



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 59 OF 2014

DAVID MBUGUA

CLAIMANT

v

KEROCHE BREWERIES LTD

RESPONDENT

JUDGMENT

1. David Mbugua (Claimant) was employed by Keroche Industries Ltd (Respondent) on 1 June 2012 as a Senior Accountant on a 2 year fixed term but renewable contract. The agreed remuneration was Kshs 120,000/-.
2. On 12 March 2014, the Claimant lodged a Statement of Claim in Court alleging that the Respondent had unlawfully varied his salary and unfairly/unlawfully terminated his services and seeking salary variation, compensation and loss of prospective future earnings.
3. The Respondent filed a Response on 16 May 2014. The Cause was heard on 19 November 2014 and 8 December 2014. The Claimant filed his submissions on 16 December 2014, while the Respondent filed its submissions on 20 January 2015.
4. The Court has considered the pleadings, documents filed, testimony and submissions and identified the issues for determination as, *whether Claimant's salary was unfairly reduced to Kshs 120,000/-, whether the termination of the Claimant's contract was unfair and appropriate relief.*

Whether Claimant's salary was unfairly reduced to Kshs 120,000/-

5. The employment contract given to the Claimant by the Respondent indicated the salary as consolidated at Kshs 120,000/- per month.
6. The Claimant's testimony was that he earned this salary upto July 2012, and that from August 2012 to December 2012, he was paid Kshs 150,000/-, and that in January 2013 the salary was reduced to Kshs 120,000/-.
7. The Claimant produced his pay slips for June and August 2012 and August 2013.
8. He further stated that pay slips were only issued on request.
9. According to the Claimant, no reasons were given for the reduction.
10. The Respondent's witness Nicholas Kipchirchir stated that the Claimant's salary was Kshs 120,000/- per month and that the Claimant was paid Kshs 150,000/- once but the overpayment was not recovered.
11. The witness also stated that salary increments were effected through written communication and that it is the Claimant who prepared his August 2012 pay slip, and that it was the department headed by the Claimant which was responsible for preparation of the payroll.
12. Remuneration is one of the *essentialia* of an employment contract. And under the common law, it is the general rule that a variation of a term of an employment contract should be by the consent of

- the parties for the variation to be lawful (see *Rigby v Ferodo Ltd* (1987) IRLR 516, *Security and Facilities Division v Hayes* (2001) IRLR 81).
13. The Claimant did not produce any document to show that there was an express communication of salary increase from Kshs 120,000/- to Kshs 150,000/-. The Claimant did not even disclose who increased his salary or informed him of the salary increase from Kshs 120,000/- to Kshs 150,000/-. He was in charge of the department in charge of the payroll.
 14. The Respondent contended that there was an error and the Claimant was paid only Kshs 150,000/- for one month.
 15. The Court cannot decipher why the Claimant's remuneration would be increased only 2 months after employment. This is unusual and a little bit more should have been disclosed. The Court finds that the increase was in error and therefore there was no unlawful variation of an essential term of the contract.

Whether the termination was unfair

Procedural fairness

16. The Claimant's testimony was that on 7 September 2013, he received a call at around noon from the Respondent's Chief Executive Officer Tabitha Karanja informing him that she had terminated his services and he should see the Operations Manager.
17. He also stated that he had not received any prior notification and was not given a termination letter or reasons for the termination. He further stated that he was not given a hearing.
18. The Respondent's witness confirmed that the Claimant's contract was terminated orally but stated that there was mutual agreement and therefore there was no need for a disciplinary hearing as the Claimant's career would have been affected.
19. He stated that the reason for the oral termination revolved around exaggerated budgets and procurement issues and that the Respondent invoked the contractual provision on termination.
20. In its submissions, the Respondent made reference to this Court's holding in *Peter Maroko Omondi v Pandya Memorial Hospital* (2014) eKLR that *a provision for termination of employment contract by notice or payment in lieu of notice without giving reasons was invalid* and submitted that this interpretation was not fair to employers.
21. The Respondent also made reference to the decisions in *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd* (2002) 2 EA 503.
22. Section 41 of the Employment Act, 2007 created a fundamental shift in the employment relationship in our jurisdiction. The section has made it mandatory for an employer to hear the employee before taking the decision to terminate on the grounds of *misconduct, performance and physical incapacity*. Natural justice before termination of an employee's contract is now an integral part of the employment relationship.
23. An employee should be informed of the allegations to confront and be afforded an opportunity to be heard.
24. The Respondent has not discharged the burden placed on employers' to demonstrate that it complied with the requirements of procedural fairness. It did not disclose who informed the Claimant of the allegations against him, that his dismissal was under consideration, or who sat or chaired the hearing.
25. The Court finds that the termination of the Claimant's contract was procedurally unfair.
26. A few words on the submissions and authorities cited by the Respondent.
27. First, authorities on employment contracts prior to commencement of Employment Act, 2007 must be understood and applied with a lot of caution and circumspection.
28. Two, section 43 of the Employment Act, 2007 expressly obligates an employer to prove the reasons for dismissal. Where an employer terminates a contract, it is the employer who knows the reasons and it is only logical that it proves those reasons.
29. Thirdly, pursuant to section 45 of the Employment Act, 2007, it is incumbent upon an employer to prove that the reasons for termination are valid and fair.
30. The Employment Act, 2007 has laid down the minimum statutory rights of employees. The statute requires that an employer proves the reasons for termination of services and that the reasons are valid and fair.

31. It is in this context that a provision in a contract providing for termination on notice or pay in lieu of notice without lawful cause is inconsistent with the minimum statutory protections given to employees. Whether the protection given to employees is unfair to employers is not for the Court to determine. It is not the responsibility of the Courts to discern the wisdom of the legislature in enacting legislation unless there is an allegation of inconsistency with the Supreme law.
32. Because of the conclusion reached it is not necessary to discuss whether the Respondent has proved the reasons for termination or that the reasons are valid and fair.

Appropriate relief

Salary variation

33. Under this head, the Claimant sought Kshs 270,000/-. The Court has reached conclusion there was no unlawful variation and so this relief fails.

Salary in lieu of Notice

34. The Claimant sought a balance of Kshs 30,000/- on the basis that his monthly salary was Kshs 150,000/- and not Kshs 120,000/-. Because of the conclusion on salary variation, this relief also fails.

Compensation

35. The Court has found the termination of the Claimant's contract procedurally unfair.
36. One of the primary remedies for unfair termination is the equivalent of not more than 12 months gross wages.
37. The remedy is discretionary and is exercised by considering the factors outlined in section 49(4) of the Employment Act, 2007.
38. The Claimant was on a fixed term contract of 2 years. He had a reasonable expectation to serve the whole 2 year contract. There was 9 months to go on the contract.
39. Considering the reasonable expectation as to the length of time the contract would have continued, the Court would award the Claimant the equivalent of 9 months gross wages which is assessed at Kshs 1,080,000/-.

Conclusion and Orders

40. The Court finds and holds that the termination of the services of the Claimant was procedurally unfair and awards him and orders the Respondent to pay him

i. 9 months wages as compensation Kshs 1,080,000/-

41. The claim for salary variation is dismissed.

42. Claimant to have costs of the Cause.

Delivered, dated and signed in Nakuru on this 20th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kairu instructed by Nancy W. Njoroge & Co. Advocates

For Respondent Mr. Karanja instructed by Mirugi Kariuki & Co. Advocates

