



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 313 OF 2012

JOHN MWALIMU MWEMA.....CLAIMANT

VERSUS

BACKLITE LIMITED.....RESPONDENT

Mr. Chege and Mr. Wachira for the Claimant

Mr. Nyawala for the Respondent

JUDGMENT

1. The Claimant filed this suit seeking compensation for wrongful termination equivalent to 12 months salary and payment of terminal benefits to wit:-

- (i) arrears salary in the sum of Ksh.204,000.00 for the period 1st to 18th January, 2012;
- (ii) six months' salary in lieu of Notice in the sum of Ksh.2,040,000.00;
- (iii) unpaid medical claims in the sum of Kshs.10,000.00;
- (iv) refund owed through training of Kshs.17,000.00.

2. During the hearing of this case, the Respondent conceded to the claims for:-

- (i) Arrear salary in the sum of Ksh.204,000.00;
- (ii) Unpaid medical claims of Ksh.10,000.00; and
- (iii) refund for training in the sum of Ksh.17,000.00.

3. The Court entered judgment in favour of the Claimant in the sum of Ksh.231,000.00.

4. The issues in dispute therefore are:-

- (a) whether the Claimant is entitled to payment of six months' salary in lieu of notice; and
- (ii) compensation for wrongful termination.

5. **Payment in lieu of Notice**

The Claimant's employment was terminated by the Respondent via a letter dated 18th January, 2012. The letter partly read;

"We hereby terminate your services in accordance with your service agreement which stipulates six (6) months' notice.

You will be allowed to spend time in your home and apply for a new job. If and when you get such a job, we will continue to pay the difference between your current salary here and your new salary until the six months have expired under condition that you honour all details in your service agreement."

The letter was by the Managing Director, Mr. Bengt Bendeus.

Contract of Employment

6. The contract of employment between the Claimant and the Respondent dated 26th November, 2010 provides under **Clause 14.1** as follows:-

"Your appointment hereunder may be terminated by either party giving six months written notice to the other or six months pay in lieu of such notice"

7. It is common cause that the Claimant's employment was terminated with immediate effect by the Respondent on 18th January, 2012.

8. It is also not in dispute that the Claimant was not paid in lieu of six (6) months notice in terms of **Clause 14.1** of the employment contract.

9. It is trite law that a party is bound by the terms of written contract unless the said terms are varied mutually by the parties in terms of the contract document itself. There was no variation of the terms of the contract of employment entered into by the parties.

10. The terms of the said contract could not be unilaterally varied and or amended by the Respondent, as the Respondent purported to do in the termination letter dated 18th January, 2012.

11. Upon termination of the contract of employment, the Claimant was immediately entitled to payment of six (6) months salary in lieu of notice in terms of the contract. At this point, no reason was given by the employer for the termination.

12. **Section 43(1)** provides;

"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."

Whereas;

Section 43(2) provides;

*“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 this employer to terminate the services of the employee.”*

13. In his sworn testimony, the Managing Director (RW1) of the Respondent told the court that he terminated the employment of the Claimant normally and deferred payment of notice pay subject to the conditions he put in the letter of termination.

14. He told the Court that at the time he had no reason to dismiss the claimant from employment but later on discovered that the claimant was involved in other business while working for the Respondent.

15. RW1 told the Court further that he then subsequently decided to summarily dismiss the Claimant upon learning of these facts. He stated that he had no reason to call the claimant for any explanation and/or subject the Claimant to a disciplinary hearing.

Determination

16. The fact of the matter is that the Claimant’s employment with the Respondent came to an end on 8th January, 2011, when the Respondent terminated the employment contract.

17. No reason was given for the termination contrary to **Section 43** of the **Employment Act**.

18. The Claimant was not also subjected to any due process in terms of **Section 41** of the **Employment Act**. RW1 stated that this was a normal termination and therefore there was no reason for a hearing.

19. In the Industrial Court of Kenya at Mombasa, **Cause No. 65 of 2012, Josiah Kioi Kivuva Vs. Kenya Shell Limited, Onesmus Makau, J.** stated;

“I have noted with surprise the submissions by defence that an employer did not need to cite the reason for termination provided that she pays salary in lieu of notice. I dismiss the said submission as outdated and not being in consonance with the concept of fair termination.

In Contemporary Labour Standards, it is unfair to dismiss an employee without citing the reasons. It would be holding onto the doctrine of employment at the will of the employer. It will also be difficult to determine procedural fairness if employers were allowed to continue with that old doctrine. Such tendencies will continue to confuse everybody because procedural fairness is dependent on the reason for the termination.”

20. I could not agree more.

By failing to provide the Claimant with the reason for termination of his employment on 18th January, 2012, and therefore failing to afford the Claimant opportunity to explain why his employment should not be terminated, the Respondent contravened not only **Section 43** of the **Employment Act, 2007**, but this rendered the termination substantively and procedurally unfair contrary to **Section 45(2)(a)** as read with **Section 42(2)(c)** of the **Employment Act, 2007**. The Claimant is therefore entitled to compensation in terms of **Section 49(1)(c)** of the **Employment Act**.

Quantum

21. In determining the Quantum of Compensation, the court is guided by the provisions of **Section 49(4)** as read with **Section 50** of the **Employment Act**.

In this case, the employee did not wish to be reinstated to his previous job. The Claimant had served

the Respondent for about two (2) years as a Sales Accounts Director.

22. At the time of termination, he earned Ksh.340,000.00 per month. He was not paid terminal benefits upon termination and the employer did not provide him with a certificate of service upon termination.

23. Furthermore, the Respondent placed his name in the local daily papers stating that he was no longer in the employ of the Respondent.

24. These moves by the Respondent according to the Claimant were meant to prejudice potential employers from offering him employment. The Claimant was however able to obtain alternative employment after a short while following the termination. The Respondent has already paid the Claimant arrear salary in terms of his contract of employment which has however come belatedly upon admission in Court.

25. Considering all these factors, the Court awards the Claimant six months salary in the sum of Kshs.2,040,000.00 as compensation for the unlawful and unfair termination. In addition, the Claimant is awarded six months salary in lieu of notice in the sum of Kshs.2,040,000.00.

Total award to the Claimant is therefore Kshs.4,080,000.00 (Four Million Eighty Thousand only).

The Award is payable with interest at court rates from the date of this judgment till payment in full.

The Respondent is also to pay the costs of this suit.

Dated and delivered at Nairobi this 5th day of December, 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE