



IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 86 OF 2012

(Originally Mombasa High Court Civil Case No. 204 of 2012)

**1. PAUL CHOMBA MUCHIRA
2. DR. WARIARA MBUGUA
3. CALEB KAHUTHIA**

4. JOHN MBUGUA

CLAIMANTS

v

MILANGO FINANCIAL SERVICES LTD

RESPONDENT

JUDGMENT

1. Paul Chomba (Claimant) was offered a five year fixed term contract as Internal Auditor by Milango Financial Services Ltd (Respondent) through a contract dated 27 June 2011. The contract provided for the terms and conditions of service. On 1 February 2012, the Respondent reviewed the Claimant's remuneration upwards to a gross of Kshs 100,000/- because of his good performance.
2. On 15 October 2012, the Respondent summarily dismissed the Claimant on the ground of gross misconduct. The reason given in the dismissal letter was that the Claimant had disclosed confidential information regarding the Respondent to a third party.
3. The Claimant was aggrieved and on 12 November 2012 he lodged a Complaint before the High Court in Mombasa on the basis that the dismissal was wrongful, actuated by malice and ulterior motives and seeking a declaration that the dismissal was harmful injurious and grossly prejudicial, and certain injunctive reliefs and costs.
4. Together with the Complaint, the Claimant filed a Motion seeking an injunction to restrain the Respondent from dismissing him. It appears the motion was not heard or determined.
5. On 21 November 2012 Mwera J (as he then was) ordered that the suit be transferred to the Industrial Court which has jurisdiction over employment disputes.
6. On 30 April 2013, the Claimant filed an Amended Complaint to plead that his dismissal was without justification and amounted to unfair termination. He included a prayer for general damages for wrongful dismissal.
7. The Respondent was served and on 14 June 2013 it filed a Response to the Amended Complaint.
8. After several false starts caused by both parties, the Cause was heard on 30 June 2014.

Claimant's case

9. The Claimant testified. He stated that at the time of hearing he was an Independent Financial Consultant but had been employed by the Respondent and was given a contract of employment

- dated 27 June 2011. He was reporting to the Respondent's Board of Directors and the Audit/Risk Committee.
10. On the process followed leading to the dismissal, the Claimant stated that he was called by the Board to a meeting on 12 October 2012 to explain the leakage of confidential information to a third party.
 11. The Claimant testified that he explained to the Board that he disclosed a draft audit report to a Mr. John Mbugua who had been the Respondent's Board Chair/shareholder to get insights from him about a solar project which had been initiated during his chairmanship of the Respondent.
 12. On the reasons for the dismissal, the Claimant stated that his audit discovered a conflict of interest between the Respondent's Managing Director and some Board members in relation to a solar project and that he informed members of the Audit Committee of his report through email. He also stated that he had sought insights from Mr. John Mbugua who had served as Respondent's Board Chair when the project was conceived and later shared the draft audit report with him.
 13. The Claimant stated that the said Mr. Mbugua was a shareholder and not a third party. He therefore denied breaching the trust of the Respondent by disclosing confidential information.
 14. In cross examination, the Claimant stated that Mr. Mbugua was not a director of the Respondent when he swore an affidavit on 12 November 2012. He also stated that he was expected to report to the Respondent's Managing Director on day to day operations and also to the Board. He confirmed that clause 10 of the employment contract provided for confidentiality.
 15. The Claimant confirmed he was paid terminal benefits.

Respondent's case

16. The Respondent called Johnson Kisendu who served as its Managing Director at the material time. He stated that he participated in the recruitment of the Claimant. He also stated that Mr. Mbugua was the Chairman of the Respondent at the time but he retired and was replaced by Mr. Michael Mbeshi in October 2011.
17. On the process followed before dismissing the Claimant, the witness stated that the Claimant was called before the Finance Committee, the Executive Committee and the Full Board and given an opportunity to explain why he shared the audit report.
18. According to the witness, the Full Board met the Claimant at Royal Court Hotel on 12 October 2012 and he gave his explanations but the Board was not convinced with his explanations. An extract of the minutes of the meeting were produced.
19. On the reasons for the dismissal, the witness stated that the Claimant shared a draft audit report with Mr. Mbugua, who was just a shareholder and not director and that the Claimant was not authorised to share information with shareholders, and that such information should have come from the Chairman.
20. On terminal dues the witness stated that the Claimant was paid his terminal dues after clearing with the Respondent.

Issues for determination

21. This being a complaint of unfair termination, two key issues for determination arise. These are whether the termination was unfair and if so, appropriate remedies. The Court has considered the Claimant's submissions filed on 14 July 2014. Submissions by the Respondent were not on record at time of preparing this judgment.

Whether termination was unfair

Procedural fairness

22. Section 41 of the Employment Act, 2007 has now made a right to a hearing before termination part of the employment relationship. The statute has placed an obligation upon the employer to comply with these procedural fairness safeguards.
23. The section has not expressly stated that the process contemplated should be through correspondence or in writing. The Court will consider each case on its own circumstances because

- of the nature and capabilities of different employers, some of whom only employ a single worker such as a domestic help and others who have whole departments tasked with human resource administration. For employers with functions such as human resource or personnel departments, they are well advised to reduce the disciplinary process into writing. It is the prudent thing to do.
24. But whether the disciplinary process is conducted through writing/correspondence or orally, an employee is entitled to know of the allegations the employer is contemplating in using to terminate the relationship; the employee should also be afforded an opportunity to respond to the allegations, in the presence of a colleague or shop steward if a union member. If it is a case of summary dismissal, the employer is enjoined to consider the representations made by the employee.
 25. The Respondent's witness testified that the Claimant was given an opportunity three times to explain before the Finance Committee, Executive Committee and before the full Board. It is normal and standard practice to keep records of Board Committee meetings. No minutes of the two committees were produced.
 26. The Claimant was called before the Respondent's Board to explain why he had disclosed information of a confidential nature to a third party on 12 October 2012. Extracts of the minutes were produced. But one issue has exercised the mind of the Court. It is as to whether the Claimant was informed that the termination of his services was/would be considered at the full Board meeting.
 27. In the mind of the Court, this is an important ingredient of procedural fairness safeguards. This is important to distinguish the process from an investigation or inquiry to establish facts upon which to conduct a disciplinary process.
 28. As a matter of evidence, it is upon an employer to demonstrate to Court that it informed an employee of the allegations against him, that disciplinary action was being considered and afford him the opportunity to make representations.
 29. The Court was not informed of whether the Board meeting of 12 October 2012 was an investigation/inquiry to establish facts upon which to commence disciplinary action or whether it was a disciplinary process contemplated by section 41 of the Employment Act, 2007.
 30. Based on the pleadings and evidence as presented, the Court is of the view that the Respondent has failed to show that it informed the Claimant that the termination of his services was being contemplated and the reasons and that he was afforded a hearing. The Respondent was not in compliance with the statutory procedural fairness safeguards.
 31. The Court therefore finds that the dismissal was procedurally unfair.

Substantive fairness

32. In light of the conclusion reached it is not strictly necessary to consider substantive fairness but because of the circumstances of this case, the Court is of the view that it discusses the issue briefly.
33. The parties agree that the Claimant shared a draft audit report with a Mr. John Mbugua who at one time served as the Respondent's Board Chairman. It is also not disputed that the employment contract forbade the Claimant from disclosing Respondent's confidential information which came into his knowledge because of the employment relationship.
34. As an Auditor, the Claimant was properly within his function to seek information and or clarifications from those who were involved in the solar project. But the Claimant went beyond that. After getting the information and clarifications, he shared a copy of his draft report with the said Mr. Mbugua. It appears the report formed the basis of litigation against the Respondent in a different case.
35. In the considered view of the Court, the Claimant was in breach of an express term of his employment and went beyond the limits and standards expected of an auditor. He was right to consult or seek insights from Mr. Mbugua, but sharing his draft report with him was not right.

Appropriate relief

36. The Claimant sought, in the Amended Claim, general damages for wrongful dismissal.
37. The Court has found the dismissal was procedurally unfair and under section 49(1) (c) of the Employment Act, 2007, one of the remedies where there is such finding is the equivalent of not

more than twelve months gross wages. The Section has not labeled the award as compensation or damages, but it is discretionary and the Court has been given 13 factors to consider (any, some or all) in section 49(4) of the Act.

38. The Claimant was on a fixed term contract, served for about one year, and is a professional who is now carrying out consultancy. He was paid terminal dues. Putting these factors into consideration, the Court would award him the equivalent of three months wages assessed at Kshs 300,000/-.

Conclusion and Orders

39. The Court finds and holds that the dismissal of the 1st Claimant was procedurally unfair and awards him and orders the Respondent to pay him

a. Three months wages compensation Kshs 300,000/-.

40. Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Mombasa on this 12th day of September 2014.

Radido Stephen

Judge

Appearances

For
Claimant

Ms. Nyangena instructed by
Lumatete Muchai & Co. Advocates

For
Respondent

Mr. Mogaka & Ms. Isoe instructed by
Mogaka Omwenga & Mabeya Advocates