



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.170 OF 2016

DENNIS KIPNGETICH KOECH.....CLAIMANT

VERSUS

MKPPA KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent on 10th March, 2013 as a Sales Representative at a salary of Ksh.20, 000.00 per month. The claimant was based at Kitale.
2. The claimant worked diligently until 1st February, 2013 when the respondent introduced a short term contract running up to 31st January, 2015. His salary was increased to Ksh.40, 000.00 gross per month.
3. The claimant worked well and made major sales and on which basis he was promoted to the position of Service Centre manager on 1st January, 2015.
4. The claimant signed his second contract on 1st February, 2015 but the terms and conditions of service remained the same.
5. On 30th July, 2015 the claimant signed his 3rd contract with the respondent. It was to run up to 1st August, 2016 but noted his position was that of Junior Service Centre Manager, a demotion from the previous position of the Service Centre Manager.
6. Effectively, the claimant was a yearly term contract. But the claimant was issued with each new contract 4 months in advance. Such was to deny the claimant the benefits of his term contracts. The changes to the contracts and terms were made without the consultation and consent of the claimant.
7. The respondent introduced a performance improvement plan (PIP) with the purpose to define serious areas of concern gaps and to allow the claimant the opportunity to demonstrate improvement and commitment. The PIP statement made provision that it was not to alter the employment contract terms.
8. On 7th February, 2016 the claimant was made to sign the PIP setting a target of 65 sales for the month. He made 5 sales in January and 10 sales in February, 2016. The claimant had agreed to meet with his supervisor to discuss his performance improvement plans but on 7th March, 2016 he was issued with a letter terminating employment. The claimant was not given a chance to argue his case or demonstrate improvement and commitment to action targets.
9. The claimant felt frustrated by the actions of the respondent where he was not given a fair chance to work on his PIP and noting the prevailing economic situation at the time, given time his sales would have picked. The claimant instructed his advocate to make demand and seek his terminal dues. In response the respondent issued him with Notice to Show cause why his employment should not be terminated dated 11th March, 2016 but the claimant has already been terminated in his employment. There was no due process and the action to show cause was just an afterthought to sanitise the given. Such is contrary to fair labour practice.
10. The claimant is seeking pay for his term contracts not honoured in full, leave pay due, accrued house allowances, unexpired contract term pay and compensation for unfair termination of employment. The dues claimed are;

a) Notice pay Ksh.40,000.00;

b) House allowance Ksh.184,039.50;

c) 3 years leave pay Ksh.94,888.95;

- d) 7 days worked in March, 2016 Ksh.12,384.75;
- e) 4 months term unexpired term contract Ksh.160,000.00;
- f) 6 months term unexpired term contract Ksh.2540,000.00;
- g) Compensation,
- h) Certificate of service, and
- i) Costs.

11. The claimant testified in support of the claims.

12. In response, the respondent's case is that the claimant commenced employment on 6th April, 2013 as a Sales Representative. Following changes within the company the claimant was issued with a fixed term contract dated 30th January, 2014 to end 31st January, 2015 and a salary of Ksh.40, 000.00 per month.

13. Each fixed term contracts had terms and conditions and the claimant signed in agreement; Contract dated 28th June, 2013 commenced 6th April, 2013 and ending 30th March, 2013 at a daily wage of Ksh.800.00 and allowance of Ksh.1, 200.00 per 7 days; Contract dated 30th January, 2014 commenced 1st February, 2014 ending 31st January, 2015 and gross salary Ksh.40,000.00 per month; Contract dated 24th December, 2014 commenced 1st January, 2015 and ending 31st December, 2015; Contract dated 30th July, 2015 commenced 1st August, 2015 ending 1st August, 2016.

14. The benefits and terms remained the same under each contract. Each contract made provision for termination upon notice or pay in lieu of notice thereof. Each subsequent contract superseded the previous contracts and the claimant signed in agreement.

15. The PIP is the respondent's mechanism of assessing an employee's performance. The claimant did not perform his duties with satisfaction of the respondent and he admitted to poor performance. The PIP therefore included various areas of improvement which was not achieved by the claimant and leading to termination of employment on the grounds of poor performance. Such PIP did not bar the respondent as the employer from taking lawful action of terminating employment.

16. On 7th March, 2016 the respondent issued the claimant letter terminating employment indicating payment of notice, accrued, leave pay, issuance of certificate of service and pay for days worked. On 9th March, 2016 the claimant replied noting his employment was unfairly terminated and for this reason on 11th March, 2016 the respondent invited him for hearing which he failed to attend.

