



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1264 OF 2010

KIZITO SAVALICLAIMANT

-VERSUS-

MARSHALLS EAST AFRICA LIMITED.....RESPONDENT

Mr. Nyamburi for Claimant.

Mrs. Awinja for Respondent.

JUDGMENT

The matter was brought by way of a memorandum of claim dated 13th October, 2010 seeking payment of terminal benefits following summary dismissal on 5th May, 2010. The Claimant **Mr. Kizito Savali** also seeks payment of damages and compensation for the alleged unlawful and unfair summary dismissal.

Facts giving rise to this matter may be summarised as follows:

That the Claimant was employed by the Respondent by a letter of appointment dated 11th April, 2005 as a senior accountant. According to the letter of appointment the claimant was paid a consolidated gross monthly salary of Kshs.30,000/=. Upon successful completion of six months probation, he joined individual retirement benefit scheme and medical scheme. He was entitled to twenty two leave days annually and the termination would be effected by either party upon giving one month's notice or payment in lieu thereof.

In terms of **Clause 6** of the letter of appointment, the Claimant could be summarily dismissed without notice for matters listed as (i) – (iv) in the said letter.

Other terms of employment are to be found in the company's **Human Resource Manual** and **Labour Laws**.

On 11th November, 2005, the Claimant was confirmed to the position of **Senior Accountant - Band 7** and his salary was increased to Kshs.60,000/= by a letter dated 24th April, 2007. By a letter dated 5th February, 2008 the salary was increased to Kshs.80,000/= and on 6th April, 2009 the Claimant was promoted to the position of **Financial Controller** with effect from 1st April, 2009. His salary was also

increased to Kshs.125,000/=.

On 25th November, 2009 the salary rose to Kshs.200,000/= in appreciation of the Claimant's good performance.

On 5th May, 2010, the employment of the Claimant was brought to an end by way of summary dismissal without giving him any reason (s) for the dismissal.

He was also not given notice or paid in lieu thereof.

The Claimant avers that the dismissal was malicious as reflected in the letter of dismissal which was back dated to 5th April, 2010 in order to deny him the benefit of payment in lieu of notice. It was only after the Claimant complained that the letter was revised to read 5th May, 2010.

The Claimant prays for payment of:

- a. *Five days salary for the month of May in the sum of Kshs.33,333/=.*
- b. *One month's salary in lieu of notice in the sum of Kshs.200,000/=.*
- c. *48 leave days in the sum of Kshs.320,000/=.*
- d. *Fuel allowance for two months at Kshs.10,000/= per month in the sum of Kshs.20,000/=.*
- e. *Telephone allowance for two months in arrears in the sum of Kshs.10,000/=.*
- f. *Leave travel allowance in the sum of Kshs.8,000/=.*
- g. *Monies not remitted to the Pension Fund from November, 2009 to April, 2010 (2.5% - Kshs.25,925/= and employer 10% - Kshs.108,875/= totaling Kshs.134,800/=) Total Kshs.726,133/= being special damages above.*

Furthermore, the Claimant prays for twelve months compensation for unlawful dismissal, costs of the suit and interest on the award.

The Claimant testified under oath in support of the particulars of claim outlined above. He referred the court to the Human Resource Manual attached to the Memorandum of Claim and in particular page 35 paragraph 6.5 titled "*Procedure for Involuntary Termination of Appointment.*"

Clause 6.5.2 provides for procedures in dismissal of a staff member.

The provision provides that a dismissal should not be contrary to the law on natural justice and should be preceded by either short or long disciplinary proceedings or processes, documenting the same and keeping records of all stages in disciplinary proceedings.

The dismissal should be in accordance with the current Labour Laws and the decision to dismiss should be communicated by the head of Human Resource function.

That the dismissed employee should be afforded reasonable dignity.

The claimant states that these provisions were applied in respect to his dismissal and was not given exit interview and a certificate of service. The letter of termination dated 5th April, 2010 did not provide any reasons for the termination of service which in effect was a summary dismissal as no notice was given.

The second letter of dismissal dated 5th May, 2010 was a replica of the first save for the date. No reason

for the termination was given therein and no notice was given which means that the Claimant was summarily dismissed.

The Respondent filed a response to the Memorandum of Claim dated 13th July, 2011 on 14th July, 2011.

It is admitted that the Claimant was employed by the Respondent in 2005 but denies that the Claimant carried out his work diligently until he was dismissed from employment on 5th May, 2010.

The Respondent avers that the Claimant's service was terminated for serious negligence and lapses in that many of the bank accounts were not reconciled and the cash balances were not checked which fact was discovered after an audit was carried out.

That the audit revealed that suppliers and other invoices were not accounted for while the payments were debited to party accounts.

The Respondent further avers that Value Added Tax (VAT) on the accounts was not claimed in the monthly returns hence a colossal amount of VAT got lost.

That the Claimant understated liabilities due to omission to book unpaid suppliers invoices by major suppliers including (TATA) which were never fully reconciled.

That job cards were left open and unposted for various reasons long after the vehicles had left the workshop which meant customers left without paying for the services.

It is also averred that many customers were allowed unauthorized credit some of which became bad debts. Some of the credit went beyond the approved limits. That the Claimant being the Financial Controller had failed to control the same.

The Respondent denies that it terminated the employment of the Claimant summarily and without notice and that he was not afforded a hearing before the dismissal, was not paid terminal benefits nor did he get a certificate of service and puts the Claimant to strict proof thereof.

The claims by the Claimant as outlined in the Memorandum of Claim are denied by the Respondent in totality and prays that the suit be dismissed with costs.

On 13th June, 2012, the Respondent filed an affidavit in support of the response to the Memorandum of Claim to which various documentation to do with the finance of the Respondent were attached in support of the averments made in the statement of response earlier.

The Human Resource Manager of the Respondent, **Roselyn Njoroge** testified under oath. She told the court she knew the Claimant well and that he was employed in 2005 and left on 5th May, 2010. She told the court that the first letter of termination dated 5th April, 2010 had a typographical error but was recalled and dated properly.

She testified that though the letter of termination gave no reasons for the decision to terminate the Claimant he was aware that it was because of anomalies in the financial report. That the Head of department had called him and explained the reasons for termination. She told the court further that the immediate superior of the Claimant was the Managing Director **Mr. Govida Guru**.

She testified further, that the Human Resource Manual produced by the Claimant had ceased to be operational upon coming of new management in December, 2009. That the Respondent simply relied on the **Employment Act, 2007** and the Collective Bargain Agreement with respect to unionisable employees of which the Claimant was not. That the manual was discarded verbally by the new management.

She denied that the Claimant was owed any fuel allowance, telephone allowance and leave travel

allowance.

She admitted the following claims:

- a. *Payment in lieu of 48 leave days in the sum of Kshs.320,000/=.*
- b. *Five days salary arrears from May, 2010 in the sum of Kshs.33,333/=.*
- c. *Payment in lieu of notice in the sum of Kshs.200,000/=.*
- d. *That Kshs.134,800/= due to the Pension Fund was already transmitted to the fund.*

Total claim admitted which is yet to be paid is Kshs.520,000/= the court enters judgment for the said amount.

The witness offered to give the Claimant a Certificate of service forthwith and the court directs the Respondent to do so immediately.

She said that the Claimant was called to collect his terminal dues but has declined.

She had admitted that no disciplinary hearing took place before the termination. She asked the court to dismiss the claim for unlawful dismissal and other disputed claims with costs to the Respondent.

The law

Section 43 of the Employment Act provides thus:

“(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.”

It is the courts' considered view that where an employer issues an employee with a letter of termination, the reasons which the employer relies on to terminate the employment of the employee must be stated in the letter. Failure by the employer as in the case of the Claimant to indicate the reasons for termination in the letter of termination is *prima facie* evidence of lack of such reasons.

This situation is exacerbated by failure by the employer to conduct a disciplinary hearing wherein the employee is confronted with the reasons for possible termination. This again is what happened in the matter in *casu*.

What inflicts the injury even further is that the Respondent had a Human Resource Manual which was incorporated in the letter of appointment of the Claimant. The manual specifically provided that a termination shall be preceded by a disciplinary hearing.

The allegations by the Human Resource Manager, Roselyn Njoroge that the manual was no longer operational cannot sell. This was part and parcel of the contract of employment of the Claimant and could not be unilaterally repudiated.

Furthermore the Claimant's employment was not just terminated but he was summarily dismissed without notice. In terms of **Section 41 (2)** of the Employment Act, the Claimant was entitled to be heard

and his presentations be considered by the employer before making a decision to terminate his services.

Accordingly, the Respondent has failed to prove the reason or reasons for the termination of the employment of the Claimant as provided under **Section 43 (1)** and has *ipsofacto* failed to satisfy the requirements under **Section 47 (5)** of the Act which places the onus on the employer to justify the grounds for the termination of employment or wrongful dismissal.

In the final analysis the Respondent having failed in these respects, the court finds that the termination of the employment of the Claimant was not for a valid reason as provided under **Section 45 (2) (a)** of the Employment Act and the said termination was not in accordance with a fair procedure as provided under **Section 45 (2) (c)** thereof.

Remedies

The Claimant held a responsible post of a Financial Controller of the Respondent and was swept off from his employment by a new management in a cruel and ruthless manner.

The Respondent did not have the civility to give him notice to ameliorate the pain of a job loss and income and thus subjected him to immense financial shock. He was not accorded dignity as is expressly provided in the Human Resource manual of the Respondent. Failure to subject him to a disciplinary hearing embarrassed him even further.

The Claimant had no record of warnings since none was produced in court and rose quickly through the ladder due to his good performance.

He was not given a certificate of service to enable him get alternative employment and was infact unemployed up to the time of hearing this matter.

This is a suitable case where maximum compensation for unlawful dismissal in terms of **Section 49(1) (c)** is warranted. The Claimant did not contribute at all to his cruel predicament.

The court directs the Respondent to pay the Claimant twelve (12) months compensation for unlawful and unfair dismissal in the sum of Kshs.2,400,000/=. The Respondent is to provide the Claimant with a certificate of service immediately.

The total amount to the Claimant is therefore **Kshs.2,920,000/=**.

The costs follow the outcome of this suit.

Dated and delivered at Nairobi this 14th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE