



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1343 OF 2010

(Before Hon. Lady Justice Hellen S. Wasilwa on 8th October, 2015)

CHARLES MUTHAMA CLAIMANT

VERSUS

WANANCHI GROUP (K) LIMITEDRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 29/10/2010 through the firm of Kinyua Mwaniki Wainaina Advocates.

Claimant's case

2. The Claimant's case is that he was employed by the Respondent as a Human Resource and Training Manager on 1/10/2008 as per his **Appendix 1** – the letter of employment. He stated that he was initially earning a consolidated pay of 460,000/= which was later increased to Kshs.560,000/=.
3. It is the Claimant's case that it was part of the Respondents statutory duty and obligation to provide a safe and secure working environment. However, contrary to this expectation, the Claimant avers that he was subjected to various cruel degrading and inhuman treatment and he was constantly insulted, intimidated, abused and humiliated by one of the directors one Richard Bell in the presence of fellow employees, and with the knowledge of the Respondent which utterances and actions amount to discrimination and border on racism and which is contrary to the law.
4. The Claimant further stated that before this termination, the said Richard Bell came to the office armed with a gun which he placed on the table with the sole purpose and intention of threatening, intimidating and harassing the Claimant and this caused the Claimant an apprehension on his life, distress and mental anguish.
5. The Claimant avers that he complained of this mistreatment, harassment and intimidation to the Respondent but instead of any action being taken against the said director, his employment with the Respondent was terminated on 23rd August, 2010. And that this was done without proper notice or legal justification and without a hearing contrary to law. His letter of termination is annexed as **Appendix 2**.
6. The Claimant states that on the date of termination, the Respondent using his supervisor had

forced the Claimant to sign a resignation letter to facilitate payment of three (3) months salary in lieu of notice together with salary earned for the month of August 2010 (**Appendix 3**).

7. It is the Claimant's case that his termination was unfair, wrongful and without legal justification and prays for a declaration to that effect and an order to issue for reinstatement of the Claimant to his previous position and grade.
8. The Claimant further avers that the termination letter aforesaid was signed by one Peter Reinartz a Belgian National, the Managing Director of the Respondent and who did not have a work permit to work in Kenya and was doing so illegally and that the said letter is therefore null and void.
9. It is the Claimant case that pursuant to the said termination, he has lost prospects of employment in similar and comparative position and his professional respect and self esteem have been adversely affected. He also avers that he lost his anticipated earnings.
10. The Claimant therefore seeks a declaration that the termination was wrongful, null and void and also seeks to be reinstated or be paid damages equivalent to 10 years he had anticipated to work for the Respondent. He also seeks costs and interest on the award.
11. The Claimant called one witness an Immigration Officer who gave evidence to the effect that one Peter Reinartz a Belgium National who was the Respondent's Managing Director was issued with a work permit on 25/2/2011 and that before this, he was not allowed to work in Kenya. He also stated that approval of the work permit by the work committee did not of itself authorize him to work and therefore had no authority to write a termination letter to the Claimant on 23/8/2010 which is an offence under the Immigration Act.

Respondent's Case

12. The Respondents filed their reply to Memorandum of Defence on 18/11/2010 through the firm of Murgor & Murgor Advocates. It is their acknowledgement that they had employed the Claimant as its Human Resource & Training Manager for the period between 9th September 2008 and 23rd August 2010 at salary of 415,000/= which was subject to statutory deductions (**Appendix WG1**). That this salary was reviewed to 560,000/= later as per **Appendix WG2** of 18/12/2009.
13. In response to Claimant's assertion, it is the Respondent position that they provided a secure and safe working environment free from discretion, threats, intimidation, degrading and human treatment. They deny breaching any statutory obligations to the Claimant as alleged.
14. It is also the Respondents position that the Claimant voluntary resigned from his employment on 23/8/2010 as per **annexture WG 3**.
15. The Respondents also deny that its Director, Richard Bell subjected the Claimant to any violations as alleged, nor was he armed with a gun, nor threatened the Claimant as alleged. They also aver that the allegations against Richard Bell are the subject of a Civil Suit being **Nairobi High Court Civil Suit No. 449 of 2010 – Charles Muthama vs Richard Bell** which is still pending for hearing and disposal in the High court.
16. In reply to paragraph 8 of the Memorandum of Claim, the Respondents deny ever receiving any complaints of mistreatment, harassment, intimidation and threats from Claimant as alleged. They also deny terminating the Claimant's employment with Wananchi Group (K) Limited on 23rd August 2010. It is the Respondents position that Claimant resigned voluntary.
17. In relation to the alleged letter of termination, the Respondents aver it was a culmination of various emails between the Claimant and Mr. Bell on some information Mr. Bell required from the Claimant. The Claimant was unable to provide the said information and therefore on 23/8/2010, the Respondent wrote to the Claimant a letter detailing its dissatisfaction with the Claimant's

failure to perform his duties and communicated its intention to termination the Claimant's employment with immediate effect.

18. That on receipt of this letter the Claimant pleaded with the Respondent to withdraw its said letter and be allowed to resign. That the Claimant further negotiated to be paid 3 months salary in lieu of notice together with August 2010 salary. The Respondent agreed and accepted the Claimant's resignation (WG3).
19. The Respondent therefore denies unlawfully terminating the Claimant but states that Claimant voluntarily and without any coercion, or duress resigned from the Respondent's employment.
20. The Respondents further avers that the Claimant circulated maliciously published electronic mails against the Respondent in breach of his contractual duty of confidentiality during and after his employment. As a result, the Respondent suffered injury to its business and reputation and will claim damages from the Claimant in respect of the malicious actions.
21. The Respondents therefore prays that the claim be dismissed with costs.

Issues for determination

- 22.(a) *Whether the Respondent terminated the Claimant's services or Claimant resigned from employment.*
- (b) *If the Respondent terminated the services of Claimant whether there were valid reasons.*
- (c) *Whether the claimant was subjected to due process.*
- (d) *What remedies if any the claimant is entitled to in the premises.*
23. On issue number 1, the Claimant avers that he was indeed terminated and issued with a termination letter Appendix 2. The sequence of events that led to this letter started way back on 11/7/2010 when one Bell wrote an email complaining about Claimant's performance for not being able to carry out tasks assigned to him. This email was issued to serve as a "warning" to the Claimant. The Claimant had responded by stating that he was committed to doing his duties and promised to complete the same on 19/7/2010 lamenting that he was feeling he had been treated overly harsh and unfair.
24. Mr. Bell in his reply had *stated "I do not intend to debate the warning that has been given to you and expect that your performance going forward will improve accordingly"*
25. This tension seemed to have built up even earlier on from June and indeed at one point Mr. Bell had written to the Claimant as follows:--"*this is silly and constitutes process over common sense. We do not have enough qualified finance people internally to fill the posts we already have... please do as Hannellie has asked and get Salma an offer letter before the end of the week*".
26. Following this spate, the Claimant has stated that he attended a meeting with Mr. Bell where the Managing Director was present. This is evidenced from the termination letter where the said Managing Director stated that:
- "Please note my dissatisfaction with what you provided and presented during our meeting on 18/8/2010. During our introductory session on 8/8/2010 I asked you to provide a full overview of all staff on payment and how they fit into the group organization chart .. to my surprise, you were not able to provide this very basic HR information...."*

The instruction to come up with the detailed pay roll/organization charts had been given to you in the month of June 2010. Three months later, the basic requested data is still not available. I have re-read the email exchange between you and Richard Bell on the same matter, and have noted that you committed “to complete the organization chart by Monday 19th July, as asked.....

We have lost all trust and confidence that you are capable of performing your duties as required. We therefore have no choice but to terminate your employment in accordance with the terms of your employment contract dated 9th September 2009. The termination of your employment will therefore be effective as of today’s date”.

27. My reading of this letter shows a developing resentment towards the Claimant from Mr. Bell and Mr. Reinartz’s point of view which led Mr. Reinartz to write the termination letter to the Claimant. The letter was not a notice to terminate as submitted by Respondents as it states clearly that, that was the effective day of termination.

28. There is now the letter of resignation dated the same date 23/8/2010 by the Claimant. In this court’s view, it will beat logic for the Claimant to write this letter unless some promise or incentive or threat had been directed at him. I find this in the following words in the letter:

“Following a discussion today with you and the Chief Operating Officer, Suhayl Esmalijee, I offer my immediate resignation effective today 23rd August 2010. Further Wananchi Group (K) Limited accepts to pay me three months salary plus salary earned for August 2010 and outstanding leave days (this is the incentive).

29. It is this court’s finding that the claimant never resigned from employment voluntarily but was coerced into writing this letter; the Respondent may be having discovered their folly in terminating the Claimant unfairly and unprocedurally. I therefore reach a determination that the Claimant was terminated from employment by the Respondent.

30. On the 2nd issue, the reasons for this termination are well documented in the termination letter. I have already alluded to these reasons in my analysis above which show bad blood between Mr. Richard Bell and the Claimant for various reasons, one being questioning him on why he shouldn’t give Salma an employment officer directly without a competitive process. The other, of course, is the issue of the alleged incompetence on the Claimant’s part given, the existing bad blood between the Claimant and Mr. Bell, even from his lack of more courtesy by being abusive and using words like silly in addressing the Claimant’s performance, it is apparently that the Respondents decision to terminate the Claimant was clouded by their negative attitude towards him.

Under Section 43 of Employment Act:

(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.

31. Reasons must therefore be valid reasons which must be proved. The Respondents have not proved the validity of reasons of this termination and I find that there were no valid reasons to terminate the services of the Claimant by Respondent in the manner they did.

32. On the 3rd issue, the issue of due process is set out under Section 41 of Employment Act which states as follows:

“(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.”

33. Of course, the Claimant was not subjected to this process. He was not given any hearing. It is therefore this court’s finding that the Claimant was not subjected to due process before his termination.

34. It is therefore this court’s determination that the termination of claimant was unfair and unjustified in terms of Section 45 of Employment Act 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.***

35. Having found as above, I find the Claimant is entitled to the following remedies as per his contract:

1. ***3 months salary in lieu of notice = 560,000/= x 3 = 1,680,000/=***
2. ***12 months salary as compensation for unfair termination = 12 x 560,000/= 6,720,000/=***

TOTAL = 8,400,000/=

Less statutory deductions.

The Respondent will also pay costs of this suit. The amount awarded will attract interest at court rates from the date of this judgment until payment in full.

Read in open Court this 8th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwaniki holding brief for Wainaina for Claimant

No appearance for Respondent

