REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 114 OF 2012

GEORGE KABUE……...……..CLAIMANT

VERSUS

NOKIA SIEMENS NETWORKS …….…… RESPONDENT

JUDGMENT

The claimant George Kabue filed his memorandum of Claim dated 27th Janaury 2012 alleging unfair termination of his employment by the Respondent Nokia Siemens Networks. He prays for the follows orders:

a. A declaration that the Respondents termination of the Claimant's employment was illegal, null and void ab initio;
b. A order directed at the Respondent reinstating or re-engaging the Claimant;
c. Damages and payments as particularized in paragraph 15 above.
d. Cost of this suit;
e. Interests;
f. Any other further relief that his Honourable Court may deem fit to grant.

The Respondent filed a Memorandum of Defence in which it denies that the termination of the Claimant's employment was unfair. The Respondent avers that:

i. The Claimant's employment was terminated on the grounds of poor performance and not any other reasons as alleged or at all;
ii. The Claimant's termination on the grounds of poor performance was genuine, warranted and justified;
iii. The Claimant's termination was in accordance with the applicable provisions of the law and his contractual terms of employment.

The Respondent prayed that the claim be dismissed with costs on the grounds that it is without basis in fact and law, false, misleading, misadvised and an abuse of the process of court.

The case was heard on 25th June, 30th September, 2013 and on 10th July, 2014. The parties thereafter exchanged written submissions.

The Claimant was represented by Mr. Ogembo instructed by Okoth & Kiplagat, Advocates while Mrs. Wetende instructed by Kaplan & Stratton Advocates appeared for the Respondent. The Claimant testified on his behalf. The Respondent called Joseph Mwangi, the Respondent's Human Resource Operations Expert. I must point out at this juncture that in the Respondents Memorandum of Defence it is stated that

the Respondent's witness would be Rose Karanja who did not testify. This is against the Provisions of Rule 14(9) and (10) of the Industrial Court (Procedure) Rules which provides that:

> (9) A party shall notify the Court when submitting a statement of claim or a response to a statement of claim under Rule 4 and Rule 11(1) of any witnesses a party proposes to call support of that party's submissions and shall, at the same time notify the other party of the same.
>
> (10) A Party may, with the leave of the court, call other witnesses.

However since the Claimant's Advocates did not raise any issue over the same, I will let the issue lie.

The Claimant's case

The Claimant testified that he was employed by Nokia International on 16th July 2006 as Training Services Manager. On 30th July 2009 there was a merger between Nokia International and Siemens to form a new company called Nokia Siemens Networks where he was seconded to and deployed in the same capacity on the same terms as in Nokia International. In July 2010 the Claimant was promoted to Care Products Manager and moved from Job Group 8 to 9. His remuneration also changed. He worked in this position until his employment was termination on 4th August 2011. His last salary was a basic of Kshs.258,427 and a car allowance of Kshs.180,000/=. His gross pay was Kshs.440,482/=.

The Claimant's line manager from July 2010 was Mr. Tomasz Wojcikowski based in Dubai. The Claimant met him only once in Dubai in October 2010. In February 2011 Mr. Tomasz informed the Claimant that he was going to be put on a Performance Improvement Program (PIP) as he needed to have certain improvements in his new position. The Claimant took this positively. He was sent a copy of the Performance Improvement Program by email. No performance evaluation was carried out before he was put on the PIP Plan. He signed the Performance Improvement Program scanned and sent it back to Mr. Tomasz on 1st March 2011. Mr. Tomasz singed it on 2nd March 2011 and sent it to Human Resource. The Performance Improvement Program had 4 review dates on 15th March, 31st March, 14th April and 28th April, 2011.

During the Performance Improvement Program the Claimant was assigned a coach Mr. Brahim Wissad based in Rabat, Morocco. The coaching was done through email and telephone communication. The Claimant went through the whole coaching program to the satisfaction of Mr. Wissad. On 28th April, 2011 Mr. Wissad told him in a telephone conversation *"George you are capable and you are in"*.

The Claimant did not receive any evaluation report of the coaching either from the coach Mr. Wissad or from his line Manager Mr. Tomasz. On 28th April 2011 after finishing the coaching the Claimant had a discussion with Tomasz who commented that *"I do not believe him"*.

On 12th May 2011 the Claimant received a warning letter from Mr. Tomasz. The warning letter is reproduced below:

Dubai, May 12th 2011

WARNING LETTER – POOR PERFORMANCE

Dear George Kabue,

This letter is an official warning for repeated poor performance.

You have been placed on a performance improvement plan for the last 2 months, and there has not been satisfactory improvement in your performances.

The improvement areas have been set and are clarified to you.

The following needs you immediate attention:

- *Improvement in SWS and HWS costing skills proven in real life cases,*
- *Working according to the rules of ME & A Care PdM team,*
- *Responsiveness within the agreed timelines,*
- *Improvement of cooperation with Safaricom account and no negative feedback from counterparts from Care, Sales and CT organization.*

Your performance will be reviewed again in 4 weeks time, after which a decision on your employment will be taken.

Yours sincerely,

Tomasz Wojcikowski

There was no evaluation done before the warning letter was issued. The letter was delivered to the Claimant through Mrs. Rose Karanja, the Human Resource Manager. On 23rd June 2011 the Claimant received a second warning letter from Tomasz. He had a discussion with Mrs. Rose Karanja at which 2 issues were discussed. The first was that there was supposed to be a face to face meeting between the Claimant and his line Manager Mr. Tomasz in South Africa in June 2011. Mrs. Karanja informed the Claimant that Mr. Tomasz did not want him to attend the meeting. The second issue was about the Performance Improvement Program. The Claimant informed Mrs. Karanja that he felt the Performance Improvement Program process had been abused as no evaluation was carried out as per policy. Mrs. Karanja promised to look into the matter.

There was no further communication from 22nd June until 4th August 2011 when the Claimant received the letter of termination.

The Claimant was on leave when he got a call from Mrs. Karanja on 3rd August 2011. She asked him to see her concerning his continued engagement. On 4th August 2011 when the Claimant arrived at the office he was stopped at the door by a security guard who informed him that he was no longer an employee and was not allowed to enter the office. The Claimant requested to be allowed to see the Human Resource Manager and was ushered into the visitor's office by an Assistant Human Resource Officer, Josephine. Josephine informed the claimant that Mrs. Karanja was not in but had left her with his letter of termination. The letter of termination gives the reasons for termination as *"poor performance over the last 12 months"*.

The Claimant stated that his previous evaluations had rated his performance as outstanding. In his opinion there were two possible explanations to his termination.

The first was that the Respondent who was a supplier of Safaricom and Airtel had lost substantial business to a Chinese competitor, Huawei and there was pressure to restructure. The second is that there was a freeze on employment and line managers were not allowed to hire any new staff. At the end of June 2011 Mr. Tomasz was going to take care of the Middle East and there was going to be need for a new manager to take care of Africa. On 11th July 2011 Mr. Tomasz announced the recruitment of Mr. Abhishek Pandita who was to be based in Dubai and was going to take care of the same work that the Claimant was doing. There was therefore need to get rid of someone to balance the staff head count.

The Claimant prayed that orders be granted as prayed in his Memorandum of Claim.

Respondent's Case

The Respondents witness RW1 Joseph Mwangi testified that he joined employment of the Respondent on

15th December 2010. He stated that his evidence was based on documents he got from the Respondent.

The employment of Claimant was terminated on the basis of poor performance. The claimant did not participate in the preparation of Performance Improvement Program. The claimant was assigned a coach who identified areas on which he was to be coached. The claimant did not meet the time lines and was sent reminders. The Claimant did not complain about any issues or against the coach. The Claimant was issued two warning letter before his termination. The warning letters specified the areas of improvement.

The Claimant was given ample opportunity to improve before his employment was terminated. The evaluation was over a period of 6 months. The termination was justified.

The Claimant was not entitled to re-instatement as his employment relationship had been severed and there was record that he was unable to perform. The Claimant had been issued with a certificate of service. He was not entitled to the orders he was asking.

Under cross examination RW1 admitted the following; that before a Performance Improvement Program an evaluation of needs improvement is required. That evaluation was not produced before the court. There was also a requirement of an employee's overall performance evaluation which was also not produced in court. The Performance Improvement Program produced in court by the Respondent was blank. No assessment was done on claimant's performance on 30th April, 2011 as per document before the court. There was no record of review done at the end of the Claimant's coaching or record of feedback given to Claimant's line manager. The Claimant cooperated through the Performance Improvement Program. The Claimant was not given an evaluation of his performance on Performance Improvement Program. There was no basis of giving the Claimant a warning. There were no evaluation reports before the warnings were issued. There was no record of any evaluation between the second warning letter and the termination letter. There was no evidence of a hearing before the termination of the Claimant's employment. The Claimant was not informed of his right to be represented. The Claimant's employment contract did not provide for performance improvement assessment. The policy document on performance improvement was not produced in court.

Issues for determination

The main issues for determination are whether the termination of the Claimant's employment was fair and whether he is entitled to the prayers in his claim.

Section 41 of employment Act provides for the Procedure for termination of employment while Section 43 provides for proof of reasons for termination.

From the facts of the case as given above, the Respondent's witness agreed with the Claimants averments that he was never subjected to a hearing before his employment was terminated. The Respondent also failed to produce in court evidence of evaluation of the Claimants performance to justify the allegation of continuous unsatisfactory performance over 12 months, which were the grounds of termination of employment of the Claimant.

The Claimant relied on the case of **Ronnie Odiwour v Nyanza Reproductive Health society** and **Abraham Gumba v Kenya Medical Supplies Authority** both of which considered the issue of termination on grounds of performance. The Claimant also relied on the case of **Kenneth Njiru Nyorani v Dodhia Packaging Limited** which considered validity of reason and fairness of reason and the case of **Jane Saba Mukala v Ol Tukai Lodge Limited** which considered fairness of process and procedures.

The respondent relied on **Nyoturu v Telkom; Nazareno Kariuki v. Feed the Children; Kezia Ijai Lugaria v Joyce Wafula** and **Jackson Butiya v EPK.**

In Ronnie Odiwour's case, the court observed that *"A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal"*.

In the case of Abraham Gumba the Court stated that:

"Poor performance is an allegation that should be supported by evidence of specific performance targets, appraisal of performance, with specific results. The Claimant had worked directly for 2 months, for the Respondent. There were no targets set for him in those 2 months which he was shown to have been appraised on, and failed to meet. It was alarming to hear Mutuku say that the e-mails exchanged between the Claimant and Laban constituted performance appraisal. The court has not found any evidence or material on record to conclude that the Claimant performed his work poorly…"

In the case of Jane Samba Mukala the court held that:

'...there is no indication or evidence submitted before this court that the respondent had taken any measure to fairly evaluate the claimant based on a policy document or any other practice that they adopted to arrive at the decision that the Claimant was of poor performance'.

The provisions of Section 41 of the Employment Act are specific on the procedure to be followed when an employer intends to terminate employment on grounds of poor performance. An employee must be informed of the intention to terminate his employment. That must be done prior to making the decision to dismiss him. The employee must be informed of his right to be accompanied by a fellow employee or a union official at the time of such information and of his right to make presentations in his defence both personally and through the person accompanying him.

Where as in the present case poor performance is the reason for termination, the employer must demonstrate that there has been an appraisal of the employee's performance over a period with the participation of the employee and there has been no improvement.

None of the cases cited by the Respondent relates to termination on grounds of poor performance. The case of Nyoturu related to a false claim and the case of Kezia Ijai Lugania and Jacob Butiya relate to warnings. In Butinya's case, he refused to submit himself to the disciplinary process after the warning letters while in Keziah's case does not relate to performance appraisal and is not helpful in determining the issue at the core of this case.

The Respondent cited the case of Nazareno Kariuki where the court affirmed the common law principle that court must not substitute its own views for those of the employer but must take a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts.

