



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1040 OF 2015

JOSPAT NDUHI.....CLAIMANT

- VERSUS -

UKASH & BROTHERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 31st May, 2018)

JUDGMENT

The statement of claim was filed for the claimant on 15.06.2015 through Maina Ngaruiya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's termination of the claimant was wrongful, illegal and unfair.
- b) Payment of Kshs.294,922.00 being salary in lieu of notice Kshs.17,600.00; leave pay for 2012 Kshs.16, 312.00; leave pay for 2013 Kshs.21, 410.00; and 12 months' salaries at Kshs.17,600.00 for unfair termination Kshs.212, 200.00.

The response to the claim was filed on 27.07.2017 through N.O. Sumba & Company Advocates. The respondent prayed that the claimant's statement of claim should be dismissed with costs.

There is no dispute that the respondent employed the claimant as a supervisor at a filling and service station and Total Kenya Limited was the franchise holder. The employment was effective 15.10.2008. The claimant's case was that on 01.09.2014 the respondent terminated the employment without notice and without a hearing. The respondent's case is that the claimant was verbally warned and written warnings issued about his poor performance for failure to meet the performance standards imposed by Total Kenya Limited and to be implemented by the respondent. The standards known as "**Top Service**" were to be realised by the claimant as a supervisor and the respondent's case was that the claimant failed to do so resulting into his termination by the letter dated 01.09.2014.

The letter stated that observations and analysis in the past months showed that the claimant had neglected his duties as a station supervisor thereby seriously affecting the station performance and sales. The letter further stated that from second quarter in 2013 the respondent's '**Top Service**' expected performance had experienced a decline and the claimant as the responsible employee had never come up with a proper reason or solution. Accordingly, the claimant's employment was thereby terminated.

The respondent, after receiving the demand letter, computed the claimant's terminal dues at a net pay of **Kshs. 62, 313.00** being one month notice pay, 5 years' severance pay, and leave pay. Prior to payment of the dues, the claimant moved to court. The payment had been negotiated between the claimant's previous lawyers and the respondent.

The **1st issue** for determination is whether the termination was unfair. The Court has considered the evidence. There is no reason to doubt that Total Kenya Limited complained about the respondent's failure to meet the performance standards. The respondent has filed correspondence in that regard. The respondent filed warning letters against the claimant and there is no reason to doubt the respondent's evidence that the claimant received oral and written warnings about his diminishing performance. The respondent's evidence that the claimant's performance started to decline after the 2012 recommendation of the claimant to Total Kenya Limited for young dealership award was credible. The Court returns that the respondent had a valid reason to terminate the claimant's contract of employment as envisaged in section 43 of Employment Act, 2007.

The claimant testified that summary dismissal must have applied to his contract of service. On the day he was dismissed, the claimant testified that he was simply told not to report at work because he had been terminated. The advocates he had appointed, Ajaa Olubayi & Company Advocates later told him that he had been dismissed for failure to meet the '**Top Service**' performance standards.

The Court has considered the warnings and the respondent's evidence that the parties had discussed the claimant's declining performance. In

such circumstances the court returns that the summary dismissal was not unfair. The respondent had walked the claimant through written and verbal motions about the performance and the process cannot be said to have been unfair.

As envisaged in section 45(2) of the Act, the respondent has established that the reason for termination related to the claimant's performance and the respondent's operational requirements namely, failure by the claimant to meet performance standards under the "**Top Service**" Total Kenya Limited franchise expectations. Further, in view of the warnings and discussions, there was due procedure prior to the termination.

The Court returns that the termination was not unfair.

The **2nd issue** is whether the claimant is entitled to the remedies as prayed for. The respondent's evidence is clear. Prior to filing of the suit the parties' advocates had struck a compromise. The relevant correspondence was filed. Of particular interest is the letter dated 27.02.2015 by Ajaa Olubayi & Company Advocates stating that the claimant was willing to accept payment of Kshs. 62, 313.00 all inclusive. As per the respondent's evidence, there is no reason why that agreement should not be binding upon the parties. The claimant will be awarded the same but less **Kshs. 20,000.00** being the claimant's part payment of the respondent's costs of the suit. While making that finding the Court considers that the claimant did not need to file the present suit in view of the agreement that had been arrived at between the parties' advocates and prior to the filing of the suit.

In conclusion judgment is hereby entered for the parties for the respondent to pay the claimant **Kshs.42, 313.00** by 01.07.2018 failing interest to run at Court rates from the date of the suit till full payment. The respondent will deliver a certificate of service to the claimant by 01.07.2018 in line with the parties' separation agreement as compromised by their respective advocates and as per section 51 of the Employment Act, 2007. A decree will issue accordingly.

Signed, dated and delivered in court at Nairobi this Thursday 31st May, 2018.

BYRAM ONGAYA

JUDGE