



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1992 OF 2013

GILBERFORCE OKONG'OCLAIMANT

VERSUS

TRANSWORLD RADIO-KENYARESPONDENT

Mr. Ombasa for the claimant

Mr. Kinyanjui for the respondent

JUDGMENT

1. The suit was commenced vide a statement of claim on 11th December 2013 seeking compensation for unlawful termination of employment and inhuman treatment and payment of terminal benefits to wit;

- i. One month's salary in lieu of notice Kshs.28,750.00; and
- ii. Seventeen (17) months' salary worked without pay while on probation (25,000 x 17) Kshs.425,000.

2. The suit is premised on the averments in the statement of claim, documentary and oral testimony by the claimant that may be summarized as follows;

That on or about December 2009, the claimant joined the respondent as a news reporter on probation. He started working for Maata F.M. which is managed by the respondent.

The claimant worked for one (1) year and five (5) months on probation and he was confirmed as a permanent employee for the respondent working as a station manager at Maata F.M. in Lodwar on a three (3) year contract at a monthly salary of Kshs.25,000 plus other benefits commencing 1st April 2011.

That the claimant performed his duties diligently and exceptionally well raising the profile of the Maata F.M. Lodwar to number one position among the five other stations managed by the respondent.

In recognition of his work, the claimant's salary was increased to Kshs.28,750 per month.

On 3rd June 2013, without notice, warning and or plausible reason, the respondent terminated the services of the claimant on framed up allegations for which he was not accorded any opportunity to defend himself.

3. The general manager accused the claimant of failure to achieve the company's performance objectives despite the fact that after working as a station manager for just one year, the station's profile improved to be number one from number three amongst five other stations managed by the respondent.

4. The claimant submits that his termination was unfair, unlawful and was done in bad faith without opportunity to defend himself.

5. The claimant pray for the reliefs sought.

Response

6. The respondent filed a response to the claim on 14th May 2015 in which it denies each and every allegation set out in the claimant's statement of claim.

7. The respondent relies on oral testimony of RW1 Eric Kadege, the then general manager of Sifa F.M. stations but now teaching at Daystar University and RW2 Emmanuel Abenyo Ekuwom, a former producer and station manager.

8. For fifteen (15) months between December 2009 to 1st April 2011, the claimant worked for the respondent as a volunteer for a stipend, specifically payable on projects completed and delivered. That claimant was paid by the respondent vide petty cash vouchers, and or cheques totaling to Kshs.172,770.00 attached to the response and marked 'TWR 12 – 49'.

9. completed. The respondent relies on the claimant's application to respondent dated 2nd August 2010 and curriculum vitae annexed as 'TWRR' as evidence of the nature of the relationship between the parties during the fifteen (15) months period.

10. That on 1st April 2011, the claimant was employed on a three (3) years fixed term contract in the position of station manager, at the respondent's Radio station, Maata Radio, located at Lodwar, at a consolidated monthly salary of Ksh.25,000.00. this was subsequently increased to Kshs.28,750.00.

11. In June 2013, the claimant's employment was terminated.

12. RW1 told the court that staff at Lodwar station complained about lack of leadership skills by the claimant including disrespect of staff, and high handedness. That the claimant abused the staff and did not delegate duties. That the staff morale and performance at the station had been negatively effected. That the claimant had bad exchanges with the staff and the landlord leading to the landlord serving an eviction notice to the respondent.

13. That the respondent discussed with the claimant, the claimant's performance issues and RW1 gave the claimant verbal and written warnings and eventually a letter of dismissal.

14. A caution letter dated 5th December 2012 was produced in this respect.

15. In the letter of termination issued on 3rd June 2013 but erroneously dated 3rd June 2012, RW1 referred to the previous warnings given to the claimant on performance issues and stated that the claimant's performance had not improved on leadership and revenue targets. That the claimant had poor working relationship with the station team including the security personnel. That this had negative impact on the station's identity and revenue.

16. RW1 maintained therefore that the respondent had a valid reason to terminate the employment of the claimant and the respondent had followed a fair procedure in terminating the employment. RW2 told the court that he worked as a producer under the claimant. That initially, the claimant had good relationship with the staff but he later became disrespectful to the staff.

17. That the claimant marginalised the Turkana members of staff and were denied access to information by the claimant.

18. The claimant did not share tasks and he was disrespectful to all staff, including security personnel and

the landlord.

19. RW2 testified that the claimant actually abused the security staff and RW2, wrote a complaint to management regarding the conduct by the claimant towards the team. RW2 no longer worked for the respondent and during cross examination persisted in the allegations he made against the claimant.

