



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 100 OF 2012

COLLINS OSORO LUKHALE CLAIMANT

VERSUS

AAA GROWERS LIMITEDRESPONDENT

JUDGEMENT

1. On 1st February 2012, the Claimant Collins Osoro Lukhale filed his claim against the Respondent, AAA Growers Limited. The claim is for unlawful or unfair termination and discrimination against the Claimant by the Respondent. On 8th May 2012, the Respondent replied to the claim admitting that the Claimant was their former employee but denied the allegations and claims in their entirety. The Claimant gave evidence in support of his claim while the Respondent called two witnesses, Mr Intiaz Sharif Nathaniel Noti Mnyika. At the close of the hearing, both parties filed their written submissions on 5th August 2014 and 26th August 2014 for the Claimant and Respondent respectively.

Claimant's case

2. The Claimant was employed by the Respondent an Accountant based at the head office along riverside drive in Nairobi and was issued with a letter of appointment dated 7th June 2010 and on the same date commenced work at a salary of Kshs.55, 000.00 per month which increased to Kshs. 60,000.00 in July 2011. The Claimant was also issued with a copy of Disciplinary procedures manual which outlined all the terms and conditions of work, disciplinary procedures and supervision.

3. On 26th August 2011 the Claimant was served with a Notice of termination of his employment issued on the same date. This notice was issued without any prior complaints or expressed dissatisfaction with his performance despite his diligence in the performance of work allocated to him. The Claimant sought for an explanation for the termination but no lawful reasons were given by the Respondent. The Claimant later learnt that his termination arose from his enrolment for evening classes at Moi University, School of Business and Economics as the Respondent wanted him to work for more hours after 5 pm for which there was no pay. The termination was therefore irregular, unfair and lacked reason to warrant drastic action of termination without warning or notice.

4. The Claimant also state that he was discriminated against by the Respondent on the base of race on grounds that he was offered a lower salary than that offered to an accountant in same position as a fellow account of Asian descent; allowing employees of Asian race to leave at 5pm while insisting that the Claimant and others of African origin work beyond the hours; using abusive language while addressing the Claimant but adopting a polite language in addressing workers of Asian descent; and on 26th august 2011 terminated the Claimant and replaced him with an Asian offering him a higher salary.

5. In evidence the Claimant testified that he commenced work with the Respondent on 7th June 2010 and was issued with a letter of appointment and the policy manual. On 26th August he was terminated without notice and on the reason that the Respondent had found out that he was not able to perform as required and was always behind schedule. This was not true as no such issues had been brought to his attention and his salary was increased to Kshs.60, 000.00. He was of good performance and diligently undertook all tasks allocated to him there was no verbal or written warning.

6. After the Claimant filed the claim against the Respondent, in defence the Respondent has attached a warning letter issued on 6^h August 2011 and dated 11th March 2008 but this letter was never served on him. The subject related to late attendance at work but work commenced from 8.30am on Saturdays which time he complied with and when the letter was written on 11th March 2008 the Claimant had not joined the employ of the Respondent and in any even the date of issue was 6th August 2011, two weeks before termination and the issue of being later is not addressed in the termination letter.

7. No due process was followed in the termination as there was no notice, hearing or appeal and when he asked for reasons none were given to him. The Claimant later learnt that he was terminated for registering back to school when he applied for a letter to help him secure his Sacco loan. By going back to school the Claimant would get good credentials but would not work after work hours since there was no overtime pay. There were four accountants in his department and they had to all work late and the Respondent did not take it kindly that the Respondent left at 5.30pm.

8. There was discrimination at the place of work. The work environment there was racism; those of African descent were made to work for extra hours but paid differently from the employees of Asian descent despite working for more hours. Sharif, an accountant had a double salary compared with the Claimant despite both being accountant yet Sharif was less qualified. He got preferential treatment for being of Asian descent. Imtiaz Sharif was the overall person and the Claimant felt he was not being treated like other employees and this was discrimination against him noting his pay, work hours and how he was addressed in abusive language while at work. That is was normal for employees of Asian descent to use abusive language whereas it was unpalatable to employees of African descent. When the Claimant was terminated he learns that the Asian employee who took over from him is getting better pay than he was earning in the same position.

9. There was a clocking system at the gate where all employees would register upon entry. However, on Saturdays, all employees would arrive at the gate and wait for it to be opened and each would follow the other to clock in. this was a system that the Respondent was aware of and the Claimant should not be victimised for being at the gate and writing for his turn to clock in which time different.

10. That the circumstances leading to the termination did not warrant such drastic action, there was no notice or hearing and this was unfair as there was no justification. The Claimant is seeking damages for wrongful termination, damages for discrimination against him and costs of the suit. The Claimant has been able to secure new employment after suffering for some time.

Defence

11. The Respondent stated that the Claimant is their former employee and was served with the letter of termination by the Finance Director who explained to the Claimant the reasons for termination which was due to unsatisfactory performance of tasks allocated to him at work. The Claimant did not only fall behind schedule in his performance of his tasks he also came late to work. The termination was procedurally and there is no claim that arises. The claims of discrimination are denied. The Respondent relied on section 40 of the Employment Act to terminate the claimant.

12. In evidence Imtiaz Sharif testified that he is the Accounts manager of the Respondent since 2009 and is paid Kshs.120, 000.00 per month. This has been increased over time. Other employees are also paid an entry salary which is increased. The claimant's salary rose from 55,000 to 60,000 in a year. There is no discrimination at the place of work; no complaint was ever lodged with him by the Claimant or any

other employee in his department. There is a grievance procedure that the Claimant was aware of.

13. The Claimant was terminated for poor performance and reporting late to work. When assigned duties, he failed to finish and when advised he refused to heed. Despite warning, the Claimant reported late to work on Saturdays. There is a check-in system with reports that show the Claimant was in the habit of being late at work. There were verbal warning and a written warning as well.

14. The termination was not for the reason that the Claimant registered back to school as the Respondent was not aware. There is no procedure that the Respondent should be aware when employee take loan with their Sacco. This cannot be a reason to terminate an employee. When the Claimant was terminated for poor performance an Indian lady was employed and started on a salary of Kshs.70, 000.00 with higher credentials than the claimant.

15. The second witness Mr Nathaniel Noti Mnyika testified that he is an Accountant in the payroll section at the Respondent business. He worked with the Claimant and when he was terminated he was notified to prepare final dues. These included pay for the number of days worked, pay for leave days due and one months' pay as notice pay all being kshs.123, 434.00 and this was issued to the Claimant who acknowledged receipt. The witness also confirmed that he worked in a different section from the one the Claimant was placed and they never worked together.

Submissions

16. In submissions the Claimant stated that when the Claimant was employed and issued with a letter of appointment, he was never given a detailed job description to enable him know what tasks he was to carry out that would facilitate an assessment of his performance. He was assigned more duties over and above what his ordinary job requirements entailed. The Claimant was therefore placed at an undue disadvantage which was in breach of his contract as held in **Absalom Ajusa Magomere versus Kenya Nut Company Limited [2014] eKLR**.

17. There was discrimination against the Claimant on the grounds of race by offering him a salary lower than that offered to an accountant in same position of an Asian race, allowing employee of Asian race to leave early at 5pm while insisting the Claimant and others of African race to work beyond the hours and using insulting language while addressing employees of African race and adopting a polite language to employees of Asian race. Upon termination of the claimant, he was replaced by an Asian and is paid more than the Claimant despite having more qualifications than the Asian employee. The Respondent contravened section 5(2) of the Employment Act and Article 27 of the Constitution.

18. The claimant's contract was for 2 years and this was unfairly terminated before the due date. The Claimant is seeking the balance pay from his contract. This is as held in **Pravin Bowry versus Ethics and Anti-Corruption Commission [2013] eKLR**. The Claimant is seeking the remainder of the contract period 12 months' pay and Kshs.500, 000.00 for discriminatory treatment.

19. The Claimant also submitted that his was a summary dismissal as due process was not followed or a hearing conducted before the termination letter issued to him. The Claimant registered back to school and when the Respondent became aware of this they were not happy. The Respondent witness Imtiaz confirmed that the Claimant would seek permission to leave the office at 5.30pm but that he did not know why the Claimant needed to leave work early. Further that the Claimant was said to have been habitually late on Saturdays but there is no notice or warning in this regard and this was not the reason used for his termination. Even in cases that require summary dismissal, section 41 of the Employment Act apply as held in **Shankar Saklani versus DHL Global Forwarders (K) Limited [2012] eKLR**. There was no justification for the termination.

20. The remedies sought are;

- a. general damages for unlawful termination
- b. damages for discriminatory treatment

- c. costs of the suit
- d. compensation for loss of office
- e. Interest on amounts awarded.

21. The Respondent submitted that the Respondent was correct in their summary dismissal of the Claimant under the provisions of section 44 of the Employment Act. The Respondent had a log system such that when an employee reported late to work, by a scan of a thumb print, the record would indicate the time of reporting. That the Claimant confirmed to reporting late and a warning was issued to him. After several warnings the Claimant failed to heed to them and was thus summarily dismissed as he had fundamentally breached his contract by being unable to perform his duties for being late and this was the reason given to him in the letter of termination.

22. There was no discrimination against the Claimant as he had a specific contract different from that of other employees. His salary was an agreed on and was paid by the Respondent and nothing is due. This was a case for summary dismissal and nothing should be paid in damages or costs as all terminal dues were paid.

Determination of the issues;

Whether this a case of unfair termination or summary dismissal

Whether there was discrimination against the Claimant by the Respondent

Whether the Claimant is entitled to the remedies sought

23. The concept of 'termination' as against a 'dismissal' though not defined under the Employment Act can be discerned from various decisions of the industrial court as well as jurisprudence on the matter. The substantive issue giving rise to either a termination or dismissal is imperative. Termination is a matter that parties to an employment contract can agree upon setting out the modalities to effect the same or upon expiry of a fixed time period or as under the terms of notification by either party to the contract. In the case of a dismissal the same arise out of a summary or instant action that parties may agree upon or as set out in law. Termination under the Employment Act is as outlined under section 35 where notice is required whereas dismissal arise as under matters outlined under section 44 of the Employment Act noting other terms that parties may agree upon for such actions that may warrant a termination or summary dismissal. In either case the doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer has to comply with the procedures set out in section 41 of the Employment Act even in circumstances where summary dismissal or instant action is contemplated.

24. An employer who resort to summary dismissal is required to demonstrate that the summary dismissal meet the requirements of sections 43 and 45 of the Employment Act by proving the reasons for termination and that the reasons are valid and fair where an employee challenges the summary dismissal. An employer has to demonstrate as a matter of fact that they have;

- i. Explained to the employee in a language the employee understood the reasons why it was considering the termination;
- ii. Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons;
- iii. Heard and considered any explanations by employee or his representative; and
- (iv) Where the employer had more than 50 employees as required by section 12 of the Employment Act that it had and complied with its own internal disciplinary rules.

25. The basis upon which the Claimant was terminated is the letter issued to him on 26th August 2011.

It states in part;

We regret to inform you that you have been terminated from your current position of employment as an Accountant.

The reason for termination is the company has felt you have not been able to perform your duties to the required standard and at most times your work had fallen behind.

However, we do wish you success in your future endeavour!

26. The core reason given to the Claimant for his termination related to his work performance. Section 41 is therefore important to quote;

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. Emphasis added.

27. Equally section 43 is important to refer;

43. (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. Emphasis added.

28. Even in a serious case that warrant summary dismissal, an employee so affected has a right to challenge the fairness of it. This is as a fundamental shift from the repealed Employment Act to the current which at section 47 allow such an employee to challenge the decision of an employer who summarily dismisses him.

47. (1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

29. It is noteworthy that the Respondent in their statement in reply to the claim, at Paragraph 11 states;

11. The Respondent avers that the termination of the Claimant was lawful and in accordance with the provisions of section 40 of the Employment Act (Cap 226).

30. In submissions, the Respondent stated that the Claimant was dismissed under the provisions of section 44 of the Employment Act (Cap 226) with regard to summary dismissal. That the Claimant was habitually late for work and received warnings. The record or warning attached relate to one dated March 2008 and issued in August 2011. That this is the basis for the summary termination. The letter of termination was with regard to 'termination of contract'.

31. Subsection 41 (1) of the Act provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, the employer should explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a union representative of his

choice present during the explanation. This section of the law is set out in mandatory terms. An employer, who terminates an employee on the basis that the employee is not performing well, *shall* follow the procedures outlined under section 41 of the Employment Act.

32. Even in a case where there is a lawful ground to terminate an employee by the employer, it is accepted labour law jurisprudence that lawfulness cannot be equated with fairness. The tenets of natural justice go beyond lawfulness and require fairness. Accordingly it is not a defence to an unfair dismissal claim that the employee's dismissal was lawful. See **Elizabeth Washeke and 62 Others versus Airtel Kenya Limited and another Cause No. 1972 of 2012**.

33. The Claimant like any other employee enjoyed the right not to be unfairly dismissed or more aptly unfairly removed from his employment. This is more so since employment and labour relations is anchored under the Article 41 of the Constitution to give effect to fair labour relations with the letter and spirit of the Employment Act with regard to fair labour practices. The right not to be unfairly dismissed is not only essential to the enjoyment of this constitutional imperative but is one of the most important manifestations thereof and further forms the foundation upon which the relevant sections of the Employment Act are built and is consonant with. See **NEWAHU versus University of Cape Town and Others (2003) 24 ILJ**. In terms of the Employment Act an employee who claims unfair dismissal has to show that there was a dismissal and once that has been established the employer has to show that the dismissal was for a fair reason. The Claimant demonstrated that there was unfair dismissal but the Respondent failed to demonstrate there was a fair reason for the dismissal.

34. Before the claimant's contract of employment was terminated by the Respondent, he was entitled to be evaluated and informed of his poor performance during the subsistence of the employment to give him an opportunity to improve. In any event, the Claimant denied that his performance justified a dismissal because he rendered his services satisfactorily and to the best of his abilities in the circumstances. The Respondent evidence that the Claimant was reporting late on Saturdays is not correlated with his work duties to show that where he came in late he was unable to perform his duties to the satisfaction of the Respondent. This reasoning is further compromised when the Respondent refer to the law applicable with regard to the termination as under section 40 and 44 of the Employment Act; which relate to cases of redundancies and summary dismissal and the facts of the case relate to a termination.

35. That as it may, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Section 43 of the Employment Act warrants the employer to prove the reasons for termination of employment, and where the employer fails to do so, the termination is deemed to have been unfair. Therefore, the Respondent had no genuine reason for terminating the claimant's employment as required under section 43 of the Employment Act.

36. On the question as to whether there was discrimination against the claimant, where a person is treated differently from others similarly situated like him, this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified. See **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No. 60 of 2013**.

37. The Claimant outlined that he was employed on contract; his terms of service were outlined under his contract noting his salary upon employment. The Claimant gave evidence that he was discriminated against at the work place on the grounds of race and noted that his pay, work hours and language used on him and others of African descent was different from that of his work colleagues who were of Asian descent. Where it relates to differences in salary, I find the Claimant had a specific contract which outlined his terms as against other employee both of Africa descend and Asian descent as confirmed by

his own evidence and that of the Respondent. With regard to work hours the Claimant fails to outline who of the Asian descent left at 5pm, 5.30pm or 6pm apart from his evidence that those of African descent worked late and were never paid. I note the Claimant is not seeking any pay with regard to work overtime. This in itself is telling in a case serious as this one where discrimination against him is alleged. So serious is such an allegation that where cited, the court must look at the intricacies at the work place to ensure that such an unconstitutional practice is not taking place within the private and public spheres of life and where this relates to a work environment. I find no good grounds to infer discrimination against the Claimant in the cited circumstances.

38. The other ground cited for discrimination is that the Respondent employees of Asian race are in the habit of using abusive language and the workplace, language that is unpalatable to those of the African race. As serious as this allegation is, the Claimant failed to state these 'abusive language', its contents and what was unpalatable to him and those other work colleagues of African race. With no such evidence, I cannot deduce discrimination against the Claimant on the evidence at hand.

39. It is however to note that if such practices do exist at the Respondent's workplace even where the Claimant is unable to prove these allegations to the required standards the Respondent is best to address them at the earliest. The Respondent to note the provisions of Article 27 of the Constitution and section 5 of the Employment Act to promote equality of opportunity in employment in order to eliminate discrimination in employment. I will say that much.

Remedies

40. On the remedies, upon the finding that there is no satisfactory evidence with regard to discrimination against the claimant, no damages will be payable in this regard. On the finding that there was unfair termination of the Claimant that lacked due process and there was no substantive reason for his contract to terminate, I will award compensation equivalent to his last payable gross pay at Kshs.60,000.00 for the twelve months all being Kshs.720,000.00.

41. The Claimant is also seeking compensation for loss of office. This is specifically pleaded by the claimant. upon the finding that the termination of the Claimant was both substantively and procedurally unfair, I am guided by the provisions of section 49(1) in making the assessment of the remedy due under this claim noting;

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) the equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

42. The Claimant was on a two years contract running from 7th June 2010 for a period of two years. He was terminated on 26th August 2011 after serving for 14 months of his contract. Had the Claimant not been unfairly terminated, he had 10 more months to serve under his contract. Taking into account the provisions of section 49(1) I will award the Claimant for remainder of the term of his contract being kshs.60, 000.00 for the 10 months all amounting to kshs. 600,000.00.

43. The Claimant received all his other terminal dues immediately upon termination. Costs will be awarded at 50% while no interest will be awarded.

Conclusion

Judgement is hereby entered for the Claimant as against the Respondent in the following terms;

- a. **Compensation for unfair termination at Kshs.720, 000.00;**
- b. **Loss of office awarded at kshs.600, 000.00; and**
- c. **Costs awarded at 50%.**

Delivered in open court at Nairobi this 25th Day of September 2014

M. Mbaru

Judge

In the presence of:

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