



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 538 OF 2014**

**JOSPHAT MWANGI GAKINGO.....CLAIMANT**

**VERSUS**

**RADIX CONSULTING LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues plus compensating for unfair termination of the claimant's contract of service by the respondent on 12.3.2014. It is the claimant's case that the termination was done for no valid reason without according him a fair hearing and prays from Kshs.4,631,930.

2. The respondent admits having employed the claimant as from 8.8.2011 to March 2014 but denies the alleged unfair termination of the said employment. It is the defence case that the claimant started with an excellent performance but down the road, his performance dwindled. It is further defence case that the claimant was invited to a meeting on 12.3.2014 to answer to charges leveled against him and when he failed to sufficiently answer, his contract was terminated and he was offered terminal dues which he declined to receive. She therefore prayed for the suit to be dismissed with costs.

3. The main issue for determination herein is whether the claimant's contract was unfairly terminated. In answer to the said question, the claimant testified as Cw1 while the respondent called her Managing Director Mr. Robert Njuguna and her former Business Administration and HR supervisor Ms. Julia Muthoni to testify as Rw1 and Rw2 respectively. After the hearing, both parties filed written submissions.

**Claimant's Case**

4. Cw1 testified that he was employed by the respondent on 8.8.2011 as a Technical Consultant starting with a salary of Kshs.75,000 per month. After one year his salary was increased to Kshs.135,000 per month. He was also entitled to a medical cover of which Kshs.30,000 for dental and Kshs.20,000 for Optical which were payable as cash reimbursements.

5. On 12.3.2014, Rw1 called Cw1 outside the office for a moment and asked about a delayed deliverable on a project that Cw1 was working on. Cw1 explained that the project was delayed because the time lines he had provided were affected by other critical and urgent projects that were not in his initial work plans. Rw1 then called Cw1 and Charles Mbatia who was managing the delayed project to another office down stairs where they spoke about the project while standing.

6. During the meeting Charles Mbatia alleged that he learned of the claimant's delayed project that morning. Thereafter Rw1 complained that Cw1 had left work early the previous day and failed to pick a call from Rw2. Cw1 admitted that he had left at 4.15 p.m. after receiving a call from his wife about his sick child and that he only saw the missed calls from Charles Mbatia past 7 p.m. He further contended that his attitude towards his work was excellent and all through he was working without break sometimes till 11p.m. However, the claimant's explanation was dismissed as "bullshit" by the Rw1 before telling him "you are done" and then he stormed out. According to Cw1, his meeting with Rw1 and Charles Mbatia took 10-15 minutes.

7. After the meeting Cw1 went back to the office and continued with his work but after leaving the office Rw2 called him telling him to leave the company laptop and office keys at his desk. When he reached home he realized that his company email address (jmwangi @Radix .co.ke) had been deactivated and his access to the company VPN which helps one to work remotely from home had also been denied. He then called Rw2 the following day for instructions but she referred him to Rw1 who told him to pick instructions the next day, which turned out to be a termination letter signed by Rw1 and an addendum of calculated dues which he declined to sign before seeking legal advice.

8. Cw1 denied the 3 warnings allegedly given to him by Rw1 contending that there were no dates cited therefore. He also denied the

absconding, alleged by the letter contending that the dates he allegedly absconded were not stated. He further contended that the only days he was absent from work were weekends, public holidays, annual leave, compassionate leave, study leave or during unforeseen circumstances like strike in the public transport.

9. He reported the matter to the labour officer on 18.3.2014 but he was advised to seek legal advice. He thereafter served demand letter through counsel on 21.3.2014. On 26.3.2014 his wife could not access medical services because his medical cover was already cancelled without prior notice. He therefore contended that he had been unfairly terminated without any proven misconduct, or poor performance, without prior notice or fair hearing. He further contended that he was never given any written contract or agreed targets and as such there was no basis for rating him a poor performer. He further viewed the project timelines as mere guidelines and not binding targets. He further viewed the termination as a violation of his rights under the constitution and the Employment Act and prayed for the reliefs sought in his suit including accrued leave of 37 days, salary for days worked in March 2014, one month salary in lieu of notice, House allowance at 15% of basic pay for 20 months August 2012 – March 2014, severance pay, medical cover arrears of salary increments at 51% of Kshs.184,846 and compensation for unfair termination being 12 months gross salary. He also prayed for certificate of service.

10. On cross examination Cw1 stated that as at the time of his termination, his salary was Kshs.186,000 per month. He denied ever receiving any warning that he was not meeting clients or not performing his duties as required. He maintained that the timelines agreed between the respondent and clients were not fixed but remained proposals.

### **Defence Case**

11. Rw1 confirmed that Cw1 was employed by the respondent as Project Manager and later as Technical Consultant. He explained that Cw1 started with a very good performance but down the road, clients started complaining that he was not attending meetings with them and he was not picking their calls or passing information to the technical team. As a result he was reassigned the work of technical consultant. He again began well but soon thereafter clients started to complain that he gave timelines for a project but it overshot by 3 times. He contended that, the Technical Manager confirmed that very little had been done forcing the company to reassign the project to another officer.

12. Rw1 testified that in March 2014 he called Cw1 to a meeting with Charles Mbatia to enquire about the cause of the non delivery. He contended that the claimant confirmed that he had been provided with all the things he needed to deliver and as such Rw1 terminated his services verbally at the meeting and told him that a letter was to follow. Thereafter Mr. Charles Mbatia summarised what happened at the meeting in an email to the HR and a termination letter dated 12.3.2014 was addressed to the claimant. The letter never gave notice but it offered to pay salary in lieu of notice and a cheque for Kshs.135,000 was issued to him.

13. On cross examination, Rw1 stated that Cw1 was terminated for poor performance. He admitted that the email by Charles Mbatia to the HR did not state that claimant's services had been terminated during the meeting. He contended that the software project for Airtel is the one the claimant failed to perform and which led to his termination. He further contended that the complaint was from the client and not from Airtel. He contended that he wrote Exh D.7 to warn the claimant against absconding meetings. He further contended that Exh. D.8 was the evidence that the claimant absconded work for 6 days.

14. Rw2 also confirmed that Cw1 was employed by the respondent and started very well but with time his performance deteriorated and both clients and Directors started complaining. He also absconded work from 3.9.2013 to 9.9.2013 and all efforts to reach him by phone failed forcing her to write an email to him on 9.9.2013. Thereafter she received an email from Charles Mbatia forwarding a brief of proceedings from a disciplinary meeting for the claimant and highlighting the reasons.

15. On cross examination Rw2 produced no Attendance register to prove the alleged absconding by the claimant. She contended that as HR Manager, she was a supervisor to the claimant. She contended that according to the email from Charles Mbatia, the claimant was heard before his dismissal. She however admitted that the email never indicated whether the claimant spoke during the meeting or signed the minutes of the meeting. She maintained that she heard verbal warning being given to the claimant. She contended that the termination was on account of unsatisfactory performance after complaints via emails from Directors and clients.

### **Analysis and Determination**

16. After careful consideration of the evidence and submissions before the Court, the following issues arose for determination:

- (a) Whether the termination of the claimant contract was unfair.
- (b) Whether the reliefs sought should be granted.

### **Unfair termination**

17. The claimant avers that his termination was unfair because the reasons cited for the same were not valid and the procedure followed was not fair because he was not accorded a fair hearing and treated with dignity. The respondent has however contended that the termination was fair because the claimant misconducted himself and so poorly performed his duties that the respondent's clients and Directors raised complaints through emails and also verbal warnings.

18. I have carefully considered the evidence tendered and especially emails produced by the defence as Exhibit D. 3,4,5,6, and 7 showing a discussion between the claimant on the one hand, and the respondents MD(Rw1) and clients on the other hand, about delayed projects and lack of communication of important information to the clients. I have also considered the email produced as Exhibit D.8 between the claimant and Rw2 about his absence without permission from 2.9.2013 to 9.9.2013. Such emails have not been disowned or contested by the claimant. They therefore contain true and factual information that the manner of performance of duty by the claimant was not satisfactory to the clients and the respondent's management. It is also correct to say that the claimant absented himself from work for 7 days in September

2013 and only returned after being sought by Rw2 through email. The said poor performance and absence from work without leave amounted to gross misconduct under section 44(4) (a) and (c) of the employment Act. In addition to the admission by the claimant in paragraph 4, of page 2 of his written statement that he left work at 4.15 p.m. instead of 5.00 p.m. after receiving a call from his wife alerting him that his son had fallen ill, such misconduct and poor performance of duty constitute valid and fair reasons for terminating the claimant's services and I so hold. The said reasons were cited in the termination letter dated 12.3.2014 which was produced as Exhibit D.1

19. As regards the procedure followed, Cw1 contended that he was called out to a meeting with Rw1 and a Mr. Charles Mbatia, a junior officer to him and discussed delayed projects where he was asked to explain the reason for the delay in delivering on the projects assigned to him. The claimant stated that his explanation was dismissed as 'bullshit' by the

Rw1(MD) who told him that "he was done". According to him the meeting lasted for 10 -15 minutes and it did not fit the description of a fair hearing.

20. Rw1 has however contended that the claimant was told about his poor performance and absence from work without leave, his poor communications to the technical team and also leaving work before time. Under section 41 of the Employment Act, before the employer terminates his employees contract on ground of misconduct, poor performance and physical incapacity, he must explain to the employee in a language he understands, and in the presence of a fellow employee or shop floor union representative of his choice, the reason for which termination is being considered, and thereafter invite the employee and his chosen companion, to air their representations for consideration before the termination is decided. The said procedure is mandatory but in my view, it does not have to take the same nature as Court proceedings. All what is required is for the employer to show fairness and treat the employee with dignity as a human being.

21. In this case, the claimant was called for meeting where delayed projects were discussed while standing for 10-15 minutes. He was not given the option to calling a fellow employee of his choice as required under section 41 aforesaid. Everything was done in flash and his defence dismissed forthwith as "bullshit". That in my view was not just and equitable process. It was not a fair and dignified treatment. It was a violation of section 41 of the Act. The claimant was a very Senior employee of the respondent and handling a very sensitive docket which reasonably required that he be accorded sufficient time to prepare his defence and present it either verbally or in writing or both. He was also entitled to the right to call another employee of his choice to accompany him to the disciplinary hearing.

22. Under section 45(2) of the Employment Act, termination of employees contract is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that it was done, after following a fair procedure. Under subsection (5), fair procedure refers to the extent to which the employer complied with any statutory requirements, including issuance of certificate of service under section 51 and the procedure provided under section 41 of the Act.

23. I have already made a finding of fact that the employer herein has proved on a balance of probability that there existed valid and fair reasons for terminating the claimant's services section 44(4) (a) & (c) of the Act, as required by section 43 and 45 2(a) & (b) of the Act. However, she has not proved on a balance of probability that she followed a fair procedure before terminating the claimant's contract of service. I say so because the procedure for a fair hearing provided by section 41 of the Act was not followed and a certificate of service under section 51 of the Act was not issued to the claimant. Consequently, I return that the termination of the claimant's contract was unfair, within the meaning of section 45 of the Act despite the existence of a valid reason for the termination.

### **Reliefs**

24. Under section 49 and 50 of the Act I award the claimant one month salary in lieu of notice Kshs.135,000 plus three months salary (Kshs.554,538.87) compensation for the unfair termination. In awarding the foregoing compensations, I have considered the fact that the claimant had worked for the respondent for a short period, that he had contributed to the termination through misconduct. However due to his seniority the claimant was not likely to secure another job within a short time after the termination.

25. He is also awarded salary for the 12 days worked in March 2014 as prayed being Kshs.52,258 although in my view the correct figure ought to be higher than it was pleaded. He is also awarded leave of 36 days prayed since the defence never rebutted that claim using leave records. This work to:

$$\text{Kshs.135,000} \times 36 = \text{Kshs.186,928.10 26}$$

26. The claim for accrued house allowance is however declined because the payslip for October 2013 indicates that the salary paid was a gross pay meaning that Housing allowance was inclusive in the claimant's gross pay. Likewise, the claim for severance pay is dismissed because the termination was not done through redundancy. In addition, the claim for medical cover benefits must also fail because unless granted by the employer, medical cover like all other fringe benefits lapse with termination for employment of an employee. Finally, the claim for arrears of salary increments from August 2013 to March 2014 is dismissed for lack of any legal or contractual basis. I say so because unless there is an automatic salary increments negotiated and agreed between the employer and the employee, increase of salary remains a managerial prerogative, exercisable only at the employer's discretion provided that the employee's salary is not below the statutory minimum pay as per the government regulations. Such discretion is reasonably exercised depending on the employees performance, conduct, increase in cost of living and productivity of the employee.

27. In view of the admission by the respondent that the claimant can go for his certificate of service, I direct that the said certificate be issued forthwith in accordance with section 51 of the Act.

### **Conclusion and Disposition**

28. For the reason that the claimant's contract of service was unfairly terminated, I enter judgment for him in the sum of Kshs.928,720, plus costs and interest from the date hereof. The said award shall be subject to the relevant statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**