



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 2308 OF 2012

SHEM MAINGO.....CLAIMANT

VS

KEMA (E.A) LIMITED.....RESPONDENT

AWARD

Introduction

1. Shem Maingo, the Claimant in this case worked for the Respondent Company, KEMA (E.A) Limited initially in the position of Marketing and Administration Manager and later as General Manager. Following the termination of his employment on 26th July 2012, he brought this action by way of a Statement of Claim dated 14th November 2012 and filed in Court on even date.

2. The Respondent filed a Memorandum of Defence and Counterclaim on 13th December 2012 to which the Claimant responded on 16th January 2013. The matter then proceeded to full hearing with the Claimant testifying on his own behalf and Hon. Manson Nyamweya testifying for the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Marketing and Administration Manager in March 1993 and by the time he left the Respondent's employment on 26th July 2012, he had risen to the position of General Manager.

4. The Claimant pleads that his employment was terminated by way of a short text message (SMS) sent to him by the Respondent's Chairman, Hon. Manson Nyamweya. He testified that Hon. Nyamweya asked him to resign on allegations that he had formed a rival company. His request for a meeting with Hon. Nyamweya was declined. Following an e-mail sent by the Claimant on 29th July 2012, Hon. Nyamweya told the Claimant not to report for duty and when the Claimant showed up at the Respondent's gate on 30th July 2012, he was refused entry.

5. The Claimant told the Court that he was not given any reason for the termination of his employment nor was he issued with a termination notice as required by law.

6. He claims the following:

- a) 3 months' salary in lieu of notice.....Kshs.704,535.00
- b) 1 month's salary for each completed

- year of serviceKshs.4,462,022.00
- c) Salary for the month of July 2012.....Kshs.234,845.00
- d) Unpaid leave for the year 2012.....Kshs.234,835.00
- e) Salary arrears for January to June 2012.....Kshs.1,409,070.00
- f) Salary until the retirement age of 60 years
- g) Costs and interest

The Respondent's Case

7. In its Memorandum of Defence and Counterclaim filed on 13th December 2012, the Respondent states that the Claimant deserted duty on 23rd July 2012. The Respondent further pleads that the Claimant acted unprofessionally in the conduct of his duties by operating a rival company behind the Respondent's back thus occasioning diversion of business from the Respondent Company. According to the Respondent, the Claimant earned a gross salary of Kshs. 50,000 which was fully paid.

8. By way of counterclaim, the Respondent claims the following:

- a) Laptop.....Kshs.85,000.00
- b) 3 months' salary in lieu of notice.....Kshs.150,000.00

Findings and Determination

9. The issues for determination in this case are as follows:

- a) The Claimant's salary as at the time of leaving the Respondent's employment;
- b) Whether the Claimant deserted duty or was terminated;
- c) If the Claimant was terminated, whether the termination was lawful and fair;
- d) Whether the Claimant is entitled to the remedies sought;
- e) Whether the Respondent has made out a counterclaim against the Claimant.

The Claimant's Salary

10. The Claimant states that at the time he left the Respondent's employment, his monthly salary stood at Kshs. 234,845. In support of this position, he produced a letter dated 26th August 2011 to the Industrial Area Branch Manager, Credit Bank Limited. This letter which was signed by Hon. Manson Nyamweya in his capacity as Managing Director of the Respondent Company shows the Claimant's gross salary as Kshs. 234,845 with a net salary of Kshs. 170,000. Hon. Nyamweya told the Court that he could not remember signing this letter although the signature thereon belonged to him.

11. The Respondent disputes the salary figure pleaded by the Claimant, stating in its Memorandum of Defence that the Claimant's monthly salary was Kshs. 50,000. The Respondent's witness, Hon. Nyamweya however told the Court that by the time the Claimant left employment, his basic salary had been reduced from Kshs. 85,247 to Kshs. 63,417. No explanation was offered for these inconsistencies.

12. Section 10(2)(h) of the Employment Act, 2007 requires a written contract of service to state the remuneration and benefits applicable to an employee. The letter promoting the Claimant to the position of General Manager dated 1st October 2007 provides as follows:

“Your monthly net salary will be Kshs. 65,747 all inclusive. In addition, you will receive monthly car maintenance and fuel allowance of Kshs. 35,000.00”

13. Section 20 of the Act requires an employer to issue to an employee an itemised pay statement giving particulars of gross salary as well as amounts of any variable and statutory deductions. The Claimant's payslips submitted to the Court show conflicting salary figures as follows:

a) January, February, April, May July, September, October, November 2011; a basic pay of Kshs.85,247.00

b) January 2012; a basic pay of Kshs.118,830.00

c) February-June 2012; a basic pay of Kshs.63,417.00

14. No basis was laid for these salary fluctuations and the Court therefore found the payslips as submitted unhelpful in determining the Claimant's salary. The employer is required by law to provide information on the salary payable to its employees and where the information provided is either inconsistent or inconclusive, the Court is left with no option but to adopt the figure provided by the employee. In line with this principle, the Court adopts the figure of Kshs. 234,845 as the Claimant's gross monthly salary for purposes of this claim.

