



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 1454 OF 2011

LOUIS ARMSTRONG OTIENO.....CLAIMANT

VERSUS

MEDIAMAX NETWORK LIMITED.....RESPONDENT

JUDGMENT

1. By memorandum of claim filed on 28th August, 2011, the claimant averred as follows as against the respondent.

(a) The claimant averred that on the 13th of November 2009, the parties herein entered into a contract of service in which the respondent offered to employ the claimant as a Television host (hereafter referred to as “TC host”) in the respondent’s TV Station known as “K24” with and the claimant agreed to offer his services forthwith.

(b) It was an essential part of the contract that the claimant would participate in the production of TV shows and news reports on regional and international events. The claimant was to oversee the production of the same and also to play a key role in the editorial process in “K24”. Accordingly, he was obligated to host his own premier television show popularly known as “This is Louis” alongside other interviews and shows.

(c) That claimant averred that his employment as a TV host within the respondent company was aimed at maintaining the claimant’s career as a prominent TV personality and host of great repute.

(d) Vide the contract, the claimant was employed as permanent and pensionable employee and was entitled to a monthly salary of Kshs.550,000, medical cover payable by the respondent, annual paid leave of twenty one (21) days subject to a termination notice of six months.

(e) The claimant averred that he carried himself with the standards of integrity and professionalism as required by journalists and offered the respondent with faithful, diligent, exemplary and uncontroversial service as a TV host, for a period of one (1) and (2) months and has never been subject to any disciplinary action.

(f) The claimant averred that on or about 10th of December, 2010, the claimant fell ill and therefore consulted his doctor who recommended that he undertakes a few days of sick leave. Accordingly, in compliance with his obligations under the contract requiring that; one should produce a medical certificate proving one’s illness, the claimant faithfully procured the said certificate upon the

employer.

(g) Further to the above, the claimant stated that acting upon the doctor's recommendation, the respondent offered the claimant with sick leave of thirty days so that he was required to report back to his work station on or about 17th January, 2011.

(h) The claimant averred that in abiding to the timeline for his return to work on 17th January, 2011, he faithfully reported on duty when he was informed that his premier show known as "This is Louis" along with all the other shows and interviews, had been withdrawn.

(i) The claimant asserted that he sought to have reasons for the said withdrawal but none was forthcoming as the respondent failed to give any reason whatsoever.

(j) Further and without prejudice to the foregoing, the claimant averred that the respondent thereon engaged in vicious and deliberate attempt to sabotage his career as a prominent media personality and host, by failing to provide avenues that will see him effectively discharge his duties as a host within the respondent company. In particular:

(i) The respondent withdrew all the shows and interviews that fell within the scope of the claimants duties as a host without giving any reasons whatsoever;

(ii) The respondent withdrew the claimant salary despite his attempt to report on duty and from January 2011 up to date; and

(iii) The respondent denied the claimant access to the respondent's editorial rooms and/or refused to assign the claimant any duties as per the contract.

(k) The claimant contends that the aforesaid acts were aimed at crippling his career which was heavily dependent upon his continued appearance in the TV shows. The withdrawal of all the shows and failure of the respondent to assign duties amounted to a breach of the fundamental terms of the contract of employment.

(l) Further and without prejudice to the foregoing, the claimant averred by withdrawing all his shows and by denying him access to the production and editorial process within the company, the respondent unfairly terminated his contract.

(m) Accordingly, it is the claimant's contention that his termination was against the principles of natural justice and equity as encapsulated in section 45(4) (b) of the Employment Act.

(n) The claimant averred that despite numerous requests for an opportunity to be heard and for reasons clarifying his termination, the respondent has remained evasive, neglected and refused to offer any reasons thereto contrary to the constitutional mandate on the right to fair administrative action, as encapsulated in Article 47 (1) and (2) of the Constitution which guarantees the right to be given written reasons for administrative actions, especially in cases where one is adversely affected by the same.

(o) By reasons of the aforesaid, the claimant is now being subjected to public odium, suffering, anxiety and injury to his professional reputation. The claimant contends that given the unique nature of his contract, the wide following and popularity of his shows and interviews, the withdrawal of the same and the subsequent 'blackout' has disintegrated his reputation and his hard-earned career as renowned TV personality.

(p) The claimant prays that this honourable Court enters judgment against the respondent for:

(i) A declaration that the respondent's actions which terminated the claimant's employment were unfair, unlawful, and unconstitutional.

