



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 222 OF 2014

BRUNO EDU AMUNGA AYAYA.....CLAIMANT

- VERSUS -

EAST AFRICA BREWERIES LIMITED.....1ST RESPONDENT

KENYA BREWERIES LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 20.02.2014 through Wamwayi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Declaration that the termination or dismissal was unlawful, wrongful and unfair.
- b) Terminal dues of Kshs. 4, 527, 507.00 as follows:
 - 12 months basic salary for unfair termination Kshs. 1, 869, 456.00.
 - 12 months variable pay for unfair termination Kshs. 465, 499.00.
 - One month pay in lieu of notice Kshs. 155, 788.00.
 - Unpaid salary 01.09.2013 to 15.09.2013 Kshs. 77, 895.00.
 - Salary during appeal period 16.11.2013 to 31.01.2014 when suit was filed Kshs. 701, 047.00.
 - Variable pay for 2 last quarters in 2013 Kshs. 232, 748.00.
 - Pay in lieu of 19 leave days Kshs. 98, 665.00.
 - Refund for provident fund for EABL Kshs. 713, 508.00.
 - Interest on provident fund Kshs. 142, 701.00.
 - Share save scheme with EABL Kshs. 72, 200.00.
 - Salary from date of filing suit till date of judgment.
- c) Interest on (b) and (c) above.
- d) Any other relief that the Honourable Court may deem fit to grant.

The memorandum of response was filed on 22.04.2014 through Iseme Kamau & Maema Advocates. The respondent prayed that the claim be dismissed with costs.

By the letter dated 09.02.2009 the 1st respondent offered the claimant employment as a Customer Relationship Representative for a period of 3 years effective 23.02.2009. The 3 years were lapsing on or about 22.02.2012. The terms of service were changed to permanent and pensionable effective 01.12.2009. The claimant was appointed Customer Relations Representative within the sales department effective 01.01.2010. The employment was governed by the terms in the employment contract, Diageo Code of Business Conduct, Employee Alcohol Policy, the 1st respondent's T & E Policy and the 1st respondent's Policy on Employee Discipline.

As at termination the claimant was earning Kshs. 155, 787.74 based on a communicated ratio of 75% being the guaranteed salary per month and 25 % being the variable pay based on achievement of set targets. The contract of service could be terminated by either party giving a month notice or payment of one month salary in lieu of the notice.

The claimant received the respondent's memorandum dated 14.08.2013 on callage behaviour below expected standards. It was alleged that between the months of May 2013 and June 2013 part of the claimant's PDA callage at outlets was inconsistent with his company vehicle (KBL 206D) car journey reports contrary the respondents' Field Standards of Excellence ways of working. It was noted that there were discrepancies between the vehicle movement report and PDA callage report for 06.05.2013; 07.05.2013; 08.05.2013; 13.05.2013; 14.05.2013; 31.05.2013; and 13.06.2013. The claimant was to reply and show-cause why disciplinary action would not be taken against him. He was to reply by 20.08.2013.

The claimant replied by his email on 19.08.2013. The claimant essentially admitted his failures and requested for apology and to be given an opportunity to prove his best skills and abilities in carrying out his duties going forward. He stated that at the material time as was alleged he had been emotionally, psychologically or mentally and even physically affected because he had job and family related stress and as a territory manager for Siaya he had made wrong decisions which were reflected in the allegations as levelled in the show cause letter. The claimant was invited to attend a disciplinary meeting on 26.08.2013 at 04.00pm to 05.00pm and which was moved to 02.09.2013 at 11.00am. The claimant attended the meeting and he admitted to the allegations and further repeated that he had emotional, psychological and physical due to family and job related stress. He also claimed that his supervisor intimidated him and seemed to have a personal vendetta against him but he had not raised the issue for fear of victimization. The supervisor denied the claimant's accusations and told the disciplinary hearing that it was a case of non-performance and he had written emails and highlighted gaps in the claimant's performance. The supervisor recommended that the claimant be put on performance improvement plan. While deliberating that the other Customer Relationships Representatives in Nyanza would be interrogated towards appropriate action including dismissal, the meeting concluded that the claimant was dishonest and should be terminated from employment.

The termination letter was dated 16.09.2013 and he was terminated effective 16.09.2013 with terminal dues as follows:

- a) Salary up to 16.09.2013.
- b) Pay in lieu of 19 leave days.
- c) Refund of all monies due to the claimant under the rules of the EABL Retirement Benefits Scheme, 2003.
- d) Refund of the claimant's personal contribution due to the claimant under the rules of the share save scheme.

The dues were to be payable but less monies the claimant owed to the company and upon clearance.

By the letter dated 24.09.2013 the claimant appealed or applied for review of the termination decision stating he expected a reply by 15.10.2013. By the letter dated 28.10.2013 the respondent upheld the termination.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair.

It is submitted for the claimant that the termination was unfair because the claimant had not been put on the performance improvement as deliberated at the disciplinary hearing. Further the allegations on inconsistent callage behaviour did not amount to gross misconduct because prior to September 2013 no employee had been dismissed on account of such grounds. Further the other officers in Nyanza had not been interrogated as per the deliberations at the disciplinary hearing. Further it was submitted that the dismissal was discriminatory because the claimant was the only one dismissed on account of the allegations as was levelled against him.

The Court has considered the material on record. As submitted for the respondent, in replying the show cause notice and at the disciplinary hearing, the claimant admitted to allegations as was levelled. The Court returns that as per section 43 of the Employment Act, 2007 as read with section 47(5), the respondent has established that as at the time of termination, the respondent had a valid reason to terminate the contract of service. The claimant alleges he was discriminated against because he was the only one dismissed in view of the allegations made against him but the Court finds that he was the only one facing the disciplinary case and there was no evidence before the Court that there was an officer with similar allegations levelled and not punished. The Court returns that the allegations of discrimination were therefore not valid. The Court further finds that the show-cause letter was valid and the disciplinary hearing was accorded and it cannot be found that the procedure leading to the termination was unfair. Section 41 of the Act was substantially complied with. The termination was therefore not unfair in substance and procedure. The appeal was presented more than 5 days from the time prescribed in the policy (per appendix 6 page 17) and the respondent nevertheless considered it and disallowed it.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a) The declaration that the termination was unfair will fail and the 12 months compensation is not due because the termination was not unfair. Similarly, the claim for one month pay is not due in view of the admission of the allegations as were levelled against the claimant.

- b) The claimant is not entitled to pay after the termination as such pay is not due after the termination that has been found not to have been unfair.
- c) The claimant is entitled to provident fund subject to compliance with completion of relevant forms and the applicable rules.
- d) The respondent has shown by appendix R (a) and R (b) that the variable pay for last quarter was paid and the prayer will fail.
- e) The claim on share save scheme as it was applied to offset loans per arrangements in place.
- f) The claimant is entitled to Kshs. 77, 895.00 for salary up to 16.09.2013; Kshs. 98, 665.00 for 19 days' leave due; and in absence of a counterclaim, the same will be paid forthwith at a sum of **Kshs.176, 560.00**.

The Court returns that in view of parties' margins of success each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondents for:

- a) Payment of **Kshs.176, 560.00** by 31.01.2019 failing interest to be payable thereon at Court rates from the date of termination 16.09.2013 till full payment.
- g) The declaration that the claimant is entitled to provident fund subject to completion of the relevant forms and compliance with the applicable rules.
- b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE