



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.28 OF 2014

FRANCIS KIARA MUTHOMI.....CLAIMANT

VERSUS

LUNAR CREDIT LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th December, 2015)

JUDGMENT

The claimant filed the statement of claim on 11.02.2014 through Mokuia Obiria & Associates Advocates. The claimant prayed for judgment against the respondent for orders:

- a) That the honourable court to find that the actions of the respondent terminating the claimant's employment were unlawful and unprocedural.
- b) That the respondent be ordered to pay the claimant commensurate terminal dues in form of gratuity; severance pay; unpaid salary for June 2013; and any other and better relief the court may deem fit.
- c) That the respondent be condemned to pay costs of the cause.

The respondent filed the response to the claim on 11.06.2014 through Wahome Gikonyo & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The respondent employed the claimant as a shop attendant. The employment was based on the letter of appointment dated 24.02.2006. It was effective 15.02.2006. The claimant was deployed to Machakos, Eldoret and finally at Meru branch. The branch manager was the claimant's immediate supervisor. It was the claimant's testimony that at termination he was serving as the branch assistant manager earning Kshs. 22,000.00 per month.

The claimant further testified as follows:

- a) He was put on forced leave from 25.05.2013 to 13.06.2013.
- b) On 13.06.2013 he reported at work after the forced leave had lapsed.
- c) On 22.05.2013 he was given a transfer memo deploying him from Meru to Nakuru as assistant branch manager. The memo stated that the claimant ceased to be staff at Meru effective 24.05.2013 at 5.30pm. He was to report at Nakuru on 27.05.2013 at 8.30am for allocation of duties. The memo advised the claimant to liaise with the accountant on the travel arrangements.

d) Before the claimant could report as deployed, his manager at Meru one Laban reported to the respondent's head office that the claimant was misbehaving towards the said Laban who was the claimant's supervisor. The respondent's managing director then summoned the claimant to Nairobi and informed him on cell phone that the complaints by Laban were that the claimant disobeyed Laban and that the claimant absented himself from duty. The claimant denied the allegations on phone; the claimant further told the managing director that he had not been in good terms with Laban as other staff had complaints against Laban - the reason for his transfer to Nakuru so he was separated from Laban. The telephone conversation had been before the internal memo conveying the transfer. he did not have a good relationship with Laban because when he reported at Meru Laban failed to welcome him and Laban failed to acknowledge his good work.

e) The claimant did not proceed to Nakuru because he received on 25.05.2013 another letter dated 24.05.2013 requiring him to report to head office on 14.06.2013. That letter was in fact a leave application form. It was for leave for 15 days from 27.05.2013 to 13.06.2013 produced as exhibit 7. The claimant had signed the leave application form and the same had been approved.

f) By letter of 13.06.2013 the employment was terminated on account of clause V(a) which provided that upon completion of the probation service, the employment could be terminated by either party giving to the other one month notice in writing or one month pay in lieu of notice. The letter further stated that the claimant had breached clauses (iv) a, d, f, g, h, and k of the appointment letter so that the respondent was unable to get a suitable place for the claimant to work. The cited clauses related to summary dismissal on account of failure of the claimant to diligently apply himself to his employment; absence from duty without lawful cause or permission; willfully neglecting to perform any work which was the claimant's duty to perform or carelessly or improperly performing his duties; use of abusive or insulting language or insulting a person in authority over the claimant; disobeying lawful orders by the respondent or supervisor; and conduct bringing the respondent into disrepute.

The respondent's case was that the claimant was lawfully and procedurally terminated from employment under the provisions of the letter of appointment. The respondent's witness (RW1) was Laban Muchena, the respondent's Meru branch manager and claimant's supervisor. He testified that on 17.05.2013 the claimant failed to deliver TV set for dispatch to Eldoret office because he failed to come back to the office that evening as he was appointed to do. On 20.05.2013 RW1 testified that the claimant left office without permission and never came back the whole day until at 5.55pm .On 22.05.2013 RW1 wrote a memo about the claimant's misconducts of being absent without permission and lateness. He was then terminated with pay in lieu of termination notice. RW1 testified that he was not aware of the show-cause letter or the disciplinary hearing. RW2, Richard Koome Imbaya confirmed the events of 17.05.2015 and 20.05.2017 as narrated by RW1.

The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The claimant in his advocate's opening remarks surrendered the prayer for gratuity. The court finds that as the claimant was not severed or declared redundant as it were, he is not entitled to severance pay which is available in section 40 of the Employment Act, 2007 in cases of redundancy. It is not disputed that the claimant was paid 13 days he was on leave in the month of June 2013 and the termination was on 13.06.2013. The court finds that he is not entitled to pay for the remaining days in June 2013 as submitted for the claimant as there is no justification for such pay.

Was the termination unlawful and unprocedural? The evidence by RW1 was that the show-cause letter or termination notice was not given and, there was no known disciplinary hearing. The court finds that the termination was not procedural for want of a notice and a hearing under section 41 of the Employment Act, 2007. If the respondent considered that the claimant had engaged in misconduct, there was no reason to invoke a soft landing known as termination under contract by paying one month in lieu of termination notice while at the same time leveling misconducts against the claimant. The termination was unfair.

Is the claimant entitled to 12 months compensation? The court finds that the claimant in a substantial way contributed to his termination in view of the reported absence from the work place without permission. There is no reason to doubt evidence by RW1 and RW2 in that respect. Thus in view of that contribution

the claimant will be awarded only 3 months for the unfair termination making Kshs. 66, 000.00 at Kshs. 22, 000.00 per month.

In conclusion judgment is entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent was unfair as it was unlawful and unprocedural.
- b) The respondent to pay the claimant Kshs. 66, 000.00 by 01.02.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c) The respondent to pay the claimant's 50% of the costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 11th December, 2015.

BYRAM ONGAYA

JUDGE