17. On 3rd May, 2016 the claimant was paid his terminal dues and he executed the Declaration of Final Dues stating he had no other claims against the respondent. Dues amounting to Ksh.58, 750.00 have since been paid to the claimant. A Certificate of Service has also been issued. Nothing remains unpaid.

18. In evidence the respondent called three (3) witnesses, Vincent Mackenzie the regional Sales Manager for Nakuru and Eldoret, Ibrahim Sande the Filed Operations Manager / Deputy Regional manager and Nyokabi Margaret Kiarie the human resource manager with the respondent. The defence evidence is that the claimant was employed under contracts which stipulated his terms of employment and that he was put under a PIP for good cause where he failed to perform as agreed and on this basis was issued with letter terminating employment for poor performance and on good basis upon payment of notice pay and in accordance with the contract terms and agreement. The claimant signed to his fixed term contract and the PIP and thus his employment was regulated by the terms and conditions therein and termination of contract complied to the agreed terms and conditions.

19. The defence evidence is also that the claimant has since been paid his terminal dues and there remains nothing outstanding and the claims made have no basis and should be dismissed with costs.

20. Both parties filed written submissions.

21. The claimant reiterated the memorandum of claim and the evidence.

22. The respondent submitted that the claimant has since signed a declaration of payment of final dues which has the effect of discharging the respondent from any further claims as held by the Court of Appeal in the case of **Coastal Bottlers Limited versus Kimathi Mithika [2018] eKLR** and the same relied upon in the case of **Gilbert Mugambi versus Michimikuru Factory Limited Cause No.20 of 2017 (Meru)**. That by signing the Declaration of final dues the claimant has a binding agreement with the respondent which is binding and upon it no further claims should be allowed by the court.

23. The respondent also submits that the fixed term contracts issued to the claimant are binding and allowed termination of employment upon payment in lieu of notice which was done in this case and the claimant has since been paid his notice pay.

24. The respondent also submits that there was valid grounds leading to termination of employment under section 47(5) of the Employment Act and the claimant has failed to prove that such was wrongful. The claimant was put on a pip to address his poor performance, he failed to meet the set targets and the resulting termination of employment on the grounds of poor performance was justified as held in the case of **Pius**

Machafuli Isindu versus Lavington Security Guards Limited [2017] eKLR.

On the pleadings evidence and submissions the issues which emerge for determination are;

Whether the execution of the Declaration of Final Dues dated 3rd May, 2016 discharge the respondent against any further claims;

Whether the claimant was fairly or unfair terminate din his employment by the respondent; Whether there are any remedies due.

25. On whether a discharge clause entered into by the parties in payment of final dues should bar an employee or a party form making any further claims, the respondent has relied on several cases by the Court of Appeal and this court asserting that such a discharge clause discharges the employee form any further claims of suit seeking any claims therefrom. Noting such authorities and submissions, this court is guided by the letter and spirit of the law and article 41 of the Constitution.

26. Article 41(1) of the Constitution, 2010 grants ‘everyone’ the right to fair labour practices and which therefore requires this court to give a purposive interpretation to the same. Though ‘unfair labour practices’ is not defined by the constitution or by statute this court has given progressive meaning which means any unfair act or omission that arises between an employer and an employee. See decision in **Elizabeth Washeke & others versus Airtel Networks & Others [2013] eKLR**. See also **Simelela and Others versus MEC for Education, Province of the Eastern Cape and Others (2001) 22 ILJ 1688(LC)**.

27. Under written law, section 35(4) of the Employment Act, 2007 guides this court that;

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.

28. This court thus guided as under the constitution and statute is bound. Where an employee is made to sign a declaration, discharge or clause indicating that they have received final dues and cannot lay claim to any other payment and which payment of dues is an entitlement in law or provided for under the constitution, such discharge provisions cannot surpass the import of the constitution and the law in protecting the employee. Where there is a valid claim encapsulated in the constitution or the law, any declaration made to discharge liability is null and void to the extent of its application weighed against the import of the constitution and the law. This court thus guided finds the Declaration of Final Dues signed by the claimant does not in any manner, style or edict bar the claimant or this court form addressing any claim(s) made and which have a basis.

29. The claims thus made by the claimant shall be addressed on their merits.

30. On the claim with regard to unfair and or fair termination of employment, the claimant was issued with letter and notice terminating his employment effective 7th March, 2016. The grounds thereto were that the claimant was of poor performance. The claimant replied challenging the same and in response he was issued with a show cause notice dated 11th March, 2016 which he testified that he did not attend as his employment had already been terminated.

31. Section 35 of the Employment Act, 2007 requires an employer to issue notice to an employee before terminating employment of to make payment in lieu of notice. Section 35(1) provides that;

(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

(a) ...

(b) ...

