



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 299 OF 2011

HEZEKIEL OIRA.....CLAIMANT

VS

KENYA BROADCASTING CORPORATION.....1ST RESPONDENT

THE BOARD OF DIRECTORS

KENYA BROADCASTING CORPORATION.....2ND RESPONDENT

AWARD

Introduction

1. The Claimant's claim against the Respondents was commenced by way of a Statement of Claim dated 1st March and amended on 21st March 2011. The Respondents filed a Reply on 24th May 2011. The Claimant's case was heard on 22nd October 2012 and following a number of adjournments the Respondents' case was finally heard on 4th July 2013. The Claimant testified on his own behalf and the 1st Respondent's Head of Human Resource, Christine Karimi Njagi testified on behalf of the Respondents.

The Claimant's Case

2. The Claimant was employed by the 1st Respondent on 1st September 1993 in the position of Legal Officer and rose through the ranks to the position of Corporation Secretary effective 23rd December 2003. On 23rd June 2010, the 2nd Respondent suspended the Claimant and subsequently terminated his employment on 6th September 2010.

3. It was the Claimant's case that the 2nd Respondent's action of terminating his employment was in breach of the law and the 1st Respondent's Code of Regulations (2009). Specifically, the Claimant was not given an opportunity to defend himself and the 2nd Respondent had no capacity to terminate the Claimant's employment contract with the 1st Respondent to which the 2nd Respondent was not a party.

4. The Claimant testified that the 1st Respondent maliciously caused him to be arrested and charged at the Anti-Corruption Court where he was acquitted on 16th August 2012. By the time of his termination in September 2010, the Claimant was under investigation and when he was suspended, he was out of the country and only learnt of his suspension through the internet. After

his suspension, the Claimant never met the 2nd Respondent and his termination letter was delivered to his house through his house girl.

5. The Claimant therefore claimed the following:

- a. One month's salary in lieu of notice.....Kshs. 339,435.00
- b. Two months' travel allowance.....678,870.00
- c. 45 unutilized leave days.....509,152.50
- d. Acting allowance
 - i) Ag Deputy Managing Director (2004-September 2010) 8,623,860.00
 - ii) Ag Managing Director for 120 days.....1,730,660.00
 - iii) Ag Managing Director (11th May to 4th October 2006) 1,297,995.00
 - iv) Gratuity for acting period.....389,398.50
- e. Salary from 23rd June to 6th September 2010.....746,757.00
- f. Damages for unlawful termination of employment
- g. Costs and interest
- h. Any other relief the Court may deem just to grant

The Respondents' Case

6. In their Reply, the Respondents stated that in terminating the Claimant's employment, they acted within the confines of the law and the 1st Respondent's Code of Regulations. It was the Respondents' case that the termination was justifiable since the Claimant had, by his actions and omissions of duty, occasioned the 1st Respondent to suffer monetary and reputational loss. The Respondents further stated that upon termination, the Claimant was entitled to one month's salary in lieu of notice which was however not paid because the Claimant had not submitted a clearance form as required under the 1st Respondent's Code of Regulations.

7. The Respondents' witness, Catherine Karimi Njagi testified that the Claimant's employment was terminated on 6th September 2010 pursuant to a Board resolution. Prior to the termination, the Claimant had been suspended on allegations of mishandling of FIFA World Cup, 2010 broadcast rights.

8. Njagi told the Court that she did not have information as to whether a meeting was held between the Claimant and the Respondents before the Claimant's suspension or termination. She also did not know whether the Respondents had complied with the disciplinary procedures set out in the 1st Respondent's Code of Regulations.

Findings and Determination

9. The first issue for determination in this case is whether the termination of the Claimant's employment was lawful. It was the Claimant's case that the termination was in violation of both the law and the 1st Respondent's Code of Regulations. The Respondents on the other hand maintained that there were justifiable reasons for the termination and that the procedure adopted in effecting the termination was within the 1st Respondent's Code of Regulations.

10. According to the Claimant's letter of termination dated 6th September 2010, his employment was terminated on account of single sourcing of an MOU with Radio Africa Limited; entering into and signing a binding agreement with Radio Africa Limited without Board approval; failing to advise the Managing Director against granting a radio broadcast rights for the 2010 FIFA World

Cup to Royal Media Services on single sourcing basis; affixing KBC's common seal on the KBC/Radio Africa Limited MOU without Board approval; and exposing KBC to unnecessary litigation.

11. The termination took effect immediately and the Claimant was subsequently charged at the Anti-Corruption Court with charges akin to the grounds of his dismissal. He was subsequently acquitted under Section 215 of the Criminal Procedure Code for lack of sufficient evidence. In the course of the hearing of this case, the Claimant sought to establish a nexus between his acquittal in the criminal case and his innocence of the charges set out in his letter of termination.

12. This Court has had occasion to render itself on the relationship between internal disciplinary proceedings against an employee and external criminal proceedings against the employee and whether in fact the outcome of a criminal case determines the decision to be taken by the employer.

13. In the case of **David O. Owino Vs Kenya Institute of Special Education (Industrial Court Cause No 453 of 2012)** the Court held that:

“Acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

14. In the case before me, the Claimant's termination preceded the criminal proceedings. Applying the principle set out in the **KISE Case** (supra), I do not think the sequencing of the termination before instigation of the criminal proceedings by itself compromised the integrity of the disciplinary proceedings. I will therefore examine the disciplinary procedure adopted by the Respondents in this light.

15. Section 45 (2) of the Employment Act, 2007 provides that:

(2) A termination of employment by an employer is unfair if the employer fails 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 employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

16. According to the Respondents, the termination of the Claimant's employment was caused by several misdeeds and omissions by the Claimant which the Claimant denied.

17. In the case of **Walter Ogal Anuro Vs Teachers Service Commission [2013]eKLR** this Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

18. The Claimant was suspended on 23rd June 2010 to pave way for urgent investigations by the Inspector General, State Corporations. The Claimant testified that he was suspended while out of the country and got to know of his suspension through the internet. He never got to know the

outcome of the investigations and did not hear from the Respondents until his letter of termination dated 6th September 2010 which was delivered to his house girl.

19. Section 41 of the Employment Act, 2007 provides the procedure for handling cases of gross misconduct, misconduct, poor performance and physical incapacity.

20. In the case of **Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013]eKLR**, Radido J held that for an employer to meet the legal requirements of legal fairness set out in Section 41 the employer must demonstrate the following:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

21. In suspending and terminating the Claimant, the Respondents relied on Section K of the 1st Respondent's Code of Regulations (2009). Section K.7.13 provides that no salary is payable to an employee on suspension and that if a decision to terminate employment is reached the effective date of the termination will be from the date of suspension.

22. In the written submissions filed on behalf of the Respondents, Counsel submitted that Section K of the 1st Respondent's Code of Regulations "provides for a disciplinary process conducted within the tenets of the rules of natural justice." Section K.8 of the Regulations generally provides for disciplinary hearings while Section K.9 provides for appeals.

23. There is no evidence that the Claimant was afforded any opportunity to defend himself before his suspension or termination. This clearly flies right in the face of the law and the 1st Respondent's Code of Regulations. An employee who is sent on suspension pending investigation has a legitimate expectation that at the very least, they will be given an opportunity to give their side of the story before termination is considered. This is even more critical in a case such as the present one where there is provision for backdating the termination to the date of suspension.

24. In view of the foregoing, I find the termination of the Claimant's employment unfair within the meaning of Section 45 of the Employment Act, 2007. In the submissions filed on behalf of the Claimant, Counsel sought to introduce a prayer for reinstatement. However, the Court did not consider an order for reinstatement which is to be granted in very exceptional circumstances to be merited in this case. At any rate such a high premium prayer cannot be introduced in final submissions. I therefore award the Claimant 12 months' salary in compensation. I also award him one month's salary in lieu of notice.

25. In view of my finding that the termination of the Claimant's employment was unfair, I award him salary from the date of suspension up to the date of termination. The Claimant is also entitled to 2 months' basic salary as travel allowance. He is further entitled to pay in lieu of 35 leave days.

26. With regard to the claim for acting allowance, no evidence was provided to prove that the Claimant acted in the position of Deputy Managing Director. With regard to the claim for acting allowance in the position of Managing Director, the Court was not provided with the minimum salary figures for the higher position for purposes of calculating the applicable acting allowance.

The Court declined to rely on David Waweru's contract which was produced by the Claimant since there was no confirmation that the figures provided in this contract were the minimum figures applicable to the position of Managing Director. Consequently, the Court has adopted the figures admitted by the Respondents in this regard.

27. In determining the Claimant's salary for purposes of this Award, the Court relied on the Claimant's payslip for May 2010 but discounted the sum of Kshs. 17,100 being Mtangazaji dividends which in the Court's estimation was not part of the Claimant's monthly earnings. The Court therefore adopted the figure of Kshs. 322,335 as the Claimant's monthly salary.

The final effect of this Award is as follows:

- a. 12 months' salary for unfair termination.....Kshs.3,868,020
- b. One month's salary in lieu of notice.....322,335
- c. Salary from 23rd June 2010-6th September 2010 (71 days).....762,860
- d. 2 months' basic salary for travel allowance.....294,670
- e. Allowances for acting in the position of MD.....64,467
- f. Domestic allowance.....54,000

- g. Pay in lieu of leave (322,335x35.....376,058)

30

Total.....5,742,410

The Respondents will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF OCTOBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*