



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 1648 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 27th May, 2015)

RIOBA DOUGLAS KAMANDACLAIMANT

VERSUS

MIDCOM LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 23/9/2014 through the firm of Mose & Millimo Advocates. It is the Claimant's position that the issue in dispute is unprocedural, illegal and unconstitutional dismissal by the Respondent as its Marketing Executive.

Claimant's case

2. The Claimant has averred that vide a letter of employment dated 30th March 2013, she was offered employment by the Respondent as a Marketing Executive with effect from 8th April 2013 which, he duly accepted as per his Appendix 1. The contract was for an indefinite period but could be terminated by either party on notice or by payment of 2 months salary in lieu of notice. At the time, the Claimant avers that his gross salary was 20,000/= per month but at the time of dismissal, it had risen to 27,500/=.

3. The Claimant avers that as part of the terms of employment, the Respondent was to cater for any transport expenses in connection to his duties as Sales Executive, and his transport expenses from Nairobi to Eldoret and any accommodation expenses incurred on duty and that upon tendering of the receipts for the said expenses, the company would reimburse the same.

4. The Claimant avers that on several occasions, he made requests for reimbursement as per his Appendix 2 but the Respondent declined to pay up and by 1st April 2014, he was owed 14,000/= by the Respondent.

5. It is the claimant's case that, he was employed in Nairobi and then transferred to Eldoret in the same capacity but transport was not reimbursed.

On 24th March 2014 however, he stated that he received an email from the management transferring him to Malindi from Eldoret in 2 weeks – Appendix 4).

On 9th April 2014, he was terminated and asked to surrender the company property in his possession.

On 14/4/2014 he wrote a letter to Respondent seeking to be given an opportunity to be heard but non

was given.

6. It is the Claimant's case that his dismissal summarily was unfair and unjustified and that he was not paid his terminal dues and seeks to be paid his terminal dues amounting to 109,250/= as per the Memorandum of Claim, damages for unlawful and unfair termination plus costs and interest.

The Respondent's Case

7. The Respondents on the other hand never filed any response to this claim but during the hearing one Atul Chadurredr gave evidence and stated that he is the Human Resource Manager for Respondent. He stated that the Claimant wanted them to pay him and they refused and then he turned whole issue to termination. He avers that they paid him all his dues and that his performance was wanting.

Issues of determination

8. Upon hearing all parties, issues for determination are whether:

1. ***There were valid reasons to terminate the Claimant;***
2. ***Due process was followed before termination of Claimant;***
3. ***Claimant is entitled to prayers sought.***

9. On the 1st issue, the process leading to Claimant's termination is not explained. But from the termination letter reasons cited include non-performance, poor work ethics, neglect of work. There is no prior communication on these issues. It is apparent that before terminating the Claimant, the Respondent didn't give him these reasons and accord him an opportunity to be heard on the same as provided for under Section 41 of Employment Act 2007 which states that:

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.***
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.***

10. No proof of the above reason was also shown to court and this would have aided court to ascertain whether the stated reasons were valid or not as envisaged under Section 43 of Employment Act 2007 which states as follows:

“ (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

11. This court therefore finds that there were no proper reasons to warrant termination of the Claimant and no due process was followed before the termination.

12. I therefore find for Claimant and I award him as follows:

1. **Travel allowance not paid as pleaded – Kshs.93,000/=**
2. **1 month salary in lieu of notice = 27,500/=**
3. **12 months salary for unlawful termination**

$$= 12 \times 27,500 = 330,000/=$$

TOTAL 450,500/=

less statutory deductions plus costs.

4. **He should also be issued with a Certificate of Service.**

Read in open Court this 27th day of May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant - Present

No appearance for Respondent