



IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NO. 1375 OF 2011

ROBERT BOSIRE NYAGAKA CLAIMANT

-VERSUS-

SAMEER AGRICULTURE & LIVESTOCK (K) LTD. RESPONDENT

Mr. Makokha for the Claimant

Mr. Sam Langat for the Respondent

JUDGMENT

The Claimant seeks maxim compensation for unlawful and unfair termination in the sum of Kshs.960,000/= and payment of terminal benefits to wit;

1. *One month's salary in lieu of notice in the sum of Kshs.80,000/=;*
2. *Salary arrears from 26th May, 2011 to 25th June, 2011, less deduction and advance in the sum of Kshs.47,000/=;*
3. *Salary arrears from 26th June to 1st July, 2011 (6 days) in the sum of Kshs.8,000/=; and*
4. *Payment of 3 days salary in lieu of leave in the sum of Kshs.8,000/=.*

The claim was brought via a Memorandum of Claim dated 9th August, 2011.

The Respondent employed the Claimant via a written contract for one year commencing on 21st December, 2009 to end on 31st December, 2010.

The contract document dated 19th December, 2009 is annexed to the Statement of Response dated 25th August, 2011 and filed on 26th August, 2011.

In terms thereof, the Claimant was placed on three months' probation within which period the contract was terminable by giving 7 days notice. Upon confirmation, the same was terminable by one month's notice.

The Claimant was a Sales and Distribution Manager and his basic salary was Kshs.68,000/= and a house allowance of Kshs.12,000/=, giving a gross salary of Kshs.80,000/=.

The Claimant worked continuously until the 1st of July, 2011 when he was issued with a letter terminating his employment.

Upon expiry of his contract on 31st December, 2010 his continued employment was verbally confirmed by the Respondent and he was given an employment identification card valid up to 30th June, 2012. He continued to work as such until he got a letter of termination on 1st July, 2011.

He states that the contents of the letter were wrong and false since: -

0. *There had been absolutely no performance appraisal ever carried out.*
0. *The sales had been on upward trend through the period of his employment.*
0. *That no complaint either written or verbal had been made to him by the management.*
0. *His employment had just been extended and wonders how the same would have been extended if his performance was poor.*
0. *That no letter or directive to show cause had been issued to him*
0. *No hearing was ever afforded to him before the decision to terminate employment was reached; and*
0. *No notice of the intention to terminate was ever issued to him.*

The Claimant concludes that the termination was unlawful, unfair, callous and inhuman and had the effect of traumatizing him through the abrupt and unplanned loss of employment which led to his loss of self-esteem and financial embarrassment due to his immediate inability to meet his financial obligations to his family living in Nairobi to pay rent, school fees and all other daily obligations.

He claims his terminal benefits and compensation as earlier outlined in this judgment.

In the Statement of Response the Respondent avers that the Claimant's contract expired on 21st December, 2010, upon which he was granted a six (6) months extension of the contract. That a letter of extension of contract dated 3rd January, 2011 was issued to him.

That sometimes in May 2011 the Claimant was issued with a new staff identification card like all other new staff which card was valid up to 30th June, 2012 as part of a security exercise and the same did not amount to an extension of the Claimant's contract as he alleges or at all.

Furthermore, the Claimant exhibited wanting performance during the continuance of his contract and did not meet his sales targets.

The Respondent further avers that upon expiry of the six (6) months contract on 30th June, 2011, he requested for an extension through his supervisor which request was declined and instructions were given to the Human Resource Department that he be informed of the same on 1st July, 2011, on which date he had reported to work despite his contract having expired and not renewed.

The defendant avers therefore that the termination was lawful and that failure to renew the Claimant's contract on grounds of wanting performance cannot be interpreted to mean unfair and unlawful termination.

Whereas the Claimant testified under oath in support of his case the Respondent failed to appear on the day of the hearing on 20th June, 2013 at 9.00 a.m.

The Claimant's advocate Namada & Co. Advocates filed an affidavit of service dated 18th June, 2013 on 19th June, 2013 sworn to by one **Geoffrey Anami**, a court process server stating that he received a hearing notice in duplicate on 10th June, 2013 from M/s. Namada & Co. Advocates and proceeded to serve it on M/s. Sang, Langat & Co. Advocates who are on record for the Respondent.

That the same was served on a legal clerk to the said firm who received the same and acknowledged service by affixing a stamp dated 10th June, 2013 and appending his signature on the notice itself. The same is annexed to the affidavit of service duly filed.

That notwithstanding, the court has considered the memorandum filed in reply to the claims by the Respondent and annexures I, III and IV.

It is instructive that at the time the employment of the claimant was terminated on the 1st July, 2011, the alleged six (6) months extension of contract had expired on 30th June, 2011. He was not on any short term contract as alleged by the Respondent.

Similarly, when the alleged extension was done on 3rd January, 2011, the Claimant was not under any short contract, the previous contract having expired on 31st December, 2010.

The letter of termination itself speaks for itself that the termination of the employment of the Claimant was with effect from 1st July, 2011, due to unsatisfactory performance for the past three months.

Termination for unsatisfactory performance is governed by **Section 44 (4)** of the employment Act which provides that it is a justifiable or lawful ground to dismiss an employee if "*an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs work which from its nature it was his duty, under his contract, to have performed carefully and properly;*"

Section 42 (2) on the other hand provides:

"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." (emphasis mine)

It was therefore mandatory to provide the Claimant with an opportunity to make representations on the alleged poor work performance, hear and consider the same in the presence of her representative (if any) before making a decision to terminate his services.

The evidence before court from the Claimant and documentary evidence attached to the Respondent's reply to the Memorandum of Claim clearly shows that no such opportunity was granted to the Claimant and no records in particular show that the Claimant's performance was wanting.

Indeed the manner in which the short term contracts were issued to the Claimant suggest an intention to defeat the protective provisions of the Employment Act, on the part of the Respondent which attempt was unfortunately not successful.

The terms of service of the Claimant, including the gross pay, leave entitlement and notice applicable upon termination are not contested since no contrary evidence was offered in this respect.

It is clear that the Claimant was entitled to payment of one month's salary in lieu of notice in the sum of Kshs.80,000/= in terms of the letter of termination. He was also to be paid in lieu of leave in terms of the letter. He claims only three (3) days salary in lieu of leave which is not contested.

The arrear salary from the period 26th May, 2011 to 25th June, 2011 is also not contested in the sum

of Kshs.47,207/= even in the Memorandum of Reply. This also applies to the salary arrears for the days worked from 26th June, to 1st July, 2011 for six (6) days in the sum of Kshs.16,000/=.

The court therefore orders payment of these terminal benefits to the Claimant in the sum of Ksh.158,207/=.

With regard to the claim for compensation for unlawful and unfair termination, the Respondent clearly has failed to justify the reasons it proffers for the termination of the employment of the Claimant. The averments in the Memorandum of Reply and the attachment thereof do not contain an iota of evidence in what respect the performance of the Claimant was wanting to justify termination. Not a single warning letter was produced. No records of appraisal were produced nor is it alleged by the Respondent that any appraisal took place.

This issue is only raised in the letter of termination and as said earlier the Claimant was not notified of the alleged non-performance before the termination nor was he given opportunity to make representations on the matter before the termination.

Accordingly the Claimant has satisfied the burden of proof placed on him in terms of **Section 47 (5)** that a wrongful and unfair termination took place. In the converse, the Respondent has failed to discharge its evidential burden of justifying the grounds for the termination of the employment of the Claimant.

Section 45 (1) binds all employers not to terminate the employment of an employee unfairly.

The court is therefore satisfied that the termination of the Claimant was contrary **to Section 45 (2) (a)** in that it was not for a valid reason and that the said termination failed to meet the requirements of **Section 45 (2) (c)** in that it was not done in terms of a fair procedure.

Section 49 (1) (c) provides that an employee whose employment has been terminated unjustly is entitled to a compensation equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of the termination.

Considering the circumstances of this case, including the fact that the termination was both substantively unlawful and procedurally unfair, the sudden loss of income without notice, the suffering and humiliation due to inability to meet the family needs, failure to provide the Claimant with a Certificate of service which is a mandatory requirement in terms of **Section 51** of the Employment Act, the period the claimant had served the Respondent, loss of future prospects of continued employment, the court awards him eight (8) months' salary as compensation for the unlawful and unfair termination in the sum of Kshs.640,000/=.

In the final analysis the Respondent is to pay the Claimant terminal benefits totaling Kshs.158,207/= and compensation in the sum of Kshs.640,000/=.

Total award payable by the Respondent to the Claimant is Kshs.798,207/=.

The Respondent is also to pay costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 19th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE