



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 103 OF 2013

(Before Hon. Justice Mathews N. Nduma)

LEMPAA VINCENT SUYIANKAn..... CLAIMANT

=VERSUS=

KENYA BROADCASTING CORPORATION RESPONDENT

J U D G M E N T

1. The suit commenced vide a Memorandum of Claim filed on 25th January, 2013 along with annexures marked 'A – U'. The Claimant filed an amended statement of claim on 22nd October, 2014. The Claimant further filed supplementary list of documents on 22nd October, 2014.

2. The Claimant seeks the following reliefs:-

- a. The sum of **Kshs.2,465,304/-** comprising terminal dues and damages for unlawful termination.
- b. An order for compensation of the claimant on account of discrimination under **Article 23** of the **Constitution**.
- c. A declaration that the Claimant's termination from employment was contrary to Section 41 and 45 of the **Employment Act**.
- d. A declaration that terminating the Claimant's services without observing the Kenya Broadcasting Corporation Code of Regulations was in breach of the Claimant's contract of employment.
- e. An order compelling the Respondent to pay the Claimant his salary and all other benefits in arrears flowing from his promotion from a **Broadcasting Assistant BA5** to a **Broadcasting Assistant BA2** in accordance with the Code of Regulation.

3. Brief facts of the Claim are as follows:-

The Claimant was employed by the Respondent on 24th October, 2005 as Broadcast Assistant (BA5). In November 2010 he was promoted to Broadcast Assistant (BA2) whereon he worked until 6th July 2012 when his services were terminated through a letter of the same date, by the Managing Director. The Claimant at the time earned a gross monthly salary of Kshs.50,255. The reasons for his termination were gross misconduct and disclosure of confidential information.

4. The Claimant states that the termination was wrongful, unlawful and unfair and prays the suit be granted as prayed.

5. The Claimant sets out particulars of unfair and unlawful dismissal as follows:-

- a. The Claimant was never summoned to make any representations or to defend the allegations against him contrary to Section 41 and 45 of the Employment Act.
- b. The termination was in breach of the rules of Natural Justice.
- c. The Respondent's actions were biased and actuated by malice and aimed at victimizing the Claimant attempting to vindicate his rights.

- d. No attempts were made to establish the veracity of any accusations levelled against him.
- e. The intentional denial of sufficient details on the accusation described as serious offences to the Claimant and terminating the service of the Claimant on account of demanding such particulars was in complete disregard of the rules of natural justice.
- f. The decision to disregard the letters of the Claimant's advocates and insisting that he acts personally in a dispute that can be resolved by application of the law amounts to violation of the rules of natural justice.
- g. The respondent breached and/or disregarded the Corporation's Code of Regulation (COR) in dismissing him from employment.
- h. The Respondent's Editor in Chief, Mr. Vitalis Musebe accused him of not being signed into the system, an aspect that was to be coordinated from a totally different department of the Respondent whereas his job description did not require him to oversee the same.
- i. The Respondent failed to provide the Claimant with detailed information as to the seriousness of the offences committed. This is evidence that the whole allegations were maliciously made against him to encumber his continual stay in the corporation.

6. The Claimant further sets out particulars of discrimination as follows:-

- a. To the extent that the Claimant was from Broadcasting Assistant BA5 to Broadcasting Assistant BA2 without any corresponding increase in salary and benefits while this was effected in favour of three other employees amounts to discrimination.
- b. Dismissing the Claimant on account of clamor for reforms in the corporation together with other employees, contrary to the provisions of the Employment Act.
- c. By failing to honour **Section L.9 (ii) of the Kenya Broadcasting Corporation Code of Regulation in August 2009** and applying selectively in respect of certain categories of employees.
- d. Selectively conferring benefits to a particular category of staff members and leaving others contrary to the **Code of Regulations and Article 236 of the Constitution and Section 5 of the Employment Act.**
- e. Failing to confer and/or pay the Claimant commuter allowances in line with his promotion from BA5 to BA2.

7. The Claimant crystalizes the quantum of reliefs sought as follows:-

- a. Salary in lieu of one month notice –
at Kshs.50,255 a month
- b. Severance payment of fifteen days
salary for each of the seven years
worked based on monthly pay of Kshs.175,892.50
- c. Twelve months compensation for
wrongful termination –
at Kshs. 50,255 a month Kshs.603,060
- d. House Allowance difference between
BA 5 and BA2 18500 x 2 Kshs.370,000
- e. Entertainment Allowance not paid as
per promotion from BA5 to BA2,
Nov 2010-July 2012 (4000*20) Kshs. 80,000
- f. Unpaid Leave days for 20 months
(Nov 2010 – July 2012) period

when promotion was done) Kshs.201,000

g. Law Society of Kenya subscriptions Kshs. 34,657

h. Monthly salary difference and allowances

for 20 months as from the promotion

from Broadcasting Assistant BA5 to

a Broadcasting Assistant BA2 on

November 2010. (48,935-30815)*20 Kshs.362,400

TOTAL Kshs.1,877,264.50/-

i. Interest on the unlawfully withheld salaries as per paragraph 9(h) from the date of accrual up to the payment of the same and interest on the above compensation at court rates per annum from the time of Termination of employment.

j. Costs of the suit.

Oral Testimony

8. The Claimant testified under oath in support of his case. He told the court that he was presently an advocate working at Katiba Institute.

9. That he worked for the Respondent as set out in the Amended Statement for Claim. That he initially served the Respondent as a correspondent from April 2004, was recruited as a news editor, in job group 'BA6' on 24th October, 2005 and continued in the position on 15th June, 2009. That he was promoted to job group 'BA5' on 22nd March, 2010 but his salary was not adjusted to reflect the promotion for a period of 20 months until his employment was.

10. The Claimant stated that he was supposed to earn a basic salary of Kshs.48,935 and house allowance of Kshs.30,000 per month upon promotion but he was kept on his old salary as demonstrated in the pay slips produced as exhibits before court. The Claimant added that he was not paid entertainment allowance of Kshs.4,000 per month also. The Claimant attributes this to malice and discrimination in violation of his right to fair labour practice.

11. The Claimant produced documentation showing his good work record and commendation from his superiors between the years 2005 to June 2012. He received a performance appraisal on 2014/2007 for the year 2006 and was rated excellent by the Managing Director. In the year 2010 he won a Common Wealth Broadcasting Award in South Africa, with his colleagues.

Trouble

12. Trouble started on 21st October, 2012 when he received a letter from his supervisor Mr. Vitalis Musebe, in which Mr. Musebe complained that the Claimant had no respect for the office of the Chief Editor, held by him. The Claimant replied the allegation in a letter dated 22nd June, 2012 denying the allegation.

13. On 6th July, 2012, the Claimant got a letter of termination from the Managing Director. The letter referred to the earlier Memo of complaint by Mr. Musebe dated 21st June, 2012. The Managing Director gave the reasons for termination to include:-

(i) Being rude and uncivil towards the Chief Editor Mr. Musebe who was the Claimant's supervisor.

(ii) Failure to observe the corporation's code of Regulations (COR) and

(iii) Failure to obey lawful command.

14. Whereas, the Claimant had responded to the first allegation on 22nd June, 2012, the Claimant was given no opportunity to respond to the (ii) and (iii) allegations above. The Respondent did not follow the disciplinary procedure set out under section 'K8' of the (C O R) in which the Claimant ought to have been charged by the Human Resource Manager, and be surcharged or warned. If it was found to be necessary, more serious disciplinary measure such as termination was to be preceded by a disciplinary hearing conducted by management staff committee.

15. The Respondent completely disregarded this procedure to the loss and detriment of the Claimant. The Claimant was also entitled to be accompanied by a colleague to such a disciplinary hearing but was not accorded that opportunity.

16. Furthermore, in terms of section K4(ii) of 'C O R' disciplinary action against staff of job group BA5 and above had to be exclusively handled by the Board of Management unless the Board specifically delegated the responsibility to the Management Committee.

17. Under cross examination, the Claimant was referred to a memo dated 25th June, 2012 which contained the serious charges facing him. He was to respond to the charges by close of 26th June, 2012. The Claimant did not respond to the same but asked his advocate to ask for further and better particulars which letter was received by the Respondent on 26th June, 2012 at 1.10 pm. The Claimant was then served a notice to show cause.

18. On 29th June 2012, the Claimant received a memo from Mr. Musebe regarding unsatisfactory work. The Claimant responded to the same on 2nd July, 2012. The Claimant received termination letter thereafter.

19. The Claimant states his right under section 41 and 42 of the Employment Act, to a fair hearing was violated.

20. The Claimant told the court that he was being victimized for voicing dissent to the permanent secretary for failure to be awarded salary increase upon promotion in December 2011. That he had written a collective memo on behalf of all affected colleagues as an Advocate. All the affected employees signed the memo.

21. Following failure by Respondent to address the grievances, on 29th February, 2012, employees of KBC went on strike and petitioned parliament to investigate the grievances. That the matter was raised in parliament on 1st March, 2012 and the Minister for Information and Broadcasting promised that the salary review commencement to the grading would be done.

22. Parliament castigated KBC for poor management. A return to work formula was agreed upon on 5th May, 2012 between the Employees and Management, in terms of which all employees were to return to work without victimization and the Respondent was to address the grievances that led to the strike.

23. The Claimant paints these events to be the cause of sudden blurry of warning letters to the Claimant especially one citing lack of respect for the Chief Editor.

24. The Respondent blamed the Claimant as the genesis of employees' agitation for better terms and conditions at work, the strike and reference of the matter to parliament.

25. The Claimant prays that the court finds the particulars of unlawful, unfair and discriminatory conduct by the Respondent have been proved by the Claimant and finds that the termination was accordingly unlawful and unfair and award the Claimant as prayed.

Response

26. The Respondent called Mr. Daniel Okoth, the Human Resource Manager of KBC as RW1 to testify in support of Respondent's case.

27. RW1 told the court that from the records in his possession, the termination of employment of the Claimant was for a fair reason and was done in terms of a fair procedure.

28. RW1 stated that the Claimant was rude to his supervisor and failed to obey instructions. The Claimant had shown incapacity to discharge his duties. Claimant had leaked confidential information on line, titled 'storm in a tea cup' which blog refers to matters contained in a confidential memo, sent to the claimant by the Chief Editor. That only the Claimant, the HRM and Chief Editor were in possession of this information and the Claimant was reasonably suspected to be the source of the blog.

29. RW 1 stated that the Claimant was given opportunity to respond to the allegations made against him but failed to provide good explanation. The Claimant had received various warnings prior hence, the decision to terminate his employment.

30. Under cross examination RW1 testified that he joined KBC in September 2013, after the Claimant had left KBC. He conceded that he had no personal knowledge of the facts but the Claimant did not answer the allegations made against him.

Promotion

31. RW1 confirmed that the Claimant rose from job group BA1 to BA2. He also confirmed that employees in job group BA3 and above had their disciplinary matters dealt with by the Board. He insisted that the case of the Claimant was dealt with by the Board.

32. RW1 added that the promotion of the Claimant did not have any monetary implications despite being shown the terms and conditions of service of KBC.

33. RW1 stated that the Claimant failed to respond to the show cause letter. That the warnings given to the Claimant were justified. That repeat of same offence before expiry of (12) twelve months attracts another warning letter in terms of the 'COR'.

That the Claimant had 48 hours to respond to the show cause letter but he failed to do so. That the notice period was corrected by a memo dated 28th June, 2012. RW1 stated that the Board met and made the decision to terminate the employment of the Claimant. The Claimant responded to the notice to show cause vide his advocate on 29th June, 2012. RW1's testimony before court clearly contradicted contents of his witness statement filed in court on 6th April, 2016. RW1 side stepped the issue by saying that the witness statement filed in court was a draft and paragraph 3 thereof did not reflect the true position regarding promotion from 'BA5' to 'BA2'. The statement clearly showed that movement from 'BA5' to 'BA2' was promotion that attracted a raise in pay.

34. RW1 was unable to reconcile his changed version under intense cross examination by counsel for the Claimant who took RW1 through the KBC code of regulation which showed different terms of service for job groups 'BA2' and 'BA5'.

35. Under re-examination RW1 stated that he recanted the contents of paragraph 3 of his filed witness statement adding that the rest of the witness statement is factual. RW1 prayed that the suit be dismissed with costs.

Determination

36. The issues for determination in this matter may be summed as follows:-

- (i) Whether the Claimant's employment was terminated for a valid reason and in terms of a fair procedure.
- (ii) Whether the Claimant is entitled to the reliefs sought.

Issue 1

37. The version told by the Claimant vis a vis that told by RW1 on the material aspects of the case are mutually destructive.

