



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 72 OF 2013

ANTHONY KAVINGUHA.....CLAIMANT

VERSUS

ERICA KRUG.....1ST RESPONDENT

FARM AFRICA (K) LIMITED.....2ND RESPONDENT

JUDGMENT

The claimant Anthony Kavinguha instituted this claim against the Respondents ERICA KRUG and FARM AFRICA (K) LIMITED by Memorandum of claim dated and filed on 22nd January 2013. The claimant seeks the following orders:

- i. One (1) month pay in lieu of notice - Kshs. 299,197/=
- ii. Severances pay - Kshs. 1,196,788/=
- iii. Annual leave - Kshs. 598,394/=
- iv. Payment for the remainder 14 months
of the contract - Kshs.4,188,758/=
- v. General damages for malicious and
Wrongful termination - Kshs.2,000,000/=
- Total - Kshs.8,283,137/=**
- vi. Interest at Court rates on (i) to (v) above till payment in full.
- vii. Costs of the suit.

The claim was filed together with a Notice of Motion under certificate of urgency of the same date seeking the following orders:

1. THAT this application be certified urgent and heard ex-parte in the first instance and service of the

same be dispensed with.

2. **THAT** the Court do make an order that the computer held by the Claimant do remain in the custody and possession of the Claimant for the remainder of the period of the trial herein, for purposes of adducing evidence to the charges contained in the 1st Respondent's letter of dismissal dated 9th January 2013.

3. **THAT** the Court do make an order that the Claimant herein be allowed ingress to the premises of the 2nd Respondent for purposes of clearing his desk and accessing his personal belongings, documents and correspondences electronically stored or otherwise, and if need be to access any file or computer for such retrieval.

4. **THAT** the O.C.P.D Kilimani Police Station to ensure compliance with prayer 3 above.

5. **THAT** in the alternative, the Court be pleased to grant an order rescinding and/or staying the unlawful decision of the 1st Respondent contained in the letter dated 9th January 2013 pending hearing and determination of this Application inter-parties.

6. **THAT** the costs of this application be provided for.

The application was grounded on the affidavit of the Claimant and the following grounds:

1. On 9th January 2013 the 1st Respondent authored a letter addressed to the Claimant herein detailing a number of accusations and/or charges against the Claimant and consequently dismissed, terminated and discharged the Claimant from his employment with the 2nd Respondent.
2. The Claimant herein was not availed an opportunity to respond, rebut or defend himself against the said allegations whether in writing or orally and the decision to terminate his employment was arrived at arbitrarily and actuated by malice on the part of the 1st Respondent.
3. The Claimant has since been barred from accessing the premises of the 2nd Respondent despite the fact that he was never given an opportunity to clear his desk, his personal belongings, documents and correspondences that form a very crucial part of the evidence that will be adduced at the hearing of the main suit.

The application was heard on 23rd January 2013 and orders sought granted.

The case was heard on 28th May and 16th June 2014. The Claimant testified on his behalf while the Respondents called Margaret Wanjiru Mararo, the Human Resource Development Advisor.

The Claimant was represented by Mr. Otudo instructed by Billy Amendi & Co. Advocates. The Respondents were represented by Ms. Lubano instructed by Anjarwalla & Khanna Advocates. The parties filed witness statements and proceeded by way of cross examination and re-examination of witnesses. The parties thereafter filed written submissions.

The Claimant's case is that he was employed by the 2nd Respondent between 1st February 2011 and 31st March 2012 as Country Programme Accountant at a salary of Kshs.133,000 per month. He was then employed as Finance and Administration Manager from 1st April 2012 to 9th January 2013 when he was dismissed from employment. At the time of dismissal he was earning a salary of Kshs.299,127 per month.

At the time of joining the company on 1st February 2011 the claimant was placed on a six months probationary period which he successfully completed. When he was engaged as Finance and Administration Manager on 1st April 2012 he was again placed on six months probation. The probation

was extended by 4 months from 1st October 2012 which was to end on 31st January, 2013. The Claimant was dismissed from employment on 8th January 2013 before the probation period expired. The reasons for termination was that the Claimant had not shown immediate and sustained improvement following the extension of his probation.

The Respondents' case is that the claimant was employed on 1st February 2011 by the 2nd Respondent in the position of Country Programmes Accountant for a duration of 2 years. In November 2011 the 2nd Respondent decided to reorganize and restructure its business. As a result a number of positions were abolished including the Claimant's. Several new positions were created including the position of Finance and Administration Manager. The Claimant successfully applied for the position of finance & Administration Manager. He was issued with a fixed term contract for 2 years. By letter dated 9th January 2013 the 2nd Respondent notified the Claimant that it would not be confirming his employment following a probationary review meeting held on 8th January 2013. The grounds for not confirming the Claimant was that his conduct and performance failed to meet the required standard.

Parties filed voluminous pleadings and documents. Among them were witness statements of the Claimant, the 1st Respondent and the Respondents' witness, Margaret Wanjiru Mararo. I must comment here that most of the documents were not relevant for the case and contained details that were unnecessary for the determination of this case.

I have considered the pleadings, the documents filed by both parties, the evidence in the witness statements as well as viva voce evidence. I have also considered the written submissions. The authorities cited and the applicable law.

The Claimant framed the following issues for determination:

- i. Whether the 1st Respondent's actions of subjecting the Claimant to probation periods in excess of the statutory limit was discriminatory against the Claimant and amounts to unfair Labour practice.
- ii. Whether the Claimant's dismissal had procedural integrity.
- iii. Was the 1st Respondent's decision to dismiss the Claimant informed by malice?.

The Respondent's also framed issues as follows:

- i. Whether the 2nd Respondent had a valid reason for terminating the claimant's employment.
- ii. Whether the 2nd Respondent followed the proper procedure in terminating the Claimant's employment.
- ii. Whether the Claimant's is entitled to the reliefs sought in his Memorandum of Claim; and
- iv. Which party should bear the costs of these proceedings?

The substantive issues for determination in my opinion are the following:

1. Whether the termination of the Claimant's employment by the 1st Respondent was fair in terms of both validity of reason and fair procedure.
2. Whether the claimant is entitled to the remedies sought.

The Claimant has urged the court to expunge from the record all documents and statements filed by the Respondents due to the fact that the 1st Respondent was not cross examined on the documents. The Claimant relied on the case of **Triloknath Bhandari & Another V. S.R. Gautama (1964) E.A** where

the learned Judge quoted a passage from HALSBURY'S LAWS OF ENGLAND (3rd Edition) Vol. 5 at Paragraph 800 as follows "Any party is entitled to cross-examine any other party who gives evidence or his witnesses and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination".

The Respondent in response to the same urged the court to apply Rule 21 of Industrial Court (Procedure) Rules which allows the court to determine a suit before it on the basis of documentary evidence only.

It is the position of the court that the position taken by the Claimant is not applicable in entirety any more following the changes in the law requiring parties to submit documents in advance so that the other party has an opportunity to comment on them during the hearing. The position of the Respondent is also not entirely correct as the section relied on is for proceedings where the court orders that parties proceed by way of affidavits or written statements which is not the case in the present suit.

I will therefore deal with the documents on record based on the issues at hand and taking into account the level of interrogation of the documents by the parties. Suffice to state that the court has the right to consider all documents on record.

The Claimant also raised the issue of discrimination under Article 41(1) of the Constitution. In my opinion this case is sufficiently covered by the provisions of the Employment Act. Section 5, 45 and 46 sufficiently cover the circumstances of this case. I do ascribe to the school of thought that simple matters covered by legislation like this case ought not to be elevated to the constitutional platform.

On the question whether the extension of the claimant's probation was valid I do not think so. The purpose of probation is to confirm whether an employee is suitable for the position to which they have been engaged. Having been engaged to a new senior position, the Respondent had the right to place the Claimant on probation to assess his suitability and ability to hold the new position. This however does not place the Claimant on a probationary contract as he was already in employment of the Respondent and had already served probation for purposes of confirmation of employment. The case of **Gichoku Kabukuru v. Postal Corporation of Kenya (2012) eKLR** cited by the claimant is therefore not relevant to the circumstances of this case as it dealt with probation period on initial employment and not on promotion or recruitment to a higher position within the same organization as the present case. The case that is relevant for the circumstances of this case is **Philemon Wachara Obenge V. Easy Mart Limited (2013) eKLR**.

I will now consider the substantive issues in dispute in this case:

1. Whether the termination of the Claimant's employment by the Respondent was fair.

The Employment Act provides at sections 41, 43 and 45 what would constitute fair or unfair termination of an employment contract. Section 41 provides that before an employer can terminate employment on grounds of misconduct, poor performance or physical incapacity the employer must explain to the employee, in the presence of a fellow employee or an official of a trade union if the employee is a member of a trade union, the reason for which the employer is considering termination. The employer must consider any representations which the employee may make on grounds of misconduct or poor performance.

This court has had opportunity to consider cases of termination of employment on grounds of poor performance.

*In the case of **John Ratemo Ondieki vs Islamic Relief World Wide (2014) eKLR**; the basis of the Claimant's termination was a filed visit report by the Operations Support Manager; the Claimant stated and the Respondent confirmed that the inspection giving rise to the report was conducted between 16th – 18th March, 2012, while the Claimant was on leave. At the conclusion of the field visit, the Claimant's supervisor initiated an appraisal of the Claimant's performance. From the appraisal report, it is evident that the Claimant and his Supervisor disagreed on the outcome of the appraisal.*

It was held:

If the employer decides to take the Supervisor's side without affording the employee an opportunity not only to present their view but also to question the basis of the supervisor's conclusions on the appraisal process is compromised and its results cannot be used on that basis for disciplinary action against the employee. To rule otherwise would be to hand performance appraisal as a blunt weapon in the hands of overzealous supervisor against employees they do not like.

In the present case, there is no letter informing the Claimant of the specific shortcomings and giving him a time frame within which to meet specific set targets. The letter of termination refers to a probation review hearing held on 8th January 2013. There is no evidence of a letter of invitation to the claimant setting out the issues to be discussed at the review meeting. There is no evidence of matters discussed at a previous review meeting at which the claimant was given specific performance targets. There is no evidence that the claimant was advised previously that failure to meet certain specified performance targets would lead to the termination of his employment. Some of the accusations in the letter of termination are ambiguous. Some of the complaints date back to March 2012. The Respondent did not comply with its own disciplinary procedure which provides as follows:

Stage one

Most breaches of conduct or performance will be addressed in an informal discussion between the manager and employee. This conversation will address the breach. Employees should use this opportunity to discuss any concerns the employee has which have led to the breach(es). The employee and the manager will discuss ways to improve performance in the future.

More serious or repeated breaches of conduct and/or performance will be addressed beginning with stage two or three (below) as appropriate.

Stage Two

If conduct or performance does not meet acceptable standards the employee will be given a formal oral warning by her/his line manager. The line manager must inform Human Resources of the formal oral warning. It should be made clear to the employee why her/his conduct or performance does not meet the required standards and what the standards are. The employee should be informed that the meeting constitutes the first stage of the disciplinary procedure and that the outcome of the discussion will be recorded and placed on the employee's personal file and removed after a stated period subject to satisfactory performance during the period. The period will normally be no more than 6 months. The employee should be informed of her/his right to appeal against the decision.

Stage three

If a further offence occurs or if the first offence is serious, a written warning should be given by the line manager. This should take the form of a letter, written in a language that can be understood by the employee, setting out the employee's alleged misconduct or performance that has led to the consideration of dismissal or taking disciplinary action and giving the basis for the accusation. This letter should then be sent to the employee and copied to the Human Resources department. The employee should be invited to attend a disciplinary meeting to discuss the matter.

Stage four

A disciplinary hearing will be held before taking any action FARM will ensure that the employee has had a reasonable opportunity to consider her/his response to the allegations before the meeting is held. Under no circumstances will the meeting be held less than 48 hours after the written warning was issued. The employee must take all reasonable steps to attend the meeting. The employee has the right to be accompanied by a work colleague or other advocate at the disciplinary meeting.

The disciplinary meeting shall be chaired by a senior manager who will be appointed by the Country or Regional Director. At the meeting, evidence in support of the allegations against the employee shall be presented. The employee will be given an opportunity to respond to these allegations with evidence in support of the employee. A Human Resources representative will be present for the meeting. The parties should complete the relevant portions of Appendix 9 in relation to the meeting.

Stage five

The Chairperson of the meeting will determine if the charges against the employee are true and, if the chairperson is not a Country or Regional Director, the decision will be communicated to the Country or Regional Director. The employee will be informed of the decision and will be given an opportunity to present to the Country or Regional Director any mitigating factors that should be considered when the Country or Regional Director is determining the appropriate sanction for the behavior. The Country or Regional Director will then determine whether the employee should be dismissed or whether another sanction is appropriate. If the Country or Regional Director chaired the stage four meeting, the UK Director of Programmes will determine whether there are mitigating factors which should be considered and whether the employee should be dismissed or another sanction is appropriate. The employee should be provided with written reasons for the dismissal or sanction and, in the case of dismissal, the date on which the employment will terminate as soon as reasonably practical after the meeting. The employee should be informed of the right to appeal.

I find that the Respondent failed to follow the procedure provided in Section 41 of the Employment Act and its own field staff Handbook. I further find that the reasons in the Claimant's letter of termination were never presented to the Claimant before hand to enable him prepare his defence in advance, that the grounds are so many and ambiguous as to constitute witch-hurting and therefore an unfair labour practice.

For these reasons I find the termination of the Claimant's employment unfair both for want of fair procedure as well as validity of reasons.

2. Whether the Claimant is entitled to the prayers sought

I will consider each of the prayers made by the Claimant

1. One month's pay in lieu of notice

The Respondent offered to pay the claimant one weeks pay in lieu of notice. As I have already observed, the Claimant was not on a probationary contract. The Claimant explained that his previous contract was never terminated. He was promoted to the new position and his previous position declared redundant after his promotion. As a result he was never paid any terminal benefits for the previous contract. He had been in continuous employment of the 2nd Respodnent for more than 2 years at the time of termination of employment.

The reasons for extension of the contract are also suspect. In the letter extending the probation, it is stated that:

"The reason(s) the probationary period was extended us/are: Due to unexpected recruitment challenges with other FA Kenya positions (most notably the POM but also the Project Accountant, MELC and others), it is felt that the original probationary period was not a fair representation for the FAM to evidence capacity to meet the faM JD requirements and objectives. Also, probationary objectives were not set in a timely fashion (through no fault of the FAM). Because the FAM was forced to perform tasks that were intended for other positions, the work load and systems were not functioning as they should have. Now that all planned positions are filled the extension period is being offered in light of the unfair conditions as mentioned. Set objectives for the probationary period will be set and performance against these will be discussed at the end of the probation. These must be attached to the file by November 15th.

The extension will be for a period of 4 months, until January 31st 2013.

Please keep this letter for your records. Farm Africa will keep a copy of this letter in your personnel file”.

The extension was thus not based on Claimant’s poor performance. It was due to shortcomings of the Respondent. The extension was therefore unlawful.

I find that the Claimant was not on probationary contract and is entitled to two month’s salary in lieu of notice. I award him **Kshs.598,254/=**.

2. Severance pay

Severance pays is only due upon redundancy. The Claimant’s contract and the staff handbook do not provide for payment of severance pay upon termination in the manner in which the Claimant’s contract was terminated. I therefore dismiss the prayer.

3. Annual leave

The Claimant has prayed for payment of Kshs.598,394 being 2 years leave. The Respondent stated that the Claimant is only entitled to 5 days which is what he is entitled to carry forward according to the Claimant’s contract of employment. The Respondent further argued that the Claimant was on several occasions reminded to go on leave but failed to do so.

According to section 10 and 74 of the employment Act, an employer is supposed to keep records of employees containing among other details, *“an employees annual leave entitlement, days taken and days due specified in section 28”*. According to section 10(7), in any legal proceedings where an employer fails to produce such records it will be the burden of the employer to prove or disprove an alleged term of employment.

In the email correspondence produced by the Claimant in his bundle filed on 30th October 2013 which the Respondent relied on, the Claimant in response to the statement from Erica Krug that she had been asking the Claimant to take time off for a long time responded as follows *“Equally I have been asking for leave and 3 times I have been denied”*. This was on 21st December 2012. In his testimony under cross examination the Claimant explained that he only went off during Christmas period when the office was closed and that the days off that he took were TOIL. He explained that TOIL means days off given to an employee after official travel. He further explained that the days taken during Christmas were not normally recovered as part of annual leave. The Respondent’s witness testified that she was recruited after the Claimant left employment. She has in her witness statement attached leave forms which show that as at 15th December 2011 the Claimant had a total of 32 leave days and had taken 7.5 days. In her statement at paragraph 26 RW1 stated that she had not managed to trace any leave forms confirming the claimant took leave from 24th December to 7th January 2013. The Claimant’s employment was terminated on 9th January 2013.

Section 28(4) of the Employment Act provides that leave is to be taken within 18 months from the end of the leave earning period. Section 10 and 74 provide for employers to keep records of leave stating *“annual leave entitlement, days taken and days due as specified in section 28”*.

The Respondent submitted that it has a policy that only 5 days can be carried forward. The policy was not produced. The Respondent did not state what action it took to advise employees to take leave so that they do not have to forfeit any leave not taken during the year. It also did not state what happens where an employee is not allowed to take leave due to exigencies of duty. The Claimant in his email dated 21st December 2012 lamented that he had been asking for leave and had been denied leave 3 times. In his testimony the Claimant stated that the days he took was TOIL and not leave.

Section 26 of the Employment Act provides that the terms in the Act constitute basic minimum terms and conditions of a contract of service and employers cannot grant less favourable terms. The Respondent cannot purport to forfeit leave before the period referred to in Section 28 which is 18 months from the end of the leave earning period. The Respondents policy is against the law and prohibited by Section 26.

For the foregoing reasons I find that the Respondent has not disproved that the Claimant is entitled to leave as prayed. I award the Claimant 2 years leave at 25 days per year in the sum of **Kshs.498,662/=**.

4. Payment for remaining 14 months of contract

The Claimant prays for payment of the remaining 14 months of his contract. As stated by Rika J. in the case of **D.K. Marete Njagi V. Teachers Service Commission (2013) eKLR**, the Claimant does not merit salaries for the entire contract. He has not performed work for that period. The law presumes that the Claimant has moved on to mitigate his economic losses.

The Employment Act contemplates the remedies payable in the event of unfair termination. In Section 49 the Act provides for compensatory damages to a maximum of 12 months salary. No compensation or unfair termination can be granted in excess of 12 months salary. I therefore dismiss the prayer.

5. General damages for malicious and wrongful termination in the sum of Kshs.2,000,000/=

The Claimant did not mention the issues of general damages in his testimony. The same has not been elaborated in the written submissions. The Claimant has therefore not addressed the court on his entitlement to this prayer or how the figure of Kshs.2,000,000/= was arrived at.

As in prayer 4 above, this relief is not contemplated in the Employment Act. The Act however provides for compensatory damages where employment is found to have been unfairly terminated.

Having found that the claimant was unfairly terminated, he is entitled to compensation. I have taken into account the circumstance under which the claimant's employment was terminated and the factors set out in Section 49(4) of the Act. In my opinion, compensation equivalent to 6 months salary would be reasonable in the circumstance.

I therefore award the Claimant the sum of **Kshs.1,795,182/=** being 6 months salary.

6. Costs

The Respondent will pay the Claimant's costs for the suit.

7. Interest

Interest shall be payable on decretal sum at court rates from date of judgment to date of payment in full.

Orders accordingly.

Read in open Court this 15th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Otundo for Claimant

