



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 2391 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st September, 2016)

FREDRICK KIBWANA ELABONGA.....CLAIMANT

VERSUS

BUILD AFRICA KENYA..... RESPONDENT

JUDGMENT

1. The Claimant herein filed a Statement of Claim dated 23rd November 2012 via the firm of Wekesa & Simiyu Advocates asking for judgment against the Respondents for:

- a) Gratuity as per Organizational Policy and Custom of awarding the same at half months pay for the period worked- Ksh. 74,896.00.*
- b) Telephone allowance not paid Kshs 8,000.00.*
- c) Monthly Cushion not paid Kshs 20,000.00.*
- d) Damages for unfair termination.*
- e) Severance pay.*
- f) General Damages.*
- g) Interest at Court rate as the Court will adjudge on (a) and (b) above from 11/04/2012 until payment in full.*
- h) An order compelling the Respondent to issue a Certificate of Service to the Claimant served as its Director Resources.*

Facts of the Claim

2. The Claimant was employed as the Director of Resources by the Respondent in a letter dated 17th November 2008 at a salary of 270,000.00 with terms and conditions in accordance with the terms and practices and conditions of employment of the Respondent contained in the Build Africa Human Resources Standard Operating Procedure Handbook.

3. In January of 2012, his contract was varied and his pay increased to Kshs. 318, 512.00 a month, and later on a Kshs. 10,000 cushion that brought his total salary to Kshs. 328,512/=.
4. The Claimant states that he was later unfairly terminated *via* a letter dated 11th April 2012 on grounds of alleged negligence. He states that he was not given an opportunity to be heard or to defend himself nor was the procedure outlined in the operating procedure handbook followed by the Respondent.
5. The Respondent filed a Statement of Defence dated 5th February 2013 *via* the firm of Macharia Nderitu and Company Advocates. In it, they admit that the Claimant was in their employment at the stated time but deny that his dismissal was unfair and unwarranted.
6. They state that the Kshs.10,000 cushion that the Claimant refers to was not an increment but an allowance that was subject to review when the economy improved. The Respondent avers that the Claimant's employment was terminated summarily but through fair procedures stipulated in the contract of employment.
7. They aver that the Claimant was negligent and there was misappropriation of funds totaling Kshs. 49,500 in the course of his employment with the Respondent as well as a non-execution of his key function which caused a budget rejection leading to a gap in the budget of Kshs.4,000,000.00 that threatened the continued operations of the Respondent in the year 2011/2012.
8. Further, the Respondents state that there was theft of a cheque of Kshs 50,000.00 from the Respondent which was unlawfully cashed by the Claimant. They state the Claimant was accorded ample opportunity to explain his negligent conduct *via* face to face meetings with the Board of Management and Country Director and extensive email communication with the Respondent's international partners.
9. The Respondents state that the Claimant failed to offer a reasonable explanation for his negligence, further they aver that the Claimant illegally appropriated funds totaling Kshs. 99,500.00 belonging to the Respondent in the course of employment with the Respondent.
10. Further, a Forensic Audit of the Account for the period when the Claimant was in charge showed the incompetence and criminal conduct on the part of the Claimant.
11. The Respondent states that the terminal benefits due to the Claimant were duly paid after the Claimant's contract was summarily terminated for gross misconduct and negligence. The Claimant is not entitled to any reliefs as set out in the Statement of Claim, they do not have a policy or custom payment of any gratuity and as gratuity is only required by law at retrenchment which did not happen in this case, the Claimant is not entitled to any gratuity.
12. They further state that the Claimant is not entitled to damages for unfair and unlawful termination as he was summarily dismissed for incompetence.
13. The Respondent counterclaims against the Claimant for the sum of Kshs. 50,000.00 being amount due and owing to them as the Claimant had cashed a cheque Number 102087 dated 2nd February 2013 without proper authority from the Country Director as required by the Respondent.
14. The Claimant denies the contents of the counterclaim and submits that proper authority had been obtained by him *via* the necessary channels and authority levels. That the stated cheque was requested by Teresia Munyuri and was signed by the Claimant and Mwaniki Thuku which monies were handed over to Teresia Munyiri. He states that copies of the cheques and bank statement will corroborate his story.
15. The Claimant submits that in this matter, the Respondent did not follow the law. He submits that the Respondents actions went against Section 42 of the Employment Act which states that before an employee is dismissed on grounds of misconduct or poor performance, the employee must be heard and considered. They rely on the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company** where the Court stated:

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.....”

16. The Court further emphasized:

“...The termination of an employee is a penalty with serious consequences that must be done with outmost regard and notice to the affected employee, who should be granted a reasonable opportunity to give a defence....”

17. The Claimant submits that the witness called by the Respondent Mr. George Kidenda – Otiu the former Country Director of Build Africa admitted to having terminated the Claimant without calling him to a meeting in which the Claimant would make his representations.

18. The Claimant states that he wrote to the overall Boss in Britain a Mr. Oliver Kemp with whom various issues were clarified. These issues were:

- a. The Country Director dismissed the Claimant to cover his own tracks of abuse of office;***
- b. The budget hole of Kshs. 4,000,000.00 the claimant was accused of causing actually originated in Britain where the computer formulae was created, which explains why an even bigger budget hole of Kshs. 51 million occurred in BAK – Uganda;***
- c. The Respondent Country Director failed to reveal over expenditure to the Head Office in Britain;***
- d. In a board meeting the Country Director obstructed the discussion of over expenditure pretending there was not enough time;***
- e. The Country Director was putting office vehicles to the exclusive use of his family over the weekends;***
- f. One prado vehicle so used costed over 400,000.00 to repair;***
- g. The Country Director expunged parts of reports to Britain which showed his abuse of resources;***
- h. Country Director forced Claimant to award a cleaning contract to the Directors Relative ;***
- i. The Country Director used to incur half of the office telephone bill;***
- j. The Country Director took an office camera worth Kshs. 150,000.00 lost it in a function and forced the claimant to write it off from the books;***
- k. The Country Director owed the organisation Kshs. 636,937.00 outstanding for three years incurred to buy a power inverter for his house and for holiday air tickets with his family;***
- l. The Country Director tried settling the debt once with a cheque of Kshs 80,000.00 which bounced;***
- m. Claimant questioned why the Country Director authorised office rent money paid through a***

broker instead of directly to the landlord for the new offices.

19. The Claimant submits that shortly after the emails, the Country Director himself was fired.
20. The Claimant further submits that he is yet to be issued with a Certificate of Service, which is his right under Section 51 of the Employment Act 2007.
21. The Claimant further submits that he was underpaid as there was a miscalculation of days worked and prorata leave when he was paid his final dues. He received Kshs.106,170.00 as opposed to 144,780.00 as his salary was 318,512.00 and the working month used had 22 days and not 30 as calculated by the Respondent.
22. The Claimant also submits that the counter claim of 50,000.00 by the Respondent is misplaced. The cheque that is subject of that claim was countersigned by Benson M. Thuku and monies were received by Teresia Wamuyu. As such the counterclaim must fail.
23. The Claimant reiterates that no valid reason for his termination was given, the procedure for termination was also unfair and that he is therefore entitled to compensation for unfair termination. To this end, he relies on the case of **Ajusa Magomere vs. Kenya Nut Company Limited** where the court stated the importance of fairness in procedure when terminating an employee.
24. The Claimant submits that the Court should look beyond the 12 months limit when awarding compensation damages. They rely on **Abraham Gumba vs. Kenya Medical Supplies Authority** where the Court stated:
- “...This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping. The Industrial Court [Procedure] Rules 2010 expressly state that the Court should not award exemplary or punitive costs in employment cases, and this Court would like to believe this is intention even in the area of damages.***
- 73. This is not to say that the Court cannot grant damages beyond the 12 months' capping for instance where the employment wrong cuts across Constitutional, Contractual and Statutory violations of the Employee's rights under the various regimes. Rather than grant different sums under the different regimes, the Court could make one coalesced award of damages, which may exceed the statutory capping, without being overly above that capping.”***
25. They submit that the Claimant's life was thrown off balance by this termination and as such the Court should consider awarding compensation that is beyond the 12 months cap.
26. They urge the Court to award the claim as prayed.
27. The Respondent in his submissions states that there was substantive justification for the dismissal of the Claimant. They state that Section 44 of the Employment Act provides for summary dismissal of an employee where he neglects to do his work or on reasonable and sufficient grounds suspects of his having committed a criminal offence. They submit that the Claimant misappropriated sums and gap in budget gave them sufficient reason to summarily dismissing him.
28. They Respondent submits that the first witness was able to testify that the Claimant constantly failed to submit monthly reports and that there were glaring gaps in the accounts, further there were imprests that were not in accordance with the organizational policy and procedure seemed not to have been followed when making payments resulting in many unsupported payments.
29. The Respondent submits that their third witness confirmed that his firm conducted an audit which

revealed a deficit of Kshs. 5,995,207.00 4 million of which was the budget hole for the year 2011. They submit that the deficit led to reserves being used to run operations resulting in a negative fund balance at the end of 2011 and had to seek funds from third parties.

30. They submit that this was evidence of gross negligence on the part of the claimant as he failed and or neglected to prepare monthly financial reports that could unravel any over or authorised expenditure as well as budget projections for the said year.

31. The Respondent submits that any unauthorized expenditure should have been made before the termination and not after as the claimant purported to have done to avoid damage being caused to the Respondent.

32. The Respondent submits that the Claimant has failed to provide any proof that the Kshs.50,000.00 funds that is subject of the counterclaim was actually handed over to Teresiah Munyiri. For those reasons they submit that there were sufficient grounds for summary dismissal due to the gross negligence of the Claimant.

33. As to procedural fairness, the Respondent submits that there were extensive meetings between the Claimant and Build Africa as the first witness testified, but the claimant was still unable to explain how the estimated deficit of Kshs. 4 million which was later confirmed to actually be on of over 5 million arose.

34. They submit that reasonable and adequate opportunity was accorded to the Claimant to offer answers and explanation on the deficit but none was forthcoming. This was a fundamental breach to his contract and showed extreme negligence making the terminations fair under the law.

35. The Respondent reiterates that the Claimant is not entitled to the reliefs sought other than his telephone allowance and his certificate of service. They submit that his termination was fair, within the law and justifiable.

36. To support their submissions they rely on the case of **Emily Muhonja vs. Ken-Knot (K) Limited [2016]eKLR** where the claimant was dismissed for desertion of her duties and the judge therein stated:

“...The Claimant seeks to rely on the authority of Walter Ogal Anuro vs. Teachers Service Commission (2013/EKLR) it was held as hereunder;

“ ... that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

This is coupled with Section 45 (4) (b) of the Employment Act 2007 which provides as follows;

“... that termination of employment shall be unfair where in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee..”

37. In this case it was held:

“...The claimant has not demonstrated a concretised case of unlawful termination of employment. She has not in any way controverted the case of, inter alia, absconding duty as presented by the respondent. She has also not rebutted the serious allegations of forgery of medical document(s) and report. I therefore find a case of lawful termination of employment and hold as such...”

38. They also rely on the case of **Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR** where Monica Mbaru J stated the following:

“...Under subsection 43 (2) of the Employment Act, 2007, 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. However these reason or reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee....”

39. As to summary dismissal they rely on the case of **Linus Barasa Odhiambo vs. Wells Fargo Limited Industrial Cause No 275 of 2012 at page 11 – 12** where the Court stated that:

“..The court has carefully considered this point and finds that summary dismissal is a dismissal which the employer is entitled to dismiss without notice. In particular subsection 44(2) of the Act provides that subject to provisions of Section 44 of the Act (providing for summary dismissal), no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. Summary dismissal is lawful only where the criteria prescribed under Section 44 of the Act is complied with. Under Subsection 44 (3), summary dismissal is tenable only where, “the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service”. Such conduct on the part of the employee is referred to as “gross misconduct” under subsection 44(4) of the Act. Where the ground for summary dismissal constitute justifiable or lawful grounds for such dismissal, that is, amount to gross misconduct, then the employer is not culpable for breach of any law and is free from liability; and in such instances Section 41 of the Act prescribing notification of alleged misconduct and hearing before termination shall not apply...”

40. The Respondent therefore submits that the Claimant cannot be allowed to take advantage of his own negligent failure to perform his duties and willfully neglect to comply with the Respondent’s employment requirement to make a claim for unfair termination which resulted in filing of the suit.

41. They submit that there were valid reasons for termination and that the Claimant was accorded adequate opportunity to explain his negligent conduct which he failed to do.

42. They pray that the Honorable Court dismiss the claim and that the counterclaim be allowed.

43. Upon hearing the parties herein, the issues for determination are as follows:

- 1. Whether there were valid reasons to terminate the services of the Claimant.***
- 2. Whether due process was followed before Claimant was terminated.***
- 3. Whether the Counter-claim is proved.***
- 4. What remedies to grant in the circumstances.***

44. On the 1st issue, the Respondent dismissed the Claimant vide a letter dated 11.4.2012 wherein they stated as follows:

“Dear Fredrick

RE: TERMINATION OF CONTRACT

I am writing in the wake of recent occurrences and in reference to several discussions we have had in the past two to three weeks. You recently brought to my attention the fact that the 2011 Kenyan budget had a KES 4m hole due to an error committed during the last budget reforecast

that resulted in BAK using wrong data for the reforecast budget. The ISMT and indeed the Management Board has taken a very serious view of this occurrence.

In this regard, and indeed you, is deemed to have been negligent to the extreme. In the past three weeks as we tried to set this matter straight, I was shocked by some of the mistakes being committed and I am not sure that you are fully in control of your office.

To this end, I hereby terminate your contract for negligence leading to poor performance.....

Thank you for your past efforts and all the best for your future endeavours.

Sincerely,

George Oti-Kidenda

Country Director”

45. From my reading of this letter, the reason for the termination is negligence of duty and poor performance. The Court should then ask itself if indeed the Claimant was negligent in his duty and if he performed poorly.

46. On the issue of negligence, the Claimant told Court that the 4m budget hole was not his making but was occasioned by a formula error in the budget template designed by Director of Resources in the UK for both Kenya and Uganda for which he had no control.

47. He stated that this ‘hole’ was also occasioned by the Country Director who had advanced himself cash i.e. salary advance, paying unauthorized expenses which he didn’t inform the UK and another cause was over expenditure.

48. The Claimant told Court that at the time of his termination the UK was not aware of the hole on the budget but was aware of the formula in the template.

49. The Claimant is of the view that the true reason for his termination was that the Country Director was trying to cover up what was going to be known about his mismanagement and illegal payments to himself and so the Claimant was sacrificed for his mistakes.

50. The Claimant states that he was finally paid his terminal benefits less 212,000/=.

51. The Respondent denied that the hole in budget was caused by a budget formula error in UK.

52. The Claimant pointed out this error in his email of 29.5.2012 to Oliver Kemp stating that this was occasioned by the template introduced in 2010 introducing a 13 months pay period where the 13th month salary was spread across the 12 months.

53. He also pointed out that a similar error occurred in BA Uganda 2011 forecast causing a difference of KES 51 million on staff costs.

54. RW3 gave evidence and stated that they prepared an Audit report for Respondent for year ending December 2011. In the report he noted that there was a budget deficit of 1,125,888/=. That in same year, the organization over spent by 5,995,207/=. He also noted some problems in the accounting procedures which was the work of the Claimant as Head of Finance.

55. In cross examination he stated that the gap of 4m was not addressed in the report.

56. RW4 also did a forensic audit for Respondent and he stated that there were some receipts which had

been altered and some payments of 1,397,739 had no supporting documents. He also didn't capture the 4m gap in the budget.

57. In effect upon considering the evidence of both Claimant and Respondent's witnesses the reasons of the 4m budget hole is not clear. The Respondent's employee one Oliver had promised to investigate this issue further and it is not clear whether these investigations were done and what they revealed.

58. Under Section 43 (1) and (2) of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(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.

59. It is apparent that reasons for the termination must be valid reasons which exist at the time of termination. It is however not clear that the 4 million budget hole was occasioned by the Claimant. The Claimant explained that a similar happening occurred in Uganda meaning that the error may actually have been caused by a template error which Respondent should have investigated before terminating the Claimant.

60. As this error was never conclusively investigated, I find that there was no valid reason that led to the termination of the Claimant.

61. On 2nd issue, the Claimant informed Court that he was summoned by the Respondent and handed a termination letter. In the evidence of RW1, he stated that he had discussed this issue with Claimant but no minutes of the alleged hearing were even recorded. A formal disciplinary hearing was never held as envisaged 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”.

62. This also contravened the provision of Art 50(1) of the Constitution which provide as follows:

1. “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

63. It is therefore clear that Respondent flouted its own HR Manual and the law on fair administrative action. I therefore find that the termination of the Claimant was unfair and unjustified in terms of Section 45(2) of Employment Act which states as follows:

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.

64. On the Counter-Claim, the Claimant informed Court that he used to take imprest from the office for running various activities. This was why he encashed certain cheques in his name. There is no evidence that Claimant actually used any office money for his own use and therefore the Counter-claim must fail.

65. That being the case, the only issue outstanding is what remedies if any the Claimant is entitled to.

66. I find Claimant is entitled to the following dues which were not paid to him:

1. 12 months salary as compensation for unlawful termination = $12 \times 328,512 = 3,942,144/=$.

2. Service pay being $\frac{1}{2}$ months salary x years worked

= $\frac{1}{2} \times 328,851 \times 3 \text{ years} = 492,768/=$

TOTAL = 4,434,912/=.

Less statutory deductions

3. The Claimant be issued with a Certificate of Service.

4. The Respondent will pay costs of this suit.

Read in open Court this 21st day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Joseph Gatere for Claimant – Present

Nderitu for Respondent – Present