



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 1554 OF 2011

(As consolidated with 1556/2011 and 1557/2011)

PATRICK BERNARD EKODERE.....1ST CLAIMANT

BENJAMIN KITUKU.....2ND CLAIMANT

PETER MWANGANGI.....3RD CLAIMANT

VERSUS

KENYA MEAT COMMISSION.....RESPONDENT

Mr. Lutta for the Claimant

Mr. Amada for the Respondent

JUDGMENT

1. The 1st, 2nd and 3rd Claimants' cases were consolidated being Cause No. 1554 of 2011, No. 1556 of 2011 and 1557 of 2011.

Facts of the Case

2. Mr. Patrick Bernard Ekodere, the 1st Claimant was employed by the Respondent as Livestock Manager on 2nd April, 2008 via a letter of appointment dated 3rd March, 2008 on a three (3) years contract renewable upon giving three (3) months' notice of intention to renew. He was placed on probation for a period of six (6) months.

3. His duties included *inter alia*, supply and delivery of good quality livestock, developing a long term plan for the continued supply of good quality livestock, ensuring the health of the livestock, preparing budgets and monitoring market prices, *inter alia*.

4. His performance was to be reviewed and appraised regularly. Other terms of employment are contained in the letter of appointment.

5. The Claimant's employment was terminated by a letter dated 12th July, 2011 on grounds of underperformance, failure to account for the Respondent's finances, ineptitude and incompetence.

6. The Claimant alleges that the said grounds were unfounded and he was not given opportunity to defend himself.
7. That the said accusations had not been drawn to the attention of the Claimant prior.
8. That the contract had just been renewed based on his good performance and therefore the termination was malicious, unlawful and unfair.
9. The Claimant outlined his achievements under Clause 38 of the Statement of Claim and was at a loss as to the sudden accusation and termination.
10. He prays for;
 - a. unpaid salary for the days worked in July, 2011, in the sum of Ksh.250,000.00 which was his monthly gross pay.
 - b. payment in lieu of 33 days leave in the sum of Ksh.307,781.00
 - c. payment of Gratuity for the entire contract term at 31% of the basic salary in the sum of Ksh.1,785,600.00
 - d. notice pay equivalent to three (3) months' salary in terms of the contract in the sum of Ksh.750,000.00
 - e. payment for the unserved period of the contract (33 months) in the sum of Ksh.11,189,381.00.
11. The 2nd Claimant, Peter Mwangangi, was employed by the Respondent on 30th September, 2008 vide a letter of appointment dated 1st February, 2007 for a period of three years, in the position of Accountant, renewable upon giving three months' notice.
12. His responsibilities are set out in the letter of appointment. He was promoted to Chief Accountant on 1st October, 2008 and his contract was renewed for a further period of three (3) years with effect from 1st January, 2009, as per the letter of renewal dated 14th October, 2008, which states that the renewal was based on his performance and dedication to work.
13. His monthly gross salary was Ksh.180,000.00. He served the Livestock Disposal Committee and the Tender Committee.
14. On the 12th July, 2011, the employment of the Claimant was terminated via a letter of same dated by a Special Board of the Commission on grounds of;
 - a. underperformance in achieving all the targets and implementation of the Board decisions;
 - b. inability to manage, control and account for most of the Corporation's finances,
 - c. failure to provide the Board with credible information and data relating to the operation of the Kenya Meat Commission and
 - d. display of general ineptitude and incompetence in corporate management and decision making.
15. The Claimant states that he heard these allegations for the first time in the letter of termination. The Board did not afford him a hearing to defend himself against these unfounded allegations.
16. That during all the material time, the Commission suffered heavy debts and the Claimant and other managers had tirelessly worked under very difficult circumstances and had succeeded in reducing the

corporate debts considerably.

17. That he served faithfully and diligently and no evaluation was conducted that found him wanting prior to the termination.

18. That the Audited Accounts for the Financial Year 2010 were found clean thereby vindicating the good performance of the 2nd Claimant as the Chief Accountant.

19. The 2nd Claimant states that his employment was terminated maliciously, unlawfully and unfairly and claims;

a. payment for 2 days worked in July, 2011 in the sum of Ksh.72,000.00

b. payment in lieu of three (3) months' notice in the sum of Ksh.540,000.00

c. payment of 125.5 leave days not taken in the sum of Ksh.1,155,288.00

d. payment for Gratuity for the period of January, 2009 to December, 2011, in the sum of Ksh.1,339,200.00 at 31% of the said salary and;

e. payment of the balance of the contract period (6 months) in the sum of Ksh.2,186,488.00.

3rd Claimant

20. The 3rd Claimant, Benjamin Kituku, was employed on 13th July, 2009 via a letter of appointment dated 19th May, 2000 in the position of Internal Auditor. He served three months' probation and his duties and responsibilities are set out in the letter of appointment.

21. In terms thereof, just like in case of the 1st and 2nd Claimants, his performance was to be reviewed and appraised regularly and documented by management. The contract was renewable upon giving 3 months' notice of intention to renew.

22. On 14th July, 2009, the 3rd Claimant was interviewed and appointed as Finance & Administration Manager via a letter of the same date.

23. He was placed on 6 months' probation and the new responsibilities were set out in the new letter of appointment.

24. The 3rd Claimant's new basic salary was Ksh.200,000.00 per month; house allowance of Ksh.40,000.00 per month and other remuneration allowances of Ksh.50,000.00 per month for the duration of the contract.

25. All other terms and conditions of service are contained in the letter of appointment. The total gross salary of the Claimant was Ksh.290,000.00 per month.

26. On 12th July, 2011, the employment of the Claimant was terminated via a letter of the same date on grounds set out as;

a. underperformance in achieving all the targets and implementation of the Board Decisions

b. inability to manage, control and account for most of the Corporation's Finances

c. failure to provide the Board with credible information and data relating to the operations of the Commission;

d. display of general ineptitude and incompetence in corporate management and decision making.

27. The 3rd Claimant states that there was no documented review and appraisal of himself on the key job indicators to warrant such a severe judgment of his performance.

28. That indeed no such appraisal or review had been conducted prior to the sudden termination.

29. That he was not just like the 1st and 2nd Claimants given a notice to show cause nor called to a disciplinary hearing by the Board to defend himself on the specific allegations or at all prior to the termination of his employment. He states that the termination of his employment was malicious, unlawful and unfair and claims;

a. payment for 12 days worked in July, 2011 in the sum of Ksh.111,000.00

b. payment in lieu of three months' notice in the sum of Ksh.870,000.00

c. payment for 127 untaken leave days in the sum of Ksh.2,232,000.00

d. payment for 36 months gratuity at 31% basic salary in the sum of Ksh.2,232,000.00 and;

e. payment of the balance of contract period(12 months) in the sum of Ksh.7,867,090.00

30. The three Claimants further seek payment of interest on the award and costs of the suit.

Defence

31. The Respondent filed a Memorandum of Defence in respect of the three consolidated claims and the following defence is common in respect of the three claims;

i. Respondent admits the particulars of employment of the three claims

ii. denies that the three Claimants worked diligently and satisfactorily as claimed in their various Statements of Claim or at all

iii. denies that any of the Claimant's employment was terminated maliciously, unlawfully and unfairly and state that the employment of the three Claimants was for valid reasons set out in the respective letters of termination

iv. states that the ventures started and overseen by the three were found to be a sham by the National Audit which revealed serious concealments, losses and underperformances prompting the termination of the contracts

v. it is the Respondent's case therefore that the three Claimants were dishonest in performance of their duties, and were guilty of negligence and underperformance.

Evaluation of Evidence

32. The parties relied on their respective pleadings, attachments, supportive documents and oral testimony under oath and final written submissions by counsel for the parties.

33. The three Claimants gave oral testimony in support of their respective and common positions.

34. They all served under contracts that had common terms and conditions of service with regard to Notice for termination, payment of gratuity and review and appraisal of their performance which was to be documented.

35. The Claimants' testimony was common in these respects;

- i. failure by the Respondent to perform job review, appraisal and documentation of the exercise
- ii. failure to notify the Claimants of the alleged failures in advance
- iii. failure to provide the Claimants with a Notice to show cause and
- iv. failure to afford the Claimants a hearing before the termination; furthermore,
- v. the terminations were done on the same date
- vi. they all allege that they had performed very well leading to increased responsibilities and promotions
- vii. all had no prior adverse warning on record.

Respondent's Testimony

36. Mr. Abdi Adan Suleiman, the former Chairman of the Respondent between 18th May, 2009 to 10th May, 2012 testified in support of the Respondent's case.

37. He told the court that the Board of the Commission prior to his taking over was dissolved by the Government and the Managing Director was dismissed from employment.

38. When he took over as the new Chairman, the Respondent was on its knees and the new Board was under strict brief to turn around the performance of the Commission by recruiting management staff afresh and implement a new strategic plan to revive the Commission.

39. A new team including a new Managing Director, Financial Controller, Sales and Marketing Manager and Internal Auditor were recruited.

40. CW1 - Mr. Patrick Ekodere was retained in his position. CW2, Mr. Kituku was recruited internally and CW3, Mr. Mwangangi was promoted to Chief Accountant.

41. With the new Executive, they embarked on developing Human Resource, Financial, Marketing and Auditing policies with a view to turn around the Commission. A target of 3 years was set for the new team so that by 31st December, 2011, the Commission was to break even. The team knew the consequences if the target was not met. The Board was to receive quarterly reports.

42. There was substantial progress in the beginning and the Commission could now pay salaries and other expenses unlike in the past when it relied on government stipends.

43. However, the target was to make profits. By 31st December, 2010, the team had not met the target. This was the first assessment. The team gave various reasons for the failure to make profits and it was given up to 31st May, 2011 to meet the targets.

44. The reasons given included the 2009 drought which killed a lot of livestock. Mismanagement began to emerge in the 2nd phase. Animals were bought and not accounted for or delivered. The government was regularly briefed on the progress. Issues of corruption emerged and RW1 called a Special Board Meeting to address the issues and the March, 2011 target was extended to 30th June, 2011.

45. The quarterly performance was considered at a Board meeting held on 12th July, 2011 in which it was found that the financial performance was now worse than in the first quarter. The matter was discussed at length and the Board decided to terminate the employment of top management including the

three Claimants.

46. The Audit report had revealed mismanagement. The Board looked at two options;
- i. Issue notices to show cause while the officers remain in office, or
 - ii. Immediate termination under the respective contracts' termination clauses, paying 3 months salary in lieu of notice and other benefits
47. The three officers had similar terms according to RW1 in this respect.
48. The Board went for the 2nd option and terminated the employment of the three Claimants. The letters of termination are dated 12th July, 2011.
49. Rw1 chaired the meeting. The Board made the decision.
50. Consequently, the Respondent admits that;
- i. it did not give the Claimants any show cause letters
 - ii. it did not afford the Claimants a chance to explain why they ought not to be terminated from employment
 - iii. the Claimants were to be paid terminal benefits in terms of their respective contracts of employment.

Determination

51. In the case of **Mary Chemweno Kipti V. Kenya Pipeline Company Limited [2014]** eKLR Mbaru J. stated;

“The Industrial Court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the strict provisions of the law and to avoid making the same invalid.”

52. The court after making reference to previous cases concluded;

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is, is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”

53. I have variously restated this position in numerous cases, and the employers are advised to follow the guidance by the courts rather than regret later as often happens. It is good for the employer to invest in this regard and if anything err on the side of caution.

54. The present employer did not try at all to grant the Claimant opportunity to be heard and was unrepentant in this regard stating that internal procedures permitted the deviation.

55. The employment law supersedes such internal procedures as the Employment Act provides minimum standards to be observed by every employer in this regard.

56. Section 45(2) specifically provides that;

“A termination of employment by an employer is unfair if the employer fails to prove;

a. that the reason for the termination is valid

b. that the reason for the termination is a fair reason –

i. Related to the employee’s conduct, capacity or compatibility; or

c. that the employment was terminated in accordance with fair procedure

57. The admitted omission by the Respondent denied it opportunity to establish or prove a valid reason existed for the termination of the employment of the claimants.

58. The Respondent blatantly admitted that it did not have to observe the provisions of Section 41 of the Employment Act and that it did not therefore issue the Claimant with a notice to show cause nor provide them with a hearing.

59. The consequences of this, is that, this termination of the employment of the Claimants was substantively and procedurally unfair due to failure by the Respondent to prove that the same was for a valid reason and that it was effected in terms of a fair procedure.

Remedy

60. Patrick Bernard Ekodere

The court awards the Claimant;

i. gratuity for the served period in the sum of Ksh.1,785,600.00

ii. payment for 46 days accrued leave in the sum of Ksh.303,781.00

iii. unpaid salary for 12 days worked in July, 2011 in the sum of Ksh.250,000.00

iv. payment in lieu of three months’ notice, in the sum of Ksh.750,000.00

Compensation

61. The Claimant lost 33 months of the unserved contract.

The court however, upon considering the provisions of Section 49(1) and (4) of the Employment Act, awards the Claimant 10 months’ salary being compensation for the unlawful and unfair dismissal in the sum of Ksh.2,500,000.00

Total award is Ksh.5,589,381.00

62. Peter Mwangangi

The court awards the Claimant;

a. 36 months Gratuity for the period January 2009 to December, 2011 in the sum of Ksh.1,339,200.00

b. payment in lieu of 125.5 accrued leave days in the sum of Ksh.1,155,288.00

c. unpaid salary of 12 days worked in July, 2011 in the sum of Ksh.72,000.00

d. payment in lieu of 3 months' notice in the sum of Ksh.540,000.00

Compensation

63. For similar considerations as for the previous Claimant and as set out under Section 49 (1) and (4) of the Employment Act, the court awards the Claimant 10 months' salary as compensation for the unlawful and unfair dismissal in the sum of Ksh.1,800.00.

Total Award is Ksh.4,906,488.00

64. Benjamin Kituku

The court awards the Claimant as follows;

- a. gratuity for 36 months served in the sum of Ksh.2,232,000.00
- b. payment in lieu of 127 leave days not taken in the sum of Ksh.1,169,096.00
- c. salary for 12 days worked in July, 2011 in the sum of Ksh.116,000.00
- d. payment in lieu of three months' notice in the sum of Ksh.2,900,000.00

Compensation

65. The court awards the Claimant for similar considerations as the other two Claimants in terms of provision of S.49(1) and (4), ten (10) months' salary as compensation for the unlawful and unfair termination of employment in the sum of Ksh.3,480,000.00

Total award is Ksh.9,897.096.00

66. The awards are payable with interest at court rates from the date of Judgment till payment in full.

67. The Respondent is also to pay to each Claimant the costs of the suit.

Dated at Nairobi this 23rd day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered by Hon. Hellen Wasilwa on 24th day of April, 2015.

In the presence of