



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1523 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th January 2016)

JOSEPH K. THUO.....CLAIMANT

VERSUS

KENOL KOBIL LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed their Memorandum of Claim on 6.10.2010, through the firm of Rachier & Amollo Advocates seeking damages for unlawful termination. The Claimant's case is that on 19.05.1983 was employed by the Respondent in the finance department where he had served in different positions until 10th August, 2012.
2. The Claimant states that during the time he was employed he worked diligently and without any misconduct and he received various awards as a result which included Departmental employee of the year which accolade he won three times and Company employee of the year.
3. The Claimant further states that all his appraisals during his time with the Respondent were either very good or excellent which led to various promotions and salary increments over the years.
4. That on or about 8.08.2012, the Claimant alleges that he was summoned by the Respondent's General Manager for a meeting where he was informed that he was required to take an early retirement due to the difficult times the company was going through. The following day, the Claimant responded to the Respondent and stated that terminating his services would cause him great suffering as he had financial commitments based on his job security.
5. It was the Claimant's evidence that during the course of his employment the Respondent had intimated that they were selling their interest to PUMA Energy and as a result they would be downsizing by two thirds before the takeover.
6. In view of this information the Claimant together with others engaged in the process of negotiations with the Respondent in Order to ensure that the employees' rights were taken care of but this was not fruitful prompting the filing of Cause No. 1022 of 2012 to assert their rights.
7. The Claimant was then severally summoned by the Respondent's Human Resource Manager and Legal Manager asking him to resign due to the hardship the Respondent was facing but the Claimant declined. On 10.08.2012 the Respondent handed a termination letter to the Claimant citing poor performance as the reason for dismissal.

8. The Claimant states that as a result of the Respondent's actions the Claimant has suffered great loss and it has become difficult for the Claimant to get another job elsewhere.

9. The Claimant therefore prays for the following reliefs:

i. ***Declarative Orders declaring that the said termination letter dated 10.8.2012 is unlawful, lacks merit and is a violation and infringement of the fundamental freedom in the Bill of Rights under Articles 27(5), 47(1), 41(1), and 26(1) of the Constitution.***

ii. ***Declarative Orders declaring that the claimant's termination should only take effect when the Respondent conforms to all the legal requirements stipulated by the Constitution, statute and the employment contract and therefore declare that he Claimant is entitled to his monthly salary until the Respondent acts lawfully.***

iii. ***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 breach of his right to earn a livelihood for the remainder of his 3 years before attaining retirement age at the following rate:***

$$\text{Monthly salary} \times 12 \text{ months in a year} \times 3 \text{ years of service} = 3 \times 12 \times 376,135.00 = \text{Shs. } 13,540,860.00$$

iv. ***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.***

v. ***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:***

$$12 \times 376,135.00 = \text{Shs. } 4,513,620.00$$

vi. ***In the alternative and without prejudice to the foregoing order immediate reinstatement of the Claimant to his position of work.***

vii. ***Order that the Respondent reissues severance pay to the Claimants calculated below:***

½ months salary x years worked

$$\frac{1}{2} \times 376,135.00 = \text{Shs. } 5,453,957.50$$

viii. ***Order that the Respondent issues payment for service charge for early and abrupt termination of the Claimant.***

$$\frac{1}{2} \times 376,135.00 = \text{Shs. } 5,453,957.50$$

ix. ***Order the Respondent compensates the Claimant for violation the Claimant's right to fair labour practices under Article 41(1) of the constitution by the act of approving his financial burdens such as loans and sacking him barely 2 months after such approvals.***

x. ***Orders the Respondent to bear the burden of Costs of the suit.***

xi. ***Order any other award or benefit that this Honourable Court may deem fit and just to grant in the circumstances of this case.***

xii. ***Orders the Respondent to pay interest at Court rates on the above prayers.***

xiii. ***Order the termination can only take effect once the Respondent conforms to all Orders issued***

by the Court.

xiv. ***Order the above Orders must be conformed to before the Respondent Company transfers nay of its shares to PUMA energy or any other Company with intentions of taking over the Respondent Company.***

10. The Respondent filed their Memorandum of defence on 31.7.2013 through the firm of Shapley Barret & Company Advocates. It is the Respondents position that indeed the Claimant was their employee and his employment was terminated by a letter dated 10th August 2012. They deny that the said termination was unfair in terms of Section 45 of Employment Act nor that was it discriminatory.

11. The Respondent further denies that the termination amounted to a violation of the Claimant's right to life as enshrined under the Constitution.

12. They contend that this contract was terminated in exercise of HR's contractual right under the said employment. They aver that in previous appraisal of Claimant before the said termination, the Claimant's performance had been rated as good and based on these approvals, the company had treated the Claimant fairly. However, in August 2012, there were signs that the Claimant's performance was deteriorating badly. The Respondent carried out a thorough review of all the Business processes across or in the company.

13. The review established that various departments including the Claimants were performing dismally. These findings showed as unprecedented loss of Kshs.6,284,375/=.

14. By reason of the above, the Respondent states that the termination of the Claimant was not malicious, unlawful and unconstitutional and was taken in the best interest of the company. The Respondent prays that his claim be dismissed with costs.

15. I have considered the averments of both parties and issues for determination are:

1. ***Whether the Claimant was terminated due to restructuring of the company or other reasons.***
2. ***Whether these reasons were valid.***
3. ***Whether due process was followed.***
4. ***What remedies if any the Claimant is entitled to.***

16. On the 1st issue, the Claimant's termination letter is dated 10.8.2012 and it stated:

“Following review of all Business processes across the company and in particular your department performance in consultation with your immediate supervisor, we note with concern that your performance is below expectation.

In line with your employment letter dated 19th May 1983, we hereby give you one month notice to terminate your services effective 10th August 2012”.

17. This letter alludes to non-performance as the reason for termination and not restructuring of the Respondent. The question then is whether the Claimant's performance was wanting. The Claimant gave evidence and indicated how he had performed over the years. He had risen up the ranks and performed well. He earned yearly bonus payment for good work in 2004, he was overall employee of the year.

18. He contends that on 8.8.2012 he was summoned by the Respondent and requested to take an early retirement which he rejected. However on 15.5.2012, the Claimant and others had filed case No. 1022 of 2012 against the Respondent when the company's position seemed to change with a proposed takeover by another company without consideration of the employees' position.

19. The Claimant avers that in his view, this is what made the Respondents attitude towards him to change asking him to take an early retirement. When he declined on this request, they decided to terminate him alleging poor performance. The Respondents failed to show the poor performance alleged as the Claimant had hitherto been a good worker who was awarded an overall employee of the year.

20. It is this Court's inference that the termination of the Claimant was pegged in the filing of Cause No. 1022/2012 against the Respondent and not on any non-performance.

21. I discussed similar happenings in Case No. 2016/2013 involving another employee against the Respondent who was subjected to harassment with the aim of deterring him from pursuing his rights in Cause No. 1022 /2012.

22. The reason therefore given for termination of Claimant is not valid as expected under Section 43 of Employment Act 2007.

23. On due process, none was followed process expected in as provided 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.”

24. It therefore follows that the termination of Claimant was unlawful and unjustified Section 45 (1) & (2) of Employment Act 2007 which states that 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.*

25. It is my finding in conclusion that the Claimant is entitled to the following prayers which I grant:

1. *12 months salary as compensation for unlawful termination = 12 x 376,135 = 4,513,620/=*
2. *1 months salary in lieu of notice = 376,135/=.*
3. *Service pay being ½ month salary for each year worked = ½ x 376,135 x 29 years = 5,453,957.50/=*

TOTAL = 10,343,712.50/=

4. *Claimant be issued with a Certificate of Service.*

5. Respondent to pay costs of this suit.

Read in open Court this 28th day of January, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Esekenye holding brief for Mr. Change for Claimant – Present

No appearance for Respondent – Absent