(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

32. In this regard the claimant was under a fixed term contract ending 1st August, 2016. Where termination of employment was valid, such should have been through notice in writing at the end of the period of 28 days next following the giving of notice.

33. In this case the claimant’s contract did not end on its terms. It ended through the termination of the respondent on the grounds of poor performance. such reasons and ground thus invited the respondent to address itself to the provisions of section 41 and 45(2) of the Employment Act, 2007 and which requires that before the employer can apply such ground and reason and leading to termination of employment to do the following;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) ...

34. And to;

(2) *A termination of employment by an employer is unfair if the employer fails to prove—*

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure

35. Where the employer finds that employee's capacity or capability is of concern, such requires the employer to bring these to the attention of the employee and ensure an explanation and grounds for which the employer is considering termination of employment and allow the employee a chance to give their defence.

36. The approach and principles applicable to a dismissal based on poor work performance differ in material respects from those applicable to a dismissal based on misconduct. Misconduct and poor work performance are distinct concepts requiring different remedial procedures with different sanctions.

37. When an employee is dismissed for poor work performance, the court must examine whether the employee was trained to perform the functions that he was tasked to do; whether such training was adequate; and whether the employee may benefit from further training. The court reading of the PIP under which the claimant was placed on 9th February, 2016 had set targets and levels of assessment as to whether he was meeting his set targets.

38. The PIP tool on its own without the necessary support to the claimant remained just that, a tool. There is no corresponding material submitted by the respondent as to what measures were put in place to give the claimant support to endure he met his set targets. In any event there was to be an assessment of his work performance which was not done. The supervisors indicated as required meet the claimant and assess him has not made any comments and failed to meet and assess the claimant.

39. In the case of **Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) versus Stanley Kinyanjui and Magnate Ventures (Cause No 273 of 2010)** the court held 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.

40. These findings are given emphasis in the case of **David Masha Maitha versus ARM Cement [2018] eKLR**

... it is evident that the Claimant was not provided with any particulars of poor performance nor was he afforded any opportunity to improve. The result is that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

41. Based on the analysis above, the resulting termination of the claimant's employment on the grounds of poor performance lacked in substance and was contrary to fair procedure and thus unfair.

42. On the remedies set out by the claimant, he is seeking the payment of;

a) Notice pay Ksh.40,000.00;

b) House allowance Ksh.184,039.50;

c) 3 years leave pay Ksh.94,888.95;

d) 7 days worked in March, 2016 Ksh.12,384.75;

e) 4 months term unexpired term contract Ksh.160,000.00;

f) 6 months term unexpired term contract Ksh.240,000.00;

g) Compensation,

h) Certificate of service, and

43. in evidence he admitted having been paid terminal dues amounting to Ksh.58, 750.00 and the respondent confirmed that these payments comprised of;

a) *Pay for days worked in March Ksh.9,032.00;*

b) *Pro-rated leave Ksh.857.00;*

c) *Payment in lieu of notice Ksh.40,000.00;*

d) *Leave day accrued Ksh.28,571.00; and*

e) *Certificate of Service was also issued.*

44. With regard to the payments thus made by the respondent, in assessing the same, payment in lieu of notice, leave days and pay for days worked in March, 2016 are correctly addressed.

45. What is outstanding is the claim for house allowances, leave pay for 3 years, 4 months unexpired contract, 6 months unexpired contract and compensation.

45. The claimant was under a fixed term contract for the duration of his employment. Each contract issued subsequently covered its term and the previous contract thus covered. Each contract set out the salary payable and gave a gross of Ksh.40, 000.00 as the last pay. Such pay though stated to be basic in the pay slip is well outlined under the written contract as the gross salary. The claimant cannot claim for house allowance outside of the core document regulating his employment.

47. Section 28 of the Employment Act, 2007 regulate allocation of annual leave. Each contract ended on its terms or was addressed in the subsequent contract which became superseding of the previous. Leave accrued has since ben addressed and paid. This also covers the claims for unexpired fixed term contract claims noting the entire period at work the claimant was under a contract and was paid accordingly for work done save for the last contract which was to end o 1st August, 2016 and was unfairly terminated as assessed above.

48. In this regard therefore, had the claimant's employment not been unprocedurally terminated he would have served his fixed term contract to the end. Upon a finding that there was substantive and procedural unfairness, section 49 of the Employment Act, 2007 allow the court to award for the unexpired term contract which is hereby assessed at 6 months which is the award in compensation all being Ksh.40,000.00 x 6 months all at Ksh.340,000.00.

Accordingly, judgement is hereby entered for the claimant against the respondent with the award of Ksh.320, 000.00 and costs of the suit.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU JUDGE

In the presence of: