



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 176 OF 2015

PETER KAMWI CLAIMANT

VERSUS

STANDARD GROUP LIMITED RESPONDENT

JUDEMENT

1. The issue in dispute is unfair and wrongful termination of employment.
2. By a letter of appointment dated 25th September 2010 the claimant was employed by the Respondent as a presenter/Anchor in the Creative Service Department at a monthly salary of Kshs.65,000.00 and a responsibility allowance of kshs.20,000.00. He completed probation and on 25th February 2011 was confirmed into full employment and was joined in the staff pension. On 27th June 2011 the salary was increased to kshs.71,500.00 as well as the responsibility allowance. Such a trend of increments went on due to the good work performance and the last salary was kshs.83,050.00 and responsibility allowance at kshs.45,000.00 and a special responsibility allowance of Kshs.10,000.00.
3. Towards the end of 2013 the claimant successfully organised a show in Mombasa to promote the Respondent and he brought Tanzanian musicians like Diamond whose rating in East Africa was at number one. The musician came in under *Kigoma All Stars* which entered into a contract with Excite Marketing whereby Excite Marketing were responsible for providing accommodation, meals and management of the event. The proceeds from the event were to be shared between Starlight and Excite Marketing. The Respondent was to benefit by having its brand promoted to the local community. The Respondent entered into an agreement with Kenyan Distiller to sell and promote its alcoholic drinks at the event and the Respondent was paid.
4. After a successful event in Mombasa, the claimant went on leave but was recalled back to work on 11th December 2013 and was issued with a letter of termination. Efforts to try and resolve the matter was ignored by the respondent. There was no prior notice or reasons given for the termination or a chance given to the claimant to defend himself. The claimant was therefore terminated for reasons that were not justified or valid and this has affected him professionally.
5. The claim is for a declaration that the termination of employment was unfair; compensation for unfair termination; exemplary damages for mental and psychological harm; payment for reasonable expectation of service; and the issuance of a certificate of service. The claimant is also seeking for a certificate of employment.
6. In evidence to support his case, the claimant testified that upon employment by the Respondent he was a presenter on new music in East Africa and from Africa. The Respondent station *Radio Maisha* was

running different events. In 2013, *Kigoma All Stars* asked the claimant if *Radio Maisha* could host artists from East Africa. The claimant asked Mr Tom Japanni as his boss to allow him to host the event and to sell the Respondent brand. Japanni was to do all the contracting and the claimant was responsible of ensuring that all the artists were present at the event. A company called Excite was to ensure the artists were accommodated, travelled and had their meals. Different companies were contracted to provide service. The Respondent was not paying anything and was to ride on the publicity of the event and make sales through radio, newspaper and news media sales and advertisements. Blue Moon was to sell alcohol at the event.

7. On the material day, the claimant joined with other presenters from the Respondent to run the event. Each of the Respondent employee had a duty allocated. The claimant was the deejay while Alex Mwakideu (Alex) was supposed to be the emcee but he was absent. All went well. Until when it was apparent that Alex was absent. He had wanted a special appearance fees for the duty allocated and the claimant did not know at the time. At around 10.30pm the claimant decided to emcee the event to avoid a lapse and cover for his absent colleague. He called his colleagues for introductions and his boss Japanni greeted the crowd at the event. By 1.45 am the main artist Diamond was to appear and the crowd was anxious to have him present. Before he could come on stage, Japanni called the claimant backstage and demanded that he be introduced before Diamond could be called on stage. Japanni was drunk and he started abusing the claimant. Outside the crowd was demanding for the main artist and when the claimant assessed the situation, he realised to do otherwise and fail to call Diamond would create a commotion and possible violence. As the claimant remained backstage, another DJ took the microphone to Diamond who started his performance.

8. After the show, the next day the claimant was due for his leave which commenced on 9th December 2013. He travelled to Nairobi and then to Isiolo to visit his in-laws. At 2pm Japanni called him before he could reach isiolo and summoned him back to work. He pleaded that he was on leave and far away towards isiolo but was cautioned to attend to the summons. This caused anxiety to the claimant's family as he had no words to explain why he had started his leave and had to cut it short and urgently return to Nairobi. He thought his colleagues needed his assistance urgently and he travelled back overnight to be at work as required.

9. When the claimant reported to work, he was directed to the human resource manager officer, Pauline Kiraithe. Present were Japanni his boss and Joe Munene the Managing Director. The claimant had no prior knowledge of the meeting and was therefore not prepared for what was to follow. He was asked to explain the event in Mombasa. Japanni also submitted that Kenya Revenue Authority had issued the Respondent with a letter with regard to non-payment of tax due from the event. To the claimant's knowledge, he was not aware of these details as Excite Promotions was responsible for such details and had been contracted for that purpose. The claimant was then asked to explain the altercation between him and Japanni where he noted that his boss was drunk and used abusive language against him and present was Mohamed Alli who could explain the details. The claimant asked that Alli be called as his witness but he was sent out. After an hour, Masha Muchiri from the human resource office brought a letter to the claimant and upon reading it he realised it was a termination letter on the grounds that he had overstepped his mandate and authority and caused confusion among staff.

10. The claimant also testified that he did not overstep his authority, he was given work by his boss, Japanni, and he was running the show perfectly until he was called backstage and while attending, the main artist was called on stage before he could give his boss, Japanni a chance to introduce himself. That in any case, Japanni was already drunk and continued using abusive language on the claimant.

11. The claimant also testified that the allegations against him had no foundation as he did his work well. He had to play double roles as Alex his colleague failed to attend and despite such lapse, Alex only received a sanction of no pay for 30 days while he was terminated. The claimant had no previous disciplinary record, he was recalled from leave so as to be terminated and had no prior knowledge or time to prepare his defence.

12. Due to his termination, the claimant has suffered psychologically. He had a wife and child of 2

years. The certificate was issued just before he testified in court. The termination was contrary to the record he had earned since he joined the respondent, his salary had been reviewed positively 4 times and had a clear record of good work. Before joining the respondent, the claimant had worked with different media houses and was employed thus due to his clear work. The termination was therefore with malice as he was not allowed to call his witness to confirm the altercation with his boss. While he attended the disciplinary hearing, nobody was taking minutes and he thought it was an ordinary briefing. He was then ambushed with a termination letter.

13. The claimant then confirmed his claims as set out in his memorandum of claim.

Defence

14. In defence filed on 10th March 2015, the Respondent admit the employment of the claimant. the Respondent also submit that on 7th December 2013 it organised a *Kigoma All Stars* event in Mombasa where the claimant as a radio presenter with Radio Miasma an affiliate of the Respondent had the role to play in the said event. Excite marketing company was contracted with Starlight moon company of Tanzania to secure performance of 14 artists for the event. During the event, the claimant exceeded his authority causing confusion with staff internally. The success of the event can only be accorded to the Respondent and its staff and not to the claimant.

15. The claimant was summarily dismissed because of gross misconduct during the event as this amounted to breach of his contract. That the claim should be dismissed with costs.

16. In evidence, the Respondent witness was Thomas Japanni who filed his witness statement on 20th November 2015. He testified that in December 2013, the claimant interested him to host *Kigoma All Stars* as they had the best songs in East Africa at the time. This was good for Respondent publicity. Event organisers were contracted. The claimant suggested Excite and a contract was done to pay the artists; make travel arrangement and pay for the venue. Suppliers were contracted. Staff travelled to Mombasa to confirm booking due to the corporate image. The organisers did all their work but failed to pay for the venue. The Respondent was forced to pay Kshs.100, 000.00 to get sole sponsorship rights to the venue. The claimant had travelled 2 days prior and when the witness arrived for the event venue he found construction of the main stage ongoing. He also found the sound system poor and the VIP areas was not good. He proposed changes.

17. The witness also testified that at 6pm he came back to the venue and found a huge crowd of revellers enjoying the event. When he checked his team the emcee, Alex was absent due to differences with the claimant and he replaced him with Mwashumbe. He remained at the event consulting with different suppliers. Upon checking his staff later, the claimant was busy organising rookie artists who were curtain raisers and had a different programme than the one of the respondent. The claimant had also stopped his colleagues Mwashumbe and Koroso from emceeing and taken over and had become uncontrollable. Some artists complained that they had paid to perform and upon enquiry he realised the claimant had received Kshs.3, 000.00 from over 20 artists for each to do a 3 minutes performance. It was apparent that the duty of deejay allocated to the claimant he could not attend as he was serving other interests. He was supposed to play jingles prepared for the event, this was to promote the Respondent and the brands but the claimant became uncontrollable. It had been agreed that the witness would introduce Diamond and acknowledgement all the other organisers but the claimant was not listening and went off-script. He did not want to interrupt the show and therefore left things as they were.

18. The plan and programme for the day had been for the witness to introduce Diamond as the main artist and use the opportunity to thank the organisers especially Radio Maisha, but the claimant ignored protocol to serve his own agenda. He left the event and later travelled to Nairobi.

19. On Monday, he came back to Nairobi and did a show cause letter to Alex for absconding duty. He was looking for the claimant as he had approved his leave. When Alex was called for hearing, it emerged that the claimant had promised him some money for emceeing at the event. Alex was suspended without pay. The claimant had his leave approved but due to numerous mentions in bad light the human resource

director and managing director asked the witness to call him from leave to explain himself. A show cause was done and a phone call made where the claimant was asked to attend a hearing. The claimant said he was out of town and asked to attend on Wednesday. At the hearing, the claimant was rude and failed to explain his indiscipline and conflict of interest and was shouting and had no remorse. When asked to explain about his insubordination, the claimant was not responsive and it was apparent he had no regard for authority. At the close of the hearing, the panel decided on summary dismissal of the claimant.

20. A KRA letter came to the attention of the Respondent that the claimant was working with the event organisers. The claimant went to the KRA offices using company name to benefit a stranger event organiser, who then failed to pay for the venue. KRA was asking for payments from the claimant as the responsible person.

Submissions

21. The claimant submit that the termination was unfair as it was contrary to fair procedure. Section 46 of the Employment Act was not adhered to as the claimant was not accorded justice and equity. Procedures required under section 41 of the Employment Act were not followed. That there should have been notification and hearing before termination on the grounds of misconduct, the claimant rely on section 42(1).^[1] The claimant is entitled to compensatory damages due to the unlawfulness and unfairness of his termination.

22. The claimant has relied on the following cases – **Abraham Gumba versus Medical Supplies Authority, Cause No.1073 of 2012** and **Fred Odhiambo versus AG & Postal Corporation of Kenya, Cause no.312 of 2010.**

The Respondent on their part submit that the termination of the claimant was effected upon issue on notice in accordance with section 35 of the Employment Act; he was given a hearing and then summarily dismissed for gross misconduct pursuant to the provisions of section 41 and 44 of the Act respectively. The conduct of the claimant was of the nature that he denied the head of Radio a chance to officially represent and promote *Radio Maisha* brand; he ignored laid down procedures and cut off his fellow employees from participating the discharging their duties. The claimant failed to do his work properly and generally conducted himself in a manner that was in breach of his obligations and which warranted the summary dismissal. In arriving at the decision to terminate the claimant, the Respondent applied fair procedure set out in the human resource policy manual; the claimant was summoned and he confirmed his attendance where he was given a hearing; and a verdict was arrived at to dismiss him for gross misconduct.

23. The Respondent has relied on the case of **Fred odhiambo versus AG 7 Another.**

Determination

Whether the claimant was terminated unfairly

Whether there are any remedies

24. The Employment Act, 2007 has fundamentally transformed the employment relationship in Kenya. Section 41 thereof has now created a statutory obligation upon employers to notify and hear representations from employees when contemplating termination of the employment contract. This is what is called *natural justice* under the common law. In the employment and Industrial relations, this is known as *procedural fairness*. Dismissals pursuant to section 44 of the Employment Act, are also subjected to the requirements of procedural fairness set out in section 41 of the Act.

25. However, the radical change is not only in the field of procedural fairness. There must be substantive fairness. An employer may comply with all the procedural fairness conditionality yet fail to meet the threshold requirements of *substantive fairness* set out in section 45 and 46 of the Employment Act. An employer is now expected to prove the validity and fairness of the reasons for termination. The

question this Court has to address therefore is whether the Respondent complied with the peremptory requirements of procedural fairness before making the decision to terminate the services of the Claimant through summary dismissal.

26. The letter of dismissal is on the grounds that the claimant overstepped his authority and mandate. Mr Japanni testified that following the event in Mombasa on 7th December 2013 where the claimant was insubordinate, he proceeded to Nairobi and issued the claimant with a show cause. This was after show cause and hearing of Alex who had absconded duty and at his hearing, it emerged that the claimant was mentioned severally in bad light. However, there is no evidence of what show cause letter was issued to the claimant. The relationship between the hearing conducted to Alex and the adverse mentions of the claimant in bad light has equally not been submitted. In any case, where the claimant was found to be insubordinate of instruction given to him by his supervisor, Japanni, such is not proved to have been sent to the claimant. The witness, Japanni admitted that he had allowed the claimant to proceed on his leave. The claimant confirmed that immediately after the Mombasa event he proceeded on his leave and travelled to Isiolo. The claimant was called while out of town and on short notice was able to attend as summoned. Japanni testified;

... since Peter had proceeded on leave immediately after the event ... I sent him a show cause letter and eventually had a meeting with HR, the Broadcast MD and himself. ... The numerous mention of peter in bad light prompted the HR Director and MD Broadcast to ask me to call him from leave and come to explain himself. I wrote him a show cause and followed it up with a phone call asking him to come to a hearing of his case. I called him on a Monday and he requested to come in on a Wednesday because as he explained he was out of town.

27. What then was the case against the claimant as at the point the show cause was allegedly issued? Did this arise from the hearing of Alex case with regard to his absconding duty or was this as a result of event Mr Japanni narrated in his evidence? Without the show cause letter to ascertain the allegations levelled against the claimant requiring him to respond at the supposed hearing on Wednesday 11th December 2013, a key procedural lapse had already occurred.

28. In the filed minutes of a ***disciplinary hearing for peter Adams on 11th day of November 2013*** therein are 5 *charges against the employee*. These charges are;

1. *Insubordination during the Kigoma All Stars Concert held at Mombasa on the 7th December 2013 (event).*
2. *Conflict of interest in the organisation of the event*
3. *Not being team player.*
4. *Not embodying SG staff values during the event*
5. *Overall unprofessionalism during the event.*

29. Present at this meeting were Pauline Kiraithe; Joe Munene; Thomas Japinni, and Peter Kamwi as the accused. The rest in attendance were Japinni as the complainant, Munene as an independent person and a chairlady.

30. Before the claimant was called for hearing, a show cause was issued. The Respondent opted to share an extract of the human resource policy. The clauses or sections that relate to issue of show cause is not attached. I take it that these omitted parts are not favourable to the respondent's case as otherwise, the policy should have been shared with the claimant or submitted in its entirety. That aside, where a show cause letter or notice is issued to an employee this Court has held in the case of **David otunga Kenani versus Office of the Controller and Auditor General, Cause No.933 of 2013** that a show cause is issued upon an investigation of allegations against an employee. The subject employee must answer to the show cause and where the response is not satisfactory, then the employee must be called to a hearing. See finding in **Amrick Consales versus Mara Ison Technologies Kenya Limited, Cause No. 2538 of 2012.**

31. What then was the purpose of the show cause? Is that why it is not attached to the proceedings herein by the respondent? Whichever the case, where such a show cause was issued, fair procedure

required that the claimant be given a chance to Respondent to it before he could be called for a hearing held on 11th December 2013. Even where the process with regard to show cause was followed, which was not the case here, section 41 of the Employment Act as cited above, set comes to bear thus;

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.

32. The reasons for which the employer is considering for termination of employment must be explained to the employee at a hearing where the subject employee is allowed to call another employee of their choice to be present. Even in cases that warrant summary dismissal, fair procedure is mandatory thus;

41 (1) ...

(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.

33. Fair procedure is therefore, mandatory at every level of termination of employment even in cases that warrant summary dismissal. An employee must be given a hearing unless such hearing is practically impossible and the circumstance leading to such impossibility must be explained by the employer.

34. In this case, the claimant's whereabouts were known to his supervisor, Japinni. He had allowed him to proceed on leave after the event in Mombasa. He made himself available when called upon. I find no special circumstances that prevented the Respondent from allowing the claimant to reply to the show cause or be allowed to call another employee at the hearing on 11th December 2013. Indeed the claimant testified that he requested to have Mohamed Ali as his witness, an employee present during the altercation he had with Japinni in Mombasa at the event, but he was asked to leave the meeting and the next thing he saw was his letter of dismissal.

25. I find there were serious procedural lapses that inherently made any other action against the claimant, fundamentally flawed. This amounted to procedural unfairness.

36. The letter of termination was on the reason that;

... Reference is made to the Kigoma All Stars event held in Mombasa on 7th December 2013. During the event, you overstepped your authority hence causing confusion with staff internally and calling your integrity to question.

At the hearing, the subject was the hearing for Peter Adams and noted;

- *This issue was picked up from another employee's discipline hearing based on the written confession received. We needed to establish Peter Adams involvement in the event and therefore called him in from leave to explain himself.*

37. Was this then an enquiry based on what another employee has heard and made a confession? From all the allegations listed in the minutes, the total sum that is noted in the letter of termination is that of overstepping authority and causing confusion with staff internally. I have scanned the entire record of the hearing proceedings, I find nothing with regard to this allegation and reason for termination. In the *findings* there is nothing to suggest that the panel, with the presentations made had any evidence from Japinni or any other staff internally affected by the conduct of the claimant. The *conclusion* thus that the claimant *behaviour led to the failure of Radio maisha meeting its set event objectives* lacks a basis, has no

justification or any iota of validity. The *verdict* arrived at cannot have root as the issues set out had no foundation. Present at the hearing were senior officers of the respondent, the complaint was the claimant's supervisor, the chair was the human resource director and also present was the managing Director Broadcast, as an independent person. However, there is no record of the claimant's defence or his request to call his witness. The claimant was faced with serious allegations which could lead to the loss of his employment, present were senior officers of the Respondent and reason demanded that the claimant's rights under section 41 of the Employment Act be secured, which I find was not the case. The resulting proceedings, the findings and verdict were therefore predicated on termination of employment. The claimant could not get justice before his accuser and supervisor who played a key role in the proceedings and presided over the same to reach an adverse verdict. I find no substantive reasons to support the findings and verdict against the claimant. The reason given for termination was therefore substantively not fair, cannot be justified under the human resource policy extract and therefore unfair.

37. The claim is also that the termination of the claimant was done with malice. That such malice was apparent when the claimant was directed by Japanni to introduce him at the Mombasa event before the main artist Diamond and when he failed to do so, he was threatened with termination. To this evidence, Japanni testified that the claimant took over the programme of the event at Mombasa and emceeding job and refused to let any other presenter of the Respondent participate. That the claimant became rude and uncontrollable and he decided to seat back and watch. The evidence of the Respondent witness than creates a scenario that Japanni was not happy by the manner the claimant run the event in Mombasa and being the superior felt slighted. What Japanni failed to do is share the programme where the events in Mombasa were to be carried out. Where indeed the Respondent had a schedule of events that show how the event was to run and that Japanni was to be introduced before Diamond and introduce the Respondent partners at the event, such I find, upon the claimant challenging the order of events, should have given such evidence credence. What was left was the word of the claimant and that of Japanni. A public event of the nature described by both the claimant and Japanni was a party with no set order and things progressed based on the mood of the event with heightened expectancy for the main artist of the day, and where indeed Japanni was to introduce Respondent sponsors or partners, as the senior most officer of the Respondent and having called the claimant backstage to confer with each other, I find nothing stopped him from taking over the event if indeed he found the claimant was not doing his job as required, the fact that the claimant was called backstage, he had the alleged argument with Japanni is enough to confirm that the claimant was taking instructions as directed. There was also no challenge that while the claimant remained backstage conferring with Japanni, another emcee took over the event and introduced the main artist Diamond and he came on stage.

38. To therefore use such events that the Respondent most senior officer had a supervisor role and failed to take charge, and then dismiss the claimant, this I find to be well choreographed to lead to the dismissal. The hearing process that took place was simply a charade to justify a decision that Japanni had made and was simply being sanctioned by the other officers. Had this not been the case, the claimant should have been given a fair chance to argue his case and call witnesses. The threat by Japanni to the claimant while in Mombasa that he would ensure he would be terminated came to pass. The sanctioned given to the claimant was harsh as against another officer who absconded duty and was simply and leniently treated. I find, the termination was done with malice and exemplary damages are due.

Reliefs

39. The claimant is seeking compensation for unfair termination. On the finding the termination of the claimant was both procedurally and substantively unfair, compensation is due. Compensation for unfair termination is made pursuant to the provisions of section 49 of the Employment Act. I find the conduct of the claimant while at work was beyond reproach, he had not previous record of misconduct and only had accolades for good performance. Maximum compensation at 12 months' pay is hereby appropriate based on the last gross pay of the claimant at kshs.138, 050.00 all being kshs.1, 656,600.00.

40. The claimant is also seeking exemplary damages due to mental and psychological harm caused to him. The evidence was that the claimant was hounded out of office for no just cause, he was recalled while on annual leave and taken through a sham process of hearing so as to dismiss him. The Court has

set out that the processes undertaken by the Respondent in this regard were unfair and the resulting outcome of termination was equally unfair. There is also a finding that the dismissal was with malice and set in motion for the simple reason of justifying a decision already taken. Such should not be allowed to happen to any employee. The harsh sanctioned metered against the claimant as against what was done to Alex is informative. The decision against was meant to do more than punishment, ensure that he suffered for what Japanni deemed was acting contrary to his instructions however far-fetched. Such is malicious and exemplary damages due. The claimant is awarded Kshs.1, 500,000.00.

41. I find no specific material outside the unfair process and reasons for dismissal and termination of employment that warrant a claim for exemplary damages. Such is declined.

42. Equally the claim for reasonable expectation of life on the basis that the claimant is now awarded compensation for unfair termination is not justified. The claimant had a contract of employment that contemplated termination upon notice or payment in lieu of such notice. Notice was not issued and is due but not pay for reasonable expectation of life.

43. Notice pay is set out in the letter of termination at 3 months. The Respondent submitted that such amount for notice was paid. The claimant attached his pay slip for November 2013. Such was before termination. Where notice pay is not settled such should be paid at 3 months gross pay all being kshs.414, 150.00.

44. A certificate of service is due to every employee upon termination pursuant to the provisions of section 51 of the Employment Act and not section 52 as submitted by the claimant. Where such a certificate is not issued and as a result an employee is unable to secure new employment, such must be submitted in evidence for the Court to assess and make a finding and award as appropriate. What the claimant is seeking is the issuance of the certificate only. Such should be issued unconditionally immediately.

45. In the penultimate, costs are due to the claimant as demand had been made and the Respondent was adamant and failed to oblige. Such costs are due.

Judgement is entered for the claimant against the Respondent in the following terms;

- a. **The termination of the claimant was procedurally and substantively unfair;**
- b. **Compensation is awarded at Kshs. 1, 656,600.00;**
- c. **Exemplary damages at kshs.1, 500,000.00;**
- d. **Notice pay as set out at paragraph 45 above;**
- e. **Certificate of service to issue immediately;**
- f. **Dues awarded above are subject to the provisions of section 49(2) of the Employment Act;**
and
- g. **Costs of the suit awarded to the claimant.**

Orders accordingly.

Read in open court at Nairobi this 10th day of March 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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