The Termination

15. The Claimant states that his employment was terminated unlawfully and unfairly while the Respondent maintains that the Claimant deserted duty. From the evidence on record, the separation of the Claimant from the Respondent's employment was triggered by a short message text (SMS) sent by Hon. Manson Nyamweya to the Claimant. Further to this SMS and following inquiry by the Claimant, Hon. Nyamweya sent an electronic mail to the Claimant on 29th July 2012 stating as follows:

“Dear Shem,

The content of my sms was clear you have formed a company in Uganda which is doing same business as KEMA (E.A) LTD the only option is for you to resign and concentrate your energy in a company you have personal interest (sic). I wish you the best.

Regards

Manson Nyamweya.”

16. Prior to this e-mail, the Respondent's Executive Director, Alice Nyamweya had written to the Claimant on 23rd July 2012 as follows:

“It has come to our notice that you have formed a company called BISDAN (E.A) Ltd together with Josephine Mulema Chibeu who is our branch manager in Uganda (see attached copies). There is conflict of interest since the company you have formed is competing with Kema (E.A) Ltd in the market of personal protective equipments (PPEs) I kindly request you to resign and return company properties which may be in your possession immediately.

Yours Sincerely,

ALICE NYAMWEYA

EXECUTIVE DIRECTOR

17. In quick succession to this letter another e-mail was sent from kema@kema.co.ke on 26th July 2012 by one Annette for Management, to the Respondent's employees notifying them that the Claimant and Josephine M. Chibeu were no longer employees of KEMA (E.A) LTD.

18. As held by **Abuodha J** in *Geoffrey Muringi Mwangi Vs Rwaken Investments Limited (Cause No. 1658 of 2012)*, an assertion by an employer that an employee has deserted duty must be evidenced by a notice to show cause why employment should not be terminated on this ground. No such evidence was rendered by the Respondent and in light of the correspondence emanating from the Respondent none of which was disowned, it seems to me that as early as 26th July 2012, the Claimant's employment had already been terminated. The issue of desertion of duty is therefore a weak defence by the Respondent which cannot stand.

Reason for the Termination

19. From the evidence adduced before the Court, the reason why the Respondent terminated the Claimant's employment had to do with the formation of a company in Uganda in the name of BISDAN (E.A) Limited with the Claimant and Josephine Mulema Chibeu as Directors. According to the Respondent, this company was its competitor and the Claimant had therefore placed himself in a position of conflict of interest.

20. In support of its case the Respondent produced an extract issued by the Registrar of Companies in Kampala showing the Claimant and Josephine Mulema Chibeu as Directors of BISDAN (E.A) Limited. Apart from a general denial, the Claimant did not adduce any evidence to counter the Respondent's assertion that he was indeed a Director of BISDAN (E.A) Limited.

21. The Claimant also took the line that since the Memorandum and Articles of Association of BISDAN (E.A) Limited were not produced in Court, there was no evidence that the said company was in competition with the Respondent.

22. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. The burden placed on an employer in this respect is to show on a balance of probability that there exists a valid reason that would cause a reasonable employer to terminate the employment of an employee.

23. In *Paul Waigiri Muriuki Vs Nairobi Water and Sewerage Company Ltd [2015] eKLR* this Court rendered itself as follows:

“When the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer acted lawfully and in a reasonable manner.”

24. I have examined the circumstances surrounding the Claimant's termination in this light and find that the Respondent had reasonable grounds to believe that the Claimant was directly involved in a company whose activities were in competition with the Respondent. The Respondent therefore had a valid reason for terminating the Claimant's employment.

Termination Procedure

25. I will now examine the procedure adopted by the Respondent in effecting the termination of the Claimant's employment. The accusation made by the Respondent against the Claimant would fall under what is commonly known as misconduct. Section 41 of the Employment Act, 2007 sets out the procedure for handling cases of misconduct as follows:

- a) That the employer has explained to the employee in a language the employee understands the reason why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

26. There was no evidence that the Respondent followed any of the conditions set out under Section 41 of the Act and the Court therefore finds that the termination of the Claimant's employment was procedurally unfair.

Remedies

27. Having found the termination of the Claimant's employment unfair for want of due procedure, I award him six (6) months salary in compensation. In making this award, I have taken into account the Claimant's length of service tempered with my finding that the Respondent had a valid reason for terminating the Claimant's employment. I have also taken into account the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice. The claim for salary for the month of July 2012 is admitted and is payable. The Claimant is also entitled to prorata leave pay for the period worked in 2012.

28. The Claimant was a contributing member of the National Social Security Fund (NSSF) and is therefore not entitled to service pay. The claim for salary arrears for January to June 2012 was not proved and is dismissed. Similarly, the Court found no basis for the claim for salary until retirement age which is also dismissed.

Counterclaim

29. By way of counterclaim against the Claimant, the Respondent claims the sum of Kshs. 85,000 being the cost of a laptop allegedly issued to the Claimant in the course of duty. However, no evidence was led to support this claim which is therefore dismissed. In light of my finding that the Claimant did not desert duty as alleged by the Respondent, the counterclaim for Kshs. 150,000 being three (3) months salary in lieu of notice fails and is dismissed. That dispenses with the Respondent's counterclaim.

Final Award

30. Finally, I make an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation for
unfair terminationKshs.1,409,070.00
 - b) 1 month's salary in lieu of notice.....Kshs.234,845.00
 - c) Salary for July 2012.....Kshs.234,845.00
 - d) Prorata leave for 2012 (234,845/30x1.75x7).....Kshs.95,895.00
- Total.....Kshs.1,974,655.00**

31. The Respondent shall meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

32. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF
MAY 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Ondabu for the Claimant

Mrs. Muriungi for the Respondent