



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 15 OF 2016

(Before D. K. N. Marete)

ANTHONY KELLY MUEMA.....CLAIMANT

VERSUS

AIRTEL NETWORKS KENYA LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court by a Memorandum of Claim dated 29th January, 2016. The issues in dispute are therein cited as;

- i. Unfair termination of the claimant.
- ii. Compensation for unfair termination of the claimant.

The respondent in a Memorandum of Defence dated the 3rd June, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times relevant to these proceedings he had been an employee of the respondent having being first employed as such on 6th September, 2006. This employment was unceremoniously terminated by the respondent on 28th December, 2015.

The claimant's other case is that he was incepted into the respondent's employment in 2006 and an arrangement where he signed a contract with a company called Computrain Secretarial Services Limited on 5th September, 2006. Here, he was to work for the respondent as a Customer Care Representative at a salary of Kshs. 21,100.00. One year down the line, the claimant signed another contract and was employed as a Trainee Customer Service Executive, job grade 13 with a starting salary of Kshs. 45,700.00. He was confirmed to this position on 1st January, 2007 due to his satisfactory service during probation.

The claimant's further case is that sometimes in the year 2011, the respondent made an arrangement with another company – Spanco Rapse (K) Ltd in which the claimant and sixty other employees were to be terminated with a soft landing in Spanco who would then send the claimant back to serve the respondent. He declined the offer for being unsatisfactory and chose to stay with the respondent.

The claimant again avers that the Spanco debacle aforesaid led to a court case against the respondent and Spanco due to his colleagues ouster from the respondent. The respondent requested and he willingly

accepted to testify in defence of the respondent.

The claimant's other case is that on or about 7th December, 2015 he was issued with letters to show cause as to why disciplinary action should not be taken against him for alleged absenteeism. This was by an email communication dated 8th December, 2015. It is his case that following his response to the show cause letter he was invited for disciplinary proceedings scheduled for 24th December, 2015 by summons dated 22nd instant. On 28th December, 2015 his employment was terminated.

The claimant's further case is that his termination of employment was premeditated as the respondent completely ignored his explanation made on 8th December, 2015. This appeal against dismissal vide a letter dated 4th September, 2016 was summarily dismissed. At the time of dismissal he earned a basic salary of Kshs. 91,208.00.

The claimant deems the termination suspicious and unfair in that it came at a time when the respondent was implementing a policy of downsizing that led to massive layoffs of employees. Again, efforts to discuss and resolve the matter with the respondent were fruitless since the decision of termination had nothing to do with the alleged absence from work.

He prays as follows;

- i. A declaration that the termination of employment of the claimant is unfair for contravening the labour legislation, the claimant's contract of employment and the respondent's employee manual;*
- ii. Kshs. 1,094,494 being the equivalent of the claimant's 12 month's salary in compensation for unfair termination;*
- iii. Kshs. 182,416 being 2 months salary in lieu of termination notice;*
- iv. Compensation for 17 days being untaken leave equivalent to Kshs.51,685; and*
- v. Costs of this suit.*

The respondent denies the claim and avers as follows;

- a) Pursuant to an agreement made between an entity known as Computrain Secretarial Services Limited and the Respondent (while it was then known and operated in Kenya as Celtel Kenya Limited), Computrain Secretarial Services Limited provided the Respondent with outsourced services;*
- b) For the purpose of providing the Respondent with some of the outsourced services, Computrain Secretarial Services Limited engaged the Claimant in September 2006 as a Customer Care Representative vide Contract of 'services dated 5th September 2006. A true copy of the foregoing contract of services is annexed to the Memorandum of Claim as Appendix 1;*
- c) The aforementioned contract of services was in place between 5th September, 2006 and 31st March 2007. During that period the claimant's employer was Computrain Secretarial Services Limited.*

It is the respondent's further case that between 30th December, 2015 and 2nd January, 2016 the claimant was absent from work without explanation. This was a violation of his employment contract and was noted and reported to the Human Resource Department. The claimant was thereby issued with a show cause letter requiring a show cause on his absence from work for three days without notice or permission to which the claimant responded vide an email sent on 8th December, 2015. He was thereafter invited for a disciplinary meeting vide a letter dated 22nd December, 2015 containing the following data;

- a) the reason for the disciplinary hearing.*

b) the date and time for the hearing.

c) the venue of the hearing.

d) that he was entitled to be accompanied by a colleague; and

e) he should attend the hearing fully prepared to give a proper explanation and provide any supporting material for his explanation.

It is the respondent's penultimate case that during the hearing, the claimant would not provide valid justification for absence from duty and was terminated vide a letter dated 28th December, 2015. This amounted to a fair termination of employment and was accordant to the respondent's Disciplinary Procedure and Consequence Management Policy and section 44 (4) (a) of the Employment Act, 2007 as read with clause 12 (h) of the employment contract. The claimant was always afforded a hearing during disciplinary proceedings and the appeal thereof but these were not exonerating of his case of abscondment from duty.

The respondent also offered a test on the jurisdiction of this court, which he denied but did not actuate his threat to pursue this and a transfer of the matter to the Employment & Labour Relations Court, Nairobi, for hearing and determination.

This matter came to court variously until the 24th January, 2017 when it was heard *inter partes*.

The issues for determination therefore are;

1. Whether the termination of employment for the claimant by the respondent was wrongful, unfair and unlawful.
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of the claim.

The 1st issue for determination is whether the termination of employment for the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his evidence and written submissions supports a case of substantive and procedural unfairness in his termination of employment.

It is his submission that where the claimant alleges a case of unfair termination of employment, the burden shifts to the employer to not only prove/indicate the reason for termination but also that such termination was for justifiable cause and done through fair procedure. He sought to rely on section 43 (1) of the Employment Act, 2007 as follows;

"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45"

Section 45 (2) on the other hand provides that;

"A termination of employment by an employer is unfair if the employer fails to prove -

(a) that the reason for termination is valid;

(b).....

The claimant's case as outlined in his evidence is that prior to termination, he was issued with a notice to show cause letter dated 7th December, 2015 where he was charged with absenteeism for three days between 30th November, 2015 to 2nd December, 2015. He responded and explained that on Saturday

28th November, 2015 he had travelled to his home county of Kitui in the hope that he would return the following day and resume work as usual. However, upon arrival at home, torrential rains ensued and thereby swept the bridge on river Nzeu thereby rendering the village inaccessible for three days. He therefore requested for leniency bearing in mind that his being held in the village for three days was against his plans and indeed an act of nature which was beyond his control.

The claimant's further submission is that in his letter of termination dated 28th December, 2015, the respondent gave the following as the grounds for termination;

I. That the claimant did not try to reach his line manager, during the period he was away; and

ii. That the CDR's and call logs on the claimant's number showed that he was not in Kitui as alleged in his response to the notice.

Based on this, the respondent concluded that the claimant did not have justifiable explanation for his absence and therefore terminated his employment.

The claimant in his evidence in chief testified that he only contacted his line manager and also David Karara. This was after accessing his phone which had been charging at the shopping centre and was not earlier available as the bridge was swept away on 29th November, 2015. Indeed, on accessing the phone, he called the Human Resource Department who advised him to call his line manager. It was here that it was agreed that he would report to work the following day, which he did. He puts it thus;

"... the first reason for termination is therefore factually incorrect and thus invalid. The claimant's testimony that he called his line manager and the human resource department and explained his predicament remains unchallenged. The said line manager did not come to court to rebut the claimant's testimony. DW1 stated that as a telecommunication company, they had the capacity to bring call logs of the claimant and the said line manager to court, to show that during the material time, the claimant did not call his line manager. However, they chose not to do this. As such, we submit that the allegation that the claimant did not reach out to the respondent to explain his predicament was not proved, thus termination based on the same is invalid."

The claimant further sought to rebut the introduction of call logs and CDR's in his line that according to the testimony of the respondent showed that he was in Nairobi at the material time of his absence. DW1-Ann Mwivaki Njoka testified that in their position as a telecommunication company, they were able to trail the claimant's movements at the material time and this through his phone. These CDRs and call logs were never presented as evidence in court and are therefore unreliable as evidence. There is no rebuttal of his evidence that he was in Kitui at the time.

The claimant also submits a case of procedural unfairness in his reliance on section 41 (2) of the Employment Act, 2007 that requires an employer to accord an employee a fair opportunity to be heard before termination. This is as follows;

41.

(1)

(2) "Notwithstanding any other provision of this part, an employer shall, before termination the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

It is his submission that at the disciplinary proceedings the panelists had extracts of his call logs which they did not share with him. DW1 on cross-examination confirmed that they had extracted the claimant's CDRs and call logs which they used to contradict his explanation. She admitted that these were not shared with the claimant. They were not shared with the court either. He puts it thus in his evidence in

chief;

“I was asked to explain why I had not reported to work and I tabulated my email (response) the panel had another document which they shared and laughed off. It was not shown to me. This was on 24th December, 2015. This was followed by a letter of termination”

This to him is a contradiction of section 41 which not only guarantee a right to be heard but also entitles parties to disciplinary proceedings to all information, data, evidence and documentation that the employer or respondent would wish to rely on.

The authority of **Rebecca Ann Maina & 2 Others Versus Jomo Kenyatta University of Agriculture & Technology, (2014) eKLR** relied on by the claimant addresses this as follows;

“I agree that counsel for the respondent that internal disciplinary proceedings are not judicial in nature. However, in order for an employee to respond to the allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in possession of employer which would assist them in preparing their defence. The employees is also further entitled to call the witnesses to buttress the defence;” (emphasis added by the claimant.)

This is further buttressed by the respondent’s Disciplinary Procedure and Consequence Management Policy (respondent’s exhibit A) at paragraph 6 as follows;

“The employee should be given a chance to explain his position and any evidence relied on against him produced to him for his views.”

The claimant further submits that he appealed against the decision of termination vide his letter dated 4th January, 2016 in which he raised six (6) grounds of appeal but this was summarily dismissed through the respondent’s letter dated 18th January, 2016. Paragraph 7.5 of the Disciplinary Procedure and Consequence Management Policy provides the following as the procedure for handling appeals;

“... the appeal herein shall be held within five days of the receipt of the appeal letter by a panel of three members of the senior management one of whom will be selected by the employee ...”

It is the claimant’s submission that the respondent’s disciplinary policy anticipated a more senior committee at this stage. It also enabled the employee/appellant to propose one member of the panel ostensibly to imbue and ascertain fairness of the process. Inasmuch, this was whimsically ignored by the respondent to the prejudice of the claimant. He therefore urges this court to find that the appeal was never determined.

The claimant links this to section 45 (5) of the Employment Act, 2007 in his submissions of a case of procedural unfairness as follows;

“In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the industrial court shall consider-

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (emphasis the claimant’s.)

The claimant submits that from the foregoing, it is evident that he was denied an opportunity to ventilate his appeal and therefore his termination was substantively and procedurally flawed and therefore unfair.

Further, and in the penultimate, the claimant had not had any disciplinary issues during his nine years stint with the respondent. This is the testimony of DW1, the respondent’s witness. He therefore submits a case of overbearing harshness on the claimant by the respondent in the termination of his employment.

The respondent brings out very elaborate submissions dated 10th February, 2017 a rebuttal of the claimant's case. It is her evidence that the claimant absented himself from work for three days without leave or information. As an employer, the respondent attempted to contact him through his wife but the phone was unanswered thereby forcing her to resort to her own technology which led to a finding that all this time the claimant was in Nairobi. The claimant's explanation and response on the show cause letter was not convincing and therefore his invitation to disciplinary proceedings.

The respondent brings out a case of substantive and procedural fairness by submitting that the claimant from the onset had a duty of proving that his termination was unfair which duty he did not discharge. This is as follows;

"... during the disciplinary hearing, the claimant did not tender any evidence to support his allegations that he was stuck in his village. Further, he did not bring any of his fellow colleagues to testify on his behalf during the hearing. He admitted all this during his testimony before the Honourable Court. Notably, he never brought any of his relations to come and testify on his behalf during these proceedings. Such a witness would have been useful in corroborating his claim that he was indeed stuck in his village. The court is therefore unable to determine if indeed the explanation it rendered to the respondent and presented in court is reasonable and believable."

The respondent further denies that the claimant was ambushed with the information, evidence and data on call logs and persist that her evidence through DW1 was emphatic that the claimant was provided with these before hearing. Again, the respondent submits a case of compliance with substantive and procedural fairness principles of the law in terminating the claimant's employment.

At the end of the day, I find the claimant's case as being overwhelmingly upfront on the respondent's. His case resoundingly comes out better than the respondent's. The claimant brings out a case of substantive and unprocedural unfairness in his termination of employment and the respondent is not able to contradict this despite concerted efforts. The respondent's resort to calling the claimant's wife and the futility of the same ends as such. It does not contradict the claimant's evidence that he was out of reach and stranded at his home in Kitui.

This is again demonstrated by the claimant in his evidence in chief where he narrates a case of misunderstanding between him and his employer in 2011 when there was a failed attempt to dismiss him. He also testified that he was involved in a court case involving sixty - three (63) other employees of the respondent who had sued her. The respondent groomed him as a witness against his colleagues but this backfired as he backpedalled on the false testimony as required by the respondent. This is as follows;

"I was groomed as a witness against my colleagues. I declined to falsify my testimony and testified on the truth. My testimony did not fit the requirements of the respondent. I had been coached on what to say in court. I told the truth. The case was won by the claimant."

Henceforth I was marked there was a feeling that I led them to lose the case. This led to the exit of Njiru. The respondent has been involved in massive layoffs."

I note that this line of examination was objected to by counsel for the respondent but the objection was adequately answered by the claimant and the original position sustained: the objection was dismissed. Coupled with the claimant's evidence and submissions that he had a blemish free stint of nine years with the respondent, I find this termination strange and harsh in the circumstances. I therefore find that the termination of the claimant by the respondent was wrongful, unfair and unlawful. It is lacking in all substantive and procedural aspects as provided by law and process. And this answers the 1st issue for determination.

On a finding of unlawful termination of employment, the claimant becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. That a declaration be and is hereby issued that the termination of the claimant by the respondent was wrongful, unfair and unlawful in the circumstances.

ii. Twelve months compensation for unlawful termination of employment Kshs.1,094,494.00.

iii. One month's pay in lieu of notice Kshs. 91,208.00.

iv. 17 days untaken leave Kshs. 51,685.00.

TOTAL OF CLAIM Kshs.1,237,387.00.

v. That the costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 21st day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Julius Juma instructed by Julius Juma & Company Advocates for the Claimant.

2. Mr. Coulson Harney instructed by Coulson Harney & Company Advocates for the Respondent.