



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 380 OF 2015

PETER KAROKI.....CLAIMANT

VS

ALBA PETROLEUM LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the respondent from 1.10.1997 to 8.3.2014 when he was terminated by the respondent for poor performance. The Claimant avers that the termination was unlawful and procedurally unfair. Consequently she prays for damages amounting to Kshs. 1,618,152 being twelve months salary as compensation for unfair termination.

2. The Respondent admits that she had employed the Claimant and that she terminated the Claimant's employment for poor performance and misconduct. It is the defence case that the said termination was warranted because the claimant had failed to improve his productivity even after being served with a warning letter. It is further defence case that she paid to the claimant all his rightful dues. She therefore prayed for the suit to be dismissed with costs.

3. The hearing of the suit was dispensed with and the parties agreed to dispose of the suit by written submissions on the basis of the pleadings, witness statements and the documentary evidence.

Claimant's case

4. The claimant stated in his statement that he was employed by the respondent on 1.10.1997 as a Laboratory Technician earning a salary of Kshs.4000 per month. That in the course of time his salary was increased gradually upto kshs. 100,000 due to good performance. That he worked well until 11.2.2013 when he was served with a warning letter accusing him of poor performance and followed by another letter dated 8.3.2013 terminating his employment on the same ground. That the termination was not fair because it was not founded on any concrete and justifiable reason and that she was not accorded any opportunity to defend himself. He therefore prayed for twelve months salary as compensation for unfair termination.

Defence Case

5. The respondent filed witness statement from her HR Manager M/s Beatrice Aooko who stated that the claimant was employed by the respondent as the Senior Laboratory Technician. That his duties included

conducting laboratory tests and blending of fuel oil and gas oil to arrive at the correct specifications. That he was required to do the said tests from the laboratory but instead he left the laboratory in neglect of work and started to sit at the main office from where he cooked results without proper laboratory tests. That the claimant was given warning in November 2012 and February 2013 but he failed to heed to the said warning. That the HR department gave him two occasions to explain why he was not abiding by the Standard Testing Procedures but again he did not improve on his performance. Consequently his services were terminated by the letter dated 8.3.2013 for fundamental breach of his obligation which was tantamount to gross misconduct. Never the less he was paid all his dues including salary in lieu of notice, leave up to 9.4.2013 and salary up to 9.4.2013 which he received as full and final settlement.

Analysis and Determination

6. After considering the pleadings, evidence and submissions, it is clear that the claimant was employed by the Respondent as Senior Laboratory Technician earning Kshs. 134,846.50 per month. It is not in dispute that his contract was terminated by the letter dated 8.3.2015 after serving for over 10 years. There is further no dispute that the reason cited for termination was negligent and poor performance of duty. The issues for determination are whether the termination of the Claimant's contract of employment was unlawful and unfair, and whether the reliefs sought by the Claimant should be granted.

Unlawful and unfair termination

7. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure.

Reasons for the termination

8. The respondent has contended that the claimant misconducted himself by neglecting his duties and also performing his duties poorly. The claimant has however denied that he was poorly performing his duties and maintained that for over ten years he performed very well and that is why his salary was increased steadily from Kshs. 4,000 per month to Kshs. 134,846.50. The burden of proving that the claimant was negligently and poorly performing his duties lies with the employer as per section 43, 44 and 45 of the Employment Act. In my view the statement by M/s Aooko fell short of proving the said misconduct on a balance of probability. She never witnessed the claimant sitting and working from the main office instead of working from the Laboratory. She also never appraised the claimant's performance after 1.3.2012 when his salary was increased for his good work and performance. The person who evaluated the claimant's performance and saw him abandon the laboratory to sit in the main office never adduced any evidence herein. Consequently, I find that the respondent has not proved on a balance of probability that there was a valid and fair reason for terminating the claimant's employment contract within the meaning of section 43, 44, 45 and 47(5) of the Employment Act.

Fair procedure

9. The claimant contended that he was not accorded any chance to defend himself before the dismissal. M/s. Aooko however, stated that the claimant was served with warning letter in February 2013 and thereafter given two occasions to explain why he was performing his duties poorly but he never improved. After careful consideration of the evidence by both sides, I find that the respondent has not proved on a balance of probability that she followed a fair procedure before dismissing the claimant from service.

10. Under section 41 of the Employment Act, an employer is barred from dismissing his employee on ground of misconduct before first explaining to her, in a language she understands and in the presence of Shop Floor Union Representative or a fellow employee of her choice, the reason for the intended dismissal and then accord the employee and his chosen companion a chance to air their representations for consideration before the dismissal is decided. In this case no hearing was done at all before the termination of the claimant's services. Although M/s. Aooko stated in her statement that the claimant was given chance to explain his poor performance on two occasions, the date, the venue and the names of the

persons before whom he appeared were not stated.

11. Under section 45 (2) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the said burden of proving the substantive and procedural fairness has not been discharged on a balance of probability and consequently, the court finds and holds that the termination of the Claimant's employment was unfair. The first issue is therefore answered in the affirmative.

Reliefs

12. The Claimant has prayed for damages amounting to Kshs. 1,618,152 being twelve months salary compensation for unfair termination plus Certificate of service. In view of the finding that the termination of the claimant's employment was substantively and procedurally unfair, the court makes a declaration that the termination was unfair and unlawful as prayed. Under section 49 of the Employment Act, he will get kshs.1, 618,152 being salary for the 12 months as compensation for the unfair termination of her employment contract. In making the said award I have considered the fact that the claimants had worked for the respondent for a long period stretching over fifteen years and that it was hard for him to secure an alternative employment of the same salary within a shorter time than one year even with due diligence.

Disposition

13. For the reasons stated above judgment is entered for the Claimant declaring the termination of his employment unfair and awarding him the sum of **Kshs.1,618,152** plus costs and interest. He will also be issued with Certificate of Service.

Signed, dated and delivered at Mombasa this 18th day of November 2016.

O.N. MAKAU

JUDGE