



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2365 OF 2012

CELESTINE MWENDA MUNENE.....CLAIMANT

VS

ROYAL MEDIA SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Celestine Mwenda Munene was an employee of Royal Media Services. He brought this claim following the termination of his employment on account of misconduct. The claim is contained in a Memorandum of Claim dated 11th September 2012 and filed in court on 22nd November 2012. The Respondent filed a Reply on 28th January 2013 to which the Claimant responded on 7th February 2013 and 21st February 2013.

2. The matter was initially heard by my brother **Nzioki wa Makau J**, who upon realizing that a person mentioned in the documents filed in court was personally known to him, recused himself and referred the matter to the Principal Judge for re-allocation. This is how the matter ended up before me.

3. When the parties appeared before me on 1st March 2017, they agreed to proceed from where my brother Judge had stopped. The Claimant testified on his own behalf and the Respondent called its former Human Resource Officer, Esther Masese, Radio Presenter, Morris Muriuki Mbaka and Musician, Gideon Kobia M’Kiriga. The parties also filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent on 29th September 2005. By letter dated 25th January 2012, the Claimant’s employment was terminated effective 13th September 2011. The Claimant avers that prior to the termination, the Respondent had put him under pressure to resign. He adds that his salary had been withheld for six (6) months prior to the termination letter which was backdated. The Claimant further states that he was not paid his terminal dues. He claims the following;

- a) Leave pay for 35 days.....Kshs. 145,883.32
- b) 3 months’ pay in lieu of notice.....375,000,00
- c) Salary arrears for September 2011 to February 2012.....750,000.00

- d) Service pay for 7 years.....875,000.00
- e) 12 months' salary in compensation.....1,500,000.00
- f) Certificate of service
- g) Costs plus interest

The Respondent's Case

5. In its Reply dated 28th January 2013 and filed in court on even date, the Respondent admits having employed the Claimant as Head of Radio, *Muuga FM*, pursuant to a contract of employment dated 25th September 2005.

6. The Respondent goes on to state that the Claimant's employment was terminated on 13th September 2011, on account of gross misconduct, particulars being that he was in the habit of asking for bribes or kickbacks from performing artists, as an inducement for inclusion in events sponsored by the Respondent.

7. The Respondent avers that when confronted, the Claimant denied the allegations before the Human Resource Manager but later admitted the said misconduct to the Respondent's Programmes Director, Fred Afune. The Respondent adds that the Claimant was advised to put the admission and an apology in writing, which he did by an email dated 13th September 2011.

8. The Respondent denies the Claimant's entire claim and states that in effecting the termination, it complied with the law and the obtaining employment contract. In particular, the Respondent states that the Claimant was given valid reason for the termination and was provided with an opportunity to be heard.

9. Upon termination, the Claimant's terminal dues were tabulated as follows:

- a) 14 days worked in September 2011.....Kshs. 58,333
- b) 1 month's salary in lieu of notice.....125,000
- c) 26 leave days earned.....108,342

10. The said dues were remitted to CFC Stanbic Bank, in payment of a loan advanced to the Claimant, whose arrears as at September 2011, stood at Kshs. 884,616.45.

Findings and Determination

11. 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

12. The termination of the Claimant's employment was effected by letter dated 25th January 2012, stating as follows:

"Dear M. Munene,

"WITHOUT PREJUDICE"

Re: Termination of employment

The following is a chronology of events that are relevant to the contents of this letter.

1. On or about September, 2011, allegations were made by an artiste to the effect that you had extorted money being your “cut” for including them on the company’s road shows. A telephone conversation with the concerned artiste was tendered as evidence.
2. You were confronted with these allegations by the Programs Director in the presence of the Human Resources Officer. You denied the allegations.
3. Shortly, thereafter, you called the Programs Director and indicated to him that you found it difficult to accept the allegations in the presence of the Human Resources Officer and that you wanted to see him alone, a request that was granted.
4. You admitted to the Programs Director the mistake and assured him it would never happen again. The Programs Director requested that you put the same in writing which you duly did.
5. Upon reviewing the case, the Finance & Administration Director in consultation with the Programs Director decided to terminate your employment. The reasons given were that these allegations were so serious as they touched on your integrity and by extension the integrity of the station.
6. The Human Resources Officer was requested to process your departure. After discussions with her, she gave you a soft option of resigning without losing your benefits.
7. You requested her to give you time and you’ll get back to her, which you never did for a long time.
8. You eventually secured an appointment with both the Finance & Administration and Program Directors where they painstakingly explained to you the company’s position and still gave you the option to resign. You again undertook to go think about it and revert.
9. You have never reverted with a resignation to date.
10. Given the above circumstances, the company has been left with no option but to terminate your employment with effect from 13th September, 2011.
11. Kindly get in touch with the undersigned for a computation of your terminal dues.

Yours Sincerely

(Signed)

Bashir Mburu

Finance & Administration Director”

13. This letter accuses the Claimant of exhorting money from artists as an inducement for their inclusion in road shows sponsored by the Respondent.

The question before the Court is whether a valid reason for termination of the Claimant’s employment has been established.

14. In determining this question, the Court is not to supplant the employer’s decision with its own. All the Court is required to do is to check whether the employer acted in a reasonable manner in the

circumstances. This is the essence of Section 43 of the Employment Act, 2007 as interpreted by this Court in ***Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Ltd [2015] eKLR***.

15. At paragraph 5 of his Reply to the Respondent's Memorandum dated 7th February 2013 and filed in court on 8th February 2013, the Claimant admits having sent an email to the Respondent under duress. The Court took this to mean the email produced by the Respondent as RM2 by which the Claimant apologised for his part "*in shameful and embarrassing mistakes involving Muriithi Ritho.*"

16. The Claimant subsequently disowned the said email in his amended Reply to the Respondent's Memorandum dated 21st February 2013 and filed in court on 22nd February 2013. The Court was however unconvinced by this apparent oscillation by the Claimant as no explanation was given on the email allegedly penned under duress.

17. It seems to me therefore that there was indeed an issue regarding the Claimant's conduct that was serious enough for the Respondent to consider terminating employment. Further, the Respondent's 2nd and 3rd witnesses, Morris Muriuki Mbaka and Gideon Kobia M'Kiriga made very serious allegations touching on the Claimant's integrity. The Court observed the demeanour of the two witnesses and found no reason to disbelieve them.

18. Taking the evidence placed before the Court, I find that the Respondent had a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act.

19. The next question is whether in effecting the termination, the Respondent observed due process. The Respondent's 1st witness, Esther Masese told the Court that on 12th September 2011, the Respondent's Programmes Director, Fred Afune convened a meeting with the Claimant, Afune's Deputy and herself in attendance.

20. A recording of a conversation between the Claimant and one Muriithi Ritho is said to have been played. The Claimant denied the contents of the recording and the following day, Masese was instructed to facilitate the Claimant's exit. Masese unsuccessfully attempted to get the Claimant to resign and on 25th January 2012, he was dismissed.

21. This procedure as presented by the Respondent's own witness falls short of the mandatory procedural fairness requirements established by Section 41 of the Employment Act. This renders the termination of the Claimant's employment procedurally unfair and he is entitled to compensation.

Remedies

22. Having found the termination of the Claimant's employment procedurally unfair, I award him three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the conduct of the parties. I further award the Claimant one (1) month's salary in lieu of notice as provided in his contract of employment.

23. The Respondent did not produce any leave records to counter the Claimant's claim for 35 leave days which therefore succeeds and is allowed.

24. The termination of the Claimant's employment was terminated by letter dated 25th January 2012 and the Court found no legal basis for backdating the termination to 13th September 2011. The Claimant is therefore entitled to salary arrears for the period between September 2011 and 25th January 2012.

25. The Claimant also claims service pay. He however admits that he was a contributing member of the National Social Security Fund. This claim is therefore without basis and is dismissed.

26. In its Memorandum, the Respondent avers that the Claimant's dues as tabulated were paid to CFC

Stanbic Bank on account of a loan owed by the Claimant to the Bank. There was however no documentary evidence to support this averment. In making its final award therefore, the Court did not take this into account.

27. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation.....Kshs. 375,000
 - b) 1 month's salary in lieu of notice.....125,000
 - c) Leave pay for 35 days.....145,833
 - d) Salary for September 2011-December 2011.....500,000
 - e) Salary for 25 days in January 2012.....104,167
- Total.....1,250,000**

28. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

29. The Claimant will have the costs of the case.

30. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF APRIL 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF APRIL 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Ogweh for the Claimant

Miss Muhoro for the Respondent