



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 853 OF 2012

JESSY OLUKUTUKEI.....CLAIMANT

VS

FEED THE CHILDREN KENYA.....1ST RESPONDENT

SEINTJE VELDHUIS.....2ND RESPONDENT

AWARD

Introduction

1. Jessy Olukutukei, the Claimant herein worked for the 1st Respondent, Feed the Children Kenya, in the position of Operations Manager. Following termination of his employment on 17th February 2012, he brought a claim against the 1st Respondent and its Regional Director as 2nd Respondent. The 1st and 2nd Respondents filed a Reply to the Claimant's claim on 3rd July 2012.
2. The matter was heard on 29th January and 14th February 2014 with Ms. Kamara appearing for the Claimant and Mrs. Wetende for the Respondents. The Claimant testified on his own behalf and the 1st Respondent's Human Resource Manager, Pamela Awori Lwanga testified for the Respondents.

The Claimant's Case

3. The Claimant was employed by the 1st Respondent on 1st July 2007 in the position of Operations Manager and worked as such until 17th February 2012 when his employment was terminated on grounds of insubordination arising from an altercation between the Claimant and the 1st Respondent's Deputy Country Director and Programmes Manager, Nazareno Ngare.
4. Nazareno Ngare accused the Operations Department which was headed by the Claimant of lack of professionalism and sabotage in handling matters relating to the Programmes Department. The Claimant stated that he had reported certain issues raised by the 1st Respondent's external security services providers regarding the 1st Respondent's warehouse to Nazareno Ngare who wrote back to the Claimant asking him to keep off the affairs of the warehouse.

5. The Claimant had also on several occasions reported to the 2nd Respondent incidences of dishonesty and conflict of interest within the Programmes Department. The Claimant further complained of being denied direct supervision of projects initiated by the Programmes Department.

6. The Claimant's claim is as follows:

- a. 1 month's salary in lieu of notice.....Kshs. 275,000
- b. Unexpired contract term.....Kshs 2,250,000
- c. 12 months' salary for unfair termination.....Kshs 3,300,000
- d. Service gratuity at 15 days' pay per year.....Kshs 550,000
- e. Certificate of service
- f. Costs
- g. Any other relief the Court may deem just to grant

The Respondents' Case

7. In their Reply to the amended claim filed on 3rd July 2012, the Respondents admitted that the Claimant was employed as the 1st Respondent's Operations Manager effective 1st July 2007. His contract of employment which was renewed on 1st October 2011, was due to terminate on 30th September 2012.

8. On or about January 2012, the Claimant and the 1st Respondent's Deputy Country Director, Nazareno Ngare began to exchange e-mail correspondence which was unprofessional, hostile and disrespectful. The e-mail correspondence was copied to various other members of staff, including junior staff members.

9. It was the Respondents' case that the Claimant's summary dismissal was warranted on grounds of misconduct and breach of the 1st Respondent's Code of Conduct. Prior to the termination, the 1st Respondent had made efforts to get the two members of staff to resolve their differences amicably to no avail and the situation degenerated to a major altercation in the presence of a senior representative of the 1st Respondent at a meeting held on 6th February 2012.

10. The 1st Respondent subsequently commenced disciplinary proceedings against the Claimant and Nazareno Ngare which culminated with a decision to summarily dismiss both members of staff on grounds of misconduct and breach of the 1st Respondent's Code of Conduct.

11. The Respondents pleaded that prior to his dismissal, the Claimant met with the Regional Director and the Human Resource Manager to show cause why he should not be summarily dismissed but the Claimant was defensive and disrespectful. Upon receiving his dismissal letter, the Claimant sent an appeal to the Respondents admitting his mistakes. The Claimant's appeal was declined by e-mail dated 20th March 2012.

Findings and Determination

12. The twin issues for determination in this case are:

- a. Whether the 1st Respondent had a valid reason to terminate the Claimant's employment
- b. Whether in effecting the termination the 1st Respondent adopted the procedure set out in the law and its own internal regulations.

13. Section 43 of the Employment Act, 2007 provides that:

(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.

14. Section 45 (2) of the Act goes on to provide that:

(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 employees conduct, capacity or Compatibility ; or

(ii) Based on the operational requirements of the employer and that;

(c) That the employment was terminated in accordance with fair procedure.

15. The Claimant's dismissal letter dated 17th February 2012 states *inter alia*:

“This letter is to inform you that your employment contract executed 1st October 2011 has been terminated, effective immediately, according to the provisions of FTC (K) Employment contract Article 7 wherein the employer reserves right to summarily terminate employment at any time without notice.....

With regards to these terms of employment you have breached the conditions that govern our agreement, according to Feed The Children Code of Conduct and contract terms of service drawn from the Employment Act of 2007, by persistent failure to observe our set code of conduct by persistently engaging in disrespectful disagreements with peers, careless communication by email causing irreparable damage to relationships and use of abusive/insulting language besides efforts to help resolve the differences which do not foster our shared vision and passion as an organization.

Yours sincerely,

Seintje Veldhuis

Regional Director

Feed The Children-Kenya”

16. From the evidence on record, it would appear that the prime mover of the termination of the Claimant's employment was e -mail correspondence between the Claimant and Nazareno Ngare, the 1st Respondent's Deputy Country Director and Head of Programmes.

17. This communication was triggered by an e-mail sent by the Claimant's Assistant, Hesbon Kadima dated 27th December 2011 to the 2nd Respondent, Nazareno Ngare, the Claimant, Moses Thuo and HR. The e-mail which was copied to several other members of staff, reported rain water overflow at the 1st Respondent's leased office premises at Gigiri, Nairobi.

18. Following this report, the 2nd Respondent wrote to Nazareno Ngare and the Claimant on 3rd

January 2012 notifying them that occupation of the main house had been put on hold pending major repairs by the landlord. The Claimant then wrote to the 2nd Respondent suggesting a way forward. On 4th January 2012, Nazareno Ngare wrote to the 2nd Respondent with copies to the Claimant, Francis Muthuka and HR complaining of lack of professionalism and sabotage on the part of Operations Department. In the Claimant's response of the same day, he accused Nazareno Ngare of '*doing things secretly*'. The Claimant also stated that '*Operations is not a punching bag*'.

19. The 1st Respondent, apparently in response to the e-mail correspondence between the Claimant and Nazareno Ngare convened a management meeting on 13th January 2012 at which managers were cautioned against exchange of unpleasant words via e-mail. Subsequent to this meeting, the Claimant sent an e-mail dated 3rd February 2012 which was in response to Ngare's e-mail of the same day asking the Claimant to keep away from issues of the warehouse. In this e-mail, the Claimant stated that Operations would indeed keep away from issues surrounding the warehouse.

20. The second lot of e-mails appears to have prompted the 1st Respondent's management to convene another meeting on 6th February 2012 at which Ramby Campbell from the 1st Respondent's Head Office in Oklahoma, USA was in attendance. From the record, it appears that the meeting was stormy and at one point, the Claimant was asked to leave.

21. Another meeting was held on 17th February 2012 between the Claimant on the one hand and the 2nd Respondent and the 1st Respondent's Human Resource Manager on the other hand. From the record of this meeting, the 2nd Respondent notified the Claimant that arising from the e-mail communication between the Claimant and Nazareno Ngare, a decision to terminate the Claimant's employment had been made.

22. The Claimant was then asked to go and work out an exit package for consideration by the 1st Respondent. In response, the Claimant wrote to Steve, Ramby and Seintje on 17th February 2012 apologising for what he referred to as '*such language or deeds, known and unknown*' and giving three options on the future of his employment with the 1st Respondent. On the same day, the Claimant was summarily dismissed.

23. A cumulative reading of the e-mail correspondence between the Claimant and Nazareno Ngare which eventually led to the termination of the Claimant's employment reveals a disharmonious working relationship between the Programmes and Operations Departments of the 1st Respondent. It seems to me that the differences exhibited in the e-mail communication between the two officers were a source of major concern within the leadership and management of the 1st Respondent.

24. Further, it would appear that by the time the Claimant wrote his letter dated 17th February 2012, he had come to the realisation that the employment relationship as between himself and the 1st Respondent had deteriorated to an extent where separation was a real option.

25. The burden on the employer imposed by Section 43 of the Employment Act, 2007 is to establish a valid reason that would move a reasonable employer to terminate the employment of an employee. From my analysis of the evidence placed before the Court, I have arrived at the conclusion that at the time the Claimant's employment was terminated, the 1st Respondent had a valid reason for the termination.

26. With regard to the second issue before the Court being the procedure adopted by the 1st Respondent in effecting the termination, the minimum procedural requirements as set out in Section 41 of the Employment Act, 2007 were summarized by **Radido J** in the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR**, as follows:

- a) That the employer has explained to the employee in a language the employee

understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

27. From the evidence presented before the Court, it emerges that some managers of the 1st Respondent held discussions with the Claimant regarding the issues leading to the termination of his employment. There was however no evidence that the Claimant was taken through the minimum requirements of procedural fairness set out in Section 41 and the Respondents' witness, Pamela Awori Lwanga admitted in cross examination that the 1st Respondent's internal disciplinary rules were not adhered to in dealing with the Claimant's case.

28. In the case of *Nazareno Kariuki Vs Feed the Children Kenya [2013]eKLR* this Court ruled that:

“Since disciplinary processes have severe consequences an employer is required to notify an employee that what they are facing is a disciplinary process and not just fellowship or a cup of tea.”

29. In the instant case, the Court found no evidence of any form of compliance with Section 41 of the Employment Act or the 1st Respondent's internal disciplinary rules. For this reason, I find the termination of the Claimant's employment unfair for want of procedural fairness and award him six months' salary in compensation. I also award him one month's salary in lieu of notice. In making this award, the Court has taken into account that all the e-mails emanating from the Claimant were in response to highly disrespectful communication from Nazareno Ngare who held a more senior position than the Claimant. The Court further considered an apparent renegeing by the Respondents on an amicable exit plan discussed at the meeting of 17th February 2012 without any expressed reason.

30. The claim for payment for the unexpired term of the contract seeks an order within the province of specific performance which by law is to be granted in very exceptional circumstances which have not been made out in this case. This claim therefore fails and is dismissed. The claim for service gratuity was not proved and is also dismissed.

31. Ultimately I make an award in favour of the Claimant in the following terms:

a) 6 months' salary in compensation for unfair termination.....Kshs. 1, 650,000

b) One month's salary in lieu of notice.....Kshs
275,000

Total.....Kshs

1,925,000

32. This award is made against the 1st Respondent as no specific claim was proved against the 2nd Respondent and the Court was unable to understand why she was joined in these proceedings in the first place. Consequently, the Claimant's claim as against the 2nd Respondent is dismissed.

33. The award amount which is subject to statutory deductions in accordance with Section 49(2)

of the Employment Act, 2007, will attract interest at court rates from the date hereof until payment in full.

34. The Claimant is also entitled to an original certificate of service.

35. Each party will bear their own costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF
MAY 2014**

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*