



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2155 OF 2012
RENSON MAKHETI WANYONYI.....CLAIMANT
VERSUS
KENYA INDUSTRIAL ESTATES LIMITED.....RESPONDENT

JUDGMENT

The Claimant sued the Respondent for unreasonable, unfair, unjust, wrongful and unlawful termination of employment and seeks the following reliefs:

1. Reinstatement
2. 1 month pay in lieu of notice 110,000.00
3. Back pay for period May September 2012 330,000.00
4. Service for 21 years worked 2,310,000.00
5. Loss of future earnings 110,000 x 12 x 14 18,480,000.00
6. Anticipated increment on future earnings 7,392,000.00
7. Retirement benefits 5,880,800.00
8. Leave pay till retirement 2,540,000.00
9. Anticipated leave travel allowance till retirement 1,540,000.00
10. Employer contribution to provident fund
11. Anticipated interest to be earned on retirement scheme contribution 17,642,400.00
12. Allowances 3,800,000.00
- Total 60,025,200.00**
13. Certificate of service.
14. Cost of the suit.

The Respondent denies the allegations made by the Claimant and avers that it paid the Claimant his dues together with salary in lieu of notice and prays that the claim against it be dismissed with costs.

Claimant's Case

The Claimant was employed as a project officer by the Respondent sometime in November 1990 on probationary terms with effect from 2nd January 1991. He was later confirmed into permanent and pensionable employment. Due to dedication, honesty and good work, the Claimant was rewarded with promotions, increments and rose to the position of Regional Manager, Garissa.

The Claimant was transferred to Garissa, and he reported and worked diligently, which effort was negated by the management. For a period of 1 ½ years, the Respondent subjected the Claimant to degrading and arbitrary treatment for reasons that are unknown to it. On 10th April 2012, the Claimant's employment was terminated without reason or proper cause.

It is the Claimant's averment that the management of the Respondent used unprofessional, non-conventional, non-standard criteria to grade and value the Claimant's work.

The Claimant also avers that the warnings, disciplinary meetings and eventual summary dismissal for poor performance is unjust, unfair, illogical, illegal and contrary to the Respondent's own terms and conditions of service.

The Claimant avers that after terminating his employment the Respondent continued to send him to official errands and approved payment of imprest for the said errands without informing him that he had already been summarily dismissed. The Claimant also avers that the Respondent deliberately withheld the termination letter beyond 14 days appeal period, thus denying the Claimant the right to appeal.

The Claimant was paid a gross salary of Kshs.110,000.00 per month at the time of termination. The Claimant alleges that he was not issued with a Certificate of Service.

Respondent's Case

The Respondent avers that the Claimant exhibited blatant and unobstructed absenteeism from work without authority, disrespect to his seniors and lack of desire towards his duties as an employee which led the Respondent to issue him with a warning letter. The Claimant failed to adhere to his employer's advice and warning and continued to exhibit laxity and total lack of interest in his employment, thereby occasioning a series of warning letters and disciplinary meetings arising out of his poor performances. The Claimant did not attempt to explain himself as required in the said letters of warning.

The Respondent avers that the Claimant's transfer to Garissa was in line with the Respondent's work manual. Further, the Claimant's performance was poor the entire period he was stationed at Garissa which was evidenced in the region's low performance. In addition, the collections from the Respondent's Garissa Branch improved significantly after a new officer was deployed following the termination of the claimant's employment.

The Respondent avers that the termination was lawful as the Claimant was given several opportunities to be heard. Further, the Claimant did not attempt to appeal the termination decision.

The Respondent further avers that the Claimant's termination letter was delivered to the Claimant on 15th May 2012.

Evidence

CW1 **Renson Makheti Wanyonyi** the Claimant, restated his employment history, terms and conditions of service as was averred in his Memorandum of Claim. He testified that the poor performance of the Garissa branch was due to lack of adequate transport to access the poor road network, absence of Sharia Compliant Banking in Garissa, lack of capacity of the staff assigned, economic recession, insecurity, low operational budget, drought and the war in Somalia which affected the region adversely.

He clarified that his absence at work following an incident involving his wife when his house was broken into. His wife was expectant at the time, so he had to rush to Nakuru where his family lived.

The Claimant stated that 9 months after his transfer to Garissa in June 2009, he was issued with a warning letter for poor performance. Further, he acknowledged that there was poor performance in Ijara, which he was in charge of. The Claimant also admitted that Garissa was amongst those branches which failed to achieve their set targets. The Claimant explained that the reason they could not generate and collect loans was because the process of processing and appraising the loans took long thus causing a delay.

The Claimant testified that his termination letter was dated 10th April 2012 which was effective immediately but was not communicated on the same date. He was served on 15th May when he signed for it. Further he testified that he received his salary for April in full even after being dismissed. The Claimant also testified that he did not receive any feedback on the outcome of the disciplinary meeting and was not afforded the opportunity to appeal.

The Claimant asserted that the complaint about poor performance was made concerning all branches. The Claimant admitted to being paid salary in lieu of notice, travel allowance even after his employment had been terminated. He acknowledged his pension scheme was notified and he was paid what was due to him.

RW1, **Matilda Mwachia** and a Human Resource Manager of the Respondent, testified that the Claimant's employment was terminated because of poor performance and failure to meet targets. The Claimant was called to a disciplinary hearing, which he attended and the Committee recommended his termination because he had been repeatedly summoned for poor performance. This was taken to the board for

action and the board confirmed the recommendation to terminate on 26th April 2012. The Respondent stated that the date on the termination letter might have been an error. She confirmed that the Claimant was paid his terminal dues.

Upon cross examination, RW1 stated that the Claimant was paid up to the date of receipt of the letter. It was her evidence that the Claimant's right of appeal started upon receipt of the termination letter.

She stated that the letter was signed by the management committee which had no power to sack until the decision had been approved by the board.

Claimant's Submissions

The Claimant submitted that the termination of his employment was unlawful, unfair and completely without basis and was in fact malicious because the evidence about the Claimant's good performance remains uncontested and as such the Respondent has failed to demonstrate the ground of poor performance that led to the Claimant's dismissal. Further, the Respondent failed to demonstrate to the court in what way the Claimant was a poor performer and which of his targets he failed to attain.

The Claimant also submitted that his termination was premeditated by the Respondent's officers even prior to the board approving the same, a fact that was admitted by the Respondent's witness Matilda Mwachia. Further, the Claimant was issued with the termination letter one month after the termination took effect and as such, the Claimant was denied the opportunity to appeal the termination decision.

The Claimant further submitted that the evidence of Matilda Mwachia could not be relied upon as it was hearsay in the absence sufficient corroboration.

The Claimant therefore submits that he is entitled to the prayers sought as he has proved that the termination of his employment was unlawful and unfair.

Respondent's Submissions

On the issue whether sufficient reason existed to warrant summary dismissal of the Claimant, the Respondent relied on section 41 of the Employment Act 2007 to submit that the dismissal letter captured the reason for termination being poor performance and as such it discharged the burden of proof on a balance of probabilities and proved that there were reasons to terminate the Claimant's employment.

On the issue whether fair procedure was followed in termination of the Claimant's employment, the Respondent relied on Section 41 of the Employment Act 2007 to submit that it adopted a fair procedure to terminate the Claimant's employment for reasons that:

- a. The Claimant was issued with sufficient notice of the disciplinary hearing.
- b. The notice to the Claimant specified the reason for considering his termination being poor performance.
- c. The hearing proceeded on the scheduled date of 20th February 2012 and the Claimant attended the hearing in person.
- d. At the hearing, the Claimant was informed of the charges against him together with the particulars and he was required to defend himself.
- e. The Claimant was heard in his defence.
- f. The Disciplinary Committee then had a rejoinder.
- g. A decision was then made to terminate the Claimant's employment.

On the issue whether the termination of the claimant's employment was fair, the respondent submitted that it complied with section 41 and section 43 of the Employment Act.

On the issue whether the Claimant is entitled to the prayers sought, the Respondent submitted that the Claimant was not entitled to the prayers sought. The respondent's submissions on the specific prayers are as follows: -

a. Reinstatement

The Respondent's position has long been filled and 6 years and 7 months have lapsed since the Claimant's termination. Further, **section 12 (3) (vii) of the Employment and Labour Relations Court Act** is instructive that an order of reinstatement can only be granted within 3 years of termination. The Respondent relied on the case of ***Moi Teaching & Referral Hospital vs. Hosea Cheruiyot Maru [2017] eKLR*** where the court stated that:

"... The period of 3 years having lapsed it is our view that it was erroneous for the trial judge to have ordered reinstatement."

b. One month's salary in lieu of notice; Kshs.110,000.00

The Claimant was already paid Kshs.69,175.00 as leave pay and Kshs.166,318.50 as salary in lieu of notice.

c. Back pay for the period May- September 2012; 330,000.00

There was no explanation by the Claimant of the factual and legal foundation for grant of this prayer and it is our humble submission that the same be disallowed.

d. Service pay for 21 years worked; 2, 310, 000.00

Section 35 (6) of the Employment Act is express that service pay is not to be paid where the employee is a member of retirement benefits scheme, gratuity scheme or NSSF or any other scheme for the benefit of the employee. From the Claimant's own pay slip there was a statutory deduction for NSSF from the Claimant's salary.

e. Loss of Future earnings 110, 000*12*14; 18,480, 000.00

The claim for future earnings is unjustified and not founded on any law as the employment was not permanent to justify a claim for future earnings. Furthermore, the maximum damages that can be awarded for unfair termination if proved is a maximum of 12 months' pay. The Respondent relied on the case of **Francis N. Gachuri -vs- Energy Regulatory Commission [2013] eKLR**, where the Court held that

"...There was no provision for payment of damages to the date of retirement. This was because employment like any other contract provided for exit from the contract. Even if the claimant's contract was referred to as permanent and pensionable, this did not mean it could not be terminated and once terminated, he could only get damages for the unprocedural or lack of substantive reason for the termination. No employment was permanent; that was why the Employment Act did not mention the word 'permanent employment'."

f. Anticipated increment on future earnings; 7,392, 000.00

There is no legal basis for this claim as the **section 49 of the Employment Act 2007** does not have a provision for such a remedy. Further, even if the Claimant was still in employment, increment in salary was not automatic and would be based on performance. The claim is thus unmerited.

The Court of Appeal in the case of **Justice Kalpana H. Rawal vs. Judicial Service Commission & 3 others (2016) eKLR (G.B.M Kariuki, A Makhandia, W. Ouko, P. O. Kiage, K. M'Inoti J. Mohammed, J. Otieno-Odek JJA)** affirmed that an employee can only be paid for work done. The Court cited with approval the decision of the United States Supreme Court in **Butler -Vs- Pennsylvania 10 HW402 131 ED 472 US** where the court rejected the argument that an official is entitled to pay for a period he expects to work but has not in fact worked. The US court expressed itself thus:

"...but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. [Emphasis by the Respondent] The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures."

The Court of Appeal thus held;

"Accordingly; we are satisfied that the High Court did not err; that there is no property right to hold the office of judge under the Constitution; and that a judge has no right to a salary for a period not served and for services not rendered."

g. Retirement Benefits; 5,880,800.00

The claim is unmerited as the Claimant did not challenge the Respondent's evidence that he was paid Kshs.1,209,451.00 as pension evidenced by the payment remittance advice dated 10th July 2012.

h. Leave pay till retirement; 2, 540, 000.00

This prayer lacks merit as the Claimant's employment was not permanent. Similarly, the Claimant could not substantiate that he planned to work without leave until retirement.

i. Anticipated leave travel allowance till retirement; 1, 540, 000.00

Travel allowance is only payable for actual travel. It is untenable in law that an employee can claim anticipated leave allowance.

j. Employer contribution to provident fund

No basis or particulars were presented in court for this prayer.

k. Anticipated interest to be earned on retirement scheme contribution: 17,642,400.00

The Claimant's employment was not permanent.

I. Allowances; 3,800, 000.00

The Claimant did not give details of allowances which he prayed for this court to grant. This having not been proved, it ought not to be granted.

Determination

The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the orders sought.

Unfair Termination

Section 41(2) of the Employment Act provides for the procedure for termination of employment under Section 44(3) and (4) being on grounds of gross misconduct. Section 41(1) refers to gross misconduct, poor performance or physical incapacity while Section 45(2)(b)(i) refers to conduct, capacity or compatibility.

Poor performance is not gross misconduct per se and can only lead to termination of employment if persistent over a period and only where the employee has been given an opportunity to improve together with the necessary support but failed to do so, or if there is proof that the poor performance is deliberate.

In the present case the claimant was treated as if he was guilty of misconduct and taken through a disciplinary process as set out in Section 41(2). This was not the correct procedure for poor performance.

From the evidence on record, the claimant had been performing well from the time of his employment in 1991. His performance appears to have taken a downward turn only upon his transfer to Garissa. In his evidence the claimant stated that he did not receive support. He testified that Garissa was not the only station that performed poorly. Further, that North Eastern is a unique zone in terms of products as the community is primarily monadic and there is no spread of power, and that the community required Sharia compliant loans which were not available. The claimant testified that the office did not have transport to cover the vast area and the capacity of staff assigned to the office did not match the tasks. He gave the example of Ijara which was about 200 km from the Branch Office connected with a loose surface road.

All these averments by the claimant were not contested by the respondent. For the foregoing reasons I find that the respondent failed to consider and address the real cause of the poor performance of the claimant following his posting to Garissa which therefore makes the termination of his employment unfair in terms of Section 45(4)(b) which provides that termination is unfair where it is found that in all the circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee. I declare that the termination of the claimant's employment was unfair.

Remedies

The claimant's employment having been terminated on 15th May 2012, he cannot be reinstated as the three year window period for reinstatement provided for in Section 12 of the Employment and Labour Relations Court Act has long lapsed. He further did not prove any exceptional circumstances to justify reinstatement as provided in Section 49(4)(d).

The claimant is further not entitled to any future earnings as no payments are due after the date of termination. All other entitlements prayed for by the claimant have been paid.

However, having found the dismissal unfair and taking into account the circumstances under which the claimant's employment was terminated, his long service of over 20 years and his substantially clean employment record, I award him maximum compensation of 12 months gross salary in the sum of Kshs.1,330,548.

The respondent will pay the claimant's costs for this suit. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE