



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 188 OF 2013

RICHARD OTIENO MBEWA.....CLAIMANT

VERSUS

MILLY GLASS WORKS LTDRESPONDENT

J U D G M E N T

INTRODUCTION

Claimant has sued the respondent to recover employment terminal dues plus compensation for unlawful dismissal from employment. The respondent has denied liability by contending that the dismissal was justified under the employment contract because it was on ground of unsatisfactory performance of work by the claimant.

The case was heard on 25/5/2014 when the claimant testified as CW1 and the respondent called Joseph Ndambuki as RW1.

CLAIMANT'S CASE

CW1 produced letter of employment to confirm that he was employed by the respondent from 27/1/2009 as an Electrical Technician. Under the contract, CW1 was entitled to 21 days leave and a salary of ksh.16500. The contract was terminable by either party by serving a one month notice or paying salary in lieu of notice. On 10/4/2013 he worked the whole day but at 5pm he was served with a letter terminating his employment with effect from 10/4/2013. The reason for dismissal was unsatisfactory performance, but no further details were given.

CW1 went to see his manager immediately thereafter but he however referred him to the Director. Director refused to see him.

According to CW1 the termination was unfair because it was without notice. He contended that although the letter offered to pay salary and leave days outstanding plus one month salary in lieu of notice the same was never paid even after he cleared with the company. He contended that during his 4 ½ years service he never went for annual leave. He maintained that whenever he applied for his annual leave the same was never approved. He however confirmed that he went for 2 paternity leaves of 14 days each in 2011 and 2012 respectively.

He prayed for salary for the days worked in April 2013, one month salary in lieu of notice, leave accruals for 4 years plus 12 months salary for unfair termination. He maintained that his work was good and that

is why he was promoted to be in charge of the other technicians.

On cross examination CW1 admitted that there were appraisals done during his service but denied ever being given any warning requiring him to improve his performance. He also admitted that his employment contract provided for dismissal for unsatisfactory performance. He contended that the procedure for leave was that the employee was required to make an application. He however maintained that all his annual leave applications were never granted. He also maintained that his termination was unfair because he was performing well.

DEFENCE CASE

RW1 is the HR Assistant for the respondent. He confirmed that there was appraisal done in 2012 for the period 2011/2012 and the HOD recommended that there was need for CW1 to improve technically. RW1 produced an appraisal report as an exhibit D.1 subject to the objection by the claimants. According to RW1, the HOD ought to have communicated to CW1 about his performance problem. RW1 explained that the claimant was given a termination letter indicating the reason as unsatisfactory performance. The letter provided for payment of final dues including 2.5 leave days. He produced leave application forms to show that CW1 went for all his annual leave except the 2.5 days earned from the 10 days worked in April 2013.

According to him the final dues payable to the claimant under the termination letter was ksh.22,417.25 less statutory deductions leaving a net of ksh.11,534.95. He contended that the claimant refused to receive a cheque drawn in his favour for the said ksh.11,534.95. RW1 was however unaware whether the claimant was given any fair hearing before termination.

On cross examination by the claimant's counsel, RW1 confirmed that he did not prepare the leave forms he had produced as exhibit 2(a)&(b). He also confirmed that leave is only approved by the HOD signing on the leave application forms.

Referring to the performance appraisal report (exhibit D.1) RW1 confirmed that CW1 scored 15.5 out of 20 of which he admitted that it was not poor performance. RW1 explained that before the termination, the claimant had been send to work at the Directors home and the following day, the Director asked for CW1's file, checked his record, and then dismissed the claimant.

After the close of the hearing, both parties filed written submissions.

ANALYSIS AND DETERMINATION

Upon perusing and considering the pleadings, evidence and submissions the following issues arose for determination:

- 1. Whether the termination of the claimant's employment by the respondent was unlawful and unfair.**
- 2. Whether the reliefs sought ought to issue.**

Unlawful/Unfair termination

The claimant believes that the termination was unfair because he was not given notice and hearing before termination. He also contends that he was not performing poorly. The respondent has cited the termination clause in the employment contract which allowed him to terminate the contract without citing any reason by notice of one month or salary in lieu of notice in addition to her right to dismiss the claimant summarily for unsatisfactory performance.

The court however wish to hold that the employment contract between the parties herein was subject to the Employment Act by dint of Section 3,7,and 8 of the said Act. Section 45 of the said Act bars an employer from terminating the employment of an employee unfairly.

Section 45(2) of the Act, bars an employer from terminating the employment of an employee except on ground of a valid and fair reason and upon use of fair procedure. The reason for dismissal in this case was unsatisfactory performance and the procedure followed is termination without prior notice with an offer to pay one month salary in lieu of notice. The background to the termination is vital to consider.

On the day preceding the termination, the claimant was sent to do work at the Directors home and the following day he was terminated for unsatisfactory performance. The dismissal letter does not refer to any time or period of the alleged poor performance.

RW1 produced an Appraisal Report for the year 2011/2012. The report was never shown to the claimant and it was not filed before the hearing date was fixed as required under rule 15 of the Industrial Court Rules (2010). No leave was sought to have the documents produced as an exhibit although the court allowed it subject to the objection raised by the claimant. The court has considered the objection and the evidential value of the document and found that it does not prejudice the claimant. The objection is dismissed.

In the opinion of this court, the reason for the dismissal was not the appraisal report for the period 2011/2012. If it were the termination letter could have stated so. Secondly, if it were the reason for the termination the respondent could have terminated him in 2012 but it only recommended for technical improvement.

In any case, if the RW1's evidence is anything to go by, the claimant's score of 15.5 out 20 points was not poor performance. The appraiser in the said report only marked the claimant either excellent or good on the various items considered in the appraisal. According to the report, the score for good performance was 15 points but he score 15.5 points. That shows that going by the said Appraisal Report, unsatisfactory performance was not a valid reason.

In addition if the unsatisfactory performance was for the period subsequent to the said appraisal report of 2011/2012, then that was also an invalid reason for termination because there was no appraisal done and the termination became unfair.

Even if the termination was to be founded on a fair and valid reason, which was not the case, the procedure followed to terminate the employment for poor performance was unfair. Section 41 of the Employment Act provides that before an employer terminates the services of an employee on ground of poor performance, he shall first accord a hearing to the employee who must be given the right of being accompanied by a fellow employee of his choice. Such hearing should in this court's view be preceded by performance appraisals based on agreed realistic and achievable targets. That was not the case herein and as such the procedure was unfair.

The claimant's evidence that he sought audience with the Director in vain was not contested by the defence. In consideration of all the matters above and the law, the court finds on a balance of probability that, the instant termination of the claimant's employment vide letter dated 10/4/2013 was unlawful and unfair. By stating the reason for termination as unsatisfactory performance meant that the terminal was not a normal termination under Section 36 of the Employment Act but one which was governed by Section 44 of the said Act and the procedure provided by Section 41, 43 and 45 of the Act.

Reliefs Sought

In view of the findings above, the termination of the claimant's employment by the respondent on 10/4/2013 is declared to be unlawful and unfair. The claimant prayed for severance pay for 4 ½ years, but that prayer is dismissed because the termination was not through redundancy. The prayer for leave outstanding is also dismissed save Ksh.1,586.55 for the 2.5 leave days according to the records produced by the respondent. The claimant did not dispute or even refer to the said forms although they were on record even before he testified. Consequently the court finds that CW1 went for all his annual leave according to the leave records produced as exhibit D.2(a) & (b). Likewise prayer for paternity leave is dismissed because the claimant admitted that he went for the same on two occasions.

The claimant will however get one month salary in lieu of notice being ksh.16500. He will also get 12 months salary being compensation for unfair dismissal being ksh.198,000.

DISPOSITION

Judgment is entered for the claimant declaring his termination to be unlawful and unfair and awarding him kshs.216,086.55. The claimant will also have costs and interests.

Orders accordingly.

Dated, Signed and delivered this 18th July 2014

O. N. Makau

Judge