



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 360 OF 2010

DAVIES MUSAU NDAMBUKI CLAIMANT

VERSUS

TOYOTA EAST AFRICA LIMITEDRESPONDENT

Mr. Kibera for Claimant

M/S Munyaka for Respondent

JUDGMENT

1. The matter commenced by way of a memorandum of claim dated 7th April 2010 and filed on the same date.

The Claimant filed a written statement of claim on 17th July 2013 and final submissions on 29th September 2013.

2. A memorandum of reply dated 12th May 2010 was filed on the same date and Respondent's written submissions were filed on 7th October 2013.

3. The matter was initially heard by **Hon. Mukunya J.** but he recused himself from the matter before he had delivered judgment.

4. The parties subsequently agreed to rely on the pleadings and written submissions and the matter was referred to judgment by consent of the parties.

5. **The Claim**

The Claimant seeks payment of terminal benefits to wit;

- i. service gratuity;
- ii. leave pay; and
- iii. notice pay to be determined by the Court and;

2. compensation for unlawful and unfair termination;
3. provision of certificate of service;
4. costs of the suit and interest at Court rates on the award.

6. **Particulars of Employment**

The Claimant was employed by the Respondent on 10th March 2004, in the position of a service manager on Grade J5B. He was given a written contract of Employment. His employment was confirmed on 1st July 2004 upon completing probation.

The employment was subject to Performance Management System process and assessment and this was done as per annex 'DMN3' to the statement of claim.

7. On 27th October 1999 the Respondent terminated the Claimant's employment on grounds of "poor management of staff." The termination letter was produced as annex 'DMN4.'

The Claimant states that the termination was unlawful and unfair as it was carried out without following Respondent's laid down procedures on termination as stipulated in the Employee Hand book and was also actuated by malice. The employee handbook was produced as annex 'DMN5.'

8. The Claimant submitted the following;
 - i. that he had served the Respondent with dedication for five (5) years;
 - ii. that the Claimant received glowing performance management system reviews which showed continuous improvement and in the last appraisal preceding the termination he was awarded an 'A' for his services, the highest possible positive review;
 - iii. that the Claimant was not afforded an opportunity to be heard and defend himself prior to the termination and the procedures in the handbook were flagrantly violated;
 - iv. that no notice to show cause was ever issued to him, warning letter nor any charges. The Respondent therefore violated the rules of natural justice;
 - v. the Claimant prays the Court to uphold his claim.

9. **Response**

The Respondent relies on the affidavit of **Anne Kirumba**, the Human Resource Manager, sworn on 12th May 2010 attached to the memorandum of reply to the following effect:

- i. She admits that the employee handbook, was incorporated to the contract of service of the Claimant;
- ii. That the Human Resource Office on 27th January 2005, received complaints relating to the Claimant's performance and conduct at the Mombasa Branch. The letter from one **Ali Swaleh** makes generalized complaints on the performance of the Claimant;
- iii. That these complaints continued and the Claimant was transferred from Mombasa on 23rd February 2006;
- iv. That the performance of the Claimant was average as per appraisal letter marked "AK3 – 5."

10. The Court observed that in terms of "AK3" dated 2nd September 2005, all the employees

were rated **“average performer (B)”** due to lack of the performance approval system that was yet to be put in place.

From “AK4” dated 20th July 2006, it is clear again the Respondent was unable to objectively evaluate all staff due to lack of the performance management system. It states:

“we also recognize that the review process was not carried out and applied for all staff as per schedule as required by the PMS system.”

The company performance bonus for the year 2005, was assessed at 70%.

The Respondent thanked the Claimant for his contribution **“towards the good result achieved in the last financial year and towards the overall success of our company.”**

11. A perusal of ‘AK5’ dated 24th July 2008 shows that the PMS assessment was finally done for the financial year 2007 / 2008.

The Claimant achieved a PMS score ‘B’ which is a good score in the Claimant’s view.

On 9th October 2009 an emergency meeting on the shop floor was called following complaints by staff serving under the Claimant.

From the minutes of the meeting marked ‘AK10’ it appears that the staff accused the Claimant of ‘intimidating management style’ which led to employees working under fear.

The employees requested action to be taken against the Claimant.

12. A following meeting of management in the presence of the Claimant was held on 12th October 2009 wherein it was resolved to apologise to the affected staff. **Mr. Bannon** was to do so. A further meeting was to be held when the Claimant returned from leave when he would be appraised of the developments.

13. On 27th October, 2009, the Claimant’s employment was terminated as follow;

“We refer to the meeting held on 12th October 2005 between yourself, the managing Director and the Human Resource Manager regarding your poor management of staff.

According, we are hereby terminating your employment with us with effect from 31st October 2009 as your poor management of staff is contrary to the company values of respect of people.”

14. **Evaluation of Evidence**

A close evaluation of the minutes of the meeting held on 12th October, 2009 indicates that the Claimant was presented with the complaints made against him by his entire team at a meeting held on 9th October 2009.

He was given opportunity to explain his conduct towards his subordinates and the Respondent being dissatisfied with his conduct, found it fit to terminate his services.

15. It is the Court’s considered view that the Respondent has discharged its onus under *Section 37(5)* of the *Employment Act* to show that the termination of the services of the Claimant in the circumstances of the case was justified and that the reason for the termination was valid in that the

improper treatment of his subordinates amounted to improper performance of his work in terms of *Section 44(4)(c)* of the *Employment Act*, which entitled the Respondent to terminate his services. The Respondent did not violate its own regulations in the handbook as alleged or at all.

16. The Claim for unlawful and unfair termination is dismissed accordingly.

According to the letter of termination, the Claimant was to be paid:

- i. 1 month salary in lieu of notice;
- ii. 14 days salary in lieu of untaken leave; and
- iii. pension refund in accordance with the Rules of the Scheme and the same have been duly paid.

The Claimant is not entitled to payment of service gratuity since he was under the Respondent's pension fund and was duly registered with the National Social Security Fund (NSSF) to which the Respondent contributed.

The Respondent has already provided the Claimant with a certificate of service dated 3rd November 2009, annexed to the Reply and marked "AK12."

That prayer is therefore spent.

Each party to bear their own costs.

Dated and Delivered at Nairobi this 25th day of April 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE