



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 696 of 2010

**THOMAS SHEM ONDUSO.....
.....APPLICANT**

VS

**KENYA BROADCASTING CORPORATION.....1ST
RESPONDENT**

**THE MANAGING DIRECTOR KENYA BROADCASTING CORPORATION2ND
RESPONDENT**

**THE BOARD OF DIRECTORS KENYA BROADCASTING CORPORATION 3RD
RESPONDENT**

Mr. Mariaria for the Claimant

Mr. John Ochora for the Respondent

AWARD

This matter was initially brought to court by way of a Notice of Motion on a Certificate of Urgency seeking for orders *inter alia*:-

(c) A temporary injunction or an order of prohibition do issue prohibiting and/or restraining the 1st, 2nd and 3rd Respondents or any other person, agent or persons acting under their behest from effecting any manner, any decision to dismiss or terminate the Claimant from his employment with Kenya Broadcasting Corporation till this application is heard and determined.

Ex-parte orders were obtained on 30th day of June, 2010 and was served on the Respondents on 1st July, 2010.

The Respondent filed a Notice of Motion on a Certificate of Urgency on 8th July, 2010 seeking in the main, the court to vacate the *ex-parte* orders issued on 30th June, 2010 on grounds that the orders had been overtaken by events because the services of the Claimant were terminated on 30th April, 2010.

Without going much into this history, the court observes that the parties eventually agreed on 1st October, 2012 to have the claim be determined on its merits. They dispensed with oral evidence and agreed to proceed by way of written submissions in support of the pleadings filed by the parties including all annexures thereof.

The claimant and the Respondent duly filed their written submissions dated 15th October, 2012 and 30th October, 2012 respectively.

The thrust of the claim may be summarized as follows:-

That the claimant was employed by the 1st Respondent as a Manager Technical Services on Job Group SS BE2 on a 3 year contract with effect from 2nd June 2009, upon undergoing a successful interview by the 3rd Respondent on 19th May 2009. The letter of appointment annexed to the Statement of Claim and marked 'TSOI' outlines the terms of service upon which he was employed. The employment was also subjected to the 1st Respondent's Code of Regulation of 29th June 2009.

It was an express term of his employment contract that he would be subjected to regular evaluation, the first one to commence after six months from the 2nd June 2009.

He was also subject to all Corporation's Rules and Regulations currently in force and as may be amended from time to time. The rules were amended on 29th June 2009, soon after his employment.

It is the Claimant's contention that only the 3rd Respondent, that is, the Board of Directors of the 1st Respondent had the mandate and or authority to employ, promote, discipline and dismiss employees of the 1st Respondent, including the claimant and not the 2nd Respondent, that is, the Managing Director of the 1st Respondent.

It is the Claimant's case that he was wrongfully, unlawfully and unfairly dismissed by the 2nd Respondent for what he alleged to be poor work performance without any evidence of such because he was not subjected to any performance appraisal or any corrective measures including a written warning on his work performance notwithstanding that he had already completed one year of service since his appointment.

The Claimant further states that he was in the Category known as 'Top Management of KBC', which category could only be dismissed from employment by the Board of Directors and not the Managing Director.

If the Board of Directors, delegated its authority to the Managing Director to dismiss the Claimant as is alleged by the Respondent, the Claimant urges the court to find that such delegation was *ultra vires* the Corporation's rules and regulations as amended on 29th June, 2009. The dismissal should therefore be declared null and void, *ab initio* and quashed by the court with the effect that the Claimant be reinstated to his former employment. However since three years have elapsed since 2nd June 2009, when the claimant's employment contract with the 1st Respondent commenced, the Claimant submits that an order of payment of damages and costs to him would suffice.

In the claimant's further particulars filed on 6th June 2011, the claimant outlines his terms of service as follows:-

1. Salary Scale on Job Group BE2: Kshs.90,335 x 4,200 – 128,135 per month.
2. Contributory medical scheme at 10% by the Employer and 5% by the Employee: Total entitlement per Annum Kshs.500,000.

3. Group Life Insurance Scheme equivalent to 4 years basic salary
4. 30 days annual leave with leave allowance of Kshs.20,000 per year
5. Gratuity at 31% of total basic salary for the period of the Contract
6. Airtime at Kshs.9,000 per month
7. Two newspapers per day and refreshments.

Basing on the above, he has tabulated the claim as follows:-

A - June 2010 to May 2011

1. Remuneration payable for remaining contract at a total sum of Kshs.2,484,420
2. Other allowances for the same period including leave allowance, medical cover (10%); airtime and daily newspapers at Kshs.2,746,662.00
3. Gratuity @ 31% of basic salary for the entire contract – Kshs.3,098,332.20

B - June 2011 to May 2012

1. Total Remuneration of Kshs.2,534,820 based on an increased basic salary of Kshs.98,735.00.
2. Other allowances:- leave allowance; medical (10%); Airtime and newspapers at Kshs.2,802,102.
3. Gratuity @ 31% of the basic pay of Kshs.98,735.00 in the sum of Kshs.3,169,396.20.

C Travelling allowance upon retirement being equivalent of two months basic salary – Kshs.197,470.00

D Aggravated damages equivalent to 1 year salary in the sum of Kshs.2,534,820.00

The total claim is for Kshs.9,336,064.60. The figures are supported by the payslips, the Code of Regulations for the Kenya Broadcasting Corporation dated 29th June 2009, and the letter of appointment.

The claimant prays the court to award him accordingly including what he refers to as General aggravated damages and General exemplary damages.

The Respondent has in its reply to the statement of claim dated 9th August, 2010 and in its written submissions dated 30th October, 2012 aptly responded to the claim and the gravamen of the response is as follows:-

That by the time injunctive orders were sought before the Chief Magistrate's Court in Civil case No.2740 of 2010 and thereafter before the Industrial Court in this matter, the Claimant had already been dismissed and therefore the allegation by the claimant that the Respondent was in contempt of a court order was completely unfounded.

By and large, the terms and conditions under which the Claimant was employed are not in dispute as contained in the Letter of Appointment.

The Respondent states that the appointment was subject to regular evaluation periodically after six months and the employment was further subject to the Claimant fulfilling other conditions of employment as per the job description dated 8th July, 2009. The Respondent avers, contrary to the allegations by the Claimant, that his performance was evaluated on diverse occasions and found wanting. That he was

severally informed by the Respondent that his performance was poor and needed to improve but the Claimant did not improve his performance.

The Court was referred to an internal memo dated the 6th November, 2009 directed to several officers, including the Claimant. The memo titled 'Daily Technical/Operational Reports' indicated a worrying trend of deteriorating service delivery of Accord Live Programmes leading to threats by the clients to withdraw sponsorship and general observations by the Board and advertisers, that the KBC TV signal had deteriorated over time and discrepancies in placement of adverts and quality resulting in loss of revenue and poor customer service.

In the memo the Managing Director ordered for daily report by 9.00 a.m. on each day. A month later, on the 1st December, 2009 the Managing Director wrote a warning letter to the claimant titled 'Work Performance'. He was notified that the Board of Directors in its meeting of 30th October, 2009 noted with concern the poor performance of his department in the delivery of its relevant services.

The Board was particularly concerned that the broadcasting signal quality of the station is still poor inspite of the Claimant's undertaking to promptly address the same upon his appointment as the Manager Technical Services (MTS).

The purpose of the letter, the Managing Director added, was to afford the Claimant opportunity to improve the performance of all critical areas of his position and was requested to provide a detailed plan on how he was to achieve that.

In the meantime, the Claimant was given six (6) months from the date of the Board Meeting (30th October, 2009) to bring his performance to a satisfactory level failure to which further action would be taken accordingly.

On the 12th February 2010, the Managing Director wrote a further memorandum to the Claimant titled 'Quality of Live Cover', in which he registered his concerns over the quality of KBC's Live Coverage Programmes due to poor planning, late rigging or technical problems. He reiterated that these problems seem to recur often without any measures being put in place to prevent further recurrence. He requested the constant buck passing to stop. He also requested henceforth he be informed in advance of all live coverages and the preparations being put in place to ensure flawless broadcasts.

On 30th April 2010, the Claimant received a letter of termination of his contract of employment with the 1st Respondent. The letter was written and signed by the Managing Director, Mr. David Waweru. The letter read as follows:-

"KBC/MD/006745/C/(10)

30th April, 2010

Mr. Thomas S. Onduso

Manager Technical Services

KBC

Nairobi

Dear

RE: TERMINATION OF APPOINTMENT ON CONTRACT

I wish to inform you that the Board and Management have been concerned about the performance of your department for sometime.

On your appointment, you were provided with a job description of which you were expected to realize set targets on timely basis. It has however, been noted that you have not satisfactorily met or achieved the requirements set out. In the letter Ref. KBC/MD/006745/(5) dated 1st December 2009 to you, the Board and Management expressed their concerns over the continued poor performance of your department on delivery of its relevant technical services particularly on signal quality improvement, problem solving and project implementation.

As the Head of Technical Department, you were given six (6) months to improve with clear guidelines. However, to date there has been no tangible evidence. The performance of the department is still a concern to the Board and Management and was discussed in the Board of 1st April 2010.

Taking into consideration the above facts, I wish to inform you that you cannot be confirmed to complete your three (3) year contract as would be expected and therefore, your services as Manager Technical Services SS BE 2 are terminated with effect from 1st June, 2010.

This is in line with Sec B(ii) of the Code of Regulations. Please hand over to the Manager Technical Services (PRD) with immediate effect and proceed on leave after preparing a comprehensive handing over report as per the regulations.

Your salary and allowances will be paid upto the date of terminating your services. In addition you will be paid gratuity calculated at 31% of your basic salary for the years you have been in service, one month's basic salary being salary in lieu of notice, and two months' basic salary to cater for travelling and transportation allowance while leaving service. Any leave days left outstanding will be commuted to cash and paid off as required. Please clear with the Corporation and Kenya Revenue Authority of any outstanding liabilities.

I wish to thank you for the services you have offered the Corporation and wish you best of luck.

Yours

DAVID WAWERU

MANAGING DIRECTOR

N.o.o.

**cc. - Corporation Secretary
- Ag. Human Res. Manager**

As seen in the letter, the Managing Director conveyed the message by

the Board of Directors that in line with Sec. B(ii) of the Code of Regulations, taking into consideration his poor work performance and failure to improve over a period of six (6) months, the Claimant could not be confirmed to complete his three (3) year contract as would be expected and therefore his services as Manager Technical Services SS BE 2 were terminated with effect from 1st June 2010. He was asked to handover immediately and proceed on leave upon preparation of a comprehensive handing over report as per the regulations.

His salary and allowance were to be paid upto the date of termination. He was also offered gratuity at 31% for the completed year of service, one month salary in lieu of Notice and two months' basic salary to cater for travelling and transportation allowance while leaving service. He too was to receive payment in lieu of leave days not taken. All these payments were subject to the deductions of any monies owed to the 1st Respondent and the Kenya Revenue Authority.

The issues for determination are as follows:-

- (a) Did the 2nd Respondent have authority to terminate the claimant's contract of service in terms of the contract document and the Code of Regulations 2009.
- (b) If so, did the employer have a valid reason to terminate the employment?
- (c) If so, was the termination done in terms of a fair procedure?
- (d) What remedies is the claimant entitled to?

(A) Did the 2nd Respondent have authority to terminate the claimant's contract of service in terms of the contract document and the Code of Regulations 2009.

It is not in contention that the employment of the Claimant was terminated on 30th April, 2010 with effect from 1st June 2010, by a letter of the same date written by the 2nd Respondent, the Managing Director of the 3rd Respondent. The Respondents have stated that the 2nd Respondent was duly mandated by the 3rd Respondent at a Board Meeting held on 1st April 2010 to terminate the employment of the Claimant for poor work performance on terms contained in the said letter. The 2nd Respondent does not purport to Act on behalf of the 3rd Respondent in the said letter but only refers casually to concerns raised by the Board in the letter dated 1st December 2009 and in a Board Meeting held on 1st April 2010.

Both parties relied on the Kenya Broadcasting Corporation –

Code of Regulations (COR) dated 29th June 2009 which is Appendix 5

to the Statement of Claim and Appendix 4 to the response by the Respondent.

SECTION B – titled 'Staff Appointments and Promotions and in Particular B.1 (i) reads:-

“The Board shall be responsible for all appointments, promotions, Discipline and separations. The Board will, however delegate powers to the Managing Director to make appointments, promotions and handle discipline and separations to posts on SS BA 4 and below on recommendation of the Management Staff Committee.

(iii) The Board will also delegate all powers for staff transfers and resignations to the Managing Director.

It is common cause that the Claimant was a Manager Technical Services in Job Group SS BE2 on a three (3) year contract with effect from 2nd June 2009.

He was not placed on probation at all in recognition of “your professional qualifications and your vast experience in Engineering and

Information Technology (IT) in a modern media environment”.

The contract subjected him “to all corporation's rules and regulations currently in force or as may be amended from time to time”

as said earlier in this judgment.

It is therefore, without a doubt that the staff rules and regulations applicable to the Claimant at the time his services were terminated mandated the Board to discipline and terminate employment of staff in the category of SS BA3 and above. The Board had no Authority to delegate that responsibility to the Managing Director. The Managing Director could only convey the decision of the Board as contained in

the minutes of a Board Meeting to the Claimant. This was clearly not the case from the papers filed by the Respondent including all the annexures to the pleadings.

In his final submissions, Mr. Ochora Advocate referred the Court to Annexure 5 to the Reply to the Statement of Claim titled:-

MINUTE NO.23/20 – TECHNICAL CONSULTANT.

He submitted that this was the minute that delegated authority to the Managing Director to terminate the services of the Claimant.

A close reading of the said minute does not show any decision by the Board to discipline and/or terminate the employment of the Claimant. The Board did not also delegate such authority to the Managing Director with specific reference to the Claimant or any other person.

Consequently, the decision by the 2nd Respondent to terminate the Claimant from the employ of the 1st Respondent was unlawful and null and void. This notwithstanding, the claimant was separated from the employ of the 1st Respondent by fiat of the 2nd Respondent and consequently stopped to provide services and receive any emoluments in terms of his contract of service.

(B) Did the employer have a valid reason to terminate the employment of the Claimant?

According to the contract of employment, the Claimant was to undergo

an appraisal of his performance after serving six months. The due date for such appraisal was 26th November, 2009. This appraisal apparently did not take place. However, the 2nd Respondent on 6th November, 2009 wrote a memorandum to several senior managers including the Claimant complaining about deteriorating service delivery standards referred to earlier in this judgment. The thrust of the memo was to request a daily report from all concerned on any occurrence that had a negative impact on the Respondent's business and image. On 1st December 2009 a warning letter on poor work performance was given to the Claimant. It referred to a Board Meeting on 30th October, 2009 which had noted poor work performance by the department headed by the Claimant. The Claimant as earlier stated in this judgment was granted six months to reach a satisfactory level failure to which further action would be taken accordingly. This was followed by a further complaint by the 2nd Respondent via memorandum dated 12th February 2010 on poor quality of Live Coverage which fell under the responsibility of the Claimant. The 2nd Respondent had complained of persistent Poor Quality Live Coverage and pinpointed buck passing between various departments as an issue that had to stop forthwith.

The final communication from the 2nd Respondent was the letter of termination of the employment of the Claimant dated 30th April, 2010. It is without doubt that there were genuine concerns on the work performance of the Claimant amongst other senior staff. The 2nd Respondent had given him a warning letter and time to rectify his performance.

It is these matters which he should have confronted the claimant with to

answer before a disciplinary hearing panel duly constituted by the Board with a view to provide the Claimant with an opportunity to defend himself and the Board with an appropriate Report and recommendations to consider before deciding whether to terminate the employment of the Claimant or not. The outcome of that process would have qualified as a valid and fair reason for the 3rd Respondent to terminate the employment of the Claimant. The 2nd Respondent failed the 1st and 3rd Respondents in this respect with the result that the employer has failed to prove that it had a valid reason to terminate the employment of the Claimant and that the employment was terminated in accordance with a fair procedure in terms of Section 45(2)(a) and (c) respectively.

4. WHAT REMEDY IS THE CLAIMANT ENTITLED TO

The Industrial Court Act, 2011, Section 12(3) provides that the Court has power to make any of the following orders:-

- (iii) *an order for specific performance*
- (v) *an award of compensation in any circumstance contemplated Under this Act or any written Law*
- (vi) *an award of damages in any circumstances contemplated under this Act or any written Law*
- (vii) *an order for reinstatement of any employee within three years of dismissal subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written Law.*

The Claimant in his written submissions opted not to seek for reinstatement since three years had elapsed from the time his three (3) years' contract commenced.

He has prayed in the alternative for damages equivalent to the remaining term of the contract entered into between himself and the 1st Respondent on 22nd May, 2009. Though the Claimant signed the Letter of appointment on 26th May 2009, he actually started work on 2nd June 2009. At the time of termination on 1st June 2010, he had served 12 months and was due to serve another 2 years.

Section 49 of the Employment Act 2007 captioned "Remedies for wrongful dismissal and unfair termination" provides:-

"(1) where in the opinion of a labour officer (read court) by dint of Section (50) summary dismissal or termination of a contract of an employee is unjustified the labour officer may recommend to the employer to pay the employee any or all of the following:-

- (a) *the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his Contract of Service.*
- (b) *where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or*
- (c) *the equivalent of a number of months wage or salary not*

exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

In terms of the Letter of Appointment the Claimant was entitled to one month's basic salary in lieu of notice; he was also entitled to a gratuity of 31% of the total basic salary earned for the duration of the Contract. In this case, he is entitled to 12 months gratuity at 31% of the basic salary for the 12 months served. It is important to note that compensation and payment in Lieu of Notice is based on gross pay and not basic pay and this should be corrected where a Contract of Service provides otherwise.

He had served for 12 months and had expected to serve a further 2 years. This expectation was unlawfully and unfairly terminated by the 2nd Respondent. Considering the facts of the case and the circumstances leading to his termination and in particular:-

- (i) The termination was by a person not authorised to do so;

- (ii) He was not subjected to any disciplinary process;
- (iii) He had lost opportunity for career advancement;
- (iv) He was a Senior Manager and was not easy to get an equivalent employment in the market;

The Court awards him 10 months' salary as compensation for unfair dismissal.

Since it was contemplated in the contract that either party may lawfully terminate the contract of service by giving a month's notice and given that lawful termination of contracts is contemplated under Section 35 of the Employment Act 2007, it is the court's view that where the termination of the contract is found to be unlawful the remedies contemplated under Section 49 referred to earlier suffice. It is therefore not appropriate to award damages equivalent to the unserved period of the contract in addition to an award of compensation.

The Industrial Court Act 2011, Section 12(3), thereof provides that award of compensation and damages to the aggrieved employees should be as contemplated in the Act itself or any written law. In this case, the Employment Act, 2007 is the relevant law applicable in considering remedies to employees.

The Claimant was also entitled to payment in lieu of leave days not taken and two months' basic salary for travel and transport. These items have been offered by the Respondent and are not in dispute.

Accordingly, the Court finds that the Claimant is entitled to the following:-

(1) One month's gross salary in lieu of notice	-	Kshs.207,035.00
(2) Two months' basic salary for travel and transport	-	Kshs.414,070.00
(3) Service gratuity (90,335x12x31%)	-	Kshs.336,046.20
(4) Outstanding leave days 207,035 x 27/30	-	Kshs.186,331.50
(5) 10 months gross salary being compensation for unlawful and unfair termination	-	<u>Kshs.2,070,350.00</u>
TOTAL	=	<u>Kshs.3,213,832.70</u>

This amount is subject to PAYE; interest on the due amount at court rates from the date of filing the suit to the date of payment

(6) Costs of the suit.
It is so ordered.

DATED and DELIVERED in Nairobi this 16th day of January, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE