



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2044 OF 2012

PHILEMON WACHARA OBENGE.....CLAIMANT

VS

EASY MART LIMITED.....RESPONDENT

AWARD

Introduction

1. On 9th October 2012, the Claimant filed a Memorandum of Claim through which he sued the Respondent for unfair termination of employment and refusal to pay terminal benefits. The Respondent filed a Statement of Defence on 15th November 2012 and the matter was heard on 30th July 2013 with Mr. Ogolla appearing for the Claimant and Mr. Bw'Omote appearing for the Respondent. The Claimant testified on his own behalf and further called Joshua Nzamba Malondo while Geoffrey Muiruri Gachanja testified for the Respondent. Both parties filed written submissions.

The Claimant's Case

2. According to the Memorandum of Claim the Claimant was, by oral agreement, employed by the Respondent as a Manager on 2nd February 2012 at an agreed monthly salary of Kshs. 70,000. The Respondent however reneged on the promise to pay the Claimant the agreed salary of Kshs. 70,000 and instead paid him Kshs. 20,000. The Claimant raised the issue of underpayment with the Respondent who did not rectify the situation as promised.

3. The Claimant worked for the Respondent first as a Branch Manager for Komarock Branch and later as a Warehouse Manager based at the Headquarters. The Claimant testified that prior to joining the Respondent, he had worked for Nakumatt Holdings and Tumaini Supermarket. He told the Court that he was encouraged to join the Respondent by the Respondent's Operations Manager, Oscar Moosi and the Procurement Manager, Sammy Kilonzo both of whom were his former colleagues at Tumaini Supermarket.

4. On 8th August 2012, the Claimant received a suspension letter dated 7th August 2012, suspending him from duty with immediate effect. According to the Claimant, the suspension letter did not disclose any reason for the suspension. At the end of the suspension period on 29th August 2012, the Claimant was not allowed back to work prompting him to report a dispute at the Industrial Area District Labour Officer who convened a conciliation meeting on 29th September 2012 which the Respondent declined to attend. It was the Claimant's case that prior to the termination of his employment, he was not given an opportunity to be heard.

5. The Claimant claimed the following:
 - a. Salary underpayments from February-July 2012.....Kshs. 300,000
 - b. Salary for 1st August-7th August 2012.....16,333
 - c.12 months' salary in compensation for unfair termination.....840,000
 - d.Salary in lieu of notice.....70,000
 - e.Half monthly salary for the suspension period.....24,500 Costs and interest
 - f. Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Statement of Defence, the Respondent stated that it was incorporated under the name *Easy Mart Supermarket Limited*. The Respondent denied the existence of any terms of agreement between itself and the Claimant and in particular any agreement for a monthly salary of Kshs. 70,000.
7. The Respondent pleaded that the reasons for the Claimant's suspension had been supplied orally to the Claimant and were therefore well within his knowledge. It was the Respondent's case that at the time of termination, the Claimant was on probation.

Findings and Determination

8. In the written submissions filed by Respondent, Counsel took issue with the name assigned to the Respondent in the Claimant's pleadings. It was submitted that the Respondent's name was *Easymart Supermarket Ltd* and not *Easymart Ltd* as stated in the Claimant's pleadings. Counsel therefore took the view that the Respondent was not properly joined in this case and asked the Court to strike out the Claimant's claim on this ground.
9. The Court considered this submission and found it lacking in merit. First, it was raised in final submissions rather than at the beginning of the trial. Second, no documents were produced to prove the Respondent's actual name. Third, the only word missing in the name used by the Claimant was "*Supermarket*" and since it was common cause that the Respondent was engaged in supermarket business, the identity of the Respondent was not in doubt. Finally, the existence of an employment relationship between the Claimant and the Respondent was not in dispute. The Court therefore dispensed with the issue of the name of the Respondent as a mere technicality and proceeded to deal with the case substantively on its merit.
10. The issue of the Claimant's salary was in contention. According to the Claimant, he had been promised a monthly salary of Kshs. 70,000 which was not honoured. The Respondent on the other hand stated that the Claimant's agreed salary was Kshs. 20,000. Section 9(1) of the Employment Act, 2007 provides that a contract of service for a period of three months or more shall be in writing and Section 9(2) places the responsibility of drawing up the contract of service on the employer.
11. Part of the particulars of an employment contract set out in Section 10(2) of the Act is the remuneration of the employee. From the evidence on record, the Respondent failed to fulfill its obligations under Sections 9 and 10 of the Employment Act. I therefore invoke Section 10(7) of the Act and adopt the figure of Kshs. 70,000 as the Claimant's monthly salary for purposes of this claim. As a consequence, the claim for underpayment succeeds and is allowed.
12. The Respondent claimed that at the time of termination of his employment, the Claimant was

on probation. Section 2 of the Employment Act, 2007 defines a probationary contract as:

“a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.” [emphasis added]

13. From the evidence on record, the Claimant's employment contract did not meet the criteria for a probationary contract as defined in the Employment Act, 2007 and the claim that the Claimant was on probation is therefore misplaced.

14. I will now deal with the claim for unfair termination of employment. Section 45 (2) defines unfair termination as follows:

(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.

15. The Claimant's suspension letter dated 7th August 2012 simply stated that:

“Due to what happened at H/Q. The Management has decided to suspend the services of Philemon with immediate effect.

The suspension will take three (3) weeks from tomorrow 8th August 2012 up to 29th August 2012. The management will focus on his conduct and behaviour with entire team since he joined Easymart.” (sic)

16. The Claimant testified that he did not know what had happened at the Headquarters that led to his suspension. He further testified that upon expiry of the suspension period, the Respondent did not allow him to resume duty. He denied receiving any letter extending his suspension. It is now settled law that an employee on suspension pending investigation has a legitimate expectation that they will at the very least be given an opportunity to respond to any adverse findings arising from the investigation. Suspension is not to be taken as a final disciplinary action.

17. In the case before me, there was no evidence that the results of investigation were made known to the Claimant with an option for him to respond. Rather, on 12th September 2012, the Respondent issued a letter of termination to the Claimant citing gross misconduct as the reason for the termination. The termination was backdated to 10th September 2012. On 6th November 2012, close to two months after the termination, the Respondent issued an elaboration of the reasons for the termination. The disclosure of reasons for termination of employment is not an academic exercise. It is a requirement of fair play and a general explanation that is issued in a *“to whom it may concern”* fashion post termination falls below the bar set by Section 45(2) of the Employment Act, 2007. I therefore find that the Respondent failed to advance a valid reason for the termination of the Claimant's employment.

18. With regard to the requirement for procedural fairness, Counsel for the Claimant referred the Court to the case of *Loice Otieno Vs Kenya Commercial Bank Ltd [2013] eKLR* where Radido J held that:

“The doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer must comply with the procedures set out in section 41 of the Act even in circumstances where summary dismissal.....is contemplated.”

19. In the instant case, the Respondent's witness, Geoffrey Muiruri Gachanja confirmed in evidence that the Claimant was not given an opportunity to defend himself. In view of the foregoing, I find the termination of the Claimant to have been unfair within the meaning of Section 45 of the Employment Act, 2007 and award him 3 months' pay in compensation. I also award him one month's salary in lieu of notice as well as salary for period between 1st and 7th August 2012. Having found the termination of the Claimant's employment unfair, I find that he is entitled to full salary for the period he was on suspension.

20. In the final analysis, I make an award in favour of the Claimant as follows:

a. Salary underpayments (50,000x6 months).....	Kshs. 300,000
b. 3 months' salary in compensation for unfair terminatio.....	210,000
c. One month's salary in lieu of notice.....	70,000
d. Salary for 1st-7th August 2012.....	16,333
e. Salary for the period of suspension (32 days).....	<u>74,667</u>
Total.....	671,000

The Respondent will meet the costs of this case.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF NOVEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**