Page 482 of Halsbury's Laws of England (4th Edition Vol.16) expounds the principle as follows:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonable take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair".

The gist of this dictum is that in adjudicating employment matters the role of the Court is not to reconstruct the internal disciplinary procedures adopted by an employer or to improve on the decision by the employer but to check whether in the particular circumstances of the case, the employer acted in a reasonably fair manner.

I agree with the principles but fail to see the relevance in the present case. In this case the Claimant's employment was terminated on grounds of poor performance based on Performance Improvement

Program yet no results of the evaluation were presented to the court. The Performance Improvement Program form which was produced by the Respondent only has the indicators that were printed on the form. There were to be several evaluations, none of which was done. There was no evidence of poor performance in the evidence submitted by the Respondent.

Secondly, the claimant was never taken through any disciplinary process even though the Performance Improvement Program has a note in the 1st page to the effect that if there is no marked improvement in the areas mentioned disciplinary action may be taken. What happened is that the Claimant was issued two letters of warning following which he was dismissed.

I find that the termination of the claimant's employment was without valid reason and failed to comply with fair procedure as prescribed in Section 41. I therefore declare the same both unlawful and unprocedural and therefore unfair.

On the remedies, the claimant has relied on his employment contract in his claim for service indemnity. In addition the claimant seeks maximum compensation of 12 months salary for unfair termination.

The Respondent submitted that taking into account the Respondent's efforts, an award of between 1 and 3 months salary as compensation would be reasonable if there was lapse in procedure. The Respondent also submitted that end of service indemnity is only payable in the event of redundancy.

On the prayer for reinstatement the Respondent submitted that the Claimant had not worked for 2 years and was also guilty of poor performance both of which disqualify him from the remedy. The Claimant submits that both redundancy and non-mutual termination of contract qualified for end of service indemnity.

The Claimant did not make any submissions in respect of reinstatement. I will therefore assume that the claimant abandoned the prayer for reinstatement.

Even if he did not abandon it I would still find that he is not entitled to the same. Reinstatement is only applicable in special circumstances which the claimant has not demonstrated.

On the prayer for end of service indemnity the Claimant's contract provides as follows:

"In case of early termination of this employment by non-mutual agreement of both parties, the employee is entitled to 45 (forty five) days per year service for duration of this contract the end of service gratuity".

The Claimants contract was transferred from Nokia Telecom Corporation to Nokia Siemens Networks with effect from 1st July 2009. Paragraph (d) of the Nokia Siemens Networks contract provides that:

"NS TL Oy undertakes and assumes all liabilities and obligations accrued to the Effective Date against NSN(K) Ltd in respect of your employment to the intent that you will be deemed to have been in the continuous employment of NS TL Oy from the date on which you commenced employment with NSN (K) Ltd".

The new contract is not a fixed term contract. It does not refer to an end of contract date. It therefore means that the end of service indemnity is applicable in all cases of termination that is not mutually agreed upon. The Respondent's argument that the end of year indemnity is only applicable in the event of redundancy is not borne by the clause. The very definition of redundancy is that it is an involuntary loss of employment at the initiative of the employer. Involuntary means it is not mutual. I disagree with the Respondent's argument.

For the foregoing reasons I make the following orders:

1. **Damages**

I award the Claimant compensation for unfair termination in the sum of Kshs.3,718,928.32 being 8 months gross salary based on Claimant's pay slip for the month of July 2011. I have taken into account the length of service and the manner in which the Claimant's employment was terminated as well as the manner in which the termination was communicated to him first though a Security Guard and then the Assistant Human Resources Officer.

2. **End of service indemnity**

The Claimant had worked for 5 years. He is therefore entitled to end of service indemnity of 45 days salary per year worked in the sum of Kshs 3,486,495.30.

3. **Certificate of service**

The Clamant admitted that the certificate of service has been issued to him.

4. **Costs and interest**

The Respondent shall pay the claimant's costs. The decretal sum is subject to interest at court rates from date of judgment to date of payment in full.

Read in open Court this 27th day of November, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Aluvale for Respondent

Ogembo for Claimant