



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 771 of 2012

NAZARENO KARIUKI.....CLAIMANT

VS

FEED THE CHILDREN KENYA.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim in this case is for wrongful and unfair termination of employment. The Claimant filed a Memorandum of Claim on 8th May 2012 and the Respondent filed a Memorandum of Defence on 11th July 2012. The matter proceeded to hearing on 5th and 22nd February 2013, with Mr. Anam instructed by Sichangi Partners Advocates appearing for the Claimant and Mrs. Wetende instructed by Kaplan & Stratton Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Pamela Awori Lwanga. The parties then filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 12th March 2007 in the position of Project Manager. At the time of termination of his employment, the Claimant was serving as Deputy Country Director/Program Manager on a fixed term contract effective 1st December 2010 to 30th November 2012.

3. On 28th February 2012 the Respondent terminated the Claimant's employment without lawful cause and due disciplinary procedure. It was the Claimant's case that the termination of his employment was in contravention of the rules of natural justice as well as the Respondent's Disciplinary and Grievance Procedure. The Claimant claimed to have had a good performance record in the course of his employment with the Respondent.

4. The Claimant's claim against the Respondent was as follows:

- a) A declaration that the termination of his employment was wrongful and unlawful;
- b) An order for reinstatement;
- c) As an alternative to reinstatement salary for the unexpired term of the contract.....Kshs 3,746,250
- d) Pay in lieu of notice.....552,324

- e) Costs and interest;
- f) Any other relief the Court may deem just to grant.

The Respondent's Case

5. In its Memorandum of Defence the Respondent stated that the Claimant was summarily dismissed following incidences of misconduct and breach of the Respondent's Code of Conduct. The Respondent confirmed that the Claimant was employed on 12th March 2007 in the position of Program Manager and that at the time of his dismissal he held the position of Deputy Country Director /Program Manager on a 2 year contract running from 1st December 2010 to 30th November 2012.

6. On or about January 2012 the Claimant began exchanging unprofessional, hostile and disrespectful electronic mail and other correspondence with the Respondent's Operations Manager, Jesse Olukutukei. The mail was copied to other members of staff, including some junior staff. The Respondent made several efforts towards facilitating the Claimant and Jesse Olukutukei who were both senior members of staff to resolve their differences but the two continued to exchange the unpleasant mail and even confronted each other in meetings.

7. The Claimant even escalated his correspondence to the Respondent's Headquarters in the United States of America prompting a reaction from the said Headquarters in February 2012. The situation degenerated into a major altercation at a meeting held on 6th February 2012 which was attended by a senior representative from the Respondent's Headquarters.

8. It was the Respondent's case that the continued exchanges between the Claimant and Jessy Olukutukei were disruptive to the smooth running of the Respondent's operations and an affront to the reputation and image of the Respondent. The Respondent therefore instituted disciplinary proceedings against both staff, who were subsequently dismissed.

9. The Respondent maintained that the Claimant's dismissal was warranted and the disciplinary procedure adopted in the case was in accordance with the law and the Respondent's Human Resources Policies and Procedures Manual. The Claimant was given an opportunity to be heard.

10. Specifically, the Claimant met with the Respondent's Regional Director and the Human Resources Manager on several occasions with the aim of addressing concerns regarding the Claimant's conduct. The Claimant was also invited to a meeting to show cause why he should not be summarily dismissed but he failed to respond to the issues raised in the show cause letter prompting the Respondent to dismiss him. The Respondent stated that the Claimant had not handed over confidential information in his possession and that he had failed to collect his certificate of service which has always been ready for collection.

Findings and Determination

11. The first issue for determination is whether the Respondent had a justifiable reason to dismiss the Claimant from employment.

12. Section 43(1) of the Employment Act, 2007 provides that:

(1) 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.

(2) 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 the employer to terminate the services of the employee.

13. The Halsbury's Laws of England (4th Edition Vol 16) at page 482 which was cited by Counsel for the Respondent expounds this 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 reasonably 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.”

14. 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.

15. It was not in contest that prior to the Claimant's dismissal there was an unpleasant exchange of electronic mail between the Claimant and Jessy Olukutukei, the Respondent's Operations Manager. While the Claimant felt that he had justification to write the mail that emanated from him, the bad blood between the two members of staff and the resultant written and verbal exchange were a source of major concern to the Respondent. The magnitude of these concerns was demonstrated by the intervention of senior officers from the Respondent's Headquarters in Oklahoma, USA.

16. In determining this case I find it necessary to touch on the position and status of the Claimant vis á vis the Respondent. The Claimant was not just any employee. He was the Deputy Country Director/Programs Manager. He was second in command at the Respondent's operations in Kenya. One would therefore have expected a better show from him.

17. In the case of **Captain Kai Tinga Vs Jubba Airways (Industrial Court Cause No 605 of 2011)** this Court stated that:

“I find it necessary to restate that the Claimant held a senior position in the Respondent Company. The level of resilience, civility and decorum expected from him was therefore correspondingly high.”

18. I hold the same for the Claimant in this case. As a senior member of the Management Team, the Claimant should have walked the high ground and pursued his rights in a more mature and dignified manner. Having engaged in the manifestly divisive and disruptive exchange with Jessy Olukutukei in a sustained manner, the Claimant soiled his hands. It seems to me that the exchange continued unabated for too long and even when the Claimant appeared somewhat apologetic, it was too little too late. Employment contracts are based on mutual trust which must be guarded by both parties. In view of the foregoing, I find that the Respondent had a justifiable reason to terminate the Claimant's employment.

19. Having established substantive justification, I will now deal with the question whether in terminating the Claimant's employment the Respondent used fair procedure. Section 41 of the Employment Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make

20. It was evident that there were many attempts towards resolution of the issues between the Claimant and Jessy Olukutukei which the two warring staff squandered. However, it seems to me that the Respondent was unclear as to when the matter moved from reconciliation to discipline. Since disciplinary processes have severe consequences an employer is required to notify an employee that what they are facing is a disciplinary process and not just fellowship or a cup of tea. My analysis of the process adopted by the Respondent in this case suggests an oscillation between reconciliation and discipline. No wonder the Claimant was shocked to receive a letter of dismissal even against the backdrop of his belated regret and apology. For this reason I convert the Claimant's summary dismissal to a normal termination and award him one month's salary in lieu of notice. The Claimant is also entitled to his salary for the month of February 2012.

21. The final effect of this Award is as follows:

a) One month's salary in lieu of notice.....	Kshs. 416,250
b) Salary for the month of February 2012.....	<u>416,250</u>
Total.....	832,500

The Award amount is subject to statutory tax.

Each party will bear their own costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF MAY
2013**

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**