



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 157 OF 2015

JOHN WANJALA WANYAMA CLAIMANT

VERSUS

WANANDEGE CO-OPERATIVE SAVIVINGS

SACCO AND CREDIT SOCIETY RESPONDENT

JUDGEMENT

1. The Memorandum of Claim was filed on 10th February 2015 and a reply filed on 1st April 2015. On 2nd February 2016 the matter came up for hearing, the Respondent introduced a new advocate from the firm of Lumumba & Lumumba Advocates but the Notice of Appointment had not been filed and the Claimant had already served the firm of Okundi & Co. Advocates with hearing dates as they were still on record. The Court noting the issues at hand directed hearing to commence at 11.30am and due to an ongoing hearing, the Claimant was only heard at 3pm. At the hearing, the Respondent was absent, there was no appearance from either Okundi & Co. Advocates or Lumumba & Lumumba Advocates.

Claim

2. The Claimant was on 1st February 2013 employed by the Respondent as a Business Development manager where he diligently performed his duties. Such duties included overseeing recruitment of over 20,000 members; preparing board papers with projected market targets; and advertising of society products. The Claimant in the course of his work questioned some inappropriate dealings affecting his work with regard to tendering process of recruiting 20,000 members by a company called Media Link Ltd where kshs.18,000,000.00 was spent and only 700 members recruited. When the Claimant investigated he discovered that some Respondent officials received kickbacks from the contract to media Link Ltd. The Claimant then became a target of intimidation and was ejected from the tender committee; he was locked from the operating system and became unable to undertake his duties; his allowances were withdrawn; and eventually he was unprocedurally terminated from employment.

3. The claim is that there was no notice or hearing before the termination. At the time the Claimant had a loan facility of Kshs.220, 000.00 and an emergency loan of kshs.40, 000.00 payable in 48 months and one (1) year respectively. The Claimant was targeted for his anticorruption stand and his efforts to stop embezzlement of member's funds. This resulted in unfair termination.

4. The Claimant is seeking salary due from November 2014 at kshs.100, 230.00 for 22 months; general damages for unfair termination; interests and costs.

In evidence, the Claimant testified that upon employment by the Respondent, his salary was kshs.87,

000.00; responsibility allowance at Kshs.13, 230.00; telephone allowance at Kshs.1, 000.00; and a board allowance of Kshs.5, 000.00 as per board schedule. The gross payable was Kshs.101, 230.00. He was placed on 6 months' probation and was to be evaluated by the chief executive officer (CEO) for confirmation. He was however not evaluated for confirmation. Every time he asked his supervisor for evaluation, he was told that his performance was fine. He was then asked to be patient. As the Business Development Manager, his work required periodic evaluation to help in improvement but the CEO declined to undertake the process of evaluation.

5. On 15th November 2014 the Claimant was issued with a termination letter. The reasons were that the CEO had evaluated the Claimant and found his performance was below required standards. He was given one (1) month notice ending on 15th December 2014. The Claimant was not given a right to appeal but he appealed on 19th December 2014, the Respondent remained silent and on his last day the CEO called him and said the appeal had been rejected.

6. The Claimant also testified that the Respondent has defended themselves and stated that the termination was procedural but there was no due process, despite the notice being issued the Claimant was denied a hearing and despite lodging an appeal in good time, this was unilaterally rejected. There was no evidence of underperformance to warrant the termination on the grounds that the Claimant was performing below required standards. His contract provided for termination notice at 2 months which was not the case.

7. The Claimant also testified that at the time of his termination he had taken a development loan of Kshs.220, 000.00 to be recovered by check off from his monthly salary for 48 months. This was given to him as a permanent employee of the Respondent. Soon after he was bereaved and he took an emergency loan of Kshs.40, 000.00 to be paid in 12 months and payable from the salary. The guarantor to the loans have pursued the Claimant and the Central Bank will list him as a defaulter as he is unable to repay these loans due to the termination. The Claimant also got married soon after his employment, he made the Respondent aware and added his wife to the medical cover and the wife has since left him due to unemployment. The Claimant had taken a car on loan and was forced to lose it and the paid amounts. Upon termination he was not given anything as all dues were taken to pay part of his loans. Had the Claimant not been terminated he would have been able to support this family and maintain his loans. The termination was unfair and he should be paid compensation.

Defence

8. In response the Respondent admit the Claimant was their employee and then follow with general denials to all the claimants save that the Claimant was advanced loan facilities and that he is not entitled to the reliefs set out. That the Claimant should be dismissed with costs.

9. No evidence was called by the respondent.

Submissions

10. The Claimant filed submissions on 8th February 2016. Despite the Claimant being directed to file submissions on 17th February 2016, this was not done to this date.

11. The Claimant submit that he was a permanent employee of the Respondent. He was on probation for 6 months and was to be confirmed but the Respondent failed to carry out the evaluation for such confirmation. The Claimant was then unfairly terminated contrary to section 45(5) of the Employment Act as he was never given a chance for hearing; his appeal was ignored; and notice given was lower than the agreed period in the contract of employment; and the Respondent did not submit any evidence that the Claimant was of poor performance. The Claimant has relied on the case of **George Onyango Akuti versus G4S Security Services Kenya Ltd [2013] eKLR**.

Determination

12. Placing an employee on probation is allowed and this can be articulated in the employment contract or agreed upon to ensure the appraisal or evaluation of an employee for purposes of confirmation into full employment. Section 42 of the Employment Act regulates probation. Where a contract of employment set out the period for probation, the employer must ensure the employee is appraised and confirmed into full employment or the same extended with consent of the employee failure to which, by operation of the law, such an employee becomes a full time employee automatically upon the lapse of the probation period. In **Peris Nyambura Kimani versus Dalbit Petroleum Limited, Petition 63 of 2014**, the Court held;

Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee.

13. In this case the parties had an employment contract dated 27th December 2013 which set the probation period at 6 months. There was no appraisal or confirmation into full employment. Section 42 therefore applies in that, upon the lapse of 6 months, the Claimant became a full time employee.

14. Performance was a key element of employment for the Claimant. It is clearly set out in his employment contract. He was engaged on specific targets to be agreed upon with timelines signed by the Claimant and his supervisor. He was to be evaluated periodically to ensure he met the set targets. Where set targets are not met the Claimant was to be given 3 months' notice or pay in lieu and dismissed. On this basis, the Respondent therefore set in motion a process for the work performance of the Claimant. His performance was to be on the following path;

- a. On specific targets with timelines;
- b. Periodic evaluation;
- c. Where targets are not met the Claimant was to be put on performance evaluation program;
- d. The Claimant was to be given a chance to improve on his performance so as to be able to meet his targets
- e. Where found unable, notice of 3 months was to issue or payment in lieu of such notice; and
- f. Dismissal upon 3 months' notice of payment in lieu of such notice.

15. These I find were very important guidelines for the Claimant and upon which the Respondent had set in motion an appraisal plan for the Claimant. For the position held by the Claimant as a Business Development Manager, his work performance was an important pillar to the work of the Respondent. Therefore, the employment contract gave specific emphasis to work performance. I take it then that the Respondent had the duty to ensure that the targets were set and agreed upon by both parties and signed upon which the Claimant was to be evaluated. This position is given affirmation in the case of **Jane Samba Mkala versus Ol Tukai Lodge Ltd, Cause No.823 of 2010**;

Majority of employers have now adopted various tool for performance appraisal every year to address matters of employee performance. This is set out as an elaborate system where an employee is given a chance for self-evaluation, then peers are invited to evaluate and a supervisor is given a chance to give their evaluation and comments. Where there are weak areas identified following this evaluation, the employee is given work target with a time plan on how to address these weaknesses. A follow up review is done and where such an employee is still found to below the set criteria, then a warning and eventual termination may arise. Where such an employee show improvement, they are given a chance to demonstrate that indeed given time and the necessary support, they can give their best. This would constitute what is procedurally and substantively fair to an employee.

