



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 220 OF 2017

STEPHEN JUMA WAFULA.....CLAIMANT

VS

FIREFOX (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Stephen Juma Wafula against his former employer, Firefox (K) Limited. The claim which is contained in a Memorandum of Claim dated 22nd March 2017 is for unlawful and unfair termination of employment. The Respondent filed a Response on 15th June 2017.

2. When the matter came up for hearing the Claimant testified on his own behalf and the Respondent called its Group Human Resource Manager, Philip Chirima. Both parties filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 26th January 2016 in the position of Technical Assistant. He was issued with an employment contract running from 1st February 2016 until 30th July 2016. The Claimant was issued with a second contract from 1st August 2016 until 30th July 2017. He earned a monthly salary of Kshs. 22,816.

4. The Claimant avers that on 22nd December 2016, he was released from work and on 23rd December 2016, he was served with a letter informing him not to report back until he was contacted by the Manager. The Claimant states that he made several attempts to make contact with the Respondent but was denied access.

5. Following a demand letter from the Claimant's Advocates dated 14th January 2017, he was summoned by the Respondent on 20th February 2017 and served with a termination letter dated 18th January 2017.

6. The Claimant terms the termination of his employment unlawful and unfair and therefore seeks the following:

- a. Salary for the remainder of the contract.....Kshs. 136,896
- b. 8 days leave earned but not utilized.....6,084
- c. 12 months' salary in compensation.....273,792
- d. Certificate of service
- e. Costs plus interest

The Respondent's Case

7. In its Response dated 15th June 2017 and filed in court on even date, the Respondent admits that the Claimant was its employee by virtue

of employment contract dated 26th January 2016.

8. The Respondent states that the Claimant's performance was unsatisfactory. The Respondent adds that the Claimant failed to report to work on 16th January 2017 as required. Thereafter, the Claimant issued a demand letter dated 14th January 2017 alleging to have been terminated orally in December 2016. The Respondent states that it received the demand letter on 25th January 2017.

9. The Respondent's case is that the termination of the Claimant's employment was lawful and fair as the Claimant voluntarily initiated the separation between himself and his employer.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant produced a termination letter dated 18th January 2017 addressed to him by the Respondent as follows:

“Dear Stephen,

RE TERMINATION OF APPOINTMENT

Reference is made to the several incidents of performance lapses on your part within the contractual period, details of which are within your knowledge. You were released on 22nd December 2016 and advised to resume on 16th January 2017 but you failed to report to work or explain your whereabouts, breaching your terms of service fundamentally.

We regret to inform you that after carefully assessing your work performance and attitudes during the period under review, Management has decided to terminate your services with notice. Your services will therefore be terminated with effect 16th January 2017.

On termination of services, you will be eligible to the following:

- Salary upto and including 16th January 2017
- One month's salary in lieu of notice
- Eight days leave earned but not utilized.

Please hand over all your duties, responsibilities and company property in your custody to the Manager as soon as you receive this letter to complete the clearance process.

By copy of this letter, the Accountant is advised to delete your name from the payroll. He should however release your terminal dues upon after (sic) clearance with the company.

On behalf of the Company, I wish to thank you for the services you rendered and wish you the best in your future undertakings.

Yours faithfully,

(Signed)

PHILIP CHIRIMA

H.R. AND ADMIN MANAGER”

12. According to this letter, the Claimant's employment was terminated on account of poor performance. While this is a legitimate ground for termination, there is a set procedure to be followed. This was well captured by my brother **Rika J** in *Kenya Science Research International Technical and Allied Workers Union (KSRTAWU) v Stanley Kinyanjui and Magnate Ventures Limited (Cause No 273 of 2010)* as follows:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

13. The Claimant's termination letter which I have reproduced above discloses that prior to the termination, the Claimant had been

suspended from duty effective 22nd December 2016. The letter goes on to state that the Claimant was to resume duty on 16th January 2017, an averment which the Claimant denies. The Court did not find any evidence that the Claimant was indeed required to report back on 16th January 2017. The warning letter dated 23rd December 2016, which was produced by both parties makes no mention of the suspension.

14. What is clear is that prior to the termination, the Claimant was not subjected to any form of capability hearing within the parameters of Section 41 of the Employment Act.

15. For this reason, the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

16. Before pronouncing final award in this matter, I need to comment on the effect of a discharge executed by the Claimant on 8th March 2017 stating that he had no further claims against the Respondent. Jurisprudence emerging from this Court on this issue is that no form of discharge can cure an unlawful termination of employment (see *Simon Muguku Gichigi v Taifa Sacco Limited [2012] eKLR* and *Duncan Mwirigi Ariithi v Jhpiego Kenya [2015] eKLR*).

17. Pursuant to the foregoing findings, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service alongside the Respondent's conduct in effecting the termination.

18. The Court found no basis for the claim for pay for the remainder of the contract which therefore fails and is dismissed. The claim for leave pay was abandoned at the trial.

19. In the end I enter judgment in favour of the Claimant in the sum of Kshs. 68,448 being three (3) months' salary in compensation for unlawful and unfair termination of employment.

20. This amount will attract interest at court rates from the date of judgment until payment in full.

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

22. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER 2018

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JUDGE

Appearance:

Stephen Juma Wafula (the Claimant in person)

Mr. Ngaine for the Respondent