



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.221 OF 2015

(Before D. K. N. Marete)

TITUS OMINDE.....CLAIMANT

VERSUS

MEDIAMAX NETWORK LTD.....RESPONDENT

JUDGMENT

This matter came to court by way of a Memorandum of Claim dated 30th July, 2015. The issue in dispute is therein cited as;

“Compensation for unlawful, unprocedural & unfair termination of employment.”

The respondent in a Statement of Defence dated the 10th December, 2015 denies the claim and prays that it be dismissed with costs.

The claimant’s case is that at all material times to this cause, he was employed by the respondent as a Reporter with effect from 1st August, 2010. At the time of unfair termination he earned Kshs.10,000.00.

The claimant’s further case is that he served with loyalty, diligence and full dedication until 18th May, 2015 when he was unprocedurally, unfairly and unlawfully terminated from his employment by the respondent without a valid reason. He puts it thus;

6. It is the claimant's case that the termination was illegal unjustified, unfair and/or unlawful and the same violates the provisions of Employment Act No.11 of 2007 and in particular Section 35(1) (c) (5), 44(4), 45(2), 28(10) of Section 15 of the Labour Institutions Act.

7. Section 41 (1) of the Employment Act requires an employer before terminating an employment of an employee on grounds of misconduct, poor performance to explain to the employee in a language he/she understands the reasons for which an employer is considering termination and the employer shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that there was no explanation from the respondent on the intended dismissal.

8. Section 44 (4) of the Employment Act lists grounds which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness or accusation. The claimant

submits that the respondent did not accord him a chance to dispute the correctness of accusation before dismissing hi.

9. Section 45(2) of the Employment Act provides that the employment should not be terminated unfairly. The Act further proceeds to provide that a termination of employment by an employer is unfair if the employer fails to prove:

- a) That the reason for termination is valid.
- b) That the reason for termination is a fair reason(s)
- c) That the employment was terminated in accordance with fair procedure.

10. a) The respondent terminated claimant's employment without proving that the reason for termination was valid as provided for under Section 43 and 45 of the Employment Act.

b) The respondent did not give the claimant termination notice as required under Section 35 (1) (c) and 36 of the Employment Act.

c) The respondent denied the claimant's employment Act specifically the procedure laid out in Section 15 and 414 of the Employment Act.

d) The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institutions Act.

e) The respondent denied the claimant his lawful leave days contrary to section 28(1) of the Employment Act which provides for annual leave with full pay.

f) The respondent failed to accord the claimant with an opportunity to challenge the allegations against him before terminating employment.

g) The respondent did not act in accordance with justice and equity in terminating employment contrary to section 45 of the Employment Act.

h) The respondent failed to give the claimant certificate of service as required under section 51 of the Employment Act.

He prays as follows;

i. Notice pay in lieu of Notice Kshs.10,000/-

ii. Accrued leave for 5 years

$10,000 \times 5 \text{ yrs}$ Kshs. 50,000/-

iii. Unpaid house allowance

for 4 years 9 months (57 months)

$10,000 \times 15\% = 1500\text{p/m} \times 57 \text{ months}$ Kshs. 85,500/-

iv. Service pay for 4 years

$15 \text{ days} \times 10,000/30 \text{ days} \times 4 \text{ years}$ Kshs.20,000/-

v. Compensation for unfair termination

10,000 x 12 months

Kshs.120,000/-

TOTAL

KSHS.285,500/-

and in the penultimate prays for;

a) Declaration that the dismissal was unprocedural, unlawful and unfairly in the circumstance that the claimant is entitled the claimant is entitled the compensation;

b) The sum of Kshs.285,500/- as set out above;

c) Cost of this suit and interest on (b) above at court rates from time of filing the suit until payment in full and

d) Any other further and better relief the Honourable Court may deem just and fit to grant.

The respondent's case is that the claimant was a radio correspondent with her sister company known as Milele F.M. This was on a retainer basis and he was paid per item delivered and that he was contracted from 12th August, 2013.

It is the respondent's further case that on 1st November, 2014, the sister company made changes to the contract for services from a monthly retainer to payment as per news item with effect from 18th May, 2015 when this was discontinued with communication to the claimant. She further avers that the press card issued to the claimant was to assist him carry out his duties but not a testament of employment as such.

The respondent submits that the claim is misconceived and an abuse of the process of court for reasons that the claimant was not an employee of the respondent *per se* or even one for the sister company in - Milele F.M.

It is a further submission of the respondent that the claimant was performing his duties under contract for service and was not being regulated by the respondent or the sister company, or at all. His payment was based on the news item he would deliver and again upon approval. He was not mandated to submit any news item for the respondent sister company but only a choice on his part.

The matter came to court variously until the 30th June, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether the claimant was an employee of the respondent?
2. Was there a termination of the employment of the claimant and if so, whether this was wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this suit?

The 1st issue for determination is whether the claimant was an employee of the respondent. On the basis of the pleadings and submissions of the parties, particularly the claimant, it is evident that the claimant was an employee of the respondent. However, it is also notable that the terms and conditions of this employment relationship were not overtly binding on the parties and therefore would not strictly be deemed as employment in the strict sense of the word and law. The claimant was serving on a retainer basis and was paid in accordance with his input and upon agreed terms. This arrangement was terminated when the respondent found it necessary to end the services of the claimant and in accordance with the

terms of service. I therefore find that the relationship between the parties did not comprise of an employment capable of being terminated *strictu sensu*. I therefore make a determination that there was no terminable employment relationship between the parties. The terms of the contract dictated the entire relationship and in the circumstances of the case these were pursued in the termination.

On a finding of no case of unlawful termination of employment, the claimant becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with an order that each party bears their own costs of the claim.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant.
2. Ms Mumia instructed by Mumia, Njiru & Company Advocates for the Respondent.