



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 3 OF 2012
THOMAS MBUGUA.....CLAIMANT
VERSUS
UNILEVER KENYA LIMITED.....RESPONDENT

M/S Ndegwa for Claimant

M/S Opiyo for Respondent

JUDGMENT

1. This suit was filed by way of a memorandum of claim on 4th January 2012.

The Respondent filed a memorandum of defence on 20th January 2012 and an amended defence was filed on 19th September 2012. Claimant filed final submissions on 24th September 2012 and the Respondent filed its submissions on 9th October 2013.

2. Claimant's case

The Claimant was employed on 1st November 2005 as a TPM Facilitator. He worked continuously for over five (5) years until the 30th June 2011 when he was summoned by his Line Manager, **John Kimani** and threatened with termination for poor work performance.

3. On 9th September, 2011, Mr. John Kimani, gave him a notice to show why his employment ought not to be terminated for neglect of responsibility.

4. The Claimant responded to the Notice on the same day and initiated a formal complaint against the Respondent's actions especially because he had on 6th September 2011 received a commendation letter for the good management of VERTICE project which was under his management. The threat came barely two weeks later.

5. The following day, on 29th September 2011, the Claimant was issued a letter signed by the said John Kimani terminating his services with immediate effect.

6. The Claimant lodged an appeal in terms of the grievance procedure. He remained at the work place until the 21st October 2011, awaiting the outcome of the appeal but was unceremoniously locked out of

the Respondent's premises the following day upon asking to be paid his salary. He was not paid his dues until November 2011 following demands by his advocates when he received some payment and a certificate of service through the Advocate's office.

7. The Claimant seeks;

- a. a declaration order that the termination was unlawful;
- b. payment of unpaid salary for October 2011 in the sum of Kshs.174,570/=;
- c. payment of fuel allowance for the month of October 2011 in the sum of Kshs.31,429/=;
- d. payment of two (2) months salary in lieu of notice in the sum of Kshs.349,140/=;
- e. 12 months compensation for unlawful termination;
- f. general damages for the mental and emotional anguish, suffered harassment at the workplace and malicious and unfair treatment in the sum of Kshs.100,000/= and;
- g. damages in the unexpected loss of employment, loss of pecuniary expectation and stature in the sum of Ksh.2,000,000/=;
- h. costs and interest.

8. The Claimant earned a gross salary of Kshs.174,570/= at the time of termination.

9. The Claimant testified under oath in support of his case as articulated in the memorandum of claim outlining the failure by the Respondent to follow its own performance appraisal procedures and disciplinary procedures in wrongfully and unfairly terminating his employment.

10. The Claimant added that a new Supply Chain Director Mr. David Olang had wrongfully and without any evaluation taken a biased view that his performance was below per and made an arbitrary decision to terminate his employment.

11. That when he raised a grievance to the highest level with a view to protect his employment, this was viewed in bad light and sealed his fate and further punishment by denying him his rightful dues, even though the same were uncontested until a demand letter was made by his advocates months later.

12. That on 30th June 2011, when Mr. John Kimani called him to his office, he told him that his employment was to be terminated with immediate effect, but had an option to resign which offer he declined.

13. At the time he had no single warning on his performance or for misconduct. The Claimant learnt that the new Director, **David Olang** had given the directive for termination and Mr. Kimani told him if he had any issues he should take them up with him.

The claimant requested for a meeting with Mr. Olang but it was not allowed until the termination.

14. The Claimant referred extensively to the policy manual on the procedure to be followed in performance appraisal and/or in case of non-performance. This provided for steps to be taken to improve the performance which was not done in his case per Clause 9.7. This performance improvement policy was a three (3) step twelve (12) months process to be completed in three (3) years.

15. The new Director was oblivious of this process and did not care less when he insisted on the termination on the basis of information apparently gathered from his predecessor. On 6th September 2011, the same director upgraded the Claimant to grade D2. The Claimant said the upgrading was in

recognition of good performance and it came as a great relief to him only to be surprised by the sudden termination of employment two weeks later hence the protest letter of 19th September 2011.

16. The Respondent had completely disrespected the service the Claimant had rendered for over five years and the manner of handling him was degrading and an affront to his human dignity.

He attended a meeting on 28th September 2013 chaired by **Mr. Mark Suge**, the new Human Resource Director.

It was a question and answer session where the Claimant, in his view answered very well all the misgivings on his performance. He received a termination letter the following day on 29th September 2011.

He however remained at work till 21st October 2011, pending the outcome of his appeal which did not materialize.

17. The Claimant remained unemployed for a while since he had not received a certificate of service. He even produced a letter dated 19th February 2013 where he was denied employment based on allegations of poor work performance while working in the Respondent. The Respondent according to him continued to hinder him from getting new means of livelihood.

18. The Claimant withstood very close cross-examination by counsel for the Respondent regarding his work performance at work.

The Claimant also answered numerous questions candidly on the procedure followed leading to his termination. He insisted the same was in violation of the law and the Respondents Human Resource Manual.

Claimant denied categorically that his performance was poor adding that there was no prior objective evaluation of the same, and the termination was based on subjective notions of Mr. David Olang who had just joined the organization.

20. **Respondent's case**

The Respondent called Mr. Mark Sunge, to testify in support of the Respondent's case. He was the Human Resource Business Partner for Supply Chain Organization in East and Southern Africa.

The Claimant's Line Manager Mr. John Kimani and the Supply Chain Director, Mr. David Olang who made the decision to terminate the employment of the Claimant did not testify in this matter nor did they file in any witness statement or an affidavit on the matter.

21. Mark Suge told the Court that the performance of the Claimant was poor per documentation on page 69 – 70 of the Respondent's documents. He alleged that the Claimant had consistently not achieved his targets hence his performance record were marked red.

With regard to the VERTICE Project he said the Claimant recorded constant failure since he did not report on time or at all hence many emails were written from Dubai and North Africa office, where the Claimant was representing the Respondent that the project was lagging behind.

21. He referred the Court to **pages 7, 9, 10, 14, 17, 45, 49 and 55**, showing complaints from Mr. Hamed who was over all head of Procurement on Claimant's failure.

He stated that the Claimant's performance indicators were in his work-plan and he did not measure up in most respects. They were eight (8) indicators.

22. Mr. Suge down-played the new grading of the Claimant stating that it was not based on his performance but was done to all staff.

Mr. Suge gave example of the failure by the Claimant to train one **Jane**. One **Samuel Muita** did the training.

He denied that the Claimant was unfairly targeted in the appraisal programme as this applied to all staff.

23. He denied that the Claimant was verbally terminated on 30th June 2011, stating that a verbal warning was issued to him on that day but the formal termination took place on 22nd September 2011. He added that the Claimant was given a hearing on the notice to show cause prior to the termination. The hearing was done by himself, and Mr. Kimani. That at the hearing the Claimant had clarified his responses to the notice to show cause and they had taken that into account before reaching a decision to terminate the Claimant's employment.

An attempt to file supplementary documents by the Respondent was refused because this was after the Claimant had closed its case and had no opportunity to address its contents. In Court's view allowing the admission of the documents at that late hour would have prejudiced the Claimant's case in a manner not remediable by way of costs.

24. **Evaluation**

The Respondent did not produce any record of performance appraisal by itself on the Claimant. It instead relies on routine email correspondence between members of staff as evidence of poor work performance.

The Respondent did not also produce any performance enhancement programme by itself on the Claimant. There was also no evidence of any notice of intended disciplinary action against the Claimant based on his poor work performance up until he received a notice to show cause.

25. The Court does not accept the Respondent's assertion that the upgrade of the Claimant was mere routine and was not based on his good performance.

26. The compelling evidence by the Claimant that the new Supply Chain Director had made an arbitrary decision to get rid of the Claimant was not adequately responded to because as indicated earlier, David did not offer any evidence on this matter. Mr. Kimani who implemented this decision was also not available to respond to this evidence by the Claimant.

The Claimant had been asked to resign or his employment be terminated well before the issuance of a notice to show cause and the alleged hearing.

27. The Court accepts the evidence by the Claimant that these subsequent actions were just meant to camouflage an already forgone conclusion.

This conduct by the Respondent was contrary to the provisions of its own Human Resource Manual extensively referred to in this hearing touching on procedures for performance appraise; performance enhancement and disciplinary process.

28. This conduct by the Respondent violated the provisions of **Section 41** of the **Employment Act**, in that, no opportunity to present an explanation as to why the Claimant should not lose his employment was given to him prior to the decision by David, to terminate his services. Quite to the contrary, the performance of the Claimant in the whole was good from the totality of the evidence presented before Court.

29. **Section 45(1)** of the **Employment Act**, prevents any employer from terminating the employment of an employee unfairly.

This provision has moderated the law of termination of employment contract purely based on the provisions of the contract itself on termination and requisite notice.

30. Indeed, **Section 43(1)** provides:

“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.”

31. In this case, the Court is not satisfied that the Respondent has discharged the onus placed on it in terms of **Section 43(1)** as read with **Section 47(5)** which place the burden of justifying the grounds for termination of employment or wrongful dismissal on the employer.

This however is an evidential burden that kicks in once an employee has made out a *prima facie* case that unfair termination of employment or wrongful dismissal has taken place.

32. In the matter at hand the Claimant discharged his onus in this regard from the totality of evidence presented to the Court.

The failure by the Respondent to pay terminal benefits and provide a certificate of service and the further evidence indicating that the Respondent has continued to prevent the Claimant from getting new employment by giving negative references which are not based on objective evaluation of his performance, demonstrate, as is claimed in this matter a vindictive attitude by the Respondent against the Claimant.

33. **Section 45(1)** provides that:

“No employer shall terminate the employment of an employee unfairly.”

Whereas **Section 45(2)** provides that a termination must be for a valid reason and the same should in terms of **Section 45(2)(c)** be effected in accordance with a fair procedure.

Where an employer fails to comply with its own set procedures, as in this case, in an Human Resource Manual, the termination becomes unfair *abinitio* for failure to adhere to a procedure agreed upon by the parties since the manual comprise documentation incorporated in the employment contract itself. See the case of **Boniface M. Kabara Vs. M.O. Mugasia & Another [2006] eKL per Osiemo J.**

The Claimant has established on a balance of probability that this was the case here and the Court finds that the termination was not only for a reason that was not valid, but the same was executed following an unfair procedure.

34. **Remedy**

The **Supreme Court of Canada** in **Wallace Vs. United Grain Growers Limited [1997] 3 R.C.S.** made an exhaustive analysis of how and when damages should be paid in a cases of wrongful dismissal / unfair termination.

I. Ocobucci J. delivering a majority decision stated thus;

“for most people work is one of the defining features of their lives. Accordingly any change in a person’s employment status is bound to have far-reaching repercussions

“when this change is involuntary, the extent of ‘personal dislocation’ is even greater.”

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need the law

ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.”

35. The Court enunciated the principle of good faith stating that in the course of dismissal an employer ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive. **See page 743 paragraph 98 of the judgment.**

36. In the present matter, the Respondent only paid Kshs.204,462/= thousand on 14th November 2007, which in its view constituted full and final terminal benefits to the Claimant. This followed a letter of demand from the Advocates for the Claimant.

This amount did not include a salary for the month of October 2011, which the Claimant in the Court's view has established he was at work and was asked by the Respondent to prepare various Reports and perform various other duties. The Claimant was hurriedly locked out of the premises when he asked to be paid for the work done.

37. Accordingly the Court finds that the Claimant is entitled and should be paid Kshs.174,570/= being the salary for the month of October, 2011. Since the Claimant was entitled in terms of the letter of appointment dated 31st October, 2005 to fuel allowance while at work, the Respondent should also pay a sum of Kshs.31,429/=, being the fuel allowance for the month of October 2011.

38. Furthermore, in terms of the Agreement of service attached though not signed by the Respondent, termination notice as per **Clause 10** was three (3) months by either Party or payment in lieu thereof. This service Agreement is referred to in the letter of appointment dated 31st October 2005 where it is indicated that upon confirmation of appointment **“you will be required to enter into a formal contract with the company by signing a Service Agreement.”**

39. The Court has no doubt this Agreement was entered into upon confirmation and the Claimant continued to work until the date of termination. However, the Claimant seeks payment of two months' salary in lieu of notice ostensibly because he had been paid one month salary in lieu of notice.

40. The Court has no hesitation in awarding the Claimant two months salary in lieu of notice in the sum of Kshs.349,140/=.

As stated earlier in this judgment, the Respondent treated the Claimant in a deceitful manner and was not honest to him as to its intentions from the time his employment was verbally terminated by the Supply Chain Director up to the time he was literally locked out of the premises upon requesting payment for work done.

41. He was kept in limbo thereby elongating his psychological trauma at the hands of an employer he had diligently served for about six (6) years.

Matters were not helped by the denial of terminal benefits, including salary for days worked until he went to his Advocates months later.

His attempt to seek new employment was thwarted by bad reference from the Respondent hence compounding his suffering and damage.

42. This is in the Court's view an appropriate case for the Court to award maximum compensation of 12 months gross salary in terms of **Section 49(1)(c)** of the **Employment Act**.

This compensation is sufficient to cater for the General damages sought by the Claimant under prayer (f) and (g) of the memorandum of claim in the Court's view.

43. However, **Section 49(1)(c)** obliges the Court to calculate the compensation based on the gross pay and

not the basic pay. From the contract of the Claimant he was entitled to a fuel allowance of Kshs.300,000/= per annum. which the Claimant has calculated to be Kshs.31,429/= per month. This was a regular payment which therefore became part of the monthly gross pay.

Accordingly the compensation is as follows:

$$(Kshs.174,470 + 31,429 \times 12) = 2,471,988/=).$$

44. In the final analysis the Claimant is awarded as follows;

- a. Kshs.174,570/= being salary for October 2011;
- b. Kshs.31,429/= being fuel allowance for October, 2011;
- c. Kshs.349,140/= being two months basic pay in lieu of notice; and
- d. Kshs.2,471,988/= being 12 months gross pay for the unlawful and unfair termination of employment.

Total award is Kshs.3,027,127/=.

The award is to be paid with interest at Court rates from the date of judgment until payment in full.

The Respondent is also to pay the cost of the suit.

Dated and Delivered at Nairobi this 9th day of May, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE