



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1551 OF 2014

KELVIN KARUNGU KARANJA.....
....CLAIMANT

VS

TUSKER MATTRESSES LIMITED.....
.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by Memorandum of Claim dated 1st September 2014 and filed in Court on 4th September 2014 is for unlawful termination and failure to pay terminal dues.
2. The Respondent filed a Statement of Response on 1st October 2014 but did not attend the hearing in spite of due notice. The Claimant testified on his own behalf.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 1st September 2011 in the position of E-Business Development Manager.
4. By letter dated 19th June 2014, the Respondent notified the Claimant that management had reviewed the performance of his office and found that it had fallen short of expectation. The Respondent had therefore decided to scrap the Claimant’s office with immediate effect.
5. It is the Claimant’s case that the Respondent did not explain to him the reason for the termination of his employment. The Claimant states that he was not privy to any review and that he was not aware of any objective appraisal systems.
6. The Claimant further states that he was not given an opportunity to be heard prior to the termination.
7. The Claimant’s claim is as follows:

- a) Balance of leave pay.....Kshs. 25,132
- b) Balance of salary for June 2014.....98,188
- c) Severance pay

d) Compensation for unlawful termination

e) Costs plus interest

The Respondent's Case

8. In its Statement of Response dated 1st October 2014 and filed in Court on even date, the Respondent states that the Claimant had been engaged to develop and maintain an e- business platform for online shopping.

9. The Claimant however failed to discharge his obligations and the intended online shopping never took off.

10. The Respondent further states that the Claimant's terminal dues were computed in accordance with the law and his terms of service. Additionally, the Claimant was paid the sum of Kshs. 568,547.50 being withdrawal benefits on account of Tuskys Staff Pension Scheme of which he was a member.

Findings and Determination

11. There are two (2) issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. The termination of the Claimant's employment was communicated by letter dated 19th June 2014 stating as follows:

"Dear Kelvin

Ref: LOSS OF OFFICE

We refer to our 15th August 2011 contract offering you employment with the company with effect from 1st September 2011 for the newly created office of the E-Business Development Manager.

A review of the performance of your office up to date has fallen short (sic) of the management's expectations.

Consequently, following consultations with management, it has been decided that the office be scrapped with immediate effect. You are herewith notified that in accordance with clause 12.2.2 of your contract of your (sic) employment, your contract shall be terminated as from 20th June 2014.

You will be paid a month's salary in lieu of notice and you will as such not be expected to work through the notice period. Ensure that you have surrendered to the Head of Operations all company property that you have or for which you were responsible during the course of your employment. You may collect your terminal dues, if any, from the Human Resources office on Saturday, 12th July 2014 at 11.30 a.m.

Yours faithfully,

Tusker Mattresses Limited

(signed)

(signed)

(signed)

Stephen M. Kamau Peter L. Leparachao Francis N. Kimani
Managing Director G.M-Supply Chain Human Resources Manager
and Logistics”

13. The Claimant told the Court that he was very shocked by this letter and that he did not know the reason for the termination. The letter itself makes reference to management dissatisfaction with the performance of the office held by the Claimant. It is however not clear whether the issue was the Claimant’s performance or operational failure of the office. This is significant because admittedly the office was a new creature in the Respondent’s organisation structure. The Respondent did not call any evidence to answer this question.

14. At any rate, even assuming that it was the Claimant’s performance that was the problem, there was no evidence that any issues of poor performance were ever raised with the Claimant in the course of his employment or even as a prelude to the termination.

15. It is now settled law that an employer seeking to rely on poor performance as a ground for termination must demonstrate that the employee targeted for termination was made aware of their specific shortcomings and given reasonable time and support to improve

(see *Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR* and *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)*).

16. Further, poor performance is one of the grounds that must be established pursuant to the mandatory procedure set out under Section 41 of the Act.

17. It is therefore not enough for an employer to state that an employee is a poor performer.

18. In *Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR* this Court went further to hold that disciplinary action based on poor performance must be preceded by a capability hearing within the parameters set out in Section 41 of the Employment Act.

19. There is however, the possibility that in abolishing the office held by the Claimant, the Respondent was motivated by its operational failure. If that be case, then the Claimant would have been terminated on account of redundancy.

20. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act , 2007 define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

21. While the law recognises redundancy as a legitimate mode of termination of employment, it must be undertaken within the following conditions set out under Section 40 of the Employment Act:

a) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

22. There was no evidence that the Respondent observed any of the conditions set out under Section 40 of the Employment Act and as held by this Court in *Francis Maina Kamau v Lee Construction [2014] eKLR* where an employer fails to observe these conditions, the ensuing termination is unfair within the meaning of Section 45 of the Act.

Remedies

23. In light of the foregoing, the Court finds the termination of Claimant's employment substantively and procedurally unfair and awards him three (3) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award the Claimant severance pay for two (2) complete years of service.

24. The claims for salary and leave pay balance were however not proved and are dismissed.

25. Finally I enter judgment in favour of the Claimant in the following terms:

a) 3 months' salary in compensation.....	Kshs. 850,965
b) Severance pay for 2 completed years (283,655/30x15x2)	<u>283,655</u>
Total.....	1,134,620

26. The judgment amount will attract interest at court rates from the date of the judgment until payment in full.

27. The Claimant will have the costs of this case.

28. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF MARCH 2017

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JUDGE

Appearance:

Miss Omoto for the Claimant

No appearance for the Respondent