



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1167 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th June 2017)

VINCENT EDWARD NJOROGE.....CLAIMANT

VERSUS

KENOL KOBIL LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. Before the Court is a Statement of Claim dated 18th July 2013 where the Claimant prays for judgment for:

1. Declarative orders declaring that the said termination letter dated 16th January 2013 is unlawful, lacks merit and is a violation and infringement of fundamental freedom in the Bill of Rights under Article 27(5), 41(1), 47(1) and 26(1) of the Constitution.

2. Declarative orders declaring that the Claimants termination should only take effect when the Respondent confirms to all legal requirements stipulated by the Constitution, statute and the employment contract and therefore declare that the Claimant is entitled to his monthly salary until the Respondent's terminate his services within the law.

3. An order of compensation as directed by Article 23(3) of the constitution by the Respondent's breach of his right to life under Article 26(1) by the breach of his right to earn a livelihood for the remainder of his 14 years and 3 months he has until attaining the retirement age at the following rate:

Monthly salary x 12 months in year x 13 years of service 13 x 12 x 253,800 = KShs 39,592,800.00

4. Order the Respondent to pay General Damages to the Claimant for unfair termination of employment as contemplated in section 12 (3) (vi) of the Industrial Court Act.

5. Order the Respondent pays the claimant 12 months salary on the gross monthly salary at the time of dismissal as stipulated under section 49 of the Employment Act as compensation for unfair termination thus:

12 x Kshs 253,800 = Kshs 3,045,600.00

6. Order that the Respondent issues severance pay provided for under Section 40 (1) (g) of the

Employment Act and Section 49(4) (h) to the Claimant calculated below:

½ months salary x 20 years and 41/2 months (20.375 years worked)

½ x 253,800.00 x 20375 = Kshs 2,585,587,50

7. Order that the Respondent pays the claimant for his accrued annual leave for 43.983 days calculated below:

Monthly Salary/monthly working days x Leave days

(Kshs 253,800.00 / 22 months working days) x 43.983 days = Kshs 507,403.88

8. Without prejudice to the forgoing an order that the Respondent pays the Claimant his full salary Kshs. 253,800 per month from the date of suspension to the date of the purported termination. Calculated below:

(2 + [16 /22 months]) months 253,800 = Kshs 692,181.00

9. Order that the Respondent pays the Claimant his difference in salary for the months of October. Calculated below:

Correct Monthly Salary – Reduced Salary Paid 253,800.00 – 97,348.00 = Kshs 156,452.00

10. Order the Respondent to return to Claimant his original car log book.

11. Order the Respondent to pay the Claimant end year Bonuses for the year 2012 which he was entitled to at the end of every year.

12. Order that the Respondent pay general damages to the claimant for violating the Claimant's rights to fair labour practices under Article 41 (1) of the Constitution by several acts of the Employee Harassment that eventually culminated into the Claimant termination from service.

13. Orders the Respondent to issue the Claimant with a Certificate of Service as contemplated in Section 51(1) of the employment act.

14. Orders the Respondent to bear the burden of the cost of suit.

15. Order any other award or benefit that this honorable court may deem fit and just to grant in the circumstances of this case.

16. Orders the Respondent to pay interest at the Court rate on all the above prayers.

17. Orders that the termination can only effect once the Respondent conforms to all orders issued by the Court.

Facts

2. The Claimant was employed by the Respondent on the 13th of August 1992 and confirmed on the 1st of September 1992. He performed his duty well earning him promotions and various accolades including annual bonuses, company shares and salary increments which saw him rise to the current position.

3. The Claimant states that they had a good working relationship until May 2012 where through a cautionary statement the Respondent announced the intention of PUMA ENERGY a foreign company to take over Kenol Kobil by the purchase of its shares. The third party representatives arranged a visit to the company where they met different heads of departments and made it clear that they would not need all the

people in management. They had the intention to downsize once they took over the company.

4. The Claimant states that together with other employees they tried to engage the Respondents' in dialogue to safeguard their future but this proved futile.

5. The Claimant states he was harassed by the Respondent as seen in appraisals conducted in June 2012 deeming him as excellent but a subsequent one done in July of the same year marked him as adequate. This was the first time he was appraised that way and this he states was unfair.

6. He states his phone allowance was reduced from Kshs 2,000 with no reasons given and on the 3rd of September 2012, he was transferred with immediate effect from his current position in Management Information Systems to Operations Department Kisumu as an Assistant Depot Manager. He was immediately escorted to clear his desk and his computer was confiscated.

7. The Claimant states that he was then given a letter on the 3rd of September 2012 requiring him to report to Kisumu by the 5th of September 2012, to the above stated post which amounted to a demotion. He later received a letter dated 18th September 2012, expelling him from enjoying the benefits of the Company car Loan Scheme without giving him ample time to consider the matter and asking him to clear a loan immediately or within 12 months instalments to be charged at 16%. The loan had an initial clearing time of 2 years.

8. The Claimant wrote back raising his concern but was issued with a further ultimatum in a letter dated 4th October 2012 which required him to clear all his outstanding company loans by the 19th of October 2012 failure to which balances will attract an interest charge of 21.5% per annum. He states that the same letter threatened to withdraw the Claimant from the House Loan Scheme.

9. The Claimant received another letter demoting him from Salary Group 15 to Salary Group 10 reducing his salary from Kshs 253,800.00 to Kshs 97,348.00.

10. The Claimant then alleges further harassment by the Respondent who accused him of damaging the computer system in their company and went as far as instructing the police to obtain search warrants to the Claimant's house to search and obtain material which they claimed would help their case against the Claimant.

11. The Claimant was suspended pending investigation and he was asked to go away for 43 days on 30th October 2012, without pay and on the 16th of January 2013, his services were terminated.

12. Before termination, the Claimant was asked to reimburse his house loan amounting to 2,388,477.00 within 2 days.

13. The Claimant states that he suffered great loss both financially, emotionally and socially by termination, the Respondent as far as declining to pay the Claimant his dues including his retirement benefits.

Memorandum of Response

14. The Respondent has filed a response dated 20th August 2013 where he admits that the Claimant was in their employee but denies all allegations included therein.

15. They state that bonuses were awarded to all staff and the Claimant needs then to prove exceptional services, moreover, that the shares did not vest immediately and that they were being managed according to the share program, and that the pay increase was to cushion against the rising cost of living.

16. Further, the Respondent states that they severally promote their employees to enable growth.

17. The respondents states that Claimant and his team were laid off following the hacking of the IT system of the Respondent for which the claimant was IT Assistant Manager exposing the Respondent to great risk.

18. The state that the Claimants' department failed to discharge its function in view of hacking incidences that had occurred in the company and for which the department had not been able to contain. The transfers were not targeted at the Claimant but affected other members of staff in the department who would have otherwise been terminated.

19. The Respondent states that no corrective measures were taken after the IT hack by the claimant and his team causing great embarrassment to the management. A warning letter had been sent dated 6th September 2012 pointing out the breach and issuing notice. The letter was a follow up to one dated 19th July 2012 where the management had pointed out that it noted with concern the inability of the manager of the department to lead his team in performance and professional conduct.

20. The Respondent states that the demotion of the Claimant meant that he was no longer entitled to certain benefits that came with his previous title, his responsibility had diminished and his wages then had to follow. The Respondent submits that his salary could not be paid for a position he was not holding.

21. The Respondent states that the police investigated all staff and not just the claimant and any investigations were solely within the control of the police. The further state that the termination of the Claimant came after the company restructured as the Claimant was not suited to work in any other department. They decided to outsource the services required and therefore there was justification for the termination and it cannot be unfair.

22. The Claimants have filed submissions dated 2nd of March 2017. They submit that Section 47(5) of the Employment Act provide that for a complaint of unfair termination, the burden of proving unfair termination or wrongful dismissal rests with the employee, while that of justifying the termination rests with the employer.

23. They submit that the reason for termination stated in the letter is the company's resolution to restructure and is not any fault of the Claimant. The Claimant submits that the termination then was due to redundancy falling within the definition as provided in Section 2 of the Employment Act and Section 2 of the Labour Relation Act.

24. The Claimant submits that from the termination letter it is clear that the reason given for restructuring falls under redundancy as it is not premised on any fault of the Claimant but on the Respondent's need to restructure.

25. He states the reason for terminating is unreasonable and this Honorable court ought to frown upon reasoning for the following reasons:

a. The Claimant wishes to strongly assert that the abusive email supposedly titled "pat must go" was not sent by him or from his email account;

b. An email account is supposed to receive emails sent to it despite the contents and the Respondent cannot claim that an email account that receives all mails sent to it was hacked;

c. There were police investigations into the alleged hacking yet no report has ever been tendered by the Respondent in that regard;

d. That the emailing system only failed after the claimant and other employees of the IT Department had been quickly ejected from the IT department leaving no one to maintain the system. There were not even allowed to train anyone else or go near the respondent's computers at this particular point in time.

26. They submit that from the foregoing the Respondent's reason for termination of the Claimant is a complete fabrication and far from the truth.

27. They submit that the Claimant has failed to prove the reasons for termination and it should then be deemed unfair. They submit that under Section 43(2) of the Employment Act, the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believes to exist, and which caused the employer to terminate the services of the employee.

28. They submit that the reasons given were but an afterthought and were not issues at the time of termination.

29. They submit that all employee representatives in another case Cause no 1022 of 2012 underwent the same kind of Harassment. Employees from other departments not just IT were unfairly terminated and this then cannot just be an IT issue. They ask the Court to take judicial notice of the numerous Court cases that is:

Hellen Wambui vs Kenol Kobil LTD[2015]eKLR

Thomas Odol Ojwang vs KenolKobil LTD [2015]eKLR

Joseph Kamau Thuo vs Kenol Kobil LTD [2016] eKLR

Ronald Kampa Lugaba vs KenolKobi LTD [2016]Eklr

30. They submit that the procedure for termination of the Claimant was unfair. To this end, they rely on the matter of **Kenya Plantation & Agriculture Workers Union vs. Finlay Horticulture Kenya Ltd [2015]** where the Court observed that:

“natural justice has now become entrenched in the employment relationship where an employer is contemplating terminating the services of an employee. That is one of the essentials of the right to fair labour practices which has been given statutory underpinning in section 41 of the Employment 2007. Where an employer contemplating taking a decision to terminate the service of an employee, the statute has provided procedural safeguard. An employee is thus protected from procedurally unfair termination of service. This means that generally the employee will suffer the legal injury or actionable wrong after the employer has made the decision to terminate the employment in disregard of the prerequisite procedures or without valid and fair reasons.”

31. They further submit that in Section 40 (1) of Employment Act 2007 provides for termination of employment on account of redundancy. Before an individual is declared redundant they must show that:

a) There were consultations with the employee and government before and during the retrenchment exercise;

b) There was a fair selection criteria that was used;

c) Notices were issued to the employee in good faith;

d) Payment of accrued leave days

e) Payment of at least one months salary in lieu of Notice;

f) Payment of severance pay.

32. They submit that procedure was not followed moreover, the Respondents Human Resource Policy at page 127 describes procedure to be taken before termination of an employment.

It states that

1. An inquiry into all relevant circumstances of the offence, with the affected employee being kept involved so as to be fully acquainted with the charges against him and fully heard in his defence.

2. The responsible supervisor or other person appointed for the purpose shall hear and record particulars of the charge and defence and shall make a recommendation to the next higher level of management.

3. If possible, the human resource manager should be present at the hearing.

4. Upon receipt of the recommendations of the inquiry, management shall decide the action to be taken and the employee advised accordingly.

33. The Claimant submits that they were never heard and the procedure was not applied.

34. They rely on Section 41(1) which provides that an employer before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity should explain to the employee, in a language the employee understands the reason for which the employer is considering terminating and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

35. None of the procedure was applied to the Claimant and they submit that the said termination was then unfair.

36. As to remedies, they submit that the Court should grant them as prayed.

37. In response, the Respondents submit in their written submissions dated 28th April 2017. They reiterate that the termination of the employment was done on the ground of restructuring of the company.

38. They submit that Section 45 of the Employment Act recognizes the fact that the employment can be terminated based on operational requirements of an employer.

39. The Respondent has demonstrated that there was a breach of the IT system leading to the decision to outsource the service. There was therefore no need for an IT department and termination was fair.

40. They submit that the Claimant who is seeking a declaration of infringement of rights set out in Article 27(5), 41(1) (47(1) and 26(1) has not shown the threat to those rights. They also submit that the Claimant is not still in valid employment and a declaration that he still is would defeat the purpose of Section 49 which sets out remedies for unlawful termination.

41. The Respondents also submit that no person is guaranteed the right to employment but that employment can end by way of termination, death, employee resigning or employer becoming insolvent.

42. As to damages, the Respondent submits that 12 months salary is not mandatory and the Court ought to weigh the appropriate period. Moreover, they submit that the Claimant has not established any of the grounds as set out in the claim and is not entitled to the remedy.

43. As to severance pay, the Respondents submit that the termination was not due to abolition of his office, job or occupation but as a result of his insufficient qualification and experience, a fault entirely on his part and not the employers. The Respondents reiterate that he was not declared redundant.

44. The Respondent submits that as to leave days, it was the Claimant who failed to submit the same hence their accumulation and is not entitled to payment of them. Further, that his shares should be claimed via the procedure noted in the share managing program once they mature and they are yet to

mature. They also submit that the claimant is not entitled to any other prayers sought and ask that the court dismiss the claim with costs.

45. I have considered the evidence and submissions of both parties and I set down the issues for determination by this Court to be as follows:

1. Whether the Claimant's termination was due to restructuring of the company or for other reasons.

2. For whatever reasons of the termination, whether they were valid.

3. Whether due process was followed.

4. What remedies if any the Claimant is entitled to.

46. On the 1st issue, there is evidence on record that the Claimant enjoyed good working relation with the Respondent and was promoted over time. His performance was outstanding and he earned several bonus payments as a token of appreciation in the year 2003 to 2011. He also avers he was awarded shares in the Respondent's company in 2003.

47. On 30th July 2007 he was also recognized for his good work and earned a promotion from the position of Data Base Administration to Assistant IT Manager in Administration Department.

48. Things seem to have changed on 5th May 2012 when the Respondent announced the intention of a takeover by PUMA ENERGY a foreign company. Fearing for his position, the Claimant and others moved to Court on 15th May 2012 and instituted a claim against the Respondent seeking to restrain the materialization of the Respondent's company takeover until all rights were fully determined.

49. In July 2012 an appraisal was conducted on the Claimant which had appraised him as excellent but on 17th July 2012 another appraisal was done which rated him as adequate. The Claimant's position is that the turn around was prompted by their going to Court vide Industrial Court Case No. 1022/2012 on 15/5/2012.

50. Thereafter things moved from bad to worse. On 18th July 2012, his phone allowance was reduced from 2000/= without any reason. On 3rd September 2012, he was called by the Group Managing Director and General Manager – Kenya and informed of an immediate transfer to Kisumu depot as an Assistant Depot Manager. He was then taken to his office and told to clear his desk and his computer confiscated.

51. He avers that the transfer was a demotion as his position as Assistant IT Manager at Head Office was Senior to that of Assistant Depot Manager. Soon after the transfer, on 18th September 2012 he received another letter expelling him from enjoying the benefits of the company car loan scheme without giving him ample time to consider the matter and he was told to clear the loan immediately or within 2 months by installments to be charged at an exorbitant interest rates of 16%.

52. On 14th October 2012 he was issued with another ultimatum to clear all his outstanding company loans by the 19th October 2012 after which all outstanding loans will attract an interest rate of 21.5% per annum. The letter also threatened to withdraw him from the House Loan Scheme.

53. The last straw came on 2nd October 2012 when his salary was reduced from Salary Group 15 to Group 10 being 97,348 down from 253,800/=. CID officers came also searched his house and carted away what they wished. He was thereafter suspended without pay from employment on 2nd November 2012. He had on 30th October 2012 been sent on compulsory leave. On 16th January 2013 he was then terminated and the house loan recalled.

54. From the chronology of events described above, it is apparent that there was an orchestrated move to push the Claimant out of employment. His termination letter indicated that he was being terminated:-

“Following review of all business processes across and board resolutions to effect restructuring of the Group.....”

55. It is apparent that the change in Claimant’s fortunes turned around after the filing of this case against the Respondent stopping the planned taken over by PUMA ENERGY. That is the inference this Court make due to the events following 15th May 2012.

56. The reduction in Claimant’s salary was definitely against Section 10(5) of Employment Act 2007 which states as follows:

“Where any matter stipulated in subsection (1) changes (Section 5(1) deals with terms of contract), the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing”.

57. The Respondents have also stated that they were doing a restructuring process. No consultation was done as envisaged under Section 10(5) of Employment Act even in the reduction of salary or withdrawal of the employee benefits.

58. The ILO General Survey on Protection Against Unjustified Dismissal 82nd session 1995, in its report of the Committee of Experts No. 115 stated as follows:

“This valid reason for termination of employment is an important aspect of employment security as it provides protection for workers against retaliatory measures During the preparatory work, an amendment for the deletion of the expression “in good faith” in the proposed correction was adopted. The author of the amendment considered that protection against termination of employment for having filed a complaint or participated in proceedings against an employer should not depend on the subjective question of whether the worker was acting in good faith”.

59. At comment No. 117, the Committee noted as follows:

“The Committee emphasized more specifically that the effective protection of the principle of equality presupposes the existence of guarantees providing protection against retaliatory measures for a person who lodges a complaint with the appropriate body, who institutes proceedings to enforce his or her rights or who is a party to such proceedings as a witness. Such measures, the most brutal form of which in termination of employment, taken against a person who has suffered discrimination and who availed himself of a right which is his in accordance with the national policy of equal opportunity and treatment are of a particularly serious nature and can have detrimental effects with regard to the practical application of anti-discriminatory provisions as those who have suffered discrimination after hesitate to have recourse to procedures to redress their grievances for fear of reprisals”.

60. It is therefore my finding that the Respondents assertion that the Claimant was terminated due to restructuring is not valid.

61. On due process, it is apparent that the same was never followed. The Claimant was never accorded a hearing as envisaged under Section 41 of Employment Act 2007 which states as follows:

“(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.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating 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.”

62. Even if it was due to restructuring or redundancy as the Respondent avers, the process too was never followed as envisaged under Section 40(1) of Employment Act 2007 which provides as follows:

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

(a) Where the employee is a member of a trade union, the employer notifies the union to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

63. This Court therefore opines that the Claimant was unfairly and unjustly terminated in line with Section 45 (1) & (2) of Employment Act 2007 which states as follows:

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

64. Having found as above, this Court concludes that the Claimant is entitled to an array of prayers sought as follows:

1. A declaration that the termination of the Claimant vide a letter dated 16th January 2013 is unlawful and unfair and in breach of the in the Constitution and the law.

2. Payment for 12 months salary being damages for unfair termination $12 \times 253,800 = \underline{\text{Kshs } 3,045,600/=}$.

3. 1 months salary in lieu of notice = 253,800/=.

4. Difference in October 2012 salary Claimant was entitled to but reduced being $253,800 - 97,348 = \underline{156,452/=}$.

5. Severance pay at 15 days salary for each completed year of service the Respondent having attributed the termination to redundancy = $\frac{1}{2} \times 253,800.00 \times 20 = \underline{2,538,800/=}$.

6. Leave accrued but not taken of 44,983 days not contested by the Respondent being Kshs. = $43,983 \times 253,800 = 22 \text{ days} = \underline{507,404/=}$.

7. Payment of salary earned during the illegal suspension of 2 months being $253,800 \times 2 = \underline{692,181/=}$.

TOTAL – 7,194,237/=

8. The Respondent issues Claimant with a Certificate of Service.

9. Return of Original Log Book to the Claimant for car bought by Claimant.

10. Respondents to pay costs of this suit and interest at Court rates with effect from the date of termination.

Read in open Court this 6th day of June, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omondi holding brief for Change for Claimant – Present

No appearance for Respondent