



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 311 OF 2013

MARTIN MULINGE KIMOLO.....CLAIMANT

V

AFRICAN COTTON INDUSTRIES LTD.....RESPONDENT

JUDGMENT

1. The Court is called upon to determine

Whether the termination of the Claimant's contract was unfair

Whether the Respondent breached its contract with the Claimant

Whether Claimant owes the Respondent Kshs 352,003/- and

Appropriate remedies/orders.

2. The Cause was heard on 22 February 2018 and on 11 April 2018 after which the Claimant filed his submissions on 8 June 2018 (should have been filed before 4 May 2018) while the Respondent's submissions were filed on 18 June 2018. The Court has considered the submissions.

Unfair termination

3. The Claimant was engaged by the Respondent as a Territorial Sales in Charge in 2011. He was based in Southern Nyanza.

4. The Respondent terminated his contract through a letter dated 28 January 2013 prompting these proceedings.

5. The Claimant alleged in the Memorandum of Claim that the termination of employment was unfair because he was not given notice of termination.

6. On the circumstances surrounding the termination, the Claimant testified that he received a text message from the National Sales Manager to travel to the Respondent's Nairobi offices and he travelled on 27 January 2013.

7. On 28 January 2013 he reported to the offices where he found other employees and they met with the Human Resources Manager, the Sales Director and the National Sales Manager separately.

8. The National Sales Manager then told him that it had been decided to terminate his contract and therefore he should start the clearance process.

9. According to the Claimant, he was not afforded an opportunity to be heard nor given prior notice of the termination of contract.

10. The Respondent's first witness was a Human Resources Officer and he stated that he was not part of the managers who met with the Claimant on 28 January 2013. He only acted on the instructions of the Sales Director to prepare the termination letter.

11. The Respondent's other witness was a Credit Controller who was not involved in the meeting of 28 January 2013.

12. The Claimant's testimony as to the proceedings on the morning of 28 January 2013 is the only credible version the Court has as to what transpired.

13. In terms of section 35(1)(c) of the Employment Act, 2007, the Respondent should have given the Claimant a written notice of termination of employment at least 28 days in advance.

14. There is no evidence that was done.

15. Further, pursuant to section 41 of the Act, the Respondent should have informed the Claimant of the allegations to confront and afforded him an opportunity to make representations in the presence of a colleague, if possible.

16. The Respondent did not present any evidence that the Claimant was informed of the right to be accompanied by a colleague during the meeting of 28 January 2013 or that he was informed of the reasons for his contemplated dismissal and allowed to make representations.

17. The Court can therefore conclude that the termination of the Claimant's employment was unfair (procedurally and substantively).

Breach of contract

Leave

18. In terms of clause 5 of the employment contract, the Claimant was entitled to 27 working days leave every year.

19. The Claimant's testimony that he did not go on leave for the 2 years of service was not interrogated by the Respondent.

20. In the final dues schedule, the Respondent included pay in lieu of leave equivalent to 38 days.

21. Being the custodian of employment records, the Court will adopt the computation by the Respondent.

Commission

22. The Claimant's contract provided for payment of Kshs 5,000/- commission per month on meeting a target of Kshs 8,000,000/-.

23. The Claimant's testimony that he met the targets was not rebutted by the Respondent. The Respondent's *TSI Sales Data* for 2011 and 2012 support the Claimant's assertion that he met the targets.

24. The Claimant qualified for payment of commission.

Salary increment after probation

25. Clause 4 of the employment contract provided that the Claimant would be given a salary increment of Kshs 5,000/- upon successful completion of 3 months' probation.

26. The Claimant continued to serve the Respondent after the 3 months' probation and the Court can assume that the Respondent was satisfied with his performance entitling him to the salary increment.

Other dues

27. The Claimant did not present any contractual or evidential basis for the claim for Kshs 30,000/- said to be *other dues*.

Counterclaim

28. The Claimant admitted that he secured orders with Ouru Superstores Ltd and Comila Enterprises but denied having knowledge of the Kshs 352,003/- because he could not follow up on the payments because of his dismissal.

29. The Respondent's second witness produced a statement from Ouru Superstores Ltd showing Kshs 260,333/- was due. The statement had details of invoices and description.

30. The witness also produced copy of communication from Comila Enterprises indicating that the Claimant and another employee loaded goods worth Kshs 232,525/- which were not paid for (Claimant was accountable for Kshs 91,670/- of the amount).

31. The Court finds that the Claimant did not account for the sales and is therefore liable to the Respondent in the sum of Kshs 352,003/-.

Appropriate remedies

Pay in lieu of notice

32. The termination of the Claimant's contract having been found to be unfair, he is entitled to 1 month pay in lieu of notice (Respondent had offered to pay the Claimant the same).

Accrued leave days

33. The Court finds for the Claimant in the sum of Kshs 44,333/- as computed by the Respondent.

Salary increment

34. The Claimant sought Kshs 95,000/- under this head and the Court having found that the claim is supported by the contract will allow the same.

Commission

35. This relief is allowed in the sum of Kshs 7,500/- as claimed.

Compensation

36. The Claimant served for about 2 years and on account of the length of service, the Court will award the equivalent of 5 months gross pay as compensation.

Conclusion and Orders

37. The Court finds and holds that the termination of the Claimant's contract was procedurally unfair and awards him

(a) Pay in lieu of notice	Kshs 35,000/-
(b) Leave	Kshs 44,333/-
(c) Salary increment	Kshs 95,000/-
(d) Commission	Kshs 7,500/-
(e) Compensation	Kshs 175,000/-
TOTAL	Kshs 356,833/-

38. The sum of Kshs 352,000/- to be deducted from the award.

39. Claimant is denied costs for late filing of submissions.

Delivered, dated and signed in Nairobi on this 19th day of June 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kiluva instructed by Kiluva & Omuga Advocates

For Respondent Mrs. Makori instructed by Omaari Muumbi & Co. Advocates

Court Assistant Lindsey