



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2434 OF 2012

AHMED SALIM BAHANNAN CLAIMANT

VERSUS

FOTON EAST AFRICA RESPONDENT

Mr. Muthama for claimant

Mr. Ataka for respondent

JUDGMENT

1. The claimant seeks terminal benefits set out in the statement of claim filed on 5th December 2012 the sum of Kshs. 3,258,959.00.

Facts of the claim

2. From the statement of claim and oral testimony by the claimant, the claimant was employed on 3rd December 2010 by the respondent in the position of Regional Manager Coast reporting to the General Manager.

3. The contract was for a three (3) year period. In terms of the written contract, the claimant was to get a monthly net salary of Kshsh.100,000 and that welfare and other loyalties would be provided to him according to the company's salary standards.

4. The claimant was entitled to twenty one (21) days leave per year and the contract was terminable upon giving one month's notice by either party or payment in lieu.

5. That pursuant to an oral agreement between the claimant and the General Manager, the claimant was to be paid commission on sales calculated at respondent's standard sales commission rates.

6. The claimant states that these oral terms varied the initial contract.

7. The respondent was a young company incorporated in June 2010 and lured the claimant to leave his previous employer to boost its marketing force. The claimant commenced work on 3rd December 2010 and was sent to Nairobi to set up Nairobi workshop branch which he did for about three and a half (3^{1/2}) months while residing in Nairobi. On 25th March 2010 he returned to Mombasa to set up the respondent's office there and continue working as the Regional Manager while at Nairobi, the claimant

incurred expenses which the respondent refused to refund inspite of several oral promises.

8. The claimant was solely running the Mombasa office because respondent did not employ staff. He only had two casual employees doing cleaning and logistics.

9. The respondent also failed to provide financial support for the office to set up a workshop, show room and parts and service centre.

10. Claimant used own funds to run the business and later claim fare from the respondent.

11. The claimant inspite of all these hurdles managed to make reasonable sales. However to his surprise on 6th March 2012, the respondent repudiated the contract of employment and indicated that from the month of March 2012, the claimant would be remunerated according to the Mombasa sales.

12. The salary was reduced from Kshs.100,000 a month to Kshs.60,000 while the balance of Kshs.40,000 would be calculated and paid based on performance and sales target. The claimant was never consulted on the changes. In March 2012, the claimant was paid Kshs.60,000 only.

13. The claimant objected in vain and was forced to instruct his advocate to write a letter of demand. On 18th April 2012, the respondent wrote a letter of termination of employment to the claimant in terms of Clause 7.1 of the contract.

14. The claimant alleges fundamental breach of the contract and claims;

a) Salary for the remainder of the contract between 18th April 2012 to 1st December 2013 in the sum of Kshs.1,940,000.00;

b) Unpaid salary for eighteen (18) days in April 2012 Kshs.60,000.00.

c) One month salary in lieu of notice Kshs.100,000.00

d) Salary deduction for the month of March 2012 in the sum of Kshs.40,000.00

e) Accumulated leave days twenty nine (29) Kshs.96,667.

f) Unpaid house allowance for seventeen (17) months Kshs.340,000.00

g) Commission on sales Kshs.677,292.00

h) In the alternative compensation for unfair termination of employment.

15. In his testimony, the claimant stated that he had sold motor vehicles for the value of Kshs.34 million in the seventeen (17) months period. This was the value of fifteen (15) trucks sold.

16. That clause of the contract provided for payment of royalties as per company standards. That emails on page 21 – 39 of the claimant's bundle reflect these sales and payable commission. That the respondent promised to pay but failed to do so inspite reminders. The claimant denied that any customer cheque was returned unpaid.

17. The claimant prays that the suit be allowed with costs and interest.

Response

18. In its statement of response filed on 29th January 2013 the respondent admits that it employed the claimant on 3rd December 2010 as a regional manager Coast region at a basic salary of Kshs.100,000.00

per month.

19. The respondent states that Clause 8 of the contract prohibited accrual of leave days not taken or encashed in one year to another year.

20. The respondent denies ever agreeing to pay commissions on sales as alleged or at all. Respondent states that in January 2012, the parties began discussing possibilities of payment of commissions and sustainability of commission payment plan and structure but this had not been finalized by the time the claimant stopped working.

21. Respondent further states that the respondent Foton East Africa was incorporated on 23rd June 2010 as a branch of the larger Foton Group with its headquarters in China.

22. Respondent state that claimant was a subordinate staff to the General Manager and cannot claim credit for setting up Nairobi and Mombasa offices.

23. Respondent denies any personal expenses incurred by the claimant to run the business of the respondent and adds that respondent had a petty cash system for that purpose.

24. Respondent denied having reduced the salary of the claimant but admits that by its email dated 6th March 2012, the respondent stated that part of the basic salary would be performance based as stated therein.

25. That the need to subject the claimant to performance was necessitated by the claimant's serial poor performance and losses recorded in the Coast Region notwithstanding the infrastructure and incentives that the respondent invested in, in the region.

26. Respondent adds that subjecting an employee remuneration to performance is not a variation of contract but reinforces the provisions of section 17 of the Employment Act, 2007.

27. The respondent adds that it received a letter of resignation from the claimant on 17th April 2012. The respondent denies that it had fundamentally breached the contract of employment.

28. The respondent accepted to terminate the contract of employment in terms of Clause 7.1 of the contract and offered to pay the claimant one month salary in lieu of notice.

29. Respondent further averred that it paid the claimant a consolidated salary and he was therefore not entitled to payment of house allowance. That it was the responsibility of the claimant in terms of section 31 (2) (a) to provide himself with accommodation.

30. The respondent denies having received letter of demand.

31. The averments by the respondent in the statement of claim were not supported by any oral testimony before court because the respondent failed to call any witness in support of its case. The documentation attached to the memorandum of response was therefore not produced by any witness nor admitted by consent of the parties due to the non-appearance by the advocate of the respondent on 3rd February 2016 when defence case was scheduled to be heard.

32. The court deemed the defence case closed and the parties were given opportunity to file written submissions which they both proceeded to do.

33. Determination

The issues for determination are as follows;

- a) Whether the termination of the contract of service was fair and lawful;
- b) Whether the written contract of service could subsequently be amended or varied by an oral agreement between the claimant and the respondent;
- c) Whether the respondent fundamentally breached the contract of employment by conduct of subjecting part of the salary payment to performance;
- d) Whether the claimant is entitled to the reliefs sought.

Issue a

34. From the totality of evidence before court, in March 2012, the respondent unilaterally reduced the monthly salary of the claimant from Kshs.100,000.00 to Kshs.60,000.0. The respondent purported to subject payment of the balance of Kshs.40,000.00 to performance of the Coast branch.

35. The contract between the parties dated 3rd December 2010 has no provision allowing such variation in the basic salary of the claimant.

36. The respondent went ahead and paid the claimant Kshs.60,000.00 basic salary for the month of March 2012. The salary payable to an employee goes to the core of an employment contract. Any unilateral substantial reduction of the salary by the employer amounts to a fundamental breach of the contract, and the employee is entitled to terminate the contract.

37. The revised salary is contained an email dated 6th March 2006 written to the claimant by the General Manager Calvin Guo. The claimant protested the deduction in an email sent to the General Manager on 4th and 6th April 2012. This conversation is found from page 68 to 71 of the claimant's bundle.

38. The respondent wrote a letter of termination of employment to the claimant dated 18th April 2012 effective on the said date. The claimant was not charged with any dismissible offence nor was he given any reason for his termination.

39. The respondent only invoked Clause 7.1 of the contract titled termination of contract, which reads;

“This will be implemented in accordance with the Employment Act, 2007. On confirmation you or the company may terminate the employment without assigning any reason thereof by giving one month notice or paying one month salary in lieu of notice.”

40. This Clause is contradictory in terms in that, section 43 as read with section 45 provides that an employer must have a valid reason for terminating the employment of an employee.

41. Section 41 in addition provides that an employer wishing to terminate the employment of an employee must provide the employee with opportunity to explain why the employment ought not to be terminated. The employer must therefore give notice to show cause to the employee stating the offence for which it intends to terminate the employment, and invite the employee to appear before the employer and inform the employee that he/she may be accompanied by a fellow employee to the disciplinary hearing to make representations on the matter.

42. Under section 47 (5) the employee bears the onus to show that the termination was wrongful and the employer has the burden of justifying the reason of termination.

43. From the facts of this case, the claimant has proved on a balance of probability that the respondent had no valid reason to terminate his employment. Furthermore, the employer had fundamentally breached the contract of employment by unilaterally and substantially reducing the basic salary of the claimant.

44. The court finds that the termination of the employment was unlawful and unfair in terms of section 45 of the Employment Act, in that the respondent had no valid reason to terminate the employment and that the respondent did not follow a fair procedure in terminating the employment of the claimant.

45. The claimant is therefore entitled to compensation in terms of section 49 (1) (c) as read with section 49 (4) of the Act.

46. The claimant seeks damages equivalent to the remainder of the three (3) year fixed term contract. The claimant had yet to serve one (1) year, eight (8) months and fifteen (15) days.

47. The claimant had legitimate expectation that he would serve the entire term of the contract and he suffered loss and damage as a result of the fundamental breach of the terms of the contract followed by the unlawful termination of the employment itself.

48. The court will in the circumstances award the claimant, maximum compensation allowed under section 49 (1) (c) of the Act, equivalent of twelve (12) months salary for the unlawful and unfair termination of employment.

Terminal benefits

Notice pay

49. In terms of the contract of employment, termination of the employment was by giving either party, one month notice. The claimant was not given notice of termination. The claimant is entitled to one month salary in lieu of notice in the sum of Kshs.100,000.00. the court awards accordingly.

Deduction of salary for the month of March 2012

50. The claimant has also established that the respondent unilaterally deducted Kshs.40,000 from his salary for the month of March 2012.

The court awards the claimant the deducted sum of Kshs.40,000.00 accordingly.

Unpaid salary for the worked days up to 18th April 2012

51. The claimant has also proved that he was not paid for the eighteen (18) days he worked for the month of April 2012 since the termination was with effect from 18th April 2012. The court awards the claimant Kshs.60,000.00 arrear salary.

Salary for the remainder of the contract

52. The court having awarded the claimant twelve (12) months compensation for the unlawful and unfair dismissal cannot allow this prayer as this would amount to double payment.

Accumulated 29 days leave

53. The claimant has on preponderance of evidence shown that he was owed Kshs.96,667.00 in lieu of twenty nine (29) untaken leave days. The court awards him accordingly. Any provision of the contract that purports to take away leave from an employee violates the Employment Act, 2007 and is void.

Commission on sales

54. It is trite law that a written contract cannot be varied by a subsequent oral agreement, unless, that variation is implemented by parties. There is no evidence that the respondent implemented payment of the commission on sales. Since the contract of employment does not provide for the payment of the sales commission, the claimant has failed to prove on a balance of probability that he was entitled to the

payment. The claim for commission on sales is dismissed. Equally, the contract did not provide for payment of house allowance. The claimant was paid a lumpsum basic salary of Kshs.100,000. The claimant did not seek payment of house allowance while he worked. The claim has no merit and is dismissed.

55. The court enters judgment in favour of the claimant as against the respondent as follows;

- a) Equivalent of twelve (12) months salary being compensation for unlawful and unfair termination of employment Kshs.1,200,000.00.**
- b) Kshs.60,000.00 unpaid salary for eighteen (18) days worked in April 2012.**
- c) Kshs.100,000 in lieu of one month notice.**
- d) Kshs.40,000 refund of deducted salary for the month of March 2012.**
- e) Kshs.96,667.00 in lieu of twenty nine (29) days untaken leave.**

Total award Kshs.1,496,667.00.

f) Interest at court rates in respect of items b, c, d & e from date of filing suit till payment in full and from date of judgment in respect of item (a) above.

Dated and delivered at Nairobi this 9th day of December 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE