



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAROI

CAUSE NO.812 OF 2015

GABRIEL KARIUKI CHOMBA.....CLAIMANT

VERSUS

INSIGHT MANAGEMENT CONSULTANTS LTD.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent and posted in the mountain region for the client, Philips East Africa Limited as a Sales Executive on a contract commencing 22nd September, 2014. The contract was for one (1) year. The Claimant had a gross pay of Kshs.50, 000.00 per month which was reviewed to Kshs.60, 000.00 on 2nd October, 2014.

2. On 14th April, 2015 the Claimant was summarily dismissed from his employment by the Respondent without reason or ground to justify the same and contrary to section 44 of the Employment Act. The Claimant was not given a hearing or notice and the terminal dues and pay for 14 days worked have not been paid by the respondent.

3. The Claimant is seeking;

One month pay in lieu of notice;

14 days salary unpaid for April, 2015;

12.25 days of accumulated leave not taken;

Compensation; and

Costs

4. In evidence to support his case the Claimant testified that upon employment by the Respondent he was required to sell solar lighting in the central mountain region. Before the launch of the solar project he was working for the respondent's client Phillips doing a road show for them with 9 others. His salary was reviewed from Kshs.50, 000.00 to Kshs.55, 000.00 plus Kshs.5, 000.00 for airtime. As the sales executive, the Claimant was to work with a distributor, Green Switch by moving products from the stockists to the market and ensure deliveries.

5. That in December, 2014, the client, Philips attended the Claimant more duties over Embu region. On 24th february, 2015 the Respondent called all the employees at Bulls Hotel and the management said that they were restructuring and the solar team and lighting teams would be merged. The Claimant was placed

under a new sales team under Mr Wakaba who directed his team to proceed with their duties and await demarcation of work areas. The Claimant was based at Mwea centre. On 28th february, 2015 the Claimant called Mwenda his colleague in the region to ask if Mr Wakaba had allocated areas and he learnt that a meeting had been organised for 2nd march, 2015 where Mwenda had been invited and the Claimant was not invited.

6. The Claimant called Mr Wakaba and informed him that he had been moved to the North Rift and there was an email to this effect. On 2nd march, 2015 the Claimant learnt that all his team members had been allocated their regions in Kirinyaga but he had not been allocated. As a sales executive the Claimant had a route plan and he had to give an explanation to his team leader. He sent his route map and report to Mr Wakaba but told him that he was supposed to move Kitui. The Claimant asked to be facilitated to move to Kitui but there was no response.

7. On 7th march, 2015 the Claimant was called by the area sales manager, South Rift Ms Kibugi who told him to move to Kitale by 9th march, 2015. The Claimant asked that she initiate the movement to Kitale but by the due date neither had wakaba or kibugi communicated with the claimant.

8. On 10th march, 2015 the Claimant was issued with a show cause letter on the basis that a client had reported to wakaba that the Claimant had not been at work and that he had not submitted his daily reports. The Trade Distributor Mr Mbindyo directed that the Claimant be given a hearing and Ms Joan Wahu called for a meeting with wakaba, Kabogo, Kibugi and Mbindyo on 18th march, 2015. On the due date the Claimant attended the hearing but his team leader, wakaba was not present. There was no fair hearing. The hearing was brief where Kabogo dismissed the Claimant by condemning him and stating that the Claimant had a bad attitude. The meeting resolved that the Claimant should resume work with set targets and a time line agreed upon on 25th march, 2015.

9. The Claimant also testified that the new tasks allocated to him he could not be able to undertake as the materials to be carried from Thika to various stockists and distributors were bulky and he sales expected could only be achieved if he had means of transport. The merging of solar and lighting products meant that he had to carry bulbs each at 4 kilos so as to meet his target of Ksh.50, 000.00 per day sales. This meant that he had to carry 14 to 15 cartons of bulbs every day and move such load while on foot which was impossible as he could only be able to carry 5 cartons at a time. The Claimant asked to have a distribute in Kirinyaga area instead of having to travel to Thika daily on public transport and so as to avoid he expense but there was no response.

10. The Claimant was also faced with the problem of hawkers selling fake bulbs and his products were not moving as fast. The price difference also meant that the shops stocked the cheap bulbs and the Claimant could not sell enough so as to meet his set targets.

Defence

11. In defence, the Respondent case is that the Claimant was a contract and his salary was never reviewed to Kshs.60, 000.00 per month. The summary dismissal was justified as the Claimant was given a hearing and notice. The 5 months of the contract were compromised by the Claimant by reason of his conduct and breach of its terms.

12. The Claimant was informed by the Respondent that there was dissatisfaction with his poor work and attitude. The Claimant had failed to cooperate with his manager; did not send weekly reports; failed to submit dilly requirements as required; and absenteeism and constantly failing to be accessed when out in the field. The Claimant was informed about his poor work performance, he was invited to a hearing and was then given an opportunity to prove his work and redeem himself.

13. The contract had stipulated that the Claimant could be dismissed without notice or payment in lieu of notice where the Respondent found that such summary dismissal was justified. For the reasons of the Respondent being dissatisfied with the claimant's work, the Claimant was dismissed.

14. In evidence, the Respondent called Ms Joan Wahu, the Accounts manager assigned to the client, Phillips where the Claimant was placed. The Respondent is a consultancy firm to outsource labour. The Respondent had Philips as a client and recruited employees for them. The Claimant was assigned Central region, from Thika to Isiolo. His supervisor was wakaba and Kibugi was the Sales Administrator who was then promoted to North Rift.

15. The Respondent got complaints from wakaba that the Claimant had not been to markets and his daily and weekly reports had not been sent as required. The sales representative had to receive all reports from the field. Such were to be filed with Ms Laura at the head office and there were no report from the Claimant by February. That wakaba went to look for the Claimant following his route plan but never traced him and he refused to pick his calls. This meant that there was no work being done. As the Area Sales Manager, wakaba had to ensure the Claimant was in the market for sales to move.

16. As a result a notice to show cause was issued and the Claimant called for a hearing. The Claimant was given time to redeem self and a plan agreed upon with targets and timelines. The Claimant failed to do his work as directed as he could not meet his targets. The Respondent decided to terminate the Claimant as a result and his contract had set out the same. Failure to perform in his duties was a subject for dismissal.

17. Both parties filed their written submissions.

Determination

18. The Respondent has admitted that the Claimant was dismissed for the reasons and grounds that he failed to meet his performance requirements despite being given a chance to redeem himself. That the dismissal was also as a result of the fact that the claimant's contract of service allowed and made provision for dismissal where he failed to meet the terms set out.

19. Summary dismissal is allowed under the provisions of section 44 of the Employment Act; however, the provisions of section 44 are subject to section 41(2) requirements that before effecting dismissal, an employee must be given notice and hearing. The notice and hearing may be shorter in the case that warrant summary dismissal but the circumstances requiring such short notice must be set out and demonstrated by the employer.

20. In this case, the main reason leading to the dismissal of the Claimant was his alleged poor performance and bad/wrong attitude to work. He was issued with a show cause letter and invited to a hearing on 18th march, 2015. At the hearing, the Claimant was placed on a performance improvement plan to which he signed in agreement to the plan. However things did not improve and sales targets remained poor. For the period of 18th march, 2015 to 14th April, 2015, the sales target set for each day were not achieved.

21. The Claimant was then dismissed as he did not redeem himself despite the Performance improvement plan. There was summary dismissal.

22. In Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR the court held that;

Poor performance is an allegation that should be supported by evidence of specific performance targets, appraisal of performance, with specific results. The Claimant had worked directly for 2 months, for the Respondent. There were no targets set for him in those 2 months which he was shown to have been appraised on, and failed to meet. It was alarming to hear Mutuku say that the e-mails exchanged between the Claimant and Laban constituted performance appraisal. The court has not found any evidence or material on record to conclude that the Claimant performed his work poorly...

23. *Where there are performance targets set for an employee or the employee is put on a performance improvement plan, where the employee is given a timeline, the employer or supervisor must call the employee for a review or appraisal before taking action that is advance and like to infringe on the rights*

and interests of an employee.

24. In **Jane Samba Mkala versus Ol Tukai Lodge Limited [2013] eKLR** the court held that:

...there is no indication or evidence submitted before this court that the Respondent had taken any measure to fairly evaluate the Claimant based on a policy document or any other practice that they adopted to arrive at the decision that the Claimant was of poor performance.

25. Also, in the case of **Kenny Kinako versus Ringier Kenya Limited [2016] eKLR**; the court held that;

*The subject of poor performance of an employee is a serious matter. Such requires thorough investigations before an employer can use such a reason as the basis for termination. The rationale is that an employee is hired for being competent for the job and upon confirmation; such an employee has been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance, the root cause must be established. In **Tharratt versus Volume Injection products (pty) Ltd [2005, 6 BALR 625]** an employee who was dismissed during the probation period for poor performance was found to have been unfairly terminated as the employer failed to investigate the cause of the poor performance*

26. Where an employer is contemplating on terminating an employee on the grounds of performance, recourse must be given to the provisions of section 41 of the Employment Act. Even where an employee is put on a performance improvement plan and the same is signed, before termination of employment or summary dismissal due to poor performance, section 41 provides that;

(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.

27. It is not sufficient that an employment contract provides for a termination clause; the law requires that before any termination can take effect and be found to be justified, reasonable and fair, the employee must be taken through the mandatory provisions of section 41 of the Employment Act. In the case of **Rachael Nafula versus Beauty Clinic Ltd, Cause No.687 (N) of 2009**; the court held that;

The Employment Act, 2007 unlike the repealed Employment Act has now made it obligatory to observe the rules of natural justice before a decision to dismiss an employee is taken. The Act requires procedural fairness to enthrone the termination process. The Employment Act has radically shifted the goal post. Before the enactment of the Employment Act, 2007, there was no statutory obligation upon an employer to conduct a hearing. Indeed the employer did not even require to give a reason for terminating the services of an employee. The employer only needed to make the requisite payment in lieu of notice and other payments enshrined in the employment contract. This position does and cannot hold any longer in Kenya.

28. In this case therefore, where the Respondent failed to follow the mandatory provisions of the law and went ahead to summarily dismiss the Claimant without adhering to the provisions of section 41; this was contrary to section 45 of the Employment Act, as the dismissal amounted to procedural unfairness. Such is not allowed even where the Claimant was of poor performance. Upon the failure to meet the set targets, the law required that the Claimant be appraised and given a chance to argue his case. When the Claimant was heard on 18th march, 2015 he was given a chance to redeem himself. The show cause notice and the hearing which resulted in a performance improvement plan had thus purged the misconduct. To use the same material to effect summary dismissal without notice or hearing is procedurally unfair.

Remedies

29. The Respondent in the letter of termination offered to pay the Claimant salary for days worked and leave days due. Such should be paid as the Claimant had earned these dues. Upon clearance by the Claimant, the dues set out under the letter of termination are payable.

30. Notice pay is due in a case where summary dismissal is found unprocedural. The pay slips submitted are to the effect that at the time of dismissal, the gross pay to the Claimant was Kshs.55, 000.00. The due notice pay is awarded at Kshs.55, 000.00.

31. On the finding that the Respondent acted unfairly, putting into account the time served of 6 months and the evidence of both parties, 3 months gross pay in compensation is found appropriate. The Claimant is awarded Kshs.165, 000.00 in compensation.

Judgement is hereby entered for the Claimant for his due salaries and leave days unpaid; notice pay of Kshs.55, 000.00 and compensation at Kshs.165, 000.00. Each party shall bear their own costs.

Dated and delivered in open court at Nairobi this 9th day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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