



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1470 OF 2010

JAMES COX KIBUNGACLAIMANT

-VERSUS-

NATIONAL OIL CORPORATION LIMITEDRESPONDENT

Mr. Busolo for Claimant.

Mr. Gachungi for Respondent.

JUDGMENT

This suit was brought by a Statement of Claim dated 19th November, 2010 and filed on 16th December, 2010. The Statement of Claim was amended with leave of court and an amended statement of Claim was filed on 7th February, 2012.

The Respondent filed an amended statement of defence dated 16th May, 2013 on 17th May, 2013.

The Claimant filed a notice to produce documents on 29th March, 2012 demanding from the Respondent the following documents:

1. *The employment letter and contract document between the Claimant and the Respondent;*
2. *Any warning letter given to the Claimant;*
3. *All performance appraisals during the Claimant's employment period;*
4. *All mileage claims by the Claimant;*
5. *The board minutes that approved the termination of the Claimant's employment;*
6. *All minutes on any hearing proceedings between the Claimant and the Respondent's Human Resource Department;*
7. *A certified copy of the Respondent's Employee Handbook;*
8. *Termination letter.*

The Respondent however relies on a list of documents filed earlier on 6th February, 2012 and did not produce any further documents.

The hearing of the matter commenced on 31st October, 2012 with the testimony of the Claimant **James Cox Kibunga**, under oath. He told the court that he is presently in the business of importing cars. That he was employed by the Respondent on 1st July, 2008 and was given a written contract of employment.

The letter of appointment was produced by the Respondent as annex 1 to the amended Statement of Claim.

In terms thereof, the Claimant held the position of Systems Administrator with effect from 11th August, 2008. He was placed on six (6) months probation during which period his performance would be assessed. During the probation period, his employment could be terminated on one (1) month's notice in writing or payment in lieu thereof.

His monthly gross salary was Kshs.115,000/= made up of:

1. Basic salary of Kshs.74,750.00;
2. House allowance of Kshs.18,690,00; and
3. Other allowances of Kshs.21,560.00.

He was entitled to a medical cover in accordance with the Corporation's Medical Scheme.

Other terms included ninety (90) consecutive days sick leave with full pay. Twenty one (21) days annual leave and a leave allowance of Kshs.20,000/= per annum upon taking the leave and Group Life pension.

In terms of the contract, termination of the contract was by one (1) month's notice or pay in lieu thereof by either party.

On 25th February, 2009, the Claimant was confirmed to the position of System Administrator by a letter of same date. He was included in the pension scheme with effect from 1st March, 2009. In the said letter, the Managing Director **Mr. Mwenda Nyaga** appreciated his dedicated service and specifically the Claimant's contribution in the ERP and NDC projects which were on-going then.

The managing director noted factors that had affected achievement of Claimant's targets during the period under review and consequently approved the Claimant's request to adjust his performance targets from January to July, 2009.

The managing director assured him of continued support as he continued to grow "*in the talents and abilities that have been demonstrated in your time with us.*"

The Claimant told the court that he had undergone two annual appraisals and had been rated well. That his supervisor was the IT Manager, Mrs. Elizabeth Ochieng.

I.T System

The Claimant told the court that the IT system in place had shortcomings and was not running smoothly and this caused friction and disagreement with his supervisor.

That the system had many problems which resulted in him working overtime and at times overnight. This caused him not to report in the morning at times due to fatigue and sickness. This led to a warning letter given to him on 23rd April, 2010 by the supervisor. This was a first warning in terms of the Corporation handbook which was produced in court as an attachment to the Notice to produce.

In terms of the handbook, item 11.0 on Disciplinary Handling, disciplinary actions were to commence with a verbal warning in respect of minor offences or failure to reach minimum standards of

conduct or performance or breach of company's rules. This was to be followed by a first written warning if the verbal warning was not heeded and the misconduct is either repeated or performance has not improved as previously agreed or if the offence is of a more serious nature for which written warning is more appropriate.

A second warning is given to an employee who has committed a minor offence repeatedly over a period of time and a third written and final warning is issued when the employee commits the same or another offence of similar nature during the period when the second warning is still in force.

And if an employee who has three warnings commits a fourth misconduct, he/she is liable to summary dismissal.

The warnings expire after twelve (12) months if the employee does not commit an offence during the period.

The handbook added that summary dismissal was to be handled in terms of the provisions of the **Employment Act** and the serious gross misconduct that could result to summary dismissal are listed therein.

It is the Claimant's case that on 3rd November, 2010, while he was having lunch, the IT Manager called him to her office and gave him a termination letter. She instructed him to hand over the company laptop and gate pass and leave immediately.

He narrated that he had attended a meeting in the morning and there was no indication that there was any problem at all. Two (2) other colleagues had their jobs terminated in a similar fashion on that day.

The Claimant told the court that he was not notified of any disciplinary action against him. He was not told the reasons for the termination nor was he given a chance to explain why his employment should not be terminated.

The letter of termination dated 4th November, 2010 did not provide any reason for the termination. The letter was tendered before court and was signed by Mr. Sumayya Hassan-Athmani, Acting Managing Director.

It is the Claimant's case that the disciplinary procedure in the handbook was not followed at all. He does not to-date therefore know the real reason for the termination. The claimant added that he felt humiliated especially because an announcement was placed in the newspapers bearing his photograph stating that his services had been terminated.

He was paid one month salary in lieu of notice and nothing else. He now claims:

0. *Maximum compensation for unlawful and unfair termination of his services equivalent to 12 months salary in the sum of Kshs.1.4 million; and*

0. *Gratuity at the rate of half year salary for the one year worked in the sum of Kshs.700,000/=.*

He told the court that the claim for gratuity is based on his contract.

He narrated how he was unable to secure a job with Consolidated Bank because of the notification which was placed in the local newspapers. He was specifically asked during the interview why he was placed in the newspapers and was sent out of the interviewing room. He had failed to secure a job to-date because of this and the fact that he had not been provided with a Certificate of Service by the Respondent.

During cross-examination by Mr. Gachungi for the Respondent, he was shown a letter written by the IT Manager Mrs. Elizabeth Ochieng wherein she questioned his ability to deliver the planned road

map. She questioned why he had delayed for two months to deliver the roadmap. She also noted that his performance on key important issues was deteriorating. He was asked to stop the laxity and lack of commitment to his work.

The Claimant explained that he had acquired an expert to evaluate the gaps in the IT system and the same showed the entire system needed to be re-engineered, a task he could not accomplish alone and especially on such short notice.

He explained that Mrs. Ochieng surcharged him on modem expenses as shown in an email dated 19th April, 2010 yet, he had incurred those expenses in the course of his work. He believed that she was malicious and unfair towards him. He paid Kshs.5,170/= as refund on 19th April, 2010.

He told the court that he had not received any other warning to warrant termination as provided in the corporation handbook and therefore claims compensation for unlawful and unfair termination.

On 27th October, 2009, Mrs. Elizabeth Ochieng had sent her another email indicating areas of concern with regard to outstanding assignments. These areas of concern were to be reviewed every Monday at 8.30 a.m. commencing 2nd November, 2009.

The two correspondence dated 27th November, 2009 and 15th April, 2010 were produced by the Respondent as evidence of poor work performance by the Claimant hence his termination on 4th November, 2010. The Respondent also produced the Claimant's job description to show the responsibility he had in his capacity as ICT Systems Administrator which he had according to the Respondent failed to perform satisfactorily.

The Respondent, attached to its amended Statement of defence minutes of a Special Board Committee meeting held on 3rd November, 2010 held at 10.30 p.m. Four directors attended the meeting and resolved to terminate the employment of procurement manager, **Mwaniki Gachuba**, the Claimant Cox Kibunga on the basis of non-performance and SHEQ Officer, **Samuel Odumba** for gross negligence and the operations manager was issued with a warning letter.

The minutes do not show whether any other person was in attendance and what documentation was relied on, if at all, to arrive at these decisions. More importantly, the affected employees did not attend the meeting.

Mrs. Elizabeth Ochieng testified under oath in support of the Respondent's case. She was the ICT manager of the Respondent from October, 2007 and was the immediate supervisor of the Claimant.

She confirmed the employment particulars of the Claimant and his responsibilities and told the court that the claimant had at the time of termination failed in the performance of those duties with serious consequences to the Respondent.

That he failed to perform key tasks on time, failed to report to work without permission regularly, and when she called him he failed to pick his phone. He did not respond to several emails she wrote to him except once.

She referred specifically to the two emails dated 5th April, 2010 and 27th October, 2009 wherein his performance was discussed.

She denied that the Claimant was overworked and fatigued stating that the Claimant did not raise the matter with her. She however agreed that he needed to work overtime as it was a high pressure job and the corporation depended on him.

On 15th April, 2010, she said she referred the matter to the Human Resource Department as she was getting concerned about his performance which affected over all operations. That there was a risk

that the operations of the Respondent would come to a standstill unless the Claimant improved his act. The warning letter dated 23rd April, 2010, came from the Human Resource Department and it was the only one the Claimant had received.

She told the court that she had no details of the Human Resource Policy from the Respondent though she was aware it existed.

She emphasized that the Respondent's handbook authorized summary dismissal as it happened to the Claimant. She was not aware if he was called to defend himself before the termination. She did not attend any meeting to discuss the matter in the presence of the Claimant.

She told the court that she had at times discussed the Claimant's performance with him and Human Resource Department though the Claimant was not present when that happened.

She maintained that the Claimant absented himself from work and performed poorly. She admitted he was sick a few times but she did not know the reason for the sickness. She denied it was due to fatigue.

She maintained that the Claimant was responsible to fill in the gaps in the IT system. He was to analyse them and get them filled but had failed. This is the roadmap he had failed to provide. She admitted that he had brought in a consultant, named **Firas** to analyse the system and present a report which the Claimant was meant to refine and come up with a roadmap.

The challenges in implementing the IT system was part of his job. He had delayed for two months to provide the roadmap. It was required in the meeting of 20th April, 2010.

The roadmap was provided by the time he was dismissed in November, 2010. It was however implemented after he had left.

She denied that she had personal vendetta against the Claimant as alleged or at all.

Witness number two for the Respondent was **Sicilia Kaluyan** the Human Resource Officer of the Respondent. She was employed in December, 2011, long after the Claimant had left. She had in her possession the employment records of the Claimant but had no personal knowledge of the matters that led to the Claimant's dismissal.

She confirmed from the records, that a disciplinary hearing was not held before the termination of the Claimant's services. She produced the documents Mrs. Elizabeth Ochieng had referred to. She confirmed that the Claimant had only one warning letter regarding absenteeism dated 23rd April, 2010. She also confirmed that there was no correspondence on the Claimant's performance between the 23rd of April, 2010 and the 3rd of November, 2010 when his employment was terminated.

She also confirmed that the disciplinary procedure in the Respondent's handbook was not followed prior to the termination of the employment of the Claimant.

She said the record shows that the Claimant's services were terminated on one month's notice but he was not summarily dismissed.

She also confirmed that the Claimant's name and photograph were published in the newspapers. She said this was not a normal practice by the Respondent.

She also confirmed that the letter of termination did not provide a reason for termination.

Both parties filed written submissions in support of their respective cases.

Facts

The court has established that the employment of the Claimant was terminated by a letter dated 4th November, 2010. That prior to the termination he had received only one written warning dated 23rd April, 2010 for absenteeism. The letter did not indicate any particular date when the Claimant was absent from work.

The court has found as a matter of fact that the Claimant held a high pressure job in the position of ICT Administrator. It is conceded by both parties that the IT system had many gaps that needed to be fixed. That these gaps had been identified by a consultant and the claimant was to provide a roadmap of fully rectifying the identified shortcomings to avoid the collapse of the IT system and optimize its performance.

It is a fact that the Claimant and his supervisor had differences regarding the timeline in which the roadmap was to be put in place but it is common cause that the same had been provided to the Respondent as at 3rd November, 2010 when the services of the Claimant were terminated.

That the said roadmap was implemented upon termination of the employment of the Claimant.

It is a fact that the Claimant was not charged with any misconduct or subjected to a disciplinary hearing in terms of the Respondent's handbook and/or the **Employment Act, 2007** prior to the termination of his job. He was in fact called to his supervisor's office, handed a termination letter and told to hand over and leave immediately.

He was not paid any terminal benefits other than one month's salary in lieu of notice. His name was published in the newspapers indicating that his services had been terminated a matter which he told the court highly traumatized him and caused him not to get alternative job. He was not given a Certificate of Service to enable him look for alternative job.

The court finds that the relationship between the Claimant and his supervisor was acrimonious and this contributed to his hastened exit from the Respondent's employ. That no proof of non-performance has been presented to the court as justification for the termination especially because he had not received any warning letter between 23rd April, 2010 and 3rd November, 2010 when his services were terminated. In fact he had no warning letter whatsoever regarding his performance other than routine correspondence between him and his supervisor regarding specific tasks to be performed and meeting given timelines in the course of his duties.

His confirmation after six (6) months probation was done by the managing director in a letter full of praise for his overall work and the court has no reason to believe that this had changed so suddenly.

The fact that the letter of termination gave no reason at all for the decision to terminate the Claimant's employment vindicates the Claimant's case that he was maliciously targeted by his immediate supervisor and victimised for no good reason.

In **Kenya Plantation Workers Union vs. Plantation (K) Limited Cause No. 1153 of 2012**, the court held that the procedure in **Section 41** of the **Employment Act, 2007** is meant to facilitate validation of the reason or intended termination or dismissal and where the process does not take place, the opportunity to validate the reason for termination is lost making it difficult for the employer to discharge the onus under **Section 45 (2)** of the Act to prove:

- a. **that the reason for the termination is valid;**
- b. **that the reason for the termination is a fair reason;**
 - i. **related to the employee's conduct, capacity or compatibility;**
 - ii. **based on the operational requirements of the employer; and**

c. **that the employment was terminated in accordance with a fair procedure.**

Justice Onesums N. Makau in **Kenya Union of Commercial Food & Allied Workers vs. Delmonte (K) Limited** put it differently when he held:

“Section 41 of the Employment Act, 2007 is in mandatory terms that an employer shall not terminate an employee on grounds of misconduct before explaining to him in a language he understands and in the presence of a workmate or shop floor union representative of his choice the reasons for which he intends to terminate his employment and the section forbids termination before hearing and considering the employee’s representation. The omission is fatal to the employer’s case and it offends Section 45 (1) and (2)(c) of the Act. Any employer who ignores Section 41 of the Act does so at his own peril.”

The cases were cited with approval by Hon. Justice Byram Ongaya in **Kenya Plantations & Agricultural Worker Union vs. Roseto Flowers**, Industrial Court of Kenya at Nakuru, **Cause NO. 44 of 2013**.

For these reasons, the court finds that the termination of the employment of the Claimant by a letter dated 4th November, 2010 was substantively unlawful and procedurally unfair in that no reason was given for the termination and the Claimant was not given a hearing either alone or with a representative of choice before the decision to terminate was made.

Accordingly, this court considering the conduct of the Respondent in publishing the Claimant’s name in the newspapers for no reasonable cause, failing to give him adequate notice before the termination and the failure to grant him a Certificate of Service to enable him get alternative employment awards him ten (10) month’s salary as compensation for the unlawful and unfair termination in the sum of Kshs.1,150,000/= (one million, one hundred and fifty).

The Claimant had served the Respondent from 4th August, 2008 to 3rd November, 2010, a period of two years. The contract of service provided him with a Group Life Insurance which he had already joined upon confirmation of his employment. We have found no clause in his appointment letter entitling him to service gratuity upon termination. The claim for gratuity remains unproven and same is dismissed.

The Respondent is to:

- i. *provide the claimant with Certificate of Service immediately;*
- ii. *pay Kshs.1,150,000/= compensation; and*
- iii. *pay costs of the suit to the Claimant.*

It is so ordered.

Dated and delivered at Nairobi this 6th day of September, 2013.

MATHEWS N. NDUMBA

PRINCIPAL JUDGE