(ii) A declaration that the claimant is entitled to compensation from the respondent for unlawfully terminating his employment without due process.

(iii) An order compelling the respondent to compensate the claimant.

2. In response to the memorandum of claim, the respondent averred as follows:-

(a) The respondent averred that the claimant was employed on 13th November, 2009 on the terms and conditions outlined in the Contract of Employment dated 13th November 2009.

(b) The Contract of employment spelt out the claimant's duties and responsibilities at clauses 3 and 4.

(c) On or about 14th December, 2010, the respondent, at the claimant's request and instance, granted the claimant 30 days sick leave in pursuance of the claimant's doctor's letter dated 10th December 2010 and which leave was to last up to 12th January, 2011.

(d) The claimant was at the expiry of the leave required to report to work on or about 17th January, 2011.

(e) In total disregard of the terms of the contract of employment and without any justification, the claimant failed, refused and/or neglected to report back to work after the expiry of the sick leave.

(f) The claimant made no attempt to contact the respondent until 29th April 2011 when the claimant through his advocates alleged that the respondent had breached the contract of employment by withdrawing the premier show hosted by the claimant popularly known as "This is Louis" without any cause or explanation and required the respondent to reinstate the aforesaid show.

(g) Notwithstanding the respondent's aforementioned request the claimant neither reported to work nor offered any explanation regarding his absence from work.

(h) On or about 31st May 2011 the claimant was lawfully terminated from employment vide a summary dismissal letter dated 31st May, 2011. The reasons for summary dismissal were clearly outlined in the dismissal letter as being absconding from duty and/or failure by the claimant to report to work after the expiry of the sick leave. The said letter was sent to the claimant's last known postal address.

(i) The claimant conduct amounted to gross misconduct and blatant disregard of the terms and conditions of the contract of employment and entitled the respondent to dismiss the claimant summarily.

(j) The respondent averred that upon summary dismissal the claimant was duly paid all his terminal dues which were clearly outlined in the summary dismissal letter. The respondent averred that the said benefits were computed in line with the provisions of the Employment Act 2007, the same being the entire benefits payable upon summary dismissal.

3. In his evidence in Court the claimant testified that he resumed duty on 17th January, 2011 but found he was not listed on the programmes for the week. When he sought to find out he was told a meeting would be held in an hour. One hour later he was called by the Chief Executive Officer Mr. Paul Wanyanga and Administration and Finance Manager and was informed his show was being rebranded and was told to wait and return after one week. He was not assigned any other duties as he waited. The respondent came up with a show for him called the Nairobiian and was told not to use his name. According to him his show attracted a lot of revenue for the respondent. It was his evidence that he used to report to work during this period and was asked to wait for the Chief Executive Officer at the

reception. Later on in February, he was asked to take a break and he would be called. He subsequently sought legal help and his lawyers wrote to the respondent. He denied knowledge of being asked to resume duties. It was his evidence that he kept calling a lady in Human Resource asking when he would resume work but was told they were waiting for instructions. He denied receiving any dismissal letter. He admitted being paid for the three months he was not working.

4. In cross-examination, he stated that he had general responsibilities but on instructions. He further stated that his show was not listed in his contract of employment and that he did not expect additional payment. It was his evidence that no one else would present his show in his absence. He denied knowledge of any attempt to look for him. He denied receiving the letter dated 6th May, 2011 addressed to his lawyers in response to the lawyer's letter of 29th April, 2011. The letter asked him to resume his duties forthwith or legal action against him would be taken. He further denied receiving the dismissal letter though he conceded that the address used was his. He admitted receiving the sum of Kshs.1,095,496 but not his benefits.

5. The respondent on its part called two witnesses. Annabel Iraki who was the first witness stated that she was the Human Resource and Administrator for the respondent. It was her testimony that the claimant's position was Executive Senior News Anchor for the respondent. The claimant had a number of duties and the show "**This is Louis**" was one of his duties. She recalled receiving a sick sheet dated 10th December 2010 indicating the claimant had been given a 30 days sick off. The off was approved and the claimant was to report back to work on 17th January, 2011. The claimant did not report as expected.

6. According to her, the claimant was to report to the Chief Executive Officer and that the Chief Executive Officer informed the Head of Human Resource of the claimant's continued absence. The claimant did not contact the respondent about his whereabouts but there were several informal contacts which were not successful. The claimant received his January and February salary but was thereafter stopped. According to her the payment was done in good faith as the respondent knew the claimant was unwell. It was her evidence that they received a letter from claimant's lawyers after stoppage of the claimant's salary. The demand letter was responded to. The demand letter was responded to asking the claimant to resume duties forthwith but the claimant never reported. On 31st May, 2011 the claimant was summarily dismissed from respondents employment and his dues for March, April and May were computed and paid to him. The dismissal letter was sent through registered post and the dues deposited into the claimants account.

7. Concerning disciplinary hearing she stated that it was impossible to call one because contact with the claimant was unsuccessful.

8. In cross examination she stated that she was not aware if the claimant was admitted in hospital. Further that the communication from the Chief Executive Officer over the claimant's absence was verbal. No formal letter was written to the claimant asking his whereabouts. She further stated that the informal contact was via telephone and this did not succeed. It was further her evidence that the first communication during the claimant's absence was the demand letter from his advocate. The respondent's second witness Mr. Kenneth Ngaruiya informed the Court that when paying the claimant they were aware he had consulted an advocate and that the letter forwarding his benefit was never copied to his lawyers.

9. In his final submissions before Court, Mr. Ligunya for the claimant submitted that the respondent wilfully engaged in action that made it impossible for the claimant to perform his duties under the contract by failing to allocate him duties and withdrawing his shows. This according to counsel, was geared towards constructive dismissal. Counsel contended that the act of the respondent relegating the claimant to sit in the office without any duties being allocated to him, the withdrawal of his parking lot were geared towards rendering the working conditions at the respondent intolerable for him by the new Chief Executive Officer Mr. Wanyanga.

10. The claimant therefore submitted that it was as a result of these actions that he sought for an amicable resolution but the respondent refused leading him to leave office in April, 2011. According to

counsel the respondent had by its actions effectively and knowingly repudiated the contract as at beginning of January, 2011 to April 2011 and was merely making attempts to cover up for its breaches by way of retracting the repudiation through calling the claimant to resume his duties forthwith.

11. Mr. Ligunya further submitted that the respondent failed in their evidence and in their correspondence to show that they indeed tried to contact the claimant by way of telephone calls or otherwise but were unable to reach him. According to counsel, the respondent had no reason to look for him as he was dutifully seated in the office which thus explained the reason for not issuing a warning letter to the claimant.

12. The claimant further submitted that the termination by the respondent was unfair as the respondent failed to prove that the termination was valid and that he was afforded fair reasons in relation to his conduct capacity and or compatibility and that fair procedure was accorded to the claimant at the time the decision was reached to dismiss him. Further the issuance of the dismissal letter through registered post and subsequent payment of the claimant's dues directly to his bank account without involving him or his advocates was in anticipation of any adverse action or legal remedy available to the claimant against the respondent. According to the claimant the termination was unlawful and unfair as the same was not in accordance with fair procedure as established in section 45(2) (c) and (4) (b) of the Employment Act. According to counsel at no time prior to the termination or summary dismissal of the claimant had he acted in a manner that would amount to gross misconduct and neither had he been subjected to any disciplinary action during the period of service to the respondent.

13. Mr. Kabaiku for the respondent on the other hand submitted that the claimant's dismissal was prompted by his failure to report to work after his medical leave ended on 17th January 2011 without any justifiable reason which amounted to gross misconduct. In support of this submission counsel relied on the case of **Carolyn Chegero vs. Pan African Life Assurance Ltd.** Counsel further submitted that if he was to assume as alleged that the claimant was locked away from work on January 2011 it then followed that the period in dispute between January 2011 when the medical leave ended and 6th May, 2011 when the respondent requested the claimant to resume work, the claimant opted not to report to work and could not then claim compensation from the respondent. According to counsel, the respondent followed due procedure when terminating the contract of employment as the claimant was given a warning and an opportunity to exercise his right to fair hearing vide the letter dated 6th May, 2011 which he failed to exercise. Counsel further submitted that the testimony of the parties confirmed that there was both informal and formal communication before the services were terminated.

14. This Court has stated severally that employment relationship is essentially a contract and a contract can be terminated even by breach. Unlike ordinary contracts however, employment law provides a regulatory framework for entry into and exit from an employment relationship. It is noteworthy that prior to 2007 when the present employment laws came into force in this Country, employment relationship was a contract at will and a party could terminate the same without assigning any reason. However with the new developments in law of employment, termination of employment is no longer an at will affair.

