



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 323 OF 2014

TOM WEKESA MUSUNGU CLAIMANT

V

NATION MEDIA GROUP LIMITED RESPONDENT

JUDGMENT

1. Tom Wekesa Musungu (Claimant) was appointed as a Circulation Sales Executive, Nation Newspapers Division by Nation Media Group Ltd (Respondent) through a letter dated 30 July 2004.
2. On 2 April 2007, the Respondent informed the Claimant of a promotion to the position of Field Circulation Supervisor and transfer to Nairobi. Barely 6 or so months later, the Respondent again promoted the Claimant to the position of Area Business Partner, Circulation Department. The promotion, he was informed, was a reflection of past performance.
3. The Claimant appears to have maintained the performance for on 17 June 2008, the Respondent promoted him to the position of Regional Team Leader.
4. However, the relationship hit turbulence for on 4 June 2014, the Respondent terminated the employment of the Claimant with immediate effect for having not shown any effort to improve on the key performance objectives even after several discussions and email reminders on the key performance areas. Your inability to improve your performance to the set standards is unacceptable and against the policies and procedures of Nation Media Group.
5. The Claimant appealed against the decision the same day and on 23 July 2014, he moved to Court contending that the dismissal from employment was unfair and without sufficient cause.
6. On 30 September 2014, the Claimant filed an *Amended Memorandum of Claim* in which he introduced a head of claim for pension/income he would have earned had he retired at 60 years.
7. The Respondent filed a Replying Memorandum on 13 October 2015 (out of time, but leave was granted to admit it), and on 17 February 2016, it filed an application seeking the transfer of the Cause to the Chief Magistrates Court.
8. The Court had earlier on 19 January 2016 directed the Respondent to file and serve the application on or before 29 January 2016, but the timeline was not observed by the Respondent.
9. In this respect, the Court directed that the *issues* raised in the motion be canvassed during the hearing of the Cause on the merits.

10. The parties filed *Agreed Issues* on 9 December 2016, and hearing commenced on 6 March 2017 when the Claimant testified and closed his case.

11. The Respondent's case could not proceed immediately thereafter because the Respondent's advocate sought an adjournment on the ground that its witness a Mr. Sekou Owino was out of the country. The Respondent's case was therefore scheduled for 16 March 2017.

12. When the file was called out for hearing of the Respondent's case on 16 March 2017, it sought another adjournment, on the ground that its witness, the Human Resources Manager at the material time had left employment (joined Kenya Broadcasting Corporation) and was also out of the country.

13. Because the Respondent's advocate was giving inconsistent statements as to the reasons for seeking adjournment (identity of witness), the Court declined to grant another adjournment, and allowed the advocate a few minutes to seek further instructions.

14. When the Cause was called out later, Mr. Watiri for the Respondent applied to close Respondent's case and the Court directed that the Respondent's case be closed.

15. The Court must make clear that it finds the attempts by the Respondent to secure adjournments through inconsistent reasons reprehensible and bordering on unprofessional conduct.

16. In effect, the Respondent did not advance any witness and/or evidence to support its case.

17. The parties agreed on some 9 Issues for trial but the issues can be condensed into some 3 broad categories.

Whether demand before action was issued

18. This was issue 6 as framed by the parties. The Claimant did not produce any copy of demand before action and the Court therefore finds that no demand was made.

19. As to what order the Court ought to make in respect of the failure, the parties made no express submissions.

Whether Claimant was on duty on material date

20. This was issue 2 and the Court assumes the material date to be 4 June 2014, when the dismissal took place.

21. The only evidence on record is the testimony of the Claimant that he was issued with a dismissal letter on 4 June 2014, and that on 3 June 2014 he was in Nairobi pursuant to a call to attend a sales review meeting.

22. Having been summoned to Respondent's Nairobi offices, the Court finds that the Claimant was on duty both on 3 June 2014 and 4 June 2014.

Whether dismissal was unfair

23. Issues 1,3,5,7 and 8 all relate to the procedural and substantive aspects of the separation between the parties.

The law

24. The statutory framework providing for the irreducible protections for termination of ordinary employment is found in sections 35, 40, 41, 43, 45 and 47 of the Employment Act, 2007.

25. The point to start the discourse is section 47(5) of the Employment Act, 2007 which provide that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

26. The above statutory provision lays a very low threshold of proof on an employee, but in any case a threshold which an employee must meet in the first instance, when complaining of unfair termination or wrongful dismissal, before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the Employment Act, 2007.

27. To meet the threshold, an employee can for example demonstrate that the written notice envisaged under section 35 of the Employment Act, 2007 was not given.

28. In the instance case, the Claimant testified that no notice was given and further that no disciplinary hearing was held or conducted.

29. The Court is therefore satisfied that the Claimant has met the test of showing that an unfair termination of employment occurred in terms of section 47(5) of the Employment Act, 2007.

Procedural fairness

30. In terms of section 41 of the Employment Act, 2007, an employer is a duty bearer, which means that the employee becomes a right a holder.

31. It therefore becomes imperative for the employer to ensure that the protections assured ordinary employees pursuant to the said section are complied with.

32. The case of the Claimant was one of summary dismissal, for it was with immediate effect. A hearing as contemplated by section 41(2) of the Act therefore became imperative.

33. According to the Claimant, the meeting he attended on 3 June 2014 was a sales review meeting which was converted into a disciplinary hearing, despite not having been served with allegations to confront beforehand.

34. This testimony by the Claimant is corroborated by the appeal letter he penned off on 4 June 2014, wherein he contended that he had not been afforded a fair hearing.

35. The Court is also concerned that despite having a Human Resource Manager, the Respondent did not bother to formally place before the Claimant the allegation he was to confront immediately before taking the decision to dismiss.

36. All that was presented before Court were correspondences on misconduct and performance in 2010, 2011 and 2012, some 2 good years before the decision to dismiss.

37. It is not even clear whether the Respondent had a disciplinary policy in place as required by section 12 of the Employment Act, 2007 and/or whether it complied with the provisions of such a policy.

38. The Court is therefore satisfied that the contention by the Claimant that the dismissal was procedurally unfair is merited.

Substantive fairness

39. Unlike the legal regime obtaining under the Civil Procedure Act and Rules and the Evidence Act, where *he who alleges must prove*, in complaints of unfair termination of employment, *it is the burden of*

the employer to prove the reasons for dismissal and that the reasons were valid and fair, by dint of sections 43 and 45 of the Employment Act, 2007.

40. The Respondent did not present any evidence and or witnesses in Court to discharge that burden, and though the Court is not legally obligated to make a finding on this head because of the finding on the procedural fairness requirements, it would still have reached a conclusion that the dismissal was substantively unfair.

Transfer to Subordinate Court

41. The question of jurisdiction of the Magistrates Court over employment and labour matters was the subject of litigation before the High Court and it is public knowledge what the decision, which has been appealed was and therefore this Court need not delve into the issue.

Appropriate remedies

Lost years

42. The Claimant sought a whopping Kshs 30,284,736/- on account of lost years (income he would have earned up to retirement at 60 years).

43. The Claimant did not lay any evidential, contractual or statutory foundation for this head of claim.

44. In my view, considering the material placed before Court, I can only endorse as very persuasive, the holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Pay in lieu of notice

45. The Claimant is entitled to 3 month pay in lieu of notice in terms of the contract letter and sections 35(1)(c) and 36 of the Employment Act, 2007. He admitted in testimony the same had been paid.

Accrued leave

46. Under this head, the Claimant sought Kshs 84,112/- and because the dismissal letter had informed him of the entitlement, the Court finds in his favour. He equally admitted the same was paid.

June 2014 salaries

47. The Respondent equally indicated in the dismissal letter that the earned salaries were due and the Court would allow the claim of Kshs 21,028/-. The Claimant admitted payment of the same.

Service charge

48. The Claimant sought under this head Kshs 662,382/- but no evidential foundation for it was disclosed.

49. If by service charge the Claimant meant service pay in terms of section 35(5) and (6) of the Employment Act, 2007, he would not be entitled to the same as the contract show he was eligible (and must have been a member) of a pension scheme.

Unpaid claims

50. The Claimant also sought Kshs 67,250/- being field expenses/allowances for October and November 2013.

51. The Respondent did not interrogate or resist this head of claim in any material way and the Court allows it.

Compensation

52. The Claimant made a general plea for compensation in paragraph 14 of the Statement of Claim.

53. Having succeeded in the plea that the dismissal was unfair and considering that the Claimant served the Respondent for about 10 years, the Court would award the equivalent of 12 months gross wages (gross salary at dismissal was Kshs 157,733/-), assessed as Kshs 1,892,796/- as compensation.

Conclusion and Orders

54. The Court finds and holds that the dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

(a) Compensation **Kshs 1,892,796/-**

55. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 10th day of July 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mongeri instructed by Mongeri & Co. Advocates

For Respondent Mr. Mukira/Mr. Watiri instructed by Iseme, Kamau & Maema, Advocates

Court Assistant Nixon