38. The court had the opportunity to assess the credibility and veracity of the testimony given under oath by the Claimant and RW1 and made the following observations;

39. RW1 did not have personal knowledge of the facts in issue in this matter. He was not employed by the Respondent at the material time. RW1, in his oral testimony contradicted in material respects, contents of paragraph 3 of his witness statement filed in court.

40. The position taken by RW1 on the controversial aspects of the case did not stand scrutiny placed against the code of regulation of the respondent.

41. The court has come to the conclusion that RW1 was a witness amenable to bending of facts; was not a candid witness; his testimony of material aspects of the case was not credible and the court treats him as un-reliable witness.

42. On the contrary the Claimant was subjected to very close, cross examination by counsel for the Respondent on all material aspects of this case, and his testimony was consistent and credible placed against the pleadings, and documentations produced in court as annexures to both the statement of claim, the statement of Response and further list of documents filed.

43. The Claimant clearly demonstrated that he worked for the Respondent from the year 2004, until June 2012 and during all this time he was very well rated by the respondent and had no adverse record on his character and performance during this period.

44. To the contrary, the Claimant's work performance was rated excellent and had won international award on his performance during the time.

45. The Claimant was through documentation able to demonstrate that he was promoted with others from job grade 'BA5' to 'BA2' and that the code of regulations provided for an increase in salary and allowance upon the promotion.

46. The Claimant ably demonstrated that the Respondent failed, refused and or neglected to implement the remuneration increase commensurate with his new position.

47. The Claimant further demonstrated that employees who had been promoted and did not receive commensurate salary increase raised the grievance with the Respondent but the same was not addressed.

48. The employees led by the Claimant escalated the issue, leading to a memo written by the Claimant and signed by all affected employees to the principal secretary. That the employees went on strike upon failure by the Respondent to address the grievance. The matter was also escalated to parliament, where the Respondent was castigated for the shoddy manner it had dealt with the employees' grievances.

49. The Claimant has ably established a nexus between the immediate mistreatment, victimization and eventual termination that followed the aforesaid events.

50. It is the court's considered view and finding that the charges against the Claimant were concocted. The alleged disciplinary process that followed was in violation of the respondent's code of Regulations and was a charade with a defined outcome.

51. The Claimant has proved on a balance of probabilities that there was no valid reason to terminate his employment and that the termination did not follow a fair procedure. The conduct by the Respondent violated section 36, 41, 43, and 45 of the Employment Act, 2007.

52. The court relies on the **E & LRC Case, David Wanjau Muhoro Vs Ol Pejeta Ranching Limited (2014) eKLR** to find that the conduct by the Respondent to remunerate the Claimant and other employees promoted to various positions differently amounted to discrimination. The court observed –

“137. Discrimination, whether direct or indirect, on among others, the reason of race, is prohibited under section 51(3) of the

Employment Act, 2007; ILO Declaration on Fundamental Principles and Rights at work; ILO convention 100 of 1951 of equal Remuneration; ILO convention 111 of 1958 on Discrimination [Employment and occupation]. ILO convention 122 of 1964 on Employment policy; ILO convention 158 on Termination of Employment and the UN International convention on the Elimination of all Forms of Discrimination”

53. In the present case, the Claimant was promoted, from job group ‘BA5’ to ‘BA2’ with three others. The three others were granted commensurate salary increase whereas the Claimant was not. This is a clear case of discrimination within the meaning attributed to the term discrimination under Article 1 of convention no.11, 1958 as follows –

“For the purpose of this convention the term discrimination includes –

(a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

(emphasis mine)

54. The exclusion visited on the claimant is covered by Article 27(5) of the constitution of Kenya 2010 which provides-

“A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

55. Clause four prohibits discrimination against any person on any ground.

56. In the present case, discrimination against the Claimant as inferred from the facts of this case is attributable to his assertiveness and resolve to be treated fairly by his supervisor and the employer.

57. The Claimant is entitled to payment of all the monies improperly not paid to him from date of promotion and this is an aggravating factor, when we consider the issue of damages payable to the Claimant in the next issue.

Issue ii

58. Whether or not the Claimant is entitled to the reliefs sought follows from the finding of the court in (i) above.

59. The court has made a finding of fact and law that the Claimant was wrongfully, unlawfully and unfairly deprived of his employment. The court has also found that the Claimant was discriminated upon, by not being paid salary and allowances applicable to job group ‘BA2’ upon promotion, whereas his three colleagues were paid correctly. The Respondent aggravated the matter by victimizing the Claimant, leading to the termination of his employment for daring to assert his right. KBC is a public corporation and is bound by the values and principles of public service which include –

“232(1)(i) affording adequate and equal opportunities for appointment, training and advancement at all levels of the Public Service of –

(i) Men and Women;”

60. Furthermore, in terms of Article 236 –

“A Public Officer shall not be –

(a) Victimized or discriminated against for having performed the functions of office in accordance with the constitution or any other law; or

(b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

61. When the Claimant was unlawfully removed from office as stated herein before, the constitution was in place and the Respondent needed to take heed of these provisions being a corporation in the public sector.

62. The court considers the remedies sought by the Claimant as follows –

a. **Notice pay:** The Claimant is entitled and the court awards him Kshs.50,255 in lieu of one month notice following the finding that the Claimant was wrongfully, unlawfully and unfairly terminated from employment.

b. The Claimant was not retrenched from employment under section 40 of the Employment Act, 2007. The Claimant is therefore not entitled to payment of severance pay as claimed or at all.

c. **Underpayment:** The Claimant is entitled to payment of all arrear remuneration not paid to him from date of promotion from job group ‘BA5’ to ‘BA2’ to date of termination itemized in paragraphs –

(c) House Allowance Kshs.370,000 and

(d) Entertainment Allowance Kshs.80,000 and

(h) Arrear salary Kshs.362,400

d. **Unpaid Leave days:** The Claimant is entitled to payment in lieu of leave for the period November 2010 to July 2012 in the sum of Kshs.201,000 being the period when promotion was done.

e. Law society of Kenya subscription to which the Claimant was entitled and was not paid for in the sum of Kshs.34,657.

Compensation

63. Following the finding of unlawful and unfair termination of employment, the Claimant is entitled to compensation in terms of section 49 (1) (c) of the Employment Act, 2007 as read with subsection 49(4) thereof.

64. The Claimant had served the Respondent with distinction from April 2004 to June 2012, a period of about eight (8) years. The Claimant was promoted and was discriminated upon by failure to pay him requisite remuneration attributed to the grade, unlike his colleagues. The claimant was victimized and employment terminated for daring to assert his right.

65. The Claimant was not paid terminal benefits upon termination. The Claimant suffered loss and damage at the hands of a public employer who chose to violate the law to his detriment.

66. The Claimant was a professional lawyer and wished to continue serving the Respondent, he lost career growth and development.

67. The court finds that the Claimant did not contribute to the termination. Asserting one's right cannot be termed as contribution to an unlawful termination.

68. The court considers the case of **VCK v CUEA Cause No.1161 of 2010** in which the court awarded the Claimant Ksh.5 million as compensation for discrimination.

69. In **David Wanjau Muhoro v Ol Pejeta Ranching Limited (2014) eKLR**, the court awarded the Claimant the maximum equivalent of 12 months salary for unlawful termination activated by discrimination.

70. In **Abraham Gumba v Kenya Medical Supplies Authority (2014) eKLR**, the court awarded the Claimant equivalent of 10 months salary in compensation for unlawful and unfair termination of employment.

71. These authorities are fairly recent and have similar aspects to the present case.

72. The **Court of Appeal in Civil Appeal No.79 of 2012, Peter M. Kariuki Vs Attorney General** at page 43 stated –

“It bears repeating that assessment of amount of damages is a matter for the discretion of Trial Judge, which must be exercised judiciously and with regard to the general conditions prevailing in the Country and to prior relevant decision”

73. Having regard to all the above, the court awards the Claimant equivalent of eight (8) months salary in compensation.

74. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows –

a. One month salary in lieu of notice Kshs.103,135.

b. Underpayment Kshs.918,000.

c. Payment in lieu of leave Kshs.171,892.

d. Law Society subscription Kshs.34,657.

e. Compensation 825,080.

Total award Kshs.2,052,764.

f. The award in (a) – (d) above is payable with interest at court rates from date of filing suit while that in (e) is payable with interest at court rates from date of judgment till payment in full.

Dated and Signed in Kisumu this 2nd day of May, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 30th day of May, 2018

Maureen Onyango

Judge

Appearances:-

Mr. Maingi for Claimant

M/s. Adionye for Respondent

Anne Njung'e: Court Clerk