



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 266 OF 2017

WHYCLIFFE BUNDI.....CLAIMANT

VS

FLAME TREE AFRICA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Whycliffe Bundi filed this claim against his former employer, Flame Tree Africa Limited on 12th April 2017. The claim is contained in a Memorandum of Claim of even date. The Respondent's defence is found in a Statement of Response dated 13th October 2017 and filed in court on 18th October 2017.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Marketing Team Leader, Ruth Ngonyo Mwaura. Both parties also filed written submission.

The Claimant's Case

3. The Claimant pleads that he was employed by the Respondent as a Sales Assistant, by contract of service dated 1st September 2008. He rose to the position of Area Sales Manager, Mombasa. At the time his employment was terminated on 10th February 2017, his monthly salary was Kshs. 54,492.50.

4. The Claimant avers that the Respondent terminated his employment without any justifiable cause and without availing him due procedure. He therefore claims the sum of Kshs. 652,822 being twelve (12) months' salary in compensation. He also claims costs of the case.

The Respondent's Case

5. In its Statement of Response dated 18th October 2017 and filed in court on even date, the Respondent states that the Claimant's employment was terminated in accordance with the laid down procedure in Part VI of the Employment Act, 2007.

6. The Respondent further states that as at the time of termination, the Claimant had been issued with three (3) warning letters on 5th April 2016, 10th September 2016 and 3rd January 2017 on the following grounds:

- a) Absenteeism from work without permission;
- b) Absconding duty;
- c) Misuse of company vehicles and fuel;
- d) Failure to obey lawful command of his employer;
- e) Inconsistency and failure to meet the target of Kshs. 4 million at the Coast Region.

7. The Respondent avers that prior to his termination, the Claimant attended a disciplinary hearing on 10th February 2017, to which he had been invited by letter dated 10th January 2017. Having heard the Claimant and having given him ample time to defend himself, the Disciplinary Committee resolved to terminate his services.

Findings and Determination

8. From the pleadings filed by the parties, the following three (3) issues emerge for determination by the Court:

- a) Whether there was an employment relationship between the parties;
- b) Whether the termination of the Claimant's employment was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

9. In the final submissions filed on behalf of the Respondent on 26th March 2018, it was submitted that by letter dated 11th March 2016, the relationship between the Claimant and the Respondent changed. This letter makes reference to clause 3 of the Claimant's appointment letter which provided for the Claimant's monthly salary.

10. In this regard, Counsel for the Respondent referred the Court to the decisions in *Zachariah Kerauni Maosa v British American Insurance Co (K) Ltd [2015] eKLR* and *Joseph Mwambodze Nyotta v Capex Life Assurance Co. Ltd [2016] eKLR* where the Court disallowed claims for unfair termination on account of non-existence of an employment relationship.

11. The effect of the letter of 11th March 2016 was to put the Claimant on a monthly retainer of Kshs. 10,000 plus a 4% commission based on collection within his Region, less statutory deductions. The question then is whether this had any impact on his employment relationship with the Respondent. I do not think so. I say so because at the end of the letter, the Respondent made it clear that all other terms and conditions of the Claimant's employment contract remained unchanged.

12. The question as to whether there was an employment relationship between the parties is therefore a non-issue. This finding is buttressed by subsequent letters issued to the Claimant by the Respondent, which evidently acknowledged the Claimant as an employee of the Respondent.

The termination

13. The Claimant's employment was terminated by letter dated 10th February 2017 stating:

"Dear Wycliffe,

RE: TERMINATION WITH NOTICE

This letter serves you with a termination with notice as per clause 10 of your appointment letter.

The reason for termination is as follows:

1. *The company cannot sustain your expenses in the different areas because the sales are low.*

After the disciplinary hearing held on 10th February 2017, a decision to terminate your services has been agreed by the management. To this effect, you will no longer be required to work for Flame Tree Africa Ltd.

Your salary will be paid up to 10th March 2017. You will receive a cheque and a final payslip. Your outstanding leave days will also be paid once you have handed over any company property in your possession. Also a completed handover in the Accounts, Sales and HR will need to be completed to the respective managers.

You will also receive a certificate of service and a reference letter for the term you have served Flame Tree Africa Ltd.

Yours sincerely,

(Signed)

Heril Bangera

CEO"

14. The termination letter cites inability to sustain the Claimant's expenses due to low sales. However, the letter also refers to a disciplinary hearing held on 10th February 2017, giving the impression that there were disciplinary issues facing the Claimant.

15. The Respondent's Marketing Team Leader, Ruth Ngonyo Mwaura told the Court that the Claimant's employment was terminated on account of underperformance, misuse of company motor vehicle and fuel, absenteeism and absconding duty. In his testimony before the

Court, the Claimant denied receiving any warning or show cause letter on any of these counts.

16. Moreover, on the same day the Claimant's employment was terminated, he was issued with a recommendation letter stating *inter alia*:

"Whycliff was a hardworking employee who was always ready to discharge his duties with zeal and energy. He is a reliable person and we do not hesitate to recommend him to a similar position."

17. The Court was unable to synchronise this glowing recommendation with allegations of underperformance and misconduct, which appear not to have been pursued at the shop floor, as required under Section 41 of the Employment Act, 2007. The resultant finding is that the termination of Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

18. Before making the final award in this matter, I need to deal with the issue of the applicable monthly salary for purposes of the claim. From January 2016, the Claimant earned a monthly retainer of Kshs. 10,000 plus a 4% commission based on collection within his Region. The Claimant's payslips produced by the Respondent referred to the constant amount of Kshs. 10,000 as basic pay. Perusal of these payslips reveals varying amounts in sales commission, ranging from Kshs. 50,161 to 100,223.

19. As the custodian of employee records, the Respondent ought to have provided the average monthly salary, inclusive of commission payable to the Claimant. The Respondent having failed to discharge this responsibility, the Court invokes Section 10 (7) of the Employment Act and adopts the figure of Kshs. 54,492.50 pleaded by the Claimant as the monthly salary for purposes of this claim.

20. Having settled the issue of the Claimant's monthly salary, I award him the sum of Kshs. 544,925 being ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

21. The award amount will attract interest at court rates from the date of judgment until payment in full.

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

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2018

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JUDGE

Appearance:

Mr Ajiko for the Claimant

Mr Oduor for the Respondent