



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 738 OF 2016

MAZHAR SUMRA.....CLAIMANT

VERSUS

OVERDRIVE CONSULTANTS (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 29.2016 alleging that his employment had been unfairly terminated by the respondent on 10.5.2016. He claims salary in lieu of notice, compensation for unfair termination, service pay, accrued leave, unpaid salary General damages for breach of contract, certificate of service, costs and interest.

2. The respondent has however denied the alleged unfair termination and averred that the claimant was terminated for insubordination and operating a rival company which solicited her clients. It is the defence case that due to the said misconduct, she served the claimant with 30 days termination notice under section 35 of the Employment Act. She therefore averred that the termination was fair and prayed for the suit to be dismissed.

3. The suit was heard on 19.10.2017 and 29.11.2017 when the claimant testified as Cw1 and the respondents Director Mr. Keval Devan testified as Rw1. Thereafter, both parties filed written submissions which I have carefully considered.

Claimant's Case

4. Cw1 testified that he was employed as Technical Director by the respondent under a 3 years contract from 1.12.2014 for a month salary of Kshs.100,000 per month but it was later increased to Kshs.150,000 after six months. He was never issued with any payslips and he was also never registered for N.S.S.F.

5. Later in February 2015 he noticed that the respondent changed name from Overdrive Consultant Limited to the Current name without any prior notice. All the address and letterhead logo remained the same and Rw1 still being the Director. He was never given a new contract and the terms of employment remained the same. There was also no formal communication to him about the changes in the company. He continued being in charge of the Nairobi Branch and also taking care of Technical Teams in Mombasa.

6. On 10.5.2016 he received a notice of termination of employment from the respondent. The reason cited was resistance to growth, exchanging unethical emails with the Director, and declining to honour the chain of command. Cw1 termed the cited reasons as untrue. He contended that as the Head of the Nairobi Branch he encouraged growth of the business. As regards the alleged unethical emails, he contended that the emails were part of an informal chat among colleagues initiated by the Rw1 on 9.5.2016 and they were never meant to be formal communication. Finally, regarding the chain of command Cw1 contended that he was directly reporting to the Rw1 and not Mr. Imtiaz Khan who was interviewed and employed as Sales Head Executive reporting to him. He denied that Mr. Imtiaz was ever introduced to him as the General Manager.

7. Cw1 further stated that before the termination he was never invited to any hearing and he was therefore not accorded a chance to defend himself against the said allegations. He therefore maintained that the termination was unjustified and unfair and prayed for the reliefs sought in the suit because his contract was prematurely ended by the respondent.

8. On cross examination, the claimant maintained that he did not know whether there was a General Manager the respondent company. He admitted that the informal chat on 9.5.2016 was related to the company business in Nairobi and Mombasa. He further admitted that when Rw1 referred Imtiaz as the General Manager, he (Cw1) responded that he did not wish to argue about petty things. He admitted that he was

supposed to respect the Director.

9. On further cross examination he contended that Mr. Imtiaz portrayed arrogance towards him through his email correspondences. He stated that he responded to the termination out of emotions stating that he had also received new job. As regards notice of termination, Cw1 maintained that the contract provides for 3 months notice period before termination but he was given one month notice.

Defence Case

10. Rw1 admitted that he employed the claimant from December 2014 to May 2016. He explained that he was previously had shares in Overdrive Consultant Limited and left to register the respondent company on 2.12.2014, he invited member of staff of the initial company to new company and the claimant accepted a salary of Kshs.100,000 net per month in addition to commission on the sales made.

11. Rw1 confirmed that for 8 months the two companies operated under one roof where the claimant was working until August 2015 when he was transferred to Nairobi. In November 2015, the respondent employed Mr. Imtiaz as the General Manager and transferred him to Nairobi in or about December 2015. However the claimant seemed to clash with the General Manager up to May 2016 when the Rw1 initiated an informal chat among the colleagues to iron out petty administrative issues in relation to work. Rw1 clarified that the informal chat was not meant to be binding on the administration of the company.

12. Rw1 contended that through out his service the claimant portrayed pride and rudeness. That he was inappropriate and unprofessional compared with the General Manager. Rw1 further contended that the conduct of the Claimant was affecting the company business negatively because projects were delayed by the unnecessary differences. Consequently, the claimant was terminated by one month notice for misconduct and poor performance.

13. Rw1 contended that the contract which provided for 3 months was between the claimant and the former company which he left in December 2014 to join the respondent. He further contended that under the respondent's policy any leave not taken in the same year was forfeited. As regards compensation for unfair termination, Rw1 contended that the claimant had secured another job a day before the termination and thereafter registered his own company called Exfinity Limited. He concluded by stating that after the termination the claimant was paid Kshs.220,000 including 10 days salary for May 2016, one month salary in lieu of notice, salary arrears for April 2016, leave, bonus and final reimbursement.

14. On cross examination Rw1 maintained that the respondent company was registered in December 2014 and it is a separate entity from Overdrive Consultant Limited. He however admitted that he was a shareholder in the latter company. He did not produce any evidence to prove that he resigned from the ownership of the latter company. He further did not produce letter to prove that he employed the claimant in the new company under different terms from the other company.

15. On further cross examination, Rw1 confirmed that the claimant worked well until Mr. Imtiaz joined the company. He further confirmed that there was no HR manual to guide the staff on the chain of command. He also confirmed that there was no leave policy. He admitted that he never did any performance appraisal on the claimant before the termination. He further admitted that the claimant was never accorded any disciplinary hearing before the termination. He also confirmed that the claimant had not been served with any warning letter before the termination finally he admitted that the claimant registered his Exfinity Limited after the termination.

Analysis and Determination

16. After careful consideration of the evidence and the submission presented to the court, the following issues arose for determination:

- (a) Who was the claimant's employer from 1.12.2014 to 10.5.2016 when he was terminated.
- (b) What were the terms of engagement in respect of salary, leave and termination.
- (c) Whether contract employment was unfairly terminated by the respondent.
- (d) Whether the claimant is entitled to the reliefs sought.

The Employer

17. Rw1 contended that he registered the respondent on 2.12.2014 and invited members of staff to cross from Overdrive Consultant Limited to work for the new company. He further contended that the claimant left the former employer (Overdrive Consultancy Limited) and joined the respondent under new terms governed by the Employment Act. The claimant has however contended that he worked under the same terms of the contract signed between the Rw1 and himself while operating as Overdrive Consultant Limited. He contended that no new contract was signed and no formal notice was given about change of the employer or the contract.

18. I have carefully considered the contract dated 26.11.2014 it was signed by Rw1 as the Director of Overdrive Consultants Limited. It was for 3 years starting 1.12.2014 the same time when Rw1 stated that he invited employees of Overdrive Consultants Limited to cross over to the respondent. No written evidence was adduced to prove that Rw1 notified the claimant of registration of the respondent as a new and separate entity and also that he invited him to cross over to her. On a balance of probability, therefore, I have formed the view that Rw1 engaged the claimant with the sole intention of working in the respondent company.

19. The reason for the foregoing view is that the contract they signed on 26.11.2014 was to commence on 1.12.2014, the same time when the

respondent was registered. It would appear without any doubt that the claimant never worked for the Overdrive Consultants Limited. The foregoing view is fortified by the fact that Rw1 stated in his testimony that the claimant joined the respondent in December 2014. Consequently, I hold that claimant's employer from 1.12.2014 to 10.5.2016 was the Respondent.

Terms of Employment

20. The claimant stated that his terms of service were contained in the contract dated 26.11.2014 including salary of Kshs.100,000 and termination notice of 3 months. He however contended that the salary was increased after 6 months to Kshs.150,000. No evidence of such increment was adduced. The Rw1 contended on the other hand that the contract dated 26.11.2014 was not applicable to the respondent because the claimant abandoned that contract of work for the respondent under new terms governed by the Act.

21. In view of my finding herein above that the contract between the parties herein is the one dated 26.11.2014, I dismiss the respondents allegation that the said contract had been abandoned and as such not applicable to the respondent. The terms on salary remained Kshs.100,000 per month reviewable after every 6 months but the alleged increment to Kshs.150,000 is dismissed for lack of any supporting evidence. The notice period for termination remained 3 months and the alleged reduction to one month is dismissed for lack of any documentary evidence. Finally, the contract provided for 21 days leave per year without any indication of forfeiture if not utilized.

Unfair termination

22. There is no dispute that the termination of the contract of service was done by the respondent by the letter dated 10.5.2016. Under section 45(2) of the Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

Reasons of termination

23. The reason cited for the termination by the letter dated 10.5.2016 was misconduct namely insubordination by failing to take instructions from the seniors in the chain of command. In his testimony Rw1 cited a second reason for termination namely, poor performance. The alleged poor performance was however not proved by performance appraisal reports. However, the offence of insubordination was proved on a balance of probability.

24. The offence is obvious from the tone and the wording of the claimant's emails during the "informal chat" among the colleagues which was initiated by Rw1 to iron out petty administrative issues. By the said emails, the claimant refused to acknowledge the indication by Rw1 that Mr. Imtiaz was the General Manager and therefore senior to claimant. In a rather rude tone, the claimant sarcastically told Rw1 that Mr. Imtiaz was his General Manager. He also did not want to discuss the status of Mr. Imtiaz with Rw1 and referred the subject as petty issue. The foregoing view is fortified by the fact that the claimant remained adamant even in his testimony that the claimant was his junior. Consequently I find that the respondent has proved that there was a valid reason for terminating the claimant. The said reason was fair because it touched on the claimant's conduct which made him incompatible with other staff and managers of the respondent.

Procedure followed

25. The procedure followed was not in consonance with the mandatory procedure provided by section 41 of the Act. The said provision requires that before terminating an employee on ground of misconduct, poor performance and physical incapacity, the employer shall first explain to the employee, in a language he understands and in the presence of another employee or shop floor union representative of his choice, the reason for which termination is contemplated and thereafter invited the employee and his chosen companion to air their representations for consideration before the terminations decided. In this case, the claimant was terminated before being accorded hearing in the presence of another employee and as such, the termination was rendered unfair within the meaning of section 45 of the Act.

Relief

26. Under section 49 of the Act, I award the claimant Kshs.300,000 being 3 months salary in lieu of notice plus Kshs.600,000 being 6 months salary compensation for unfair termination. In awarding the salary in lieu of notice, I have considered the contract of employment dated 26.11.2014. On the other hand I have considered the fact that the claimant contributed to the termination through misconduct.

27. I have also allowed the claimant for accrued leave between December 2014 and May 2016 being 1 ½ years. I therefore award $Kshs.100,000 \times 33/26 = Ksh.126,923.10$.

28. The claim for salary for 10 days worked in May 2016 is allowed being Kshs.38,461.55 I also award service pay for one complete year at the rate of 15 days salary per year equaling to Kshs.50,000.

29. The claim for breach of contract is dismissed as the same is compensated by the salary in lieu of notice. However certificate for service is granted as prayed being a right under section 51 of the Act.

Disposition

30. For the reason that the claimant was unfairly discharged by the respondent, I enter judgment for him in the sum of Kshs.1,115,384.65 plus cost and interest from the dated hereof. The said award will be subject to statutory deductions and Kshs.220,000.

Signed and dated and at Nairobi this 6th day of April, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26 day of April 2018.

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JUDGE