



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 342(N) of 2009

JOSEPH TOWETT.....CLAIMANT/APPLICANT

VS

KALEE LTD.....RESPONDENT

JUDGMENT

On the 6th July, 2009, the Claimant herein Joseph Towett filed this claim through M/S J.A. Guserwa and Co. Advocates by filing a Statement of Claim dated 2/7/2009. He sought the following orders;

- (1) He be reinstated to his previous position/job without any loss of benefits.
- (2) He be paid salary arrears for the entire period he has been out of employment.
- (3) He be paid special damages set to be proved at the hearing.
- (4) Maximum 12 months compensation for wrongful dismissal.
- (5) Costs of this suit with interest thereon.
- (6) In the alternative, payment of all the lawful terminal dues compelling notice pay, leave due, salary for days worked and service pay.

The evidence of the claimant as adduced before this count and through his pleadings is that on 1/2/2005, he was employed by the Respondent as a General Manager. The contract was verbal and it was a 3 year contract with option for renewal.

The salary attached to this post was Ksh.85,000/= as per his Appendix 1 (a). The claimant states that he worked diligently, faithfully and with due honesty throughout his employment with the Respondent and is still able, ready and willing to continue with such service. He states that by a notice dated 3rd July 2006, the Respondent unlawfully irregularly and prematurely dismissed him from its employment without any justifiable cause or reason. As per Appendix J7 3(a) to (g), the complainant was an employee of the Kenya Broadcasting Corporation (KCB) and resigned from KCB on 29/4/2005. His letter Exhibit 3,b dated 5/1/2006 to the Executive Chairman of the Respondent, shows that he was yet to get an appointment letter a year after he joined the company. Appendix 1 and 1b supports his salary claim of Ksh.85,000/=.

The Respondent was a new company setting up a radio station and the Claimant was expected to recruit persons to run and produce programmes. He was also expected to design programme line ups for the 24 hour station. The claimant states that on 19/4/06, he received a letter asking him to explain certain transactions that had taken place and it was alleged that he was responsible for the outstanding amount of Ksh.252,300/=. He says he was not aware of it and he was not handling debt collection. He responded to this letter on 20.4.06. (Appendix 3b) stating that the adverts went on air at the initial stage and that at the same time, they had not set proper structures to take care of re-adverts and in that case, it was the accountant tracking down the commercials and had full information on the questions. That accountant was one Mr. Kirui.

On 4/5/06, the claimant states that he received a letter sending him on compulsory leave and making further allegations. The letter stated that they were to investigate the said outstanding balances and additional allegations that he had authorized unpaid announcements against company policy. The claimant was not asked to explain to the new allegations. He went on leave until 3/7/06 when his services were terminated. He was given a termination letter and in this letter he was told that he had engaged in fraudulent transaction with clients, intimidated junior staff and misused company resources. He was not given details of their allegations. He denied that he ever intimidated staff and said that he never misused company resources.

Upon receipt of the letter, he wrote a defense appeal dated 22/7/2006 (Appendix Kh 3) he expressed shock and took responsibility as the manager for shortcomings. He asked them to give him a salary equivalent to 12 months to end the matter amicably. He never heard of them. He wrote a follow up letter on 1/9/06. There was no reply. He states that when he joined the company, he was given a vehicle KAU 808B which he was told would be his but the company will recover the cost from his salary. He had Paid Ksh.120,000/= towards the vehicle. The vehicle remained with Respondent when he was terminated. He surrendered it as instructed. He said on termination he received his June 2006 pay but he had never taken no leave throughout the period he worked for Respondent.

He seeks damage for premature termination of contract; he was to serve for 3 years but served to 1 year, 5 months. He also seeks for outstanding refund of 120,000/= paid towards the vehicle and compensation for loss of employment. He denies as the Respondent state in their defense that he admitted performing poorly. He says he wrote the letter on behalf of other employees whom he had groomed and he took responsibility as General Manager. He says his termination was unjustified as he gave his best and accomplished the set objectives.

In cross examination by Mr. Mwenesi for Respondent, claimant told court that he started working for the Respondent in February, 2005. He says he admitted mistakes at page 8 of his documents which he went on to correct. He informed the entire management team. He denies he was the one posting specific duties. He said that, he had no contract letter of employment and that it was the duty of the employer to prepare the contract. He says the money he was paid at appendix 16 was salary for June 2006 and not notice pay. He says he never admitted that he failed.

The Respondents filed their defense dated 3rd November, 2007 on 5/11/2009 through the firm of S. Musalia Mwenesi and Co. Advocates. They denied that the claimant served the Respondent in the manner described as General Manager or under any contract of employment. They aver that they terminated the claimant's employment in a regular, justified legal and lawful manner after the Claimant was suspected to be involved in transactions with the Respondent's clients on diverse dates that were inconsistent with his terms of employment. The Respondents further aver that by a letter dated 19th April, 2005, from the Executive Chairman of the Respondent to the claimant, the Claimant was required to account for moneys which were due to the Respondent from the Respondent's clients. The claimant did not adequately explain the observed shortcomings and claimant was therefore sent on compulsory leave to pave way for investigations. That the said investigations revealed irregularities showing the claimant misappropriated the Respondent's monies and misused the respondent's resources. That this attracted summary dismissal under the claimant's contract of employment. The Respondent further aver that there are no any terminal benefits owing from the Respondent to the claimant which they have failed, refused or neglected to pay the claimant. They say the termination of the claimant was not malicious and that the claimant got an

opportunity to be heard and after a fair hearing was relieved of his duties.

The Respondent denies that the claimant is entitled to any of the moneys he claims and that Ksh.14,488 was lawfully deducted from the claimant's salary for the month of May, 2006 as reimbursement for announcements which the claimant unprocedurally, unlawfully and illegally authorized to be aired on respondent's KASS FM Radio Station contrary to Respondent's rules, regulations and procedures.

The Respondents called one witness Mr. Julius Kiprono Lamaou who said he is the Chief Executive Officer of the Respondent. His duties are doing business strategy for the station and ensuring it is managed as a business. In relation to the claimant he stated that the claimant was part of the first team employed at the station when it started in April 2005, that Towett came in as Editor and participated in radio and music content which were to be edited by Mr. Kwambai. That Mr. Kwambai was the senior most among the team from June 2005. However, they noted that he did not have capacity or experience to manage the station as a business and they needed higher capacity in Marketing and Information Technology. In August 2005, he forwarded to the claimant standard appointment contracts to administer to all staff including himself. The said contracts were with effect from 1/1/2006 (App. 4). That all staff were issued with contract but when Towett left employment they were unable to get his copy in the file. They suspect he took it as he was the custodian of the documents. That by their policy each staff was on contract for 1 year.

He says there were complaints of Mr. Towett picking clients money and not returning it. That from their Appendix 3q page 7, the claimant did not answer satisfactorily to the accusations. He stated that the claimant was the one who certified the commercials to run on air but he was not a sales person. That the Claimant as a team leader, did not show how money could be recovered or make any effort to recover it.

He further stated that Mr. Kirui was the Accountant and he used to receive all cash and ensure it is banked. He says the claimant became the General Manager to allocate programmes to presenters and ensure their availability. On two occasions, he states that the claimant was surcharged, from his pay to recover clients' money. When claimant was asked to explain for the Moneys unaccounted for, he made a reply which was unsatisfactory.

He was send on compulsory leave and thereafter summarily dismissed. He was then paid Ksh.75,000/= in lieu of notice. He was not paid in lieu of leave and R.W. I admits he had not taken any leave. In relation to Ksh.120,000/= paid in respect of the motor vehicle. He says the claimant was assigned a car and the cost was to be recovered from Claimant's salary. That by July 2006, the car was recovered in a bad situation and had to be repaired. That this vehicle was not registered in Claimant's name. As to Ksh.14,488/= refund, he says, this was the surcharge of May, 2006 where claimant had taken client's money delivered at this reception. He says the claimant's dismissal was lawful as he intimidated junior staff, accountant and secretary. The company felt it could not entertain his behavior.

In cross examination by Ms Guserwa for claimant, R.W I stated that Towett was employed in April 2005 and that Towett did not go through an interview process. Paragraph 4 of amended statement of defense however states that there was an advert in KASS FM Radio but that this was not the case. He states that this statement is not correct. He says that Claimant came in as Editor and there was no appointment letter. He says claimant was verbally sent to collect information/music from the South Rift. He further states further that he gave out appointment letters in August, 2005. However he admits that the one of Ezekiel Towett is dated 2006. He says all contracts were shifted to begin 1-1-2006. He says there were no letters for August 2006. He says all letters are for 1 (one) year but one for Towett Ezekiel is for 2 (two) years. He says claimant could not have different terms from the rest. He says Towett's file was in claimant's office and they could not trace it. (He says claimant App. 3(b) is not in their office).

He says that Towett did not sign Ezekiel Towett's letter. He concedes that the termination did not refer to leave. Concerning the vehicle, he stated that the vehicle was not being used by the Respondent before the termination of the Claimant. He says there is no status report of this vehicle in May to July 2006. He admits Ksh.120,000/= was deducted from Claimant's salary which Claimant had paid towards ownership of the car. He says this amount was used to repair the vehicle and it is now under the Respondent's

ownership. He says he is not a mechanic but the repairs show what was done to the vehicle. He says the letter of 5.1.2006 was written by Claimant after he left the employment. He says that in June 2006 the claimant was still on compulsory leave. He says they gave him two cheques for June 2006 and July 2006, but he did not have documents. He further stated that the claimant was given as opportunity to put in writing his explanation.

In re-examination, the witness RW 1, further told court that the contract letters were forwarded to Mr. Towett in 2005. The format of the letter is the one marked A in further supplementary decree to claim. He indicated that the Appendix K and L refer to Charles Kirui and Edwin Kirui who were terminated in the re-organization. Their letters are dated 10.1.2006.

At the close of the evidence submitted by both parties, Counsel opted to file their written submissions. The claimants filed their submissions on 15/12/2011. The Respondent did not file any submissions but asked that court to rely on the evidence given in court.

Having heard the evidence and submissions put forward by the parties, the issues this court has to consider are twofold:-

1. Whether the Claimant was unlawfully terminated by the Respondent.
2. What remedies if any are available to the Claimant if the answer to (1) above is yes.

On the First issue, the Claimant gave evidence and stated that he was employed by the Respondent through a verbal contract. He was not issued with any written appointment letter or contract of employment. However, in the cause of time the Respondent alleged that there were malpractices in which the Claimant was suspected to have engaged in leading to loss of company funds. This necessitated the Respondent to suspend the claimant pending investigation.

The claimant was invited to reply to allegations made against him and he did reply. The Respondent found the reply not satisfactory and dismissed him altogether. Let me address the issue of investigations done by the Respondent. To start with, the claimant was never given an opportunity to appear before any investigative panel and be heard. The court did not get the advantage of knowing the terms and conditions of employment of the claimant as there was no contract letter. The Respondent have contended that the claimant must have hidden this letter as he was in the office. If the Respondent employed the Claimant surely his contract of employment and claimant's file should not have been kept by the claimant but the Respondent's officers senior to the claimant. The contention that claimant may have destroyed the letter does not carry much weight. In any case there were other contract letters which were presented to court by the Respondent which bear dates that were not consistent with the dates Respondent allege they were made.

I find that the Respondent omitted to issue the claimant with a letter of employment as provided under Section 9 of the Employment Act, which states:

9. (1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months; shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)

The wording of this section are couched in mandatory terms requiring the Respondents to cause a written contract to be made in respect of the Claimant and this omission cannot be visited against the Claimant. Since the Respondent omitted to issue this contract of employment to the claimant makes it hard to determine what his duties and responsibilities were. When the claimant now states that his duties did not include managing accounts, the only point of reference would be the contract which is lacking. The anomalies which occurred could not therefore be blamed on the claimant.

In any case, failure to call the claimant for an oral disciplinary committee meeting to get to the bottom of the matter is in breach of rules of natural justice which demand that a man should not be condemned unheard.

The attempt to resolve the problem of outstanding payments, blame of which was laid on the claimant never bore fruit. The Respondent admits that the claimant's appeal towards the termination was not granted because the company was unable to recover the alleged stolen money. The Respondent also claimed that the car that was assigned to the claimant was recovered and in bad taste and so the money deducted from claimant Ksh.120,000/= was used to repair the car. No valuation or assessors' reports on the state of the car before and after claimant's use was produced in court as proof of this assertion.

For the above reasons, I find that the claimant was terminated unfairly and this answers my first question and so I move to the next.

What remedies are available to the claimant? The claimant had sought an order that he be reinstated to work. Under Section 49 (4) (a) of the Employment Act 2007, the law demands that the practicability of the reinstated be considered. In the instant case, the claimant left the employment of the Respondent in 2006, and ordering reinstatement 6 years down the line is not practicable nor fair to the Respondent bearing in mind the nature of the Respondent's work which is dynamic. I therefore decline to grant this order.

I however take notice that the claimant was terminated without being paid his terminal benefits. I will therefore order he be compensated as follows:-

1. Payment of Ksh.120,000/= deducted from his salary towards purchase of the car.
2. He be paid Ksh.85,000X12= kshs.1,020,000/= equivalent to 12 months salary compensation for wrongful termination.
3. 1 month's salary in lieu of notice – Ksh.85,000/=
4. 1 month's salary in lieu of leave – Ksh.85,000/=

Total – Kshs.1,310,000/=

5. The Claimant be issued with a certificate of service

6. Costs of this suit to be paid by the Respondent.

Signed, dated and delivered this 15th day of October, 2012, in the presence of the Court Clerk; Rachel Gichuki, Mr. Onindo holding brief for Mwenesi for Respondent and no appearance for Claimant.

**HELLEN WASILWA
JUDGE**