



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT MOMBASA
CAUSE NO. 391 OF 2013
BENSON MURIITHI KAGAI CLAIMANT
VERSUS
KENYA EQUATORIAL HOTELS LIMITED T/A
MOMBASA INTERCONTINENTAL RESORT LIMITED RESPONDENT
J U D G M E N T

Introduction

1. The Claimant's suit is contained in the Re-amended Memorandum of Claim dated 12.5.2014. It seeks employment termination dues plus damages for unfair termination of employment by the Respondent on 19.8.2013. The basis for the suit is that the termination was not founded on a valid and fair reason and that it was done without following a fair procedure.
2. The Respondent has denied liability and averred that termination was lawful and all the terminal dues were paid to the Claimant at the time of the separation.
3. The suit was heard on 15.9.2014 when the Claimant testified as CW1 while the Respondent called Mr. Fredrick Munyambu as RW1.

CLAIMANT'S CASE

4. CW1 was employed by the Respondent on 26.5.2009 vide letter produced as Exh. 3 as a Purchasing Officer. His salary was Kshs.45,000 per month. He found that most of the suppliers were relatives of Senior Manager of the Respondent. CW1 decided to reform the department by doing prequalifications of all the suppliers. CW1 also ensured that all supply orders were to emanate from his office only. The said reforms were not popular among the Senior Managers and CW1 found himself in logger heads with some managers. CW1 gave the example of an incidence on 17.7.2009 when he was physically attacked by the Chief Engineer. CW1 explained that due to his reforms, the Respondent made great savings and that led to his promotion to the position of the Purchasing Manager on 1.9.2011 with a higher salary of Kshs.60,000 per month. That promotion came after his performance appraisal between July and August 2011.
5. CW1 explained that the Respondent employed a new General Manager (GM) from November 2011 and CW1 was suspended on 13.1.2013 by letter produced as Exh. 6. The reason for the suspension was that the GM had received reports on the operations in Purchasing Departments which warranted that CW1 stayed away from work to pave way to investigation. The suspension was on a full salary and it went on until 19.8.2013, CW1 was called to the office to collect his termination letter. He traveled from Kirinyaga and reached Mombasa on 26.8.2013 when he

- collected the termination letter (Exh. 7). Upon demand to know why he was dismissed before being heard, the GM told him that investigations were done and the recommendation made that CW1 should be terminated. CW1 was however never served with a copy of the investigations report.
6. According to CW1, his termination was unfair because he was never accorded any hearing to enable him defend himself. He contended that all the decisions were done in his absence and the termination was without notice. In addition and no reason was cited for the same. He therefore prayed for damages for unfair termination being 12 months x Kshs.60,000 = Kshs.720,000. According to CW1, the investigations report and findings dated 22.3.2012 and 27.5.2012 did not implicate him. However the Audit Report dated 9.9.2013, done after his termination, is the one which implicated him for allegedly colluding with the Receiving Clerks and the Storekeeper.
 7. One cross examination by the defence counsel, CW1 maintained that he served well and reformed the then procurement management until when the new GM Mr. Gichohi was engaged. The new GM started to dictate which Supplier to supply and when CW1 raised objection he was threatened with disciplinary action. For example, CW1 explained that, the GM directed that all meat shall be supplied by Farmers Choice and cancelled all other prequalified suppliers. He maintained that the termination was unfair for lack of valid reason and for being in breach of due process. CW1 contended that before the suspension he had written an email to the GM, HR Manager and financial controller requesting for a discussion on the problems in the purchasing. CW1 admitted that he was paid Kshs.58,748 after serving demand letter. Initially the GM had insisted that CW1 was only entitled to one leave day. CW1 denied ever colluding with the persons stated in the Audit Report.

Defence Case.

8. RW1 is the Security Manager for the Respondent. He confirmed that CW1 was employed by the Respondent as the Purchasing Manager. He explained that Mr. Gichai succeeded Mr. Mathu as the GM for the Respondent before DW1 left the Respondent. RW1 received a report from the Executive Chef of the Respondent in March 2012 about the Purchasing Department. RW1 then investigated the matter by taking statements from the persons involved including CW1 after which he prepared a report and recommendation requesting for an independent investigation because CW1 was a Manager. In his report, he found CW1 culpable because of overpricing of items bought from some companies yet there were cheaper suppliers. The record of the release of procured items to various departments were also missing from the computer. DW1 produced the photocopy investigation report as Exh. d.1 subject to the objection raised by the Claimant.
9. RW1 explained that a committee of inquiry was set up following his recommendation which included RW1 and the Executive Chef among other departmental managers of the Respondent. The committee found CW1 to have been involved in irregularities in his department and recommended for further investigations which was done by an external auditor. He produced a photocopy of the committee's report as Exh. d.2. He also produced a photocopy of the Auditor's report (letter dated 9.9.2013 and Exh.d.3 subject to the Claimant's objection. The Auditor's Report recommended for action against some individuals. He maintained that CW1 was not unlawfully terminated. According to RW1 the termination was done after much investigations and as such it was justifiable. RW1 did not know whether procurement process was interfered with by the GM.
10. On cross examination by the CW1's counsel, RW1 confirmed that his investigation and report (Exh. d.1) was about fraud by the store keeper and not CW1. He further confirmed that he took statement from CW1 during his investigations on the Storekeeper. RW1 confirmed that in his report he recommended that the burden of proof lied upon the storekeeper but recommend that CW1 be issued with a warning letter by his Head of Department. RW1 was however not aware whether CW1 was ever served with the warning letter or the Investigations Report. He however explained that CW1 was called by phone to collect the report of investigations by the Chairman of the committee in order to defend himself. RW1 could not however remember when CW1 was called by the Chairman of the committee. He could also not tell why only CW1 was called yet there were other employees being probed.
11. Regarding the Auditor Report, RW1 confirmed that, it was done on 9.9.2013 after CW1 had been dismissed. RW1 was not involved in the Audit and he did not know whether CW1 was

interviewed by the Auditor during the investigation. RW1 admitted that his security department was also blamed by the Auditors Report (paragraph 4) for not signing all the Goods Received Notes. He further admitted that at the end of the Investigations, only CW1 was dismissed. RW1 could not however know whether CW1 was told the reason for his dismissal.

12. After the close of the hearing both parties filed written submissions of which the Court has carefully read and considered in this judgment.

Analysis and Determination

13. There is no dispute that CW1 was employed by the Respondent as the Purchasing Manager for a monthly salary of Kshs.60,000. There is also no dispute that he was suspended on 31.1.2013 to pave way for investigations on alleged misconduct and improper performance of duty. There is also no dispute that CW1 was dismissed on 19.8.2013 for reasons that his services were no longer required. There is no dispute also that he was never given any chance to defend himself during the investigations by the committee of inquiry or the Auditor or at all. There is further dispute that his lay off was done on 19.8.2013 before the investigations were completed by the Auditor on 9.9.2013. It is also agreed that CW1 was paid Kshs.58,748 as his terminal dues.

14. The issues for determination are whether termination of CW1's employment was unfair and whether the reliefs sought ought to issue.

Unfair termination

15. The termination letter dated 19.8.2013 stated:

“Dear Mr. Kagai

RE: TERMINATION OF SERVICES

The management has decided that your services will no longer be required.

Consequently your employment at Mombasa Continental Resort has been terminated with effect from 19.8.2013. Upon completion of the clearance your final dues computed as follows will be paid through your bank account:

- *Salary upto and including 19th August 2013.*
- *Two months pay in lieu of Notice [60] days*

pending leave/off days and public holidays [1 day]

less:

- *Statutory deduction*
- *Any other amount owed to the company*

We would like to thank you for your services to the company and wish you the very best in your future endeavors.

Yours faithfully,

For and on behalf of

Mombasa Continental Resort

Charles Gichohi

GENERAL MANAGER

CC. Personal file

Ag. HRM

Financial Controller”

In this Courts opinion the foregoing letter meant that that CW1 was laid off or declared redundant. Redundancy has been defined under Section 2 of the Employment Act as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superflous and the practice commonly known as abolition of office,job or occupation and the loss of employment.

16. In Kenya the procedure for lay offs or redundancy is provided for in mandatory terms under Section 40 of the Employment Act. The said provision requires that before declaring an employee redundant, the employer shall serve at lease, one month notice in writing to the employee or his trade union (if a member of a union) and the Labour Officer. The employer is also required to conduct a fair selection of the employees to be laid off and then pay the employee to be laid off all his accrued employment benefits, pay in lieu of notice plus severance pay. In the present case no notice of lay off was served on the Claimant and the Labour Officer as provided for under Section 40 of the Act. Infact CW1 was serving his suspension for some alleged wrong doing while investigations were going on when he was declared redundant.
17. The lay off therefore came before the completion of the investigations as confirmed by RW1 and the Auditors Report dated 9.9.2013. The procedure for identifying CW1 for the lay off was not stated on the termination letter and it remains unknown to date. There is no evidence adduced to clarify whether it was the services of the Claimant as person which were not required or whether it was the office of the Purchasing Manager which was abolished. Lastly, the termination letter did not offer to pay severance pay to the Claimant as required under Section 40, supra. Consequently the court finds that the termination of the Claimant on ground of redundancy was in breach of the procedure stipulated under Section 40 of the Employment Act. It is now a well settled principle in our jurisdiction that, when redundancy is done in breach of Section 40 of the Employment Act, the result is an unfair termination. Consequently, the answer to the first question for determination is that the termination of the Claimant's services by the Respondent on 19.8.2013 through redundancy was unfair and unjustified.

Relief

18. Under Section 49 of the Employment Act an unfairly terminated employee is entitled to pay in lieu of notice, accrued employment benefits plus compensation for unfair termination. In the present case CW1 prayed for 12 months salary being Kshs.720,000 as compensation for unfair termination. The court awards CW1 the prayer for Kshs.720,000 because the employer acted capriciously and in breach of express provisions of the law. Firstly she accused the Claimant of wrong doing and suspended him for further investigations. Secondly, and before CW1 was heard and exonerated or convicted, unlawfully and unprocedurally declared him redundant. The termination was therefore unfair both procedurally and substantively as such it warrants maximum compensation.
19. However, the prayer for redundancy dues is dismissed for the reasons that the redundancy has already been declared to be unfair termination. It is now trite in our jurisdiction that once redundancy has been declared to be unfair termination, the remedy changes from severance pay to compensation for unfair termination. Likewise, the prayer for lost earnings after dismissal, is dismissed for the reasons that such remedy is essentially for physical injuries which compromise the Claimant's capacity to continue earning a living. The prayer for Damages for breach of contract is also dismissed for lack of particulars. Ordinarily, such remedy is compensated by the income for the notice period. In this case, the termination letter offered to pay 2 months salary in lieu of notice. The same has not been specifically pleaded and proved and as such the court will not fill in the gaps in the pleadings.

Disposition

20. For the reasons aforesaid, judgment is entered for the Claimant in the sum of Kshs.720,000 plus cost and interest.

Orders accordingly.

Dated, signed and delivered this 5th December 2014.

O.N. Makau

Judge