



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 431 of 2010

KENNETH NJIRU NYORANI.....LAIMANT/APPLICANT

VERSUS

DODHIA PACKAGING LIMITED.....RESPONDENT

JUDGMENT

This case was commenced by the memorandum dated 16th April, 2010 filed by the claimant Kenneth Njiru Nyorani through D.K Njagi Marete & Company Advocates. On 29th July, 2010 the court granted the claimant leave to amend the memorandum of the claim. The amended statement of claim dated 16th August, 2010 was filed on 17th August, 2010. The respondent Dodhia Packaging Limited through J.A Guserwa & Company Advocates filed on 28th May, 2010 the statement of defense dated 20th May, 2010. On 13th October, 2010 the parties by consent agreed to file written submissions and on 23rd November, 2010 the court ordered that the decision would be made on notice and on the basis of the documents on record as filed by the parties. The claimant's written submissions were filed on 27th October, 2010 and those for the respondent were filed on 22nd November, 2010.

The facts of this case are as follows. The claimant was employed by the respondent as the Chief Engineer under the terms of appointment dated 19th July, 2007 and with effect from 1st July, 2007. Clause 2 of the contract provided that, on account of a misconduct by the claimant, it would be lawful for the respondent to terminate the employment forthwith and without any notice whatsoever and without prejudice to any other right or remedy which may be open or available to the respondent in respect of such misconduct by the claimant. Clause 13 of the contract provided that upon termination of the employment contract by either party, the respondent will not be liable to pay any dues arising thereof as a result of service pay. In clause 4 the contract provided that the claimant's consolidated salary was Ksh.135,000.00 inclusive house, transport, communication and motor vehicle allowances.

By the letter dated 4th February, 2010 the respondent informed the claimant the termination of the employment. The letter stated that following the discussion between the claimant and the respondent on 15th February, 2010 the management had decided to terminate the respondent's employment with effect from 31st January, 2010 and that the remaining fifteen days of notice period would be compensated accordingly. By a copy of the letter the respondent's Chief Accountant was authorised to pay the claimant's dues subject to statutory deductions and liabilities owed to the respondent. The letter stated the claimant's dues as including any accrued leave up to and including the month of January 31, 2010; payment of salary for January 2010; and 15 days notice pay. The termination letter concluded by wishing the claimant success in all his future endeavors.

The respondent's Human Resources Manager had earlier in time addressed to the Standard Chartered Bank the testimony of service by the letter dated 27th October, 2009 stating that the claimant had been an

employee of the respondent since 2007 as the Chief Engineer employed on permanent terms since July 7, 2007 with a basic pay of Ksh.115,650.00; house allowance of Ksh.17,350.00; and car benefit of 12,000.00 making a gross pay of Ksh.145,000.00. In addition the letter stated, ***“Further, we confirm that the employee is 54 years old and is expected to retire at the age of 60 years. There is no disciplinary case currently pending against him nor is there any notice to resign. Any assistance extended to him is highly appreciated”.***

The record also shows that by the letter dated 11th August, 2008 the respondent's management informed the claimant that his basic salary had been increased from Ksh.135,000.00 to Ksh.45,000.00 with effect from 1st July, 2008. By the letter dated 13th September, the respondent's management informed the claimant that the pay was broken down into basic salary of 115,650.00, house allowance of 17,350.00, and vehicle allowance of 12,000.00 respectively. The breakdown tallies the claimant's last pay slip for December 2009.

Following the termination letter, the respondent paid to the claimant a sum of Ksh.152,903/= on 10th March, 2010. The claimant confirmed receipt of the payment being the full and final settlement of his dues from the respondent. In the note for acknowledgement of the receipt dated 10th March, 2010 the claimant further confirmed that he had no other claims whatsoever against the company and accepted the payment as full and final settlement of his dues. However, in signing the note the claimant endorsed thereon “without prejudice” and countersigned accordingly.

In the amended statement of claim the claimant prays for judgment against the respondent for:

1. A declaration that the purported termination of employment is unlawful and therefore a nullity;
2. Payment of salary and allowances being Ksh.145,000.00 times 12 months times five years plus a further Ksh.145,000.00 times three months making a total of Ksh. 9,135,000.00, and in alternative;
3. Service pay for three years including Ksh.145,000.00 times 15/30 times 3 making Ksh.217,500 plus balance of payment in lieu of notice being Ksh.145,000.00 less Ksh.66,500.00 making Ksh.78, 500.00 and both summing up to Ksh.296,000.00/=;
4. General damages for breach;
5. Punitive damages;
6. Exemplary damages;
7. Aggravated damages;
8. In alternative to all the foregoing an award that the respondent compensates the claimant for unfair termination of employment by paying 12 months salary for unfair dismissal;
9. Costs of the suit;
10. Interest at court rates; and
11. Any such other relief or further relief as this court may deem fit and just to grant.

In the statement of defense the respondent states that the claimant is not entitled to the prayers made and the case should be dismissed with costs. In particular the respondent states that the claimant failed to achieve the performance targets leading to great losses to the respondent; that the respondent's record of service was not neat, clean or with blemish; that rules of natural justice did not need to apply in terminating the contract of employment in the instant case; and that the claimant was made aware of his shortcomings at the meeting of 15th January, 2010.

In view of the pleadings, the documents on record and the facts of the case as set out earlier in this judgment, the issues for determination in this case are:

1. The basic and gross salary of the claimant at the time of termination of the contract of employment;
2. Whether the respondent breached the contract of employment;
3. Whether the termination of the contract of employment was unfair or unlawful; and
4. Whether the claimant is entitled to any of the prayers made.

On the issue of the basic and gross salary at termination, the evidence shows that the basic salary had been Ksh.145,000.00 until the harmonization as communicated in the letter dated 13th September, 2008 which clearly stated the basic salary as 115,650.00. This figure is confirmed by the claimant's pay slip for December 2009 and the respondent's letter to the bank as earlier stated in this judgment. Accordingly the court finds that at termination of the employment the claimant's basic salary was Ksh.115,650.00 and the gross salary or wage was Ksh.145,000.00.

On the issue of breach of the contract of employment, the evidence shows that the claimant was entitled to be on permanent employment till the attainment of the retirement age of 60 years. This is particularly evidenced by the respondent's letter to the bank and upon which the respondent no doubt intended the bank to rely on in evaluating any financial assistance to the claimant. As provided for in clause 2 of the contract, the respondent had to establish existence of a misconduct against the respondent so as to justify the termination before the retirement age. There exist no mention of any such misconduct before the termination and the termination letter does not refer to any particulars of termination. Accordingly the court finds that the termination was in breach of the express provision of the contract of employment governing termination on account of misconduct and before the retirement age.

Under section 43(1) of the Employment Act, 2007, in any claim arising out of termination of a contract, the employer must prove the reason or reasons for the termination and if the employer fails to do so the termination shall be deemed to be unfair. In the instant case the letter of termination does not state the particulars of the termination. Termination of a contract of employment is a serious decision with far reaching consequences on the livelihood and socioeconomic and professional or occupational reputation of the employee. This court shall frown at employers who take termination casually like in the instant case where there is a mere reference to a discussion prior to the termination and whose agenda and conclusion remain unknown. The employer is bound to, in clear terms, inform the employee the particulars of misconduct leading to the termination. The reasons for termination cannot be an after-thought like in the instant case where the allegations for poor performance resulting into a loss to the employer have been made after the termination and in circumstances where the same have not been proved to be attributable, solely or at any measure, to the claimant. The court therefore finds that the termination of the claimant's employment by the respondent was unfair termination as envisaged in section 45 of the Act.

In making this finding the court recognizes that the right to fair termination has constitutional basis as provided for in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. The Constitution breaks the curtains and it does not matter whether the employer is in public service or private sector. The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values include human rights. Thus, in the instant case, the respondent was bound to accord the claimant the right to a fair administrative action through observance of the rules of natural justice and as expressly envisaged in section 45(5) of the Act.

The remedy for unfair termination is governed by the provisions of section 49 of the Employment Act, 2007. In particular subsection 49(4) provides for the factors to consider in arriving at the remedy and

subsection 45(1) (a) provides that the employer may be ordered to pay the employee the equivalent of a number of months of wages not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. Accordingly, the court finds that the claimant is entitled to be paid by the respondent twelve months gross salary being 12 times Ksh. 145,000.00 making a result of Ksh.1,740,000.00. The court finds this to be a fair and adequate remedy in the circumstances of this case taking into account the claimant's mitigating opportunity for employment as a professional so that the claim for loss of five years' income till the attainment of the age of retirement at sixty years is unfounded. As held in **Joseph Okumu Simiyu Versus Standard Chartered Bank Limited, HCCC No. 889 of 1994**, an employer and employee are not bound until the mandatory retirement age. In the instant case, the court has taken into account the restrictive clause 7 of the contract which lasted for only six months and the claimant was thereafter at liberty to engage even with the respondent's competitors. The clause stated, "5. You will not for six months after you have ceased to be employed by the Company either solicit business or do business with any person or firm who have been or are in business relationship with the Company or any of its associated Companies or be employed in a position similar to the position in which you were employed by the Company." Thus, the claimant was entitled to seek and obtain employment and no evidence or reasons have been advanced for impossibility to mitigate the alleged losses between the date of unfair termination and mandatory retirement age. Compensation for loss of future earnings would be ordered by the court only in exceptional cases where there is impossibility or difficulty in the employee's capacity to mitigate such losses through obtaining alternative or other employment, or, if it is shown that the contract of employment imposed irrevocable restriction on the employee to get into any gainful employment for the period between the termination and the retirement date or date of lapsing of the contract. Such circumstances have not been shown to exist in this case and the claimant's prayer for Ksh.9,135,000.00 for lost period of service is not justified.

The court also finds that the claimant received payment of purported final payment from the respondent on without prejudice basis. Thus, the claimant by accepting the payment did not thereby waive his right to make demand and claims for just separation or terminal dues as done in this case. The claimant was entitled to file this case and to seek relief from the court.

The court therefore enters judgment for the claimant against the respondent as follows:

1. A declaration that the respondent unfairly terminated the claimant's contract of employment;
2. The respondent shall pay the claimant Ksh.1,740,000.00 plus interest thereon at court rates from the date of this judgment until the date of full payment; and
3. The respondent to pay the costs of the case.

Delivered in court at Nairobi this 5th day of October, 2012, in the absence of both parties.

BYRAM ONGAYA

JUDGE