



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1110 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 23rd July, 2015)

PETER KARENJU MWANGI.....CLAIMANT

VERSUS

HOME AFRIKA LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 3/7/2014 through the firm of Issa & Company Advocates. The Claimant's evidence is that he was employed by the Respondents herein on 1/9/2011 as Mitini Scapes Project Manager for an initial 1 year renewable contract and earning a gross salary of 230,500/= inclusive of mileage and airtime allowance. That Mitini Scales Development Limited was subsequently incorporated as a wholly owned subsidiary company of the Respondent.

2. It is further the Claimant's case that he carried out his duties and role as Project Manager diligently and the employment contract was subsequently renewed in 2012 and 2013. He also avers that he never had any disciplinary issues or warning letters issued to him.

3. It is the Claimant's averment that at a board meeting held on 13/2/2014, he was taken by surprise when the Chairman introduced one Miriam Waweru as the in-coming Mitini Scapes Project Manager. By then, the Claimant was still the Project Manager and had not tendered his resignation.

Following this, by an email dated 17th February 2014, one Steve Kagume the Ag. Projects General Manager directed the Claimant to hand over his duties to the in-coming Mitini Scapes Project Manager. The Claimant avers that the Respondent had already made a decision to terminate his services in February 2014.

4. By a letter dated 19/2/2014, the Respondent purported to suspend the Claimant from employment to pave way for investigation of his performance on premises of alleged unsatisfactory performance, failure to meet targets over a period of three months, absenteeism and mismanagement of the projects.

5. The Claimant avers that he had performed his duties diligently over time and allegation of poor performance were spurious and unsubstantiated. He also avers that no investigations were carried out by the Respondent and that at no time was he requested to clarify or explain any alleged short comings or unmet targets.

Further that identities of the investigators and the outcome of the investigations and disciplinary meeting, were never revealed to him.

6. The Claimant further avers that he was called for a disciplinary meeting held on 19/3/2014 when the Panelists read out allegations leading to his suspension and confirmed that they would avail a copy of the allegations to him. The Panelists thereafter adjourned the proceedings and gave the Claimant time to prepare for his defence and it was agreed that the Respondents Human Resource Director would communicate the date of the next disciplinary meeting.

7. It appears that the Respondent wrote a letter on 7/4/2014 enquiring about the written copy of the allegations leveled against him and whether he could access his official laptop held by the Respondent and when the follow up disciplinary meeting was scheduled to be.

The Claimant avers that the Respondent not only failed to respond to his of 7/4/2014 but also failed to set up a follow up disciplinary meeting as agreed.

8. The Claimant avers that the Respondents HR and Administration Manager summoned him to his office on 11/4/2014 and issued him with his termination letter dated 18/3/2014. By letter dated 15/4/2014 and 17/4/2014, the Claimant avers that he wrote to the Respondent expressing disappointment that the disciplinary panel had failed to accord him a hearing to defend himself from the spurious allegations, the subsequent lapse of his right to appeal and the patently unfair termination.

9. It is the Claimant's position that the termination of his employment was unlawful, unfair and violated the mandatory provisions of the Constitution and the Employment Act 2007.

10. He also avers that the Respondent violated its own HR Policy and Procedure Manual in that the procedures enshrined under Clause 10 of the Manual were not followed.

11. It is also the Claimant's case that the termination damaged his corporate image and professional reputation as Project Manager. He seeks prayers as per paragraph 29 of his Statement of Claim which includes compensation for unlawful termination, 1 months salary in lieu of notice, service pay for year 2012 and 2013, unpaid leave for 24 days in the sum of Kshs.184,400/= and unpaid salary for 11 days in April 2014 and 1 month salary bonus. He also seeks for interest on the amount awarded plus costs of this suit.

12. The Respondents filed their Statement of Response on 8/8/2014 through the firm of M/s Robson Harris & Company Advocates.

It is the Respondents position that they had a contract with the Claimant which expired on 31st August 2012 and was never renewed. They also aver that the initial employment contract was for the role of Project Manager at Mitini Scapes but on expiry of the said contract, the Claimant's job description as a Project Manager was not project specific and as such the Claimant was involved in several projects in the capacity of Project Manager.

13. The Respondents further aver that the Claimant's performance was below standard as per his end of year appraisal which was below 49.6%.

14. They also aver that Miriam Mumbi Waweru was indeed appointed as Project Manager for Mitini Scapes with effect from 10th February 2014 and the Claimant was asked to hand over to her on 18th February 2014 and that the Claimant continued being the Project Manager for the other projects he was handling.

On suspension, the Respondents agree that they suspended the Claimant from duty with effect from 18/2/2014 to pave way for investigations in his unsatisfactory performance over the past few months, failure to meet targets over 3 months, frequent absenteeism and mismanagement of the projects.

15. The Respondents further aver that in terms of due process, they gave the Claimant a chance to be heard on 11/3/2014 but he was unavailable and the meeting was rescheduled to 19th March 2014. It is also the Respondents case that there were investigations carried on and the Claimant was informed of the results of the said investigations and given a chance to defend himself and this is what culminated in the termination.

16. The Respondents avers that the Claimant is not entitled to the prayers sought and asked court to dismiss his case accordingly.

17. Having considered the evidence of both parties, the issues for determination are as follows:

1. ***Whether the Respondent terminated the Claimant's services.***
2. ***If so, whether there were valid reasons to so terminate.***
3. ***Whether due process was followed before the Claimant's termination.***
4. ***Whether the Claimant is entitled to remedies sought.***

18. On the 1st issue, the Respondent had contended that they had a contract with the Claimant which expired on 31/8/2012 and was never renewed. The Claimant on his part had averred that he had an initial contract from 2011 but it was renewed in 2012 and 2013.

The 1st contract between Claimant and Respondent is exhibited at page 118 of Claimant's documents and it was for a period of one year unless renewed for a further term in writing at least 30 days prior to expiry.

19. This contract ran until 31/8/2012. He was employed as the Mitini Scapes Project Manager. Despite the insistence of the Respondent that this contract ended in August 2012 and was not renewed, the Claimant has exhibited his payslip for June 2013 showing that he was still in the employment of the Respondent way after August 2012.

Further, the Claimant was still in communication with other customers on behalf of the Respondents as evidenced from the emails at pages 123 to 128 and using the Respondents email @ homeafrika.com.

20. It is therefore this court's finding that the contract between the Claimant and Respondent went beyond 2013 as averred by the Claimant.

21. On the second issue, the Claimant told court that he did his work diligently and was never had any disciplinary issues or complaints raised against him. However, under a letter dated 19/2/2014, the Claimant was issued with a letter of suspension to pave way for investigations on issues of frequent absenteeism, mismanagement, failure to meet targets and poor performance. The suspension was to be reviewed within 21 days.

It was also the position of the Respondent that they would inform the Claimant if he was needed for a disciplinary hearing in the interviewing period.

The 21 days of suspension should ordinary have ended by 11th March 2014 but this seems not to have been the case.

22. On 17/2/2014, the Claimant had been asked to hand over his work to Miriam. He handed over on 19/2/2014 the day of his suspension. There is no letter inviting the Claimant for any disciplinary hearing.

After the suspension, what followed is the termination letter dated 18/3/2014 but issued to him on 11/4/2014. This letter of termination refers to a disciplinary hearing held on 19/3/2014 and state that the

reason for termination was unsatisfactory performance and failure to deliver on targets.

23. The Respondents have not however adduced evidence on the alleged set targets and the Claimant's failure to meet the same. No evidence was also led by Respondent on the alleged poor performance by the Claimant.

Under Section 43 of Employment Act 2007:

(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.

It is therefore important that the Respondent not only state reasons for the termination but are required to prove the same.

The Respondents have not demonstrated to court the reasons that existed that led to the termination of the Claimant's services.

24. Then there is the issue of due process. The process envisaged herewith is the one stated at Section 41 of Employment Act 2007 which provides 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.”

25. In the case of the Claimant, there was also in existence the Respondents Human Resource Policy and Procedures Manual. The procedure enumerated in the Manual Clause 10.2 is as follows:

“HAL advocates for the fair treatment of all employees. This requires a minimum standard of conduct and performance be agreed, set and communicated with all employees. If employees do not meet this standard, appropriate corrective action, such as training, should be undertaken. Discipline should only be engaged with an employee on a performance issue if all other corrective actions has failed to achieve the desired result.

Where an employee has deliberately breached a Company policy or procedure, or engaged in misconduct, disciplinary procedures should be initiated. Employees should be treated fairly and the proper procedures should be followed. Employees must be made aware of their responsibilities, counseled and given the opportunity to reach the standards expected or them and the chance to defend themselves before action is taken.

Letters of warning may be given for neglecting to perform ones' duty, lateness, indiscipline, carelessness, etc. Such letters or warning will be three and be governed by the follows guidelines:

a. First Warning

The first warning shall be a written one and shall remain valid for a period of three months from the date of issue.

b. Second Warning

If within the twelve months period the employee commits a similar or any other offence which does not warrant dismissal the employee will be given a second warning in writing. The two warnings shall remain valid for a period of three months from the date of issue of the second warning.

c. Third Warning

If the employee commits a further offence within the twelve month period the person will be issued a final letter of warning making the employee liable to summary dismissal for any other offence committed thereafter. The final letter of warning will remain valid for a period of one year from the date of issue.

It is a requirement to have a third party attend a disciplinary meeting, and notes taken be signed as a true record of discussions. The expected standard must be clearly defined and the measurement criteria understood. A reasonable date for achievement of standards must be agreed. This should be shown as a minimum time, e.g. within one month.

A warning letter template, a verbal warning confirmation letter and a letter of dismissal are presented in appendices 13, 14 and 15.”

In cases where the issue is non-performance, the Respondents

Manual at Clause 10.2.1 reads as follows:

“Wherever possible, the Performance Management System should be used to manage employee performance. However, there may be times when performance, conduct or employee attitude need to be immediately addressed. If an employee falls below required performance standards they must be personally counseled and then given written confirmation of their deficiencies in performance (a written warning).

Such written warnings must clearly define the deficiency, the expected standard, by when it should be achieved, how the company will help the employee achieve the improvement required and the consequences of failing to do so.

A record of all meetings, training and/or coaching given and a summary of discussions must be kept by the manager concerned and a copy placed on the employee’s personnel file. This should include date, location and time of discussion.

If an employee consistently fails to meet agreed standards, he/she has been counseled and appropriate support/training has been offered and/or given, then further action is required. This may lead to the employee being dismissed under the following circumstances:

- 1. If all possible corrective action, including training and coaching, has been undertaken but has failed to improve performance.***
- 2. If the manager concerned has documentation showing the conversations taken place, agreed action plans, and other communication with the employee which have not borne any fruit.***

3. If the employee has been informed of the standard required and his/her performance deficiency (ies) with action plans in writing on at least two occasions and the consequences of failing to meet the required standards and still failed to meet these standards.

4. If the employee has been given the opportunity to appeal or respond to the issues highlighted on each occasion but has failed to.

5. It there are no other suitable options, or other appropriate positions, are available even after all these processes have been followed and the employee's performance still has not improved. “

26. It is apparent that in case of the Claimant, the provisions of Section 41 of Employment Act 2007 and Respondents own Manual were flouted. That being the case, the termination of the Claimant was unfair in terms of Section 45 (1) & (2) of Employment Act 2007 which states as follows:

1. No employer shall terminate the employment of an employee unfairly.

2. 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

ii. based on the operational requirements of the employer; and

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

27. Having so found, I find that the Claimant is entitled to the following remedies:

1. 1 month salary in lieu of notice = 230,500/=

2. 12 months salary as compensation for unfair termination = 230,500 x 12 = 2,760,000/=

3. Unpaid salary for April 2014 for 11 days

= 11/30 x 230,500 = 84,517

TOTAL = 3,221,000/=

4. The Claimant will also be issued with a Certificate of Service.

5. The Respondent will meet costs of this suit.

It is so ordered.

Read in open Court this 23rd day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mugo holding brief Issa for Claimant

Robson Harris & Company Advocates for Respondent- Absent