



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1948 OF 2012

THOMAS ODOL OJWANG.....CLAIMANT

VERSUS

KENOL KOBIL LIMITED.....RESPONDENT

JUDGEMENT

1. On 28th September 2012 the claimant, Thomas Odol Ojwang filed his claim against the respondent, Kenol Kobil Limited for unfair dismissal. The Respondent filed the defence on 1st November 2012 and denied the entire claim. At the hearing, the Claimant testified in support of his case and the Respondent opted not to call any evidence. Both parties filed their written submissions on 7th May 2015 and 3rd June 2015 for the Claimant and Respondent respectively.

Claim

2. The claim is that the Claimant was employed by the Respondent as Information Systems Auditor on 3rd November 2008. He performed well and the periodic reviews revealed that he was a very good employee. On 13th August 2012 the Respondent terminated the Claimant on the grounds that his performance was below expectation and contrary to an appraisal he had done on 25th July 2012. This caused the Claimant to suffer emotionally, financially and socially as he was portrayed as lazy and a non-performing employee. It has also been very difficult to secure new employment. The Respondent failed to adhere to section 41 and 47 of the Employment Act and article 47 of the Constitution.

3. During the claimant's employment he purchased vehicle registration No. KBG 062M on company loan on the security of his employment. He had not completed the payments at the time of termination the balance due being Kshs.402, 500.00. The Respondent has now refused to offset the terminal dues for the loan and retained the log book for the vehicle.

4. At the time the Claimant was terminated, the Respondent also did terminate several other employees on the grounds of poor performance but it has since been established that this was a well-choreographed pattern of massive lay-offs consistent with redundancy. The Respondent is being acquired by Puma Energy from Geneva Switzerland. Other former employees so affected are Joseph Thui, Annette Ounga, George Kasera, John Boyi, Gerald Wamaya and Joseph Gatuma.

5. The Claimant is seeking payment of general damages for unlawful termination of his contract of employment at 12 months' salary; salary for 13 days worked in August 2012; severance pay for 3 2/3 years; payment of leave days; one months' notice pay; mileage while on official duty and these dues to be

paid less education loan, car loan and medical bills owing from the claimant.

6. In evidence, the Claimant testified that he served the Respondent from 3rd November to 12th August 2012 when he was terminated on the grounds of performance that was below expectation. Every year the Claimant was evaluated and his rating was good. In 2010 he was rated as 'excellent' which was the highest rating and his salary went up by 3%. In 2011 he was rated as 'very good' which was next to the highest rating and his salary went up by 2%. In 2012 he continued to perform as 'very good'. However in the same year, despite the 'very good' performance, he was terminated on the basis of poor performance, one month after he had been thus rated and his salary increased. There was no notice prior to the termination to indicate that the Claimant had made poor performance or an indication as to what he needed to improve on. He was never called to show cause or warning all he got was a termination letter on the basis of a below expectation performance.

7. The Claimant also testified that in his department 6 other colleagues received a similar termination letter and a week before, 13 others had been terminated on similar grounds. Joseph Thuo was a colleague who had been evaluated as 'very good' on 17th June 2012 but was also terminated on the grounds of underperformance. Annette Ounga was in the engineering department; she was evaluated in 2012 as 'very good' but was terminated for underperformance. Similarly George Kasera and John Mboi were terminated on similar reasons despite their 'very good' performance ratings. At the time of the terminations, there were several issues ongoing with the Respondent who was selling the company to Puma Energy limited and since the Claimant was in the Audit department he handled all information from East Africa business, Zambia and all 8 countries in the region covered by the Respondent and he became aware of the intended sale. The new buyer did not want a bloated staff and wanted this reduced in lay off so as to sell well. The Respondent thus engaged in massive layoffs as since there was no valid reasons, used poor performance as a guise to do so. The Respondent did not want to declare redundancies to avoid paying off and the sudden massive terminations were effected under the guise of poor performance. The Respondent avoids the costs of redundancy.

