



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.658 OF 2011

KENYA TEA DEVELOPMENT AGENCY LIMITEDCLAIMANT

VERSUS

LEE KIMATHI RESPONDENT

JUDGEMENT

1. The claimant, Kenya Tea Development Agency filed the memorandum of claim over the recovery of car loan granted to the Respondent as their former employee. The Claimant filed his defence to the claim on 6th February 2012 denying the claim and on Counter-Claim on 7th February 2012 for his terminal dues and unlawful termination of contract and also another Counter-Claim on 22nd October 2012. The Claimant filed a reply to the counter-claim on 2nd August 2013 and another on 17th July 2012.

The claim

2. The claimant's case is that the Respondent was their employee on a two years contract from 1st September 2004 to 1st September 2006. While in employment the Claimant enjoyed car loan facilities and he obtained Kshs.800, 000.00 for the purpose. The loan was issued on 7th June 2005 to be repaid in 48 months with monthly deductions from his salary and the loan was to attract a 7% interest per annum. The vehicle was to be registered in the joint names of the employer and employee, the Claimant and the Respondent until the loan was repaid in full. The Respondent accepted the terms of the loan in his application. On 19th December 2006 the employment of the Respondent was terminated and the loan balance was Kshs.499, 994.00.

3. The claim is that on 31st January 2007 the Respondent wrote to the Claimant with a proposal to settle the loan balance from his notice pay, leave pay, pension contribution and Chai Co-operative shares and if the proposal was acceptable, the human resource of the Claimant would be instructed to make direct payments thereto. The Claimant approved the proposal on condition that repayment was to commence on May 2007 and full payment was to be done in 10 months on monthly instalments of Kshs.16, 936.00. The Claimant also intimated to the Respondent that since they had no authority over his Chai Co-operative shares it was his duty to draw a cheque in their favour. The Respondent did not honour the repayments and the loan amounts remains due and owing.

4. The claim is for the sum of Kshs. 449,994.00 being the balance of car loan from 19th December 2006 with interest and costs of the suit.

5. In response to the counter-claim, the Claimant stated that the Chai Co-operative Sacco and the Claimant Car loan Scheme are two separate entities. The clearance by the Chai Sacco did not excuse the

Respondent from liabilities he held with the Claimant car loan scheme. The Claimant did not breach the contract of employment and nothing is due or owing to the respondent.

6. In evidence, the Claimant called Elijah Oduol Angawa the claimant's Assistant Compensation manager with duties of processing salaries, terminal benefits, loan approval and recovery. And statutory deduction. He has been with the Claimant for over 20 years and worked with the respondent. The Respondent was an employee of the Claimant until 19th December 2006 when he was terminated. Before such termination, the Respondent applied for a car loan of ksh.800,000.00 which was granted with conditions to repay on 7% annual interest; repayment in 48 months but upon termination he had a balance of kshs.449,994 unpaid. This loan has been accruing a 7% interest. The parties had a repayment plan upon the Respondent proposal which the Claimant approved. The Respondent had proposed to pay in 3 months but the Claimant approved such repayment in 10 months.

7. The witness also testified that the Claimant has a procedure in the application for a car loan and the Respondent submitted his application form. He gave the car details and total amounts that was to be paid with an approval from all department heads. The vehicle was also to be registered in the joint names of the employer and employee until the repayment of the car loan. Upon termination, a balance of ksh.499, 994.00 was due and the Respondent proposed to pay this by his terminal dues amounting to Kshs.336, 033.00 and that he would pay the balance of Kshs.163, 961.00 in 3 months. The Claimant accepted the proposal and further suggested that the repayments be made from May 2007 for 10 months instalments of kshs.16, 936.00 per months. Since the Claimant had no authority over the Chai Co-operative shares, the Respondent was to issue a cheque for the amount. The Respondent did not oblige the offer.

8. The claim is also that the claimant's loan had a 7% interest per annum that has been accruing since it became due and this should be repaid with the due amount, costs and all interests.

9. In cross-examination, the witness was categorical that he was not aware the reasons the Respondent was terminated as his role with the Claimant is as the compensation and benefits for employees. There is the respondent's letter of termination which from a different department but he is aware that the Respondent had a car loan that he failed to repay in full and has been due since and attracted interests at 7% per annum. The Respondent had made a proposal to pay the balance but he did not honour it. In accepting the proposal by the Respondent on how he was to make his repayments, the Claimant asked the Respondent to give a cheque of his Chai shares but the Claimant discovered that by then the Respondent had already withdrawn his shares and did not disclose this fact. That the Claimant had the option of repossessing the vehicle the Respondent held but opted not to and use the legal means of filing the claim in Court to recover the loan balance with interest. The Claimant found it cheaper to file suit against the Respondent than doing recovery proceedings.

Defence

10. In defence the Respondent case is that he was unable to repay the balance of his car loan due to his unlawful and illegal termination of contract within two months after the contract had been renewed and two weeks after his salary had been increased. That he has since termination not been in gainful employment and thus unable to repay the loan balance. That he offered to repay the balance from his terminal dues and the balance be repaid upon getting a new job. The terminal dues have not been paid. That the Respondent reported the matter to the labour officer and Federation of Kenya Employers and has been waiting for a hearing.

Counter-claim

11. In counter-claim the Respondent stated that he was employed by the Claimant but was unlawfully and illegally terminated from his employment two months after his contract had been renewed and two weeks after his salary had been increased. He is owed two months' notice pay, leave pay and the Claimant has not paid such dues or made such deductions so as to reduce his loan balance.

12. The counter-claim is that the Respondent was cleared after his termination by the claimant. He was issued with a clearance certificate an indication that he had no liabilities. The Ministry of Labour and Head of Public Service has been following up on this matter to know why the Claimant terminated the Respondent together with 6 other employees. The termination of the Respondent occurred two months after he had been his contract renewed and salary increased and was therefore malicious as it had no reason. This was meant to stifle his career and to abuse his rights. The Respondent had a developing career and of outstanding performance, he led to the development of the *Jani* tea brand for local and international markets and led to the Claimant winning award at the trade fair.

13. The Respondent claim is that he should be paid for the unexpired term of his contract being Kshs.1,720,000.00; interest on such sums; award for humiliation and damage to the person caused by the Claimant in the termination of his high profile contract which was wrongful and unlawful which led to the jeopardising of his future career prospects; an award of damages for the Claimant publishing his name in the media; costs of the suit and any other award for unlawful termination the Court may deem fit to grant.

14. In evidence, the Respondent stated that he was employed by the Claimant and his first contract was in 2004 as Brand Executive for a period of 2 years. The contract was renewed and he became permanent employee in a contract dated 25th September 2006. His expectation in 2006 was to serve the Respondent until retirement as he had a secure contract. On 21st November 2006 his salary was increased by 7.5% and backdated. The salary rose from Kshs.80, 000.00 to Kshs.86, 000.00. On 19th December 2006 he received his letter of termination and went into shock as he had just had the contract renewed and developed high expectations.

15. The claim by the Respondent is also that the termination letter did not give any reasons for the same save that he would be given his benefits in full. At the time he had a car loan with the Respondent and this was not taken into account. The balance of loan was at Kshs.499, 994.00 and due to the summary termination he wrote to the general manager to allow him to offset the car loan with his notice pay, the Chai Sacco shares and leave pay that was due. The Respondent also offered to pay the balance of Kshs.133, 000.00 in instalments on condition he got a new job. There was however no response by the claimant. He cleared with the Claimant was issued with a certificate of clearance. Chai Sacco also issued a clearance certificate. The Claimant also issued a letter of recommendation indicating the Respondent had good credentials.

16. The Respondent noted that he was wrongfully terminated and thus reported to the labour officer Nairobi but the Claimant refused to attend. The Respondent made efforts to have the matter resolved but the Claimant was adamant and refused to oblige.

17. While employed by the claimant, the Respondent was instrumental in leading the Claimant products to the market. He developed the *Jani* tea brand and promoted it to the local and international market. The Claimant was at the Nairobi International Trade Fair where the Head of State attended and visited the Claimant stand where the Respondent was instrumental. Similar products were showcased in South Sudan and Nigeria. The termination that followed was therefore without any basis. It was malicious and without good ground.

18. At the time, the media was awash with intrigues at the Claimant agency. There were political intrigues leading to the termination of 6 other employees for no good reason. These negative media reports have made it impossible for the Respondent to secure new employment due to the negative impact. The termination was not based on any reasons and no prospective employer is satisfied that the termination was without any good cause and the damage has been severe. The Respondent had to file his defence in person as he could not afford an advocate due to constrained finances.

19. The Respondent is seeking damages; payment for the unworked duration of his contract at Kshs.1,720,000.00 the 20 months not worked which was an error as he should have been allowed to work until retirement; the terminal due have never been paid and should be remitted. The Respondent is also seeking for damages for the damage to his reputation, career and false publication in the media that he owed the claimant.

Submissions

20. In submissions, the Claimant stated that they had employed the Respondent and his contract was terminated in accordance with the contract of employment. He had a car loan which he refused to repay and this has been due and owing since his lawful termination. That section 35(5) of the Employment Act, 2007 allow an employer to terminate an employee without notice subject to the payment of notice set out under the contract the due amount in car loan should be paid as agreed with interest at 7% per year until payment in full.

21. The Claimant also submitted that the Respondent is not entitled to the counter-claim as the parties had a contract that had its terms and conditions of employment. In this case the Claimant offered to pay for the notice period. That the law does not allow the payment of damages as notice is payable. That in any event the counter-claim is overtaken by the provisions of section 90 of the Employment Act, 2007 and should be dismissed. That judgement should be entered for the Claimant with costs and the counter-claim dismissed with costs.

22. The Claimant has relied on the cases of **DK Njagi Marete versus Techers Service Commission [2014] eklr; Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eklr.**

23. The Respondent on his part submitted that the termination of the Respondent by the Claimant was wrongful and unfair under the provisions of article 41(1) of the Constitution and section 43 of the Employment Act. The Claimant is thus entitled to 24 months' pay in compensation being the term for his earlier contract that had just expired and had a legitimate expectation to run the course of his new contract.

24. The Respondent rely on the cases of **David Gichana Omuya versus Mombasa Maize Millers Ltd [2014] eklr; Kutima Investment Limited versus Muthoni Kihara & Another, Court of Appeal No.117 of 2005.**

Determination

Whether the Claimant should be paid the car loan balance with 7% interest

Whether the Respondent is entitled to his counter-claim;

Whether the counter-claim is contrary to section 90 of the Employment Act, 2007.

25. The last issue on the application of section 90 of the Employment Act, 2007 is important to start with. The cause of action arose on 19th December 2006 with the termination of the Respondent from his employment. By operation of the law, the applicable legislation was the repealed Employment Act, Cap 226 laws of Kenya. Under this legislation, the provisions of section 90 of the Employment act, 2007 are not applicable as this had not come into force and section 4 of the Limitation of Actions Act does apply herein. The Claimant commenced these proceedings and upon service, the Respondent filed the defence and then the counter-claim on 7th February 2012. This was just at the nick of time before the lapse of the 6 years rule allowed to file an employment matter under the relevant statute the repealed Employment Act.

26. With that, the provisions applicable under article 41 of the Constitution and the Employment Act, 2007 do not apply here. The submission by the Respondent that his was a case of unfair termination and he has remedies under section 49 of the Employment Act is not the case. The cause of action arose before the promulgation of the Constitution 2010 and the Employment Act, 2007.

27. The claim that the Respondent took a car loan from the Claimant is not denied. That loan was for an amount of Kshs.800, 000.00 that the Respondent repaid until his termination on 19th December 2006. The loan facility was obtained based on the respondent's application and approval. What is in contest is the balance amounts and the interest of 7% per year.

28. The loan application form is attached to the memorandum of claim as “SG2”. At part C the loan amount is stated at Kshs.800, 000.00 to be repaid in 48 months. At part D is the repayment plan at Kshs.16, 667.00; the estimated monthly interest at Kshs.6, 000.00; and total monthly repayments being Kshs.22, 667.00. This application form is signed and approved by various officers including the Claimant Managing Director on 6th June 2005. Such details were not contested by the claimant. There is however no indication as to how the 7% interest payable per month arose. There is no document or policy on the Car Loan Scheme that the Claimant has attached to detail how such a percentage arose. In the demand letter issued to the Claimant and dated 20th February 2007, no such percentage is mentioned. It is therefore not clear as to how such a percentage accrued.

29. In the evidence of Mr Angawa for the claimant, he was emphatic that the Respondent was aware that his car loan attracted a 7% interest. This was well known fact but I find no documentary evidence as to how such a percentage was arrived at. In the demand letter issued to the respondent, the Managing Director Mr S. W Githuku notes that they had accepted the respondent’s repayment plan of **Kshs.16, 936.00** for 10 months. Had such sums been repaid, the Claimant should have received the sum of **Kshs.169, 360.00**. this was on the basis that the Claimant should have offset the bulk of the balances due from his notice pay; leave pay; pension contribution; and Chai shares that were computed in his proposal all being **Kshs.336,033.00**. Had the loan facility been cleared in the proposed 10 months, the Respondent would have paid a total of **Kshs.505, 393.00**. From the balance due and what the Respondent should have repaid, the percentage factor would have been thus included. This question of the percentage payable to the Claimant over balances due from the loan is not a strange computation as it had been included in all the repayment instalments that he had done before termination and in his proposal to repay the balances upon the termination of employment. However such monies were not repaid.

30. I find that the Respondent is owing the Claimant the car loan balance of Kshs.499,994.00 and should repay the balance due and accruing from the date of termination, 19th December 2006 with all due interests to date and until full repayment. Such interest shall be computed at the rate of 7% per year. The non-payment of such a facility when it became due on the basis that the Respondent was not in gainful employment is not tenable. The measures made by the Claimant to have the balances paid in instalment were reasonable. Where the Respondent opted to retain the vehicle and not offer to dispose the same so as to repay the balances of his loan and knowing that he had no other source of income at the time cannot justify the long delays. In any case the Claimant had the option of repossessing the vehicle and selling it at the going rate then. It has been over 9 years since the Respondent has not made efforts to settle this loan balance. The kind of employment contract the enjoyed with the Claimant did not have similar protections as a contract made upon the basis of the Employment Act, 2007 or the Constitution, 2010.

31. The Respondent has a counter-claim for unlawful and wrongful termination of his employment. The Claimant witness was categorical that he was not ware as to why the Respondent was terminated by the respondent. The Claimant only called one witness, Mr Angawa. By the time the witness was recalled for his evidence, there was a counter-claim filed by the Respondent and the Claimant had filed a reply. The Claimant opted not to deal with the counter-claim against them. I take it that other than the general averments in defence, there is no substantive evidence offered to controvert the counter-claim.

32. The Respondent states at paragraph 3 of his Response to the Statement of Claim that he reported the matter to the labour officer and to the FKE and has since been waiting for a hearing date. Where the Respondent reported tot eh labour officer about the unlawful termination of his contract, the duty was on him to pursue his claim to a logical conclusion and where such a process did not lead to a conclusion, he had the option of moving this Court to assert his rights against the respondent. The cause action arose with the alleged unlawful termination of contract on 19th December 2006, the defence and counter-claim was only filed on 6th February 2012 after the Claimant had moved the court. The applicable law then had time limitation with regard to parties being heard by the labour Officer. On the other hand the matter that the Respondent states that was reported to the FKE is neither here or there. Only employers are members of such a body in law. The Respondent cannot have filed his claim with FKE as an employee of the claimant. The Claimant was categorical in their evidence that they had the options of recovery proceedings or filing suit in Court so as to recover the loan balances owed to them. They took the cheaper

option of filing suit against the respondent.

33. There is an employment contract dated 7th August 2004 issued to the Respondent for 2 years covering the period of 1st September 2004 to 1st September 2006. Such terms are outlined under clause 1 of the contract of employment. Subsequent to this and upon the lapse of this employment contract, on 25th September 2006 the Claimant issued the Respondent with the letter of appointment for;

Re: letter of appointment – post of brand executive

We are pleased to inform you that you have been offered employment with effect from 1st September 2006 under the following terms and conditions of service:-

1. *Designation*

You will hold the post of Brand Executive within Sales and marketing Division in Kenya Tea Development Agency Ltd, but the company shall have the right, if need arises, to vary the nature and place of employment.

2. *Consolidated salary*

Your monthly salary will be Kenya Shillings Eighty Thousand only (Kshs.80, 000/-) in salary scale MG VI

3. *Notice*

Either party may terminate the appointment by giving the other two (2) months' notice or paying two (2) months' salary in lieu of notice.

34. Therefore as from 1st September 2006, the Respondent ceased being a contract employee for a fixed period to a full time employee of the Claimant though in the same capacity of Brand Executive. This was the obtaining position until 21st November 2006 when the Claimant issued letter to the Respondent reviewing his terms of service thus;

We are pleased to inform you that you have been awarded a salary increment of 7.5% with effect from 1st January 2006.

Consequently, your consolidated salary will be Kshs.86, 000.00 per month. All the other terms and conditions of service remain the same.

35. From the same letter, the Claimant appreciates the good performance of the Respondent. This letter is not contested by the claimant. However soon thereafter and on 19th December 2006 the Claimant received his letter of termination. There is no reason attached to such termination. Such termination was instant. Despite the contract term for notice of 2 months, the Claimant took the option of effecting payment in lieu of such notice and therefore, the Respondent was to hand over immediately.

36. It is thus on this basis that the Respondent testified that his termination after such a high profile contract was a shock, he was unable to get new employment and there being no reason given as to the instant and summary action of termination, he was not able to secure another job. This caused damage to his career and person. It is now common cause that he was also unable to meet his financial obligations as even the car he had taken on loan he was unable to process the balance. He had to file his statement of defence herein only in person as he could not afford to pay for counsel in defence to his case.

37. In defence, the Claimant does not make any submissions giving any substantive reasons for the summary action taken against the Respondent save for general denials. There was an employment relationship governed in law by the Employment Act cap 226 Laws of Kenya. The law dictated that even

where the employer wished to terminate the employee the minimum requirement was to give such an employee a hearing and to let such an employee know the reasons for such summary action. The requirement for a lawful process being undertaken before termination of employment is well understood to mean due process where an employee is called in a disciplinary hearing or given a chance to argue their case. The Claimant does not make any effort to explain the basis of such summary action. This is contrary to the principles established in this letter is not contested by the claimant. **Charles Kariuki Wambugu versus Kenya National Library Service Board, HCCC No.2013 of 1989** thus;

The principle of natural justice applies where ordinary people would reasonably expect those making decisions, which will affect others to act fairly.

38. In this case, the Claimant did not act in a manner that was fair, the summary action taken against the Respondent was under the guise of an ordinary termination and despite the offer to pay for notice, this was contrary to the principle set out in the case of **Moses Bulenzi versus UCB Kampala High Court Civil Case No.639 of 1993** that where the contract of employment does not have a fixed term and the same is wrongly terminated, the employer should give a reasonable notice. This is therefore what forms wrongful termination and resultant remedy. It cannot be explained in any other way, the action by the Claimant to terminate the Respondent without any basis, without due process amounted to wrongful termination as held in **Eric Essau Amwani versus Attorney General, HCCC No.2691 of 1994**. The Respondent is entitled to damages for such wrongful action against him under the Employment Act, Cap 226 laws of Kenya, now repealed.

Remedies

39. The Respondent is seeking the sum of Kshs.1, 720,000.00 for the unexpired term of his contract. The Respondent however failed to state how he arrived at such figures. He does not state his age vis-à-vis the full time contract that he was issued with on 1st September 2006 so as to claim such an amount until retirement age. These figures are also not submitted with clarity as to whether the Respondent deemed his new contract as to run for two more years and hence claims the balance due from the period not served from 19th December 2006. These issues notwithstanding, it is clear from the respondent's evidence that since 1st September 2006, he had a new contract that has no time limit. To terminate such a contract without notice, a reasonable pay in lieu is justified.

40. The above thus set out, the Claimant is seeking damages for the injury caused to his career by the Claimant due to the wrongful and unlawful termination of his high profile contract and jeopardising his future prospects. Indeed as set out above, the Respondent went into a financial downturn noting that he could not repay his car loan let alone afford to defend this suit with assistance of Counsel. The Claimant does not make any effort to mitigate such wrongful action with any substantive defence. For such damage and injury the Court has power to award damages. Such damages shall be assessed noting the position the Respondent held and due to his good performance he had high prospects of surpassing his dreams which were otherwise cut short. The same is also assessed noting that the Respondent had an ongoing contributory pension scheme but due to the wrongful termination he lost this benefit. I find the sum of Kshs.5, 000,000.00 reasonable and is awarded to the Respondent in damages.

41. The Respondent is also seeking damages from the Claimant for publishing his name in the media. The Respondent went into this issue briefly in his evidence but failed to set out as to how such publication of his name directly or indirectly caused him damage save for the fact that he has been unable to secure a new job. Such publication was also not made available to the Court for assessment as to the veracity of the publication and the potential negative impact on the respondent, if any took place or can be deduced. Noting the general damages awarded above, there being no sufficient ground for this claim, it shall not be awarded.

42. On the finding that the Respondent should repay all his car loan amounts, the terminal dues he had offered to offset the same and were not used for that purpose are due. His notice pay of two (2) months, leave accrued and pension contributions are owed to him by the claimant.

Conclusion

43. Noting the above, the Claimant is owed the car loan amounts due and this shall be repaid by the respondent. Equally there is a good case in counter-claim and the Claimant shall pay the terminal dues and damages for the wrongful dismissal of the respondent.

Judgment is entered in the following terms;

- a. **the Respondent shall pay the Claimant the sum of Kshs.499,994.00 at 7% per year from 19th December 2006 until payment in full;**
- b. **amounts due above (a) shall be computed by the Claimant and confirmed by the court in 14 days;**
- c. **the Claimant shall pay the Respondent his terminal dues as follows;**
 - i. **notice pay at Kshs.172,000.00;**
 - ii. **Accrued leave at Kshs. 92,273.00**
 - iii. **Pension contributions at Kshs. 16,800.00**
- d. **The Respondent is awarded damages at Kshs.5, 000,000.00 for wrongful dismissal by the Claimant.**
- e. **Each party shall bear their own costs.**

Delivered in open court at Nairobi and dated this 14th day of October 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant.....