



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1146 OF 2012

JOB IDAKI.....CLAIMANT

VERSUS

EXPORT PROMOTION COUNCIL.....RESPONDENT

JUDGMENT

In a statement of Claim dated 3rd July 2012 and filed in Court on 5th July 2012 the Claimant JOB IDAKI alleges that his employment was terminated by the Respondent EXPORT PROMOTION COUNCIL on 27th October 2010 without notice or justifiable cause. He seeks the following orders:-

- a. Reinstatement to his previous position/job without any loss of all his benefits.
- b. Salary arrears for the entire period the Claimant has been out of employment.
- c. Damages for wrongful and/or unlawful termination.
- d. In the alternative, payment of all lawful terminal dues as set out herein together with leave due allowance, loss of earnings for the period he has been out of employment and service pay to the Claimant.
- e. Maximum 12 months compensation for wrongful termination.
- f. Costs of this suit with interest thereon.

The Respondent filed its Memorandum of Reply on 8th August 2012 and a supplementary Memorandum of Reply on 15th November 2012. The Respondent avers that the termination of the Claimant's employment was lawful and satisfied statutory conditions and further that the Claimant was paid his full terminal benefits. The Respondent prays that the claim be dismissed with costs. The case was heard on 18th November 2012, 24th January, 26th March, 22nd April and 24th June 2013. The parties thereafter filed written submissions.

The Claimant was represented by Ms. Ashobwe instructed by J. A Guserwa & Co. Advocates while the Respondent was represented by Ms. Letii Latiff instructed by Rachier & Amollo Advocates.

The Claimant testified on his behalf while the Respondent called 6 witnesses namely MARY CELESTINE ADHIAMBO, RW1, Manager, Library Services who was the secretary to the Managing Director at the time material to this case, ALBANUS MUTUA MUMO, RW2, the Manager, Finance ALOISIUS IRIGA NDERI, RW3, a director of the Respondent and NATANDA WABUYELE, RW4, the Managing Director and Chief Executive Officer of the Respondent at the time material to this case.

The Claimant's case is that he was employed by the Respondent as Manager, Human Resources and Administration on 1st July 2006 and worked until 27th October 2010 when his employment was terminated. His first salary was Shs. 139,407/- while his last salary was Shs. 189,387/-.

On 27th October 2010 he was asked by RW.4 to join him in a meeting of the staff Committee of the Board at the boardroom. At the meeting RW3 informed him that the full board had decided to terminate his services and the staff Committee of the Board was conveying to the Claimant that decision. The Claimant was then told to leave the meeting room and the premises. He had been informed earlier that there would be a meeting but he was not aware about the agenda of the meeting or that he would be discussed at the meeting. He received his termination letter two days later on 29th October 2010.

Prior to the termination of his employment he had a good working relationship with the Respondent and had successfully guided the Respondent to ISO 9001/2008 quality Management system certification and was recognized as best manager in December 2008. He represented the Respondent in various other capacities as head of procurement unit and at one time took minutes of the board and various Committee meetings. He acted as public relations Manager for several months when the substantive holder of the position left employment until the position was filled. He represented the Respondent in Khartoum international Trade Fair in 2009.

In the four years that he worked for the Respondent he did not receive either a verbal or written warning.

The Claimant testified that he was never informed of the reasons for termination of his employment at the time he was informed of the termination or in the letter of termination. He was never given a hearing.

On 27th May 2011 he was paid Shs. 508,590 being 3 months' salary and part of pending leave. He was not paid for all the 53 leave days that was pending at the time his employment was terminated. Both the notice and leave was paid based on basic salary.

The Claimant appealed against the termination of his employment but the appeal was dismissed.

The Claimant seeks orders as prayed in the statement of claim.

The Respondent's case is that the Claimants employment was terminated in accordance with the law and its procedure as set out in its Human Resource Manual. The Respondent's evidence is that the reasons for releasing the Claimant from employment was poor service delivery and inadequate job performance. That the Respondent undertook an audit of the department. The audit report made 3 alternative recommendations which were to attach the Claimant to a human resources department for three months, or give him more training or terminate his employment and recruit a competent person. The Respondent chose the 3rd option and terminated the Claimant's employment.

I have considered the evidence in the pleadings, the testimony of the witnesses called by both parties, the written submissions and the relevant law.

The issues for determination as set out in the Claimants submissions, which I adopt, are the following:-

- 1. Whether or not the Claimant was procedurally, justifiably, lawfully and /or wrongfully dismissed by the Respondent?**
- 2. What remedies are available to the Claimant?**

The Employment Act Section 45 provides for what constitutes fair termination of employment. The Section provides that termination of employment is unfair if the employer fails to prove that the reason for termination is valid and the employment was terminated in accordance with fair procedure.

In the present case, it is the evidence of both the Claimant and the Respondent that the Claimant was called into a meeting of the staff Committee of the Board and was informed of the Board's decision to terminate his employment. Both parties are also in agreement that the Claimant was never called to appear before the Board at the meeting in which the decision to terminate his employment was reached.

The Claimant's letter of termination does not give any reason for termination of his employment. It merely states that the Respondent had decided to terminate the Claimant's services following approval during the full Board meeting held on 27th October 2010.

Section 41 of the Employment Act provides for the procedure for disciplinary hearing. An employee has to be informed of the reasons for the termination in the presence of a fellow colleague or a union official. The employer must hear representations by the employee as well as the person who has accompanied him.

Section 43 provides for validity of reason. The employer has to prove the reason for termination failing which the termination is deemed to be unfair.

The procedure applied in the case of the Claimant was not in conformity with either the law or the Respondent's Human Resources Policy and Procedure Manual.

I therefore find that the termination of the Claimant's employment was unfair.

What remedies are available to the Claimant?

The Claimant prayed for re-instatement or in the alternative, terminal benefits.

Re-instatement in my opinion would not be available due to the acrimonious manner in which the Claimant's employment was terminated, and the reasons given by the Respondent which are based on performance. In any event the Industrial Court Act gives the relief of re-instatement only if it is done within 3 years from the date of termination of employment. The Claimant herein was terminated on 27th October 2010, which is more than 3 years ago.

On other remedies the Claimant prayed for the following:-

- a. **Salary arrears for entire period the Claimant has been out of employment.**
- b. **Damages for wrongful and/or unlawful termination.**
- c. **Compensation**
- d. **Costs and interest.**

- a. **Salary arrears for the period the Claimant has been out of employment.**

The law does not provide for payment of salary arrears for the period when the Claimant was out of employment. In both the cases of **D.K NJAGI MARETE V TEACHERS SERVICE COMMISSION [2013] eKLR** and **MENGINYA SALIM MURGANI V KENYA REVENUE AUTHORITY** the court held that future earnings are not payable to an employee as a consequence of termination of employment.

For this reason I dismiss this prayer.

- b. **Damages for wrongful termination.**

The Claimant did not submit any evidence on this head. The written submission of the Claimant also do not mention general damages.

I dismiss this prayer for want of proof.

- c. **Compensation**

The Employment Act Section 49(1) (c) provides for compensation of up to 12 months' salary for unfair termination. Having found that the Claimant was unfairly terminated he is entitled to compensation.

The Claimant, worked for the Respondent for just over 4 years. Taking into consideration the circumstances provided for under Section 49(4), the length of service and the manner in which the Claimant employment was terminated, I find that 6 months gross salary is reasonable compensation. I therefore award the Claimant's Shs. 1,136,332.

I also note from the evidence that the 3 months' salary paid to the Claimant was based on basic salary. According to Section 36 and 49(1) (a) and (b) of the Employment Act the same should be based on gross salary. I therefore direct the Respondent to recalculate the same and pay the difference to the Claimant.

The Respondent shall also pay the Claimant costs of the case and interest on decretal sum from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 28th Day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Job Idaki Claimant in person

Lamin holding brief for Gichamba for Respondent