8. The witness also testified that he had purchased a car and was to repay in 60 months. The Respondent paid kshs.1, 050,000.00 and the vehicle was registered in the name of the employee and where the Claimant left his employment, he had to pay the remaining balance and with continued employment by the respondent, this was off-set from his salary in a process of amortisation. The Respondent held the log book until payment in full. The Claimant was not able to complete his payments due to termination and the Respondent is still holding the log book. At the time the amount balance was Kshs.385, 000.00 and he wrote to the Respondent to have this off-set from his terminal dues which were more than the loan. The Respondent has now demanded for more money in balance beyond what was due at the time of termination. This has therefore not been resolved and the Claimant is demanding a release of his log book as he is not able to sell the car to meet his needs due to unemployment. The Respondent treated him like a criminal as they sent police officers to his home; he was summoned at Central police Station on a report that the Claimant had stolen his car and had to hire an advocate to help resolve the matter with the police. Despite all the details the Respondent had on the Claimant and the car, they treated the same as theft.

9. The Claimant also testified that his termination was invalid as this was a case of retrenchment but he was not paid his dues. He was treated as a poor performer and has been unable to get a new job which was an unfair labour practice on the part of the Respondent and hence should be paid damages. He is seeking to have his log book and is willing to pay the balance due from his terminal benefits that have never been paid. This includes notice pay; leave pay; service and salary 13 days worked in August 2012.

10. On cross-examination, the Claimant confirmed that the Respondent undertook annual evaluations of staff the highest being 'excellent' than 'very good'. 'Good', 'satisfactory' and 'unsatisfactory'. The Claimant was rated 'excellent' and then moved to 'very good'. As an internal Auditor, being 'very good' was very high and despite the drop, this was not a failure as not everyone was to be rated as 'excellent'. He was highly skilled and based on the organisational organogram the only other position he could be promoted to be Group Information auditor but this was not in the structure. There was no progression for him other than through salary increments. He also testified that other staffs terminated were of 'very good' performance. He was aware that Puma Energy limited was negotiating buying out the Respondent

and wanted staff reduced. At the time of termination, the Claimant admitted having a car loan at Kshs.385, 000.00 balances but the Respondent said that this was Kshs.405, 000.00. He had 54.5 days of leave due and mileage claim not paid. His 13 days in August 2012 were not paid for.

Defence case

11. In defence, the Respondent stated that the Claimant was a performing employee but started failing to deliver on his duties and his performance was below par and he was called to explain the same but failed to do so. The termination was not unfair and the Claimant was well aware of his poor performance and was thus terminated on account of poor performance. The Claimant is indebted to the Respondent for the balance due on the motor vehicle he purchased on loan and has not repaid the same. Other employees were terminated lawfully and they are not unrelated herein and in this case the claims outlined are not due. The case should be dismissed with costs.

12. The Respondent opted not to call any evidence in support of the defence filed.

Submissions

13. In submissions the Claimant stated that section 41 of the Employment Act provides for the statutory and procedural safeguards to employees. Before termination on the grounds of poor performance there must be a hearing. This was violated in the case of the claimant. There was no proof of poor performance and he was not given notice or a hearing before his was issued with a termination letter. The constitutional safeguard to fair administrative action was not granted to the Claimant contrary to article 47 of the constitution. The Claimant is therefore entitled to damages for wrongful termination; salary for 13 days worked in August 2012; and payment in lieu of notice. At the time of termination the Claimant had not taken leave days due and his mileage while on duty had not been paid. The log book still held by the Respondent belongs to the Claimant and should be released and the due amount owing be off-set from the terminal dues.

14. The Claimant also submitted that a claim for severance pay is due in redundancy situations under section 40 of the Employment Act. **This was a case of unfair termination and thus seeks to withdraw the claim for severance pay as this was not a case of redundancy.**

15. The Respondent on their part submitted that the termination of the Claimant was lawful as under section 47(5) of the Employment Act, he has the duty to prove that this was wrongful. The Respondent had a valid reason for terminating the Claimant as under section 45(2) of the Employment Act as his capacity was wanting following poor performance. The Claimant was the Information Systems Auditor and he remained in this position from 2008 to 2012. The senior position of Group Auditor remained vacant and filled 4 times but the Claimant was never considered for it. His performance declined over the years from 'excellent' to 'very good' and this cannot be the basis of continued good performance. The Respondent had the right to evaluate the performance of its employees based on set standards and in this case, the Claimant failed to prove that his case was not that of poor performance.

16. The Respondent also submitted that the Claimant is not entitled to his claims. Compensation only arises in cases of unfair termination which was not the case here. The claim for 13 days worked in August 2012 is not justified as the Claimant has not produced his pay slip to confirm what has already been paid. Notice too is not due. **Severance pay claim has been withdrawn.** There is no evidence to support the claimed leave days at 54.5 days or the mileage due. The claim should be dismissed with costs.

Determination

What are the circumstances leading to the termination of the claimant?

Are the remedies sought available?

17. Claim for severance pay was withdrawn. The issue shall however be assessed together with the other

matters arising for determination.

18. Section 41(2) of the Employment Act has created a fundamental change to labour relations. There is no longer any summary action allowed for an employer to take before following due process and particularly hearing an employee in defence even in a case of gross misconduct. Such a hearing is supposed to establish the circumstances leading to the allegations such an employee is said to have committed and giving the same employee a chance to defend himself. This is what principally the common law calls natural justice is. Section 41(2) is therefore mandatory as follows;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

19. Before effecting a termination or a summary dismissal that is contemplated under section 44 of the Employment Act, an employer *shall* hear and consider any representations which the employee may have. Such representations may involve matters of misconduct or poor performance. Simply stated, each employee whatever the case, has a right to be heard before an advance action is to be taken. These are the conditions that entail due process being followed.

20. The grounds of *poor performance* are subjective. Where alleged to have been the case of an employee, the employer then must demonstrate the basis of such a claim and go further to show what measures were taken to facilitate such an employee so as to have a *poor performing* employee improve. In situations where there are best practices, an employer would draw performance targets that a time-bound that can be assessed to see as to whether a poor performing employee has improved or not. It cannot thus suffice for an employer to simply state that an employee is of *poor performance*. To do so would be to defeat the very essence of the provisions of section 41(1) thus;

*41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, **poor performance** or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. [emphasis added].*

21. These are mandatory provisions. Where the cited ground for termination is *poor performance* the employer must show that the subject employees received an explanation with regard to his poor performance, such detail must be done in a language the employee understands best; and that the employee understood that such poor performance may be subject of termination. At such a forum, the employee must be accompanied by another employee or person of his choice. Failure to address these requirements in law, any resulting action that is adverse to the employee especially a termination without such due process, the same becomes invalid and of no legal force. It amount to unfair termination as there is no procedural fairness involved.

22. In this case, the Claimant testified that he was of excellent performance in 2010, but he remained of very good performance as not everybody could be excellent all the time. That a very good performer was next to the excellent performer. Below a very good performer were a 'good performer' and a 'satisfactory performer'. Being of 'very good' performance, the Claimant had a good grade. Indeed this evidence is not controverted by the respondent, the only challenged was that the Claimant remained under this grade and was not promoted. That the Respondent had a senior position that the Claimant never qualified for. However, employment and promotions are matters that an employee can address with the employer where such need arises or the employer, out of the 'very good' performance of an employee can promote him. In this regard what were in issue are the reasons used against the Claimant in his termination. Such reasons were based on his performance. The performance in issue is not with regard to his promotion. To thus terminate the Claimant on grounds that lack basis, have no validity or justification, this amounts to unfair termination under the provisions of section 45 of the Employment Act.

23. The Claimant also set out his case thus that he was declared redundant noting that before his termination, several employees of the Respondent were laid off under the guise of 'poor performance' and that with him, several other employees were terminated on similar grounds and even after he was laid off, more employees were laid off all on similar grounds of poor performance. The Claimant testified that as the person in accounts it came to his knowledge that the Respondent was selling its business to a third party, which party was not keen to take on board a bloated staff and thus asked to have these addressed. The Respondent thus took the cheapest option to avoid paying redundancy dues. This evidence was not challenged in any material way by the respondent. nothing to this end was addressed at all.

24. Situations of redundancy are addressed under section 40 of the Employment Act, such situations arise out of no fault of the employee and the employer has the right to make business changes, reorganise or abide by any new market needs towards profitability. However, to lay off employees is regulated in law. Such employees who must be laid off are entitled to legal dues. There is no justification where an employer knowing the circumstances facing its business circumvents the provisions of section 40 by the application of section 35 or 44 where termination or summary dismissal is done to avoid the legal requirements of redundancy. Noting the analysis above and the finding that there was no valid reason to terminate the Claimant on the grounds of poor performance, the evidence that several other employees were terminated on similar grounds of poor performance even where no such grounds existed, I find that this was a simple case of a redundancy situation that the Respondent had. the Court can see through The simple act of termination on non-existent grounds. This amounts to an unfair labour practice contrary to article 41 of the Constitution. No employer, however placed is allowed to act in an unconstitutional manner. To do so in a matter as clear as this one is to invite payment of damages.