Determination

20. The issues for determination are;

- i. whether the claimant's employment was terminated for a valid reason;
- ii. whether the termination was effected following a fair procedure;
- iii. whether the claimant is entitled to the reliefs sought.

Issue i

21. From the competing evidence tendered by the parties, it is apparent that the claimant had served the respondent diligently for a period of fifteen (15) months as a volunteer employee and was paid during that period based on the various tasks given to him. The claimant was subsequently employed on a fixed term contract of three years commencing 1st April 2011. The contract was brought to an end by a letter of termination dated 3rd June 2013 for poor work performance. Six months earlier on 5th December 2012, the claimant had received a letter of 'caution' regarding the way he managed the station. This matter was to be discussed in detail during the annual appraisal.

22. The appraisal was produced and attached to the statement of response and marked 'TWR5'. This was for the period January to December 2012 and was conducted on 20th December 2012 after the letter of caution aforesaid. In the appraisal, the claimant rated his performance at 85% whereas the respondent rated his performance at 60% on delivery of key objective and responsibilities whereas on the assessment of other critical performance factors, the employee rated himself at 73% whereas the respondent rated the employee at 62%. The employer's comment was;

'fair job with room for improvement' and the report was signed on 20th December 2012.

23. No other appraisal was conducted on the performance of the claimant between 20th December 2012 and 3rd June 2013 the date of termination. Equally, no warning letter was produced by the respondent written to the claimant between this period.

24. The letter of termination of 3rd June 2013, was purely based on undocumented visit to the station that RW1 says confirmed that the claimant had not improved his relationship with his team. It is not in dispute that the Lodwar station was at the time rated the best performer of the five (5) stations owned by the respondent. Whereas the claimant attributed the station performance to his good leadership, RW1 said that other factors other than the quality of leadership by the claimant could be attributed to position one (1) held by the Lodwar station.

25. What is inescapable though, is that the station was number one (1) in revenue generation at the time the employment of the claimant was terminated and therefore the allegation that the poor working relationship at the station had affected the revenue generation at the station is unsubstantiated, not factual and therefore without basis. No evidence on the image of the station, poor, good or otherwise was tendered by the respondent and therefore, the allegation in the letter of termination that the claimant had a negative impact on the station's identity is also without factual basis.

26. Accordingly, the employment of the claimant was terminated for no valid reason.

Issue ii

27. The claimant was not given a show cause letter and was therefore denied opportunity to explain why his employment should not be terminated. The termination was without notice and therefore, the procedure followed by the respondent was in violation of section 41 of the Employment Act, 2007.

28. In conclusion the claimant has established on a balance of probability that his termination from employment violated section 45(1)(2)(a) & (c) of the Employment Act, in that it was unfair, was not for a valid reason and the same was not effected in terms of a fair procedure and the court finds accordingly.

Issue iii

- i. Regarding the remedies sought by the claimant, the claimant has failed to show that he was entitled to anything more than the money he was paid for the completed projects during the first fifteen (15) months he served the respondent. The court is satisfied that the claimant was taken up by the respondent as a volunteer and was paid on piece work and / or project basis.

This claim is accordingly dismissed for want of proof.

- ii. Payment in lieu of notice

The claimant was entitled to payment in lieu of notice in terms of his letter of appointment and the Employment Act. The court awards him Kshs.28,750.00 being equivalent of one month's salary in lieu of notice.

- iii. Compensation

The court has found that the termination of the employment of the claimant was not for a valid reason and the same was not effected in terms of a fair procedure. At the time of termination, the claimant had about ten (10) months left to the completion of the fixed term contract. The contract was unlawfully breached by the respondent and the claimant cannot now be reinstated back to his employment due to passage of time. The claimant lost the source of his income without notice and suffered loss and damage. The claimant did not receive terminal benefits upon termination of his employment and this was an aggravating factor. The relationship of the claimant with his staff may have contributed to the decision to have his employment terminated and this is a mitigating factor for the respondent. The claimant was still a young person, had prospects of successful career curtailed prematurely. Taking these factors into consideration, the court awards the claimant equivalent of ten (10) months' salary as compensation for the unlawful and unfair termination of his employment in the sum of Kshs.287,500.00.

Total award Kshs. 316,250.00.

29. The award is payable with interest at court rates from date of filing suit till payment in full.

30. The respondent to pay costs of the suit.

Dated and delivered at Nairobi this 10th day of June, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE