



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 392 OF 2015

AMBANI RONALD.....CLAIMANT

VS

UMA NATHWANI KISHOR MANDALIYA MANOJ SHAH

(THE TRUSTEES OF TUMAINI HOME).....1ST RESPONDENT

DR. VARINDER SINGH SUR.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the 1st respondent as a Clinical Officer on 12.1.2011 and worked until 28.2.2015 when he was terminated by the 2nd respondent for poor performance of his duties. The claimant avers that the termination was unfair because it was not founded on a valid reason and the procedure followed was unfair. He now brings this suit claiming terminal dues plus compensation for unfair termination amounting to kshs. 8,306,280.05. That at the time of his termination his basic salary was kshs. 49,612.50 Per month.

2. The respondent has admitted that they employed the claimant and terminated her as pleaded in his suit but deny that the termination of his services was unfair. They aver that the claimant was terminated because he had been underperforming and failed, neglected and/or refused to submit important reports and/or budgets to the management committee for a period of 8 months. They further aver that the claimant calculated his terminal dues which was paid to him plus salary in lieu of notice. She denies liability for the claimant's lost laptop and further avers that the claimant was not supposed to accumulate his annual leave.

3. The suit was heard on 5.10.2015 when the claimant testified as Cw1 and the respondents called Mr. Mark Kayamba Bisia as Rw1. Thereafter the Parties filed written submissions through their respective Counsel.

Analysis and Determination

4. There is no dispute that the claimant was employed by the 1st respondent as a Clinical Officer from 12.1.2011 and worked until 28.2.2015 when he was terminated. The issues for determination are whether the termination was unfair and whether the reliefs sought ought to issue.

Unfair termination

5. The claimant contends that his termination was unfair because, the reason for his dismissal was not valid and the procedure followed was not fair. He denies the alleged poor performance and avers that no performance appraisal was done on his work. He further contends that the only time when he failed to submit a report to the Management is when there was management problems between 2011 and 2012 when the donors and Trustees disagreed. He further contended that he was never served with any warning letter before the termination on 28.2.2015. He also contended that he was not given any hearing before the termination by the 2nd respondent.

6. Rw1 is the Administrator of the 1st respondent since April 2013. He explained that the 2nd Respondent joined the 1st Respondent in January 2013 as the Chairman and brought on board a new Management Committee because the previous one was not working. That he employed Rw1 as the Administrator and reorganized the staff and their roles and responsibilities were clarified. That the Heads of the institutions including Cw1 who was in charge of the Clinic, were required to submit a monthly and quarterly reports. That Cw1 used to give his reports but then stopped to do so unless he was reminded. That towards the end of his employment he had regular reminders, to submit his reports, which he never honoured. That the committee was unhappy with Cw1's laxity and heard him on 20.2.2015 and paid him one month salary in lieu of notice. He however admitted that no performance appraisal was done on Cw1's work. Rw1 also could not produce any warning letter from the respondents to the claimant. He also admitted that he was not present on 28.2.2015 when Cw1 was dismissed by the 2nd Respondent. He however confirmed that he is the one who paid the claimant the salary in lieu of notice.

7. After carefully considering the pleadings, evidence and the submissions, the Court finds on a balance of probability that the termination of the claimant's employment was unfair both in substance and procedure. Under Section 45(2) of Employment Act, (EA), termination of employment is unfair unless the employer proves that, it was founded on a valid and fair reason and that it was done after following a fair procedure. In the present case, the ground upon which the termination was founded is poor performance. Rw1 did not produce any warning letter served upon the claimant by the respondent complaining about under performance. He also admitted that no performance appraisal was done to measure the claimant's performance. It is trite that where there is no mutually agreed realistic targets between the employee and the employer, no proper performance measurements can be done on the employee's performance. It is further trite that an employer must base the assessment of performance by the employee upon the mutually agreed realistic target through what is now called performance appraisal. In this case, no such agreed targets were proved, and no performance appraisal was done. The alleged under performance was therefore an invalid reason for terminating Cw1's services.

8. As regards to the procedure, Section 41 of the Employment Act provides in mandatory terms that before terminating the services of an employee on grounds of misconduct or poor performance, the employer must explain to the employee the reason for the intended termination. That explanation shall be in a language that the employee understands and the employee must be given the right of being accompanied by another employee or shop floor union representative of his choice. That the employee and his companion must be given a chance to air their view which must be considered before the decision to terminate is reached. The burden of proving that the employee is given a fair hearing is on the employer as per Section 45 2 (a) of the Employment Act. Rw1 was not present on 28.2.2015 when the claimant was terminated by the 2nd Respondent. The evidence by Cw1 that he was not accorded a chance to defend himself is therefore not rebutted. There is no evidence from the defence that Cw1 was invited to any disciplinary hearing and explained his rights under section 41 of the Employment Act above. The Court is therefore satisfied that no fair hearing was accorded to the claimant before dismissal within the meaning of Section 41 *supra*. In the upshot, the Court is of the considered opinion, based on the foregoing analysis that the termination of the claimant's employment by the respondent was unfair and unjustified within the meaning of Section 45 of the Employment Act.

Relief

9. In view of the foregoing finding the Court awards the claimant kshs 248,062.20 being five months salary compensation from the unfair and unjustified termination. In so awarding, the Court has considered the fact that no misconduct was proved against the claimant that contributed to his termination. Secondly the Court has considered the fact that with due diligence the claimant could secure alternative employment within 5 months after termination. As regards his terminal dues, it has not been denied that Cw1 was paid one month salary in lieu of notice plus kshs. 93,572 as dues agreed between him and the respondents. The Court will therefore not revisit that issue because no basis for that has been made. Likewise the claim for overtime refund of stolen Laptops and Administrator's salary for 2012 and 2013 is dismissed for want of evidence. As correctly submitted by the defence counsel, such claims were not substantiated and as such they must fail. Finally, the claim for leave is dismissed for want of particulars and evidence.

Disposition

10 For the reasons stated above judgment is entered for the claimant for the sum of **kshs. 248,062.50** plus costs and interest.

Signed, dated and delivered this 5th day of February 2016.

ONESMUS MAKAU

JUDGE