25. I therefore find the Respondent unfairly laid off the Claimant in a redundancy situation. The provisions of section 40 apply in this case.

26. Caution must however be made here. Where parties come before this court, it is imperative that a clear distinction be made between what is claimed under severance pay and service pay. One is applied under section 40 while the other is made under section 35(6) of the Employment Act. It was therefore strange for the claimant's advocate to withdraw the claim for severance pay in his submissions while the Claimant was very clear in his evidence as to the circumstances that led to his termination.

27. This is a Court of justice, equity and fair labour relations. That which is due should be granted, matters of legal technicalities not being a bar to grant that which is legally due in a given case. This is also the requirement under the provisions of section 12 (3) (viii) of the Industrial Court Act.

28. The failure to call evidence by the Respondent does not in any way aid their case. there lacked a tangible link to what the Claimant claimed. The decision not to call any evidence must thus be respected and with it went with crucial details that the Respondent opted not to provide to the court. This is a choice the Court cannot fault. But the consequences are that the only material for analysis is what the Claimant provided.

Remedies

29. On the finding that this was a case of unfair termination, the Claimant is awarded compensation 6 months. The same shall be based on his last salary of Ksh.230, 049.00 all at Kshs.1, 380,294.00.

30. This being a case of unfair declaration of redundancy, dues as under section 40 are payable in law. Severance pay is awarded at 15 day's pay for each year worked. the 3 full years the Claimant served the respondent, he is entitled to amounts to Kshs.345,073.50.

31. Salary worked for and not remitted for the 12 days in august 2012 is due. This is awarded at kshs. 92,019.60.

32. Notice pay is due in termination that is unprocedural. Notice pay I also due in a case where redundancy is declared and an employee terminated without the requisite notice. there is however no

double payment as the resulting impact, is that of an unfair termination. The Claimant shall therefore be awarded notice pay based on one month' pay at Kshs. 230,049.00.

33. The mileage claim was not challenged, this shall be awarded. Kshs. 8,000.00.

34. The Claimant admits owing balances in car loan, education and medical bills. The Respondent on the other hand claims that the Claimant owed in his car loan repayments. The amounts due and owing from the Claimant to the Respondent with regard to the car loan were contested. The Respondent does not have a counter-claim seeking to have such monies repaid. There was equally no evidence to outline how the car loan arose and the balances the Claimant owes. The Claimant challenged the amounts stated as owing. This has however affected his life as he cannot deal with his motor vehicle registration No. KBG 062M as he would wish to as the Respondent is holding his log book. The Claimant was terminated on 13th august 2012. It is over 3 years since. There is no evidence that the Respondent has made effort to recover the loan balance alleged owing from the claimant. there is no counter-claim herein for the consideration of the Court in this end. I find no just cause, for the continued holding of the subject log book when the termination of the Claimant was unnecessary, uncalled for and herein found to be unfair. Had the Respondent not undertaken the unfair termination, the Claimant who was paying his car loans would have by now finished such repayments. The continued holding of his log book is an unfair labour practice. Such a log book should be forthwith released to the Claimant unconditionally. This being a Court of justice, the Claimant admits owing Kshs. 385, 000.00. This Claimant should organise and repay. When there is a just cause to pursue for further monies owed, there is a legal process to that end for the respondent. I will state that much here.

Conclusion

I enter judgement for the Claimant in the following terms;

- a. **The Claimant was unfairly terminated by the respondent;**
- b. **There was unfair declaration of redundancy;**
 - i. **Compensation awarded at kshs.1,380,294;**
 - ii. **Severance pay awarded at Kshs.345,073.50;**
 - iii. **Notice pay is awarded at kshs.230,049.00;**
- c. **Leave due is awarded at Kshs.417,222.00;**
- d. **Salary due for 13 days worked in August 2012 is awarded at Kshs.99,687.90;**
- e. **Mileage dues awarded at Kshs.8,000.00;**
- f. **The Respondent shall forthwith unconditionally release the Log Book for Motor Vehicle Registration No. KBG 062M; and**
- g. **Costs awarded to the claimant.**

Delivered in open Court dated and signed at Nairobi on this 30th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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