15. In order to terminate an employment relationship the employer is required to have a reason for doing so. The reason is not just to be any reason, it must be a valid and or justifiable reason. Further once a valid or justifiable reason has been found the termination must be carried out in fair manner. That is to say the employee affected must be reasonably notified of the reasons for which the termination of his employment is being considered and given a reasonable opportunity to respond to the accusations for which termination of his services is being contemplated.

16. The claimant herein was accused by the respondent of failing to return to work on 17th January, 2011 when his sick leave presumably ended. It was the respondent's position that informal contacts through telephone were made to the claimant to ask him to resume work but none was successful. The claimant on his part refuted these allegations by the respondent and vehemently insisted that he resumed duties on 17th January, 2011 as per the sick off but found his show "THIS LOUIS" had been removed from the program clock and that he was asked to see the Chief Executive Officer Mr. Wanyagah for allocation of

duties. This never happened and he kept sitting idle at the reception for a while and was eventually asked to go away and he would be called. The claimant further stated that he regularly called the respondent's human resource officer but kept being told that they were waiting for instructions.

17. He eventually consulted his advocate who issued a demand letter on 29th April, 2011. This letter attracted a response from the respondent on 6th May, 2011 who among others demanded that the claimant resumes duties forthwith or else legal action would be taken against him. According to the respondent, the claimant never resumed duties as demanded prompting the respondent to terminate the claimant's services by a letter dated 31st May, 2011. This letter was mailed to the claimant's address and not the lawyers. The respondent further processed and deposited directly into the claimant's account what it considered his terminal dues.

18. The respondent's reason for terminating the claimant's services was absence from duty without authority or reasonable cause.

19. One of the reasons for summary dismissal under section 44(4) of the Employment Act is absence without leave or other lawful cause from the place appointed for the performance of work. If it be true that the claimant was absent from his place of work without leave or other lawful reason then the summary dismissal was justified. However before such an action could be taken it must be evidently clear that efforts were made to contact the claimant without success.

20. The respondent claims that prior to the letter it wrote on 6th May, 2011 in response to the claimant's lawyer's demands, it had tried several informal contacts with the claimant without success. These informal contacts were revealed as telephone calls which went unanswered. The respondent neither cited any of these telephone numbers it tried to reach the claimant on nor produced any telephone call logs to these numbers to vouch for these assertions. Further still, assuming these informal contacts were made and failed, the Court was not told why formal contacts could not be used. That is to say, the respondent did not tell the Court why prior to the letter of 6th May, 2011 (some three months after return to work date), it never wrote to the claimant through his last known address which the respondent had, to show cause why his services could not be terminated for absconding duty.

21. Section 44(2) requires that before an employer terminates the services of an employee or summary dismissal of such employee, the employer must hear and consider any representation which the employee may make. The respondent neither produced nor alleged that the claimant was accorded any such opportunity. It may have not been possible to procure the physical presence of the claimant but it was essential that a show cause letter be served on the claimant at least through his last known address or through his advocate. The threat of undisclosed legal action against the claimant contained in the respondent's letter dated 6th May, 2011 cannot be said to have constituted a show cause on the claimant to explain why he should not be summarily dismissed for absconding duty.

22. The claimant herein was a very senior employee drawing very handsome emoluments. Besides it was of local notoriety then that his television shows drew considerable interest and following by the TV watching public. His absence from work for such a considerably long period of time must have been a serious cause of concern to the respondent. To state that informal efforts were unsuccessfully made to reach an employee of such a stature is incredible. Besides as observed earlier no reason has been given why after failure to contact the claimant informally, formal channels were not resorted to. There is therefore some probable truth in the claimant's assertion that he reported to work but decided to stay away when he realized no duties were being assigned to him and that he was in contact with the respondent's human resource department which kept telling him that they were waiting for instructions.

23. In conclusion, the Court finds the termination of the claimant services through summary dismissal on 31st May, 2011 to be unfair and hereby awards him eight months salary as compensation for unfair termination of services. The claimant shall further be paid six months salary in lieu of notice of termination of employment as provided in clause 12.2 of the contract of employment. That is to say the Court awards the claimant:-

Kshs.

(a) Eight months salary as compensation for unfair
termination.....4,400,000.00

(b) Six months salary in lieu of notice of
termination.....3,300,000.00

7,700,000.00

(c) Costs of the suit.

24. Other heads of claim are found without merit and are hereby disallowed.

25. It is so ordered.

Dated at Nairobi this 9th day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 9th day of September 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge