



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 1809 OF 2011

(Before D.K.N. Marete)

NOEL GEORGE KHAABACLAIMANT

Versus

WANANDEGE HOUSING CO-OP SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

This matter came to court vide a claim dated 25th October, 2011 and filed on 27th instant. The issue(s) in dispute are;

- i. ***The unfair and wrongful dismissal from duty of the Claimant by Respondent.***
- ii. ***The breach of contract of employment as pertained to medical cover, life insurance and probation period during the tenure of employment.***
- iii. ***The failure to give Claimant a certificate of service upon terminating his employment.***
- iv. ***The failure of Respondent to pay claimant notice pay as the contract provided in 2011.***

The claimant's case is that on 2nd June, 2011 he was employed by the respondent as an Assistant Accountant. He was issued with a letter of employment and was to serve a probation period of three months – See Annexure 1 of the claim. The respondent did not confirm the contract of employment at the end of August, 2011 and neither did he provide an appraisal report.

The claimant served the respondent till 30th November, 2011. He was deployed in Accounts, Procurement and Human Resource. He turned up for duty on 3rd October, 2011 and after a period of thirty minutes he was asked to step outside the premises as per instructions issued to the security guards by the CEO/General Manager. He returned the following day for handing over whereupon he was served with a letter of termination – Annexure 3. This was without notice. He wrote to the respondent to enquire on this letter and dispute to no avail as to response.

The claimant therefore prays for;

- a. *An order that the Respondent pay the Claimant the salary in lieu of notice.*
- b. *An order that the Respondent supply/furnish, avail, give a certificate of service to the Claimant.*
- c. *An order that the Respondent pays the claimants medical bills for the period of employment.*
- d. *Any relief for the wrongful and unfair dismissal of the claimant from service.*

e. *Cost of the cause.*

The respondent by a Respondent's Memorandum of Reply to the Claimant's Statement of claim filed on 4th July, 2012 denies the claim and prays that the same be dismissed with costs.

The matter came for hearing severally until 25th March, 2013 when the claimant testified and reiterated his submissions on the claim. He testified that he reported to work on 2nd June, 2013 wherein he was welcomed by the General Manager and given the Fosa Manager's office as an Haven. He states that he was not facilitated, or at all.

The claimant further testified that there was no match in the data and accounts and he attempted to reconcile the same with lots of difficulty. He continued working with lots of difficulty until the 29th September, 2011 when it became apparent that the management committee was not desirous of working with him.

On 30th September, 2011 he reported to work but was slapped with a letter of termination. Obstruction by security officers was on 4th October, 2011 on instructions from the General Manager.

On cross-examination, the claimant testified that he worked for the respondent where there were three other officers. He was the senior most. On termination, he was paid a month's salary in lieu of notice but not issued with a certificate of service. He also testified that he had a claim for Ksh.2,600.00 being medical bills and that he was not aware that his employer was not happy with him. He was not assessed and got no complaints to the supervisory committee. He in the penultimate testified that his dismissal was unlawful and inexcusable.

The matter finally came for hearing on 26th June, 2013 when DW1- Peter Mukunzi Omutititi testified. He testified that he is an employee of Kenya Airways and an elected official of the respondent. He was on the Board of Recruitment which had three temporary and two permanent staff.

He testified that he knew the claimant, who was an Assistant Accountant and was recruited on 20th June, 2011. His responsibilities were to update members accounts and also on the day to day activities of the Sacco. He was also in charge of the general administration of the Sacco.

He testified that the claimant worked for four months from 2nd May, 2011 to 29th September, 2011 though the appointment letter gives this as 2nd June, 2011 to 29th September, 2011. He had lapses in his performance which were noticed a month after appointment and the board called him to highlight his challenges. His answer was that the workload was overwhelming. The respondent utilized the probation period to dismiss him for want of performance.

He was issued with a notice and a letter of termination and paid one month's salary in lieu of notice. He was also issued with a letter of explanation as to why he was not confirmed. He was accommodated wholly but the situation refused to work.

The issues for determination therefore are;

1. Whether the termination of the claimant's employment was unfair, wrongful and unlawful.
2. Whether the claimant is entitled to the relief sought.
3. Who bears the costs of this suit.

At the hearing the parties were agreeable to dispose off the hearing by way of written submissions. These were brief and to the point. They do not introduce issues on matters different from that which was adduced in the pleadings or hearing. Based on all available evidence and data, the claimant's case fails and falls into a cropper.

The claimant was given a job but would not cope with its expectations and ended up a non-performer. He was dismissed about the term of probation, four months down the line.

He does not in any way rebut the respondent's case of disability to perform, or at all. I therefore find no fault with the claimant's dismissal. It is fully in compliance with Section 45(2)(1) and Section 45(5)(b) of the Employment Act, 2007. It is also totally in congruence with the letter and spirit of Section 45 which stipulates the ingredients of unfair termination as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(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*

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

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

- a. *the termination is for one of the reasons specified in section 46; or*
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.**

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-

- a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

- d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
- e. *the existence of any previous warning letters issued to the employee.*

And this fully answers issue No. 1 above.

There being no case for unfair dismissal, the claimant is disentitled to the relief sought except for a

certificate of service which is mandatory in law.

I therefore dismiss the claim but order that the claimant be issued with a certificate of service. I also order that each party bears its own costs and thus close all the issues for determination.

Dated, delivered and signed the 20th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances:

1. Claimant in person.
2. Mr. David Rabala instructed by Maangi, Otieno & Company Advocates for the respondent.