurally terminated by the Respondent on 11th November 2013. He prays for the following remedies-

1. Declaration the termination for contract was unprocedural and with malice.
2. Compensation as per clause 6 with interest.
3. Costs of the suit.

The Respondent filed a Statement of Defence through Annet Mumalasi & Company Advocates on 6th August 2014 in which it avers that the termination of the Claimant's contract of employment was lawful, procedural and fair and that the termination was based on valid reasons as set out in the letter of termination. The Respondent denies that the Claimant is entitled to the remedies sought in the Claim and prays that the suit be dismissed with costs.

The case was heard on 3rd November 2016 when the Claimant's evidence was taken and on 14th February 2017 when the Respondent's evidence was taken. The parties thereafter filed and exchanged written submissions.

At the hearing the Claimant was unrepresented while the Respondent was represented by Ms. Mumalasi during hearing of Claimant's case and by Mr. Tsimenjero during defence case.

Claimant's Case

The Claimant testified that he was employed by One Acre Fund on 12th June 2012 as a field Officer. His duties entailed training farmers on modern farming techniques and giving them farm inputs on credit. He

received a letter of termination on 11th November 2013. The grounds for termination were that he was undisciplined, as he had not participated in team building sessions. Prior to the termination, he was served with a letter of probation on 14th October 2013.

The Claimant testified that he was never given a hearing before the probation or termination. He testified that he was never given an opportunity to vent his grievances against his manager who required him to sign documents with unverified details.

The Claimant testified that the probation letter stated that he would be awarded scores according to improvements which was not done and his contract was terminated before the expiry of the probation.

The Claimant testified that the manner in which he was terminated was horrible, that he was called into the manager's office in the morning and was informed that he was fired and then the letter of termination was handed over to him. He testified that the signature in the letter of termination is scanned confirming that he was never given a hearing. He further testified that he had submitted his grievances through the office hotline but did not receive any responses.

The Claimant testified that he loved his job and worked hard, performed well and was rated that year as 3rd among 75 field officers in his district in loans clearance and 2nd highest in giving loans. The company was very happy with his performance and awarded him plates and blankets in recognition of his efforts.

He denied that he failed to participate in team building and testified that there were witnesses who attested to his participation. On the accusation that he was absent from boot camp the Claimant testified that he contacted his manager on phone and informed the manager that his wife was sick and he had to take her for medical attention. He referred to medical records annexed to the Claimant's Bundle of Documents at page 3. The Claimant also denied the allegations on cash compliance and stated he had written to the Human Resource Manager on the issue. He testified that he received more than 500 messages of congratulations on cash compliance.

The Claimant testified that he worked under frustration as the managers misused the office. He testified that he worked with a colleague at his level and performed better but the colleague was promoted and made his field manager whom he was made to work under. He testified that none of the senior field officers who were promoted worked under a junior field officer. He testified that the junior field manager was assigned to frustrate him.

The Claimant testified that after termination he was denied a certificate of service and it had been difficult for him to get other employment without the certificate of service. He prayed for judgement against the Respondent as prayed in his claim.

Under cross-examination, the Claimant stated that he received the certificate of service after he had written several letters. He stated that his letter of appointment provided for probation due to poor performance and for termination on grounds of poor performance. He stated the documents attached to Appendix 6 of Respondent's bundle was never served upon him. He stated he was given probation of 28 days from 14th October to 11th November 2013 which was less than one month. He testified that he did not know what he scored during probation. The Claimant confirmed receiving warning letters dated 22nd April 2013 at appendix 7 of Defence for a shortage of Kshs. 1,008/= which he testified was paid the same day. He admitted signing the document at Appendix 8 of defence which indicated he had 14 errors in his receipts.

The Claimant testified that his letter of appointment does not provide for a hearing before probation. The Claimant testified that he was heard on appeal after termination of employment. He denied that he refused to hand over after termination and explained that he handed over to his manager immediately upon termination. He stated he was paid Kshs. 37,453 made up of salary for November, 2013 although he worked for 11 days only, salary in lieu of notice and Kshs. 13,500 bonus for 2013 season. He stated he was not at work on 4th October 2013 and had informed his manager on phone of his inability to go to

work. He stated that on 5th October 2013 he was in the meeting throughout contrary to allegations that he left and came back just before the last prayers.

The Claimant denied that he was unhappy because of not having been promoted and stated he was unhappy about the way the junior field officer he was assigned to work under treated him.

Respondent's Case

BEATRICE MACKSALLAH (RW1), the Respondent's Human Resource Manager stationed at Bungoma, testified on behalf of the Respondent. She testified that she knows the Claimant who was employed to work for the Respondent in Busia District in June 2012 and worked for one year 4 months. She testified that he was dismissed for poor performance.

She testified that the Respondent has a policy to place employees with performance deficiency on probation, that an employee placed on performance probation is made aware that if there is no turnaround dismissal would follow. She testified that the Claimant was given a warning letter and placed on probation. He did not turn around and a decision was made to terminate his employment. She testified that after termination the Claimant sent a protest letter which was treated as his appeal against termination. He was invited for a hearing of the appeal.

RW1 testified that the Claimant was paid salary in lieu of notice, all earned leave and bonus through his salary account. He was informed that he would be issued with a certificate of service upon clearance and this was done as is evident from the copy annexed as Appendix 5 to the Response. She urged the court to dismiss the Claim as the dismissal of the Claimant was in compliance with the law.

Under cross-examination RW1 testified that the Claimant was paid bonus for good performance. She testified that the termination letter does not refer to cash compliance but referred to new cases of indiscipline and participating in negative meetings.

RW1 testified that the procedure for termination is that the employee is given an opportunity to improve and if there is no improvement the employment is terminated. She testified that there were no complaints from farmers against the Claimant. She denied that Patrick Odeka, the Claimant's manager, was instructed to frustrate him.

Determination

I have carefully considered the pleadings and evidence on record. I have further considered the viva voce evidence of the Claimant and RW1.

The issues for determination are whether the termination of the Claimant's employment by the Respondent was unfair as alleged by the Claimant and if he is entitled to the remedies sought.

Unfair Termination

Unfair termination is defined and prohibited in section 45 of Employment Act which provides as follows-

45. Unfair termination

- (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.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where—
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) the existence of any previous warning letters issued to the employee.

In the present case the Claimant was first placed on performance related probation and thereafter was terminated on grounds that he did not improve. His letter of termination states that the termination was on grounds of poor performance as follows-

“It is with great regret that we have to inform you that we have decided to terminate your contract based on poor performance. One Acre Fund has made the decision to end your service based on the reasons listed below:

Indiscipline, not having respect to junior FMS and top management leadership.

On the dates of 14th October 2013 you were given a probation with areas of concern highlighted and steps to improve and was clearly informed that failure to turn around would lead to a termination. Through the probation period you have not lived up to the expectations set and for instance on Tuesday the 5th of November 2013 you called aside and dismissed your group leaders in the presence of your FM while fully aware that the FM had scheduled to have a meeting with this team and yourself. This is unacceptable and reflects lack of respect/discipline and incitement. You warned your FM not to call you and refused to sign the filed officers filed visit field back receipt.

Attendance to meeting and trainings: you have not lived up to the expectation of attending all

scheduled meetings/training and even skipped the field offices boot camp training that was two days without communicating the reasons for staying away until you were asked.

Negative participation during staff meetings: For the meetings that you have been in attendance during the probation time you have not been willing to participate in team building exercise unless forced to. You have engaged other staff in conversations when sessions are ongoing hence side tracking your colleagues and painting a bad picture to the rest of the team.

You also refused to send mid-week KPIs and absconded work planning session with you team. On Monday the 5th, you left after lunch and was not in the planning session neither did you explain your going away and only arrived back in time for the last prayer to close the day.

Other disciplinary actions awarded: On the 22nd April 2013, you were issued with a cash compliance warning letter where total cash was incorrectly summed.

You were given specific steps to improve during the just concluded probation time unfortunately there was no turnaround from you hence the decision to end your service with Once Acre Fund”.

There is no evidence that the Claimant was subjected to a hearing either before being placed on probation or before termination. Indeed RW1 testified that the Respondent’s policy does not provide for a hearing before termination of an employee on performance probation. This begs the question how the employee is supposed to know how they have performed during probation. The Respondent did not submit any performance appraisal form which was discussed with the Claimant before he was placed on probation specifying the areas in which he was supposed to improve on, or that there was a meeting at the end of such period to discuss how he performed during the performance probation period. The form that was given to the Claimant is blank while the one filed by the Respondent is filled with vary poor grades. It is not indicated who filled it and why the Claimant’s input was not sought before it was acted upon to his detriment.

I am inclined to believe the Claimant’s allegations that the whole process was designed to frustrate him. I cannot think of any other feasible explanation.

The foregoing notwithstanding, the provisions of section 41(1) are very explicit, that an employer who intends to terminate the employment of an employee on grounds of poor performance must give the employee a hearing. The section is reproduced below.

*41(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.*

[Emphasis added]

RW1 referred to the Respondent’s terms and Conditions of Employment at paragraph 6 which provides as follows-

“Termination due to Poor Performance

Definition: *One Acre Fund always works closely with employees to address performance deficiencies and will invest significant time and resource into staff career development. However, we serve farmers first and sometimes we have to terminate employees for poor performance in order to maintain our excellent standards of service.*

Conditions: *Termination due to poor performance can be for any performance related reason – for example misconduct, tardiness, absenteeism, etc.*

Procedures: In the case of poor performance. One Acre Fund will give all employees the opportunity to correct a performance problem prior to termination. The employee will first be placed on a 30-day probation period with a clear outline of performance deficiencies. If performance does not improve, the employee's service with One Acre Fund will be ended. The employee will receive an 'End of Service Letter' detailing severance benefits, if any."

The Respondent failed to observe its own terms and conditions of service as the Claimant was not given any support during the performance probation and was terminated before the probation period of 30 days ended. The probation commenced on 14th October 2013 and was to end on 14th November 2013 but the Claimant was terminated on 11th November 2013 without as much as discussing with him the outcome of the performance probation. As pointed out above this was in violation of section 41(1) of the Act which requires that an employee be given a hearing before termination on grounds of poor performance.

On the ground of termination, it is instructive that the grounds of termination cited in the Claimant's letter of termination are more than those on the probation notice. It therefore means that the Claimant was not given an opportunity to respond to the new grounds before the termination. No evidence was adduced to prove the said grounds which the Claimant denied.

From the forgoing the termination of the Claimant's employment was unfair both procedurally and substantively and I hold and declare accordingly.

Remedies

The Claimant prayed for compensation for 30 years. He has not explained why he sought compensation for 30 years. The employment Act provides for compensation at a maximum of 12 months' salary. His gross salary at the time of termination was Kshs. 11,500/=.

Having reached the conclusion that the Claimant was frustrated before being terminated I will award him maximum compensation of 12 months' gross salary being Kshs. 138,000/=.

The Claimant further prayed for costs. Taking into account that the suit was filed by an advocate but he was unrepresented at the hearing, I award him a global figure of Kshs. 50,000/= to represent his reasonable expenses and disbursements.

Orders accordingly.

DATED AND SIGNED THIS 15TH DAY OF JANUARY 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED ON THIS 1ST DAY OF FEBRUARY 2018

MATHEWS NDERI NDUMA

JUDGE