16. On 15th November 2014 the Claimant was issued with a letter of termination on the grounds that;

... after assessment of your performance by your supervisor it has been established that your

performance is below the required standard by Wanandegge Sacco Ltd even after [being] accorded ample time to show some improvement the performance remains poor.

17. As noted above, the defence filed is plain with mere denials. There is no record of set targets for the Claimant as agreed upon; there is nothing to show as to how the Respondent *established* that the Claimant was of poor performance; and there is nothing to indicate that he was put on an improvement plan so as to improve on any noted poor performance. The duty was therefore upon the Respondent as the employer to set out how they arrived at the reason for termination – poor performance.

19. The question of *poor performance* as a ground for termination is a matter addressed in law and taken serious by this Court once alleged. Section 41(1) of the Employment Act stipulates as follows;

41. (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. [Emphasis added].

20. The employer has a duty to give reason(s) upon which the alleged poor performance is based upon. Upon such reason(s), an employer must also comply with provisions of section 43(2) thus;

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. It is therefore not a simple or fashionable thing to do by citing the reasons for termination. Such, must be on the basis that they indeed exist and are genuine so as to cause the termination. However, where the given reason(s) are not valid or fair, the same amount to being unfair. In **Frederick Kariuki Kamau versus Bank of India, Cause No.2424 of 2012**, the Court held that;

... genuine reasons, they must be valid and directly impact on the conduct of the employee. Where such motions to establish the validity of the reasons is not undertaken, and as a result the employer undertakes a summary action, such is contrary to section 45 of the Employment Act and amounts to an unfair labour practice. The resultant action that is proceeded by a flawed process becomes invalid.

22. There is no evidence by the Respondent to controvert the submissions by the Claimant. Matters set out in the letter of termination are not supported by any evidence. I find nothing to challenge the claimant's evidence or that he failed to perform his duties as set out in his employment contract.

23. I therefore find the termination of the Claimant did not meet the required legal threshold, he was not accorded justice and equity as due process was not followed. These are mandatory requirements in law under section 45 of the Employment Act. The termination of the Claimant was unfair in the circumstances of this case.

24. The failure by the Respondent to participate in the proceedings or file written submissions does not in any manner prejudice their case. The defence filed even where it was to be supported by any call of evidence remains bare. The requirements of Rule 4 of the Court Rules requires each party to set out their case in advance and establish the basis upon which the pleadings are filed by making submissions. Unlike the case with regard to proceeding before the High Court which proceeding are regulated by the Civil Procedure Act and the Rules thereto, proceedings before this Court are regulated by the Court Rules which require parties to exchange all records in advance. The Respondent failed to address themselves as per the Rules.

Remedies

25. On the finding that the Claimant was unfairly terminated, and his evidence that he has since been put

into public ridicule, has lost his vehicle due to the unfair termination, his wife has since left him and is left without a job to support himself, the Court will award as appropriate. The Claimant had only served the Respondent for 10 month and a half. He has not been able to secure new employed. Save for the unfair termination the Claimant should have remained in employment, he had high prospects evidenced by his changed status of acquiring a new car, getting a wife, supporting his family, all because he had a job and was able to support himself. The Respondent was bound by a contract of employment but opted to go contrary to its terms. Maximum compensation under section 49 of the Employment Act is appropriate. The Claimant is awarded 101,230 x 12 all being kshs.1, 214,760.00.

26. Notice pay is due in accordance with the contract that had been agreed upon at 3 months. The Claimant was given one (1) month notice. Pay for 2 months is due in lieu of notice. The Claimant is awarded kshs.202, 460.00.

27. As the defence has not addressed any dues owing from the Claimant in any counter-claim, I will direct as follows:

Judgement is hereby entered for the Claimant against the Respondent as follows:

- a. **A declaration that the Claimant was unfairly terminated;**
- b. **Compensation of Kshs.1,214,760.00;**
- c. **Notice pay of Kshs.202,460.00;**
- d. **Dues amounts above (b) and (c) are subject to the provisions of section 49 (2) of the Employment Act;**
- e. **Costs of the suit.**

Orders accordingly.

Delivered, dated and signed in open Court at Nairobi this day of 25th February 2016.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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