



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 391 of 2009

PETER N. MUTERU CLAIMANT/APPLICANT

VERSUS

TECHNOLOGY TODAY AND

ANTHONY CORDIERO..... RESPONDENT

JUDGMENT

The Claimant Peter N. Muteru filed the dispute on 22.07.2009 through J.K. Kibicho & Company Advocates. The 1st Respondent’s memorandum of reply was filed on 13.10.2009 through Macharia-Mwangi & Njeru advocates. The Claimant’s supplementary list of documents was filed on 5.03.2010 and the Claimant also filed on 24.11.2009 the reply to the 1st Respondent’s memorandum of reply. The Respondents further supplementary list of documents was filed on 21.06.2010. The case was heard on 22.02.2010, 22.06.2010, 10.11.2010, 7.2.2011, 14.04.2011 and 13.06.2011. On 13.06.2011, Counsel for the Respondents’ informed the Court that the 2nd Respondent had since relocated to Australia. On 8.8.2011, Counsel for the Respondents informed the court that there were possibilities for parties to agree on a settlement and record consent in court. On 9.02.2012, Counsel to the Respondents’ closed the Respondent’s case. On 18.04.2012 the court ordered the parties to file written submission. The Claimant’s written submissions were filed on 25th April, 2012 and those for the Respondents were filed on 17.05.2012.

During the hearing on the diverse dates, the Claimant testified on behalf of his case. By the close of the Respondents’ case, no witness had testified on behalf of the Respondents.

The Claimant is alleging unfair and unlawful termination by the Respondent. The Claimant is alleging failure by the Respondent to follow due process in terminating the Claimant’s contract of employment. The Claimant therefore prays for judgment against the Respondent for:

- (a) Three months’ salary in lieu of notice
(250,000 x 3) - Ksh.750,000/=
- (b) 7 years service gratuity at 15 days per month
for every year served (15 x 12 x 250,000/30
x 15 x 7) - Ksh.875,000/=
- (c) Twelve months salary as compensation for

unlawful dismissal (250,000 x 12) - Ksh.3,000,000/=

(d) Commissions earned due and payable - Ksh.959,504/=

(e) Costs

(f) Interest on (a), (b), and (c) until payment in full.

On 1st September 2001, the Claimant was employed by the 1st Respondent as an Administration and Operations Manager initially on probation of 3 months and thereafter on permanent terms. The letter of appointment was issued accordingly. The appointment letter provided that the employee shall not engage or be employed in any other business or occupation whether for profit or otherwise without express notice in writing to the employer. Clause 9 of the letter of appointment stated that the appointment shall be terminated by either party giving notice of 21 days or a month's salary payment or forfeiture in lieu of thereof whichever shall be the case.

The Claimant produced his pay slip for the month of August 2008 to show that as at the time of his alleged termination of the contract on 8th November, 2008, his salary was Ksh.250,000/= excluding allowances and bonuses.

The Claimant in his evidence confirmed that the 1st Respondent was a Corporate body and the 2nd Respondent was the 1st Respondent's Managing Director. Counsel for the Respondents submitted that there was no privity of contract as between the Claimant and the 2nd Respondent as the 2nd Respondent was not a party to the contract of employment. The court agrees with the submission by Counsel for the Respondents and finds that the claim against the 2nd Respondent was misconceived, not justiceable and unsustainable.

The circumstances leading to the Claimant's case are as follows. At the time of the dispute the Claimant held the position of Head of Sales and Marketing in the 1st Respondent's company. On 24th November, 2008, the Claimant applied for and was granted leave to enable him attend his wedding that was to be held on 28.11.2008. The Claimant completed the relevant leave form and handed it to his supervisor, the 2nd Respondent. The leave form was filed in the usual manner. The Claimant proceeded on leave as permitted and on 28th November 2008, concluded his wedding vows ceremony witnessed by among others the 2nd Respondent. At the end of the leave, the Claimant resumed duty on 8.12.2008 when the 2nd Respondent called him to the 2nd Respondent's office banda located outside the main office block of the 1st Respondent. The Claimant testified that at the meeting they discussed issues of sales and gross profit, poor debt collection, current growth in profit target not being met and staff motivation.

The Claimant testified that at the meeting he informed the 2nd Respondent that debts were being collected but the staff morale was low because the commission payable were in arrears or not paid in time. He further testified that the meeting did not end well because he raised the issue that his commission was in arrears. The Claimant further testified that he was discussing the point on sales and pending orders of at least fifteen million when at that point, the 2nd Respondent got annoyed and told the Claimant, in the Claimant's words, **"let us call it a day"**. Accordingly, the Claimant testified that he was thereby fired by the 2nd Respondent verbally. The Claimant in his evidence stated,

"I went to my desk and packed my belongings. I needed a carton. I proceeded to the store. I was informed that I needed to hand in the company car. I requested a colleague who gave me his car to carry my items home; it was about 9.30 a.m. When I reached home I checked on my e-mail and there were instructions from the Managing Director (the 2nd Respondent) saying kindly proceed on your remaining leave days".

In January, the Complainant testified that he received his December pay slip which prompted him to write

to the 2nd Respondent the letter of 6th January 2009. In that letter the Claimant highlighted the opportunity of having worked with the Respondent between September 2001 and December 8, 2009, after which the 2nd Respondent asked him to leave. The letter then proceeded, thus

“However, a visit to your office today, January 6, 2009, revealed a new twist to the dismissal. The facts are that I returned from my wedding leave applied for two weeks between November 24th 2008 to resume on 8th December, 2008, on that day, 8th November 2009, at 9.30 a.m. we had a meeting convened by yourself and you shortly ordered me to pack and leave your company immediately which I promptly complied with. You then sent an e-mail instructing me to proceed on leave for my remaining days. Further I have received payment for salary and all pending leave days to December 2008. I enquired from you and your Finance Manager Mr. Fredrick Otudeh, on the status of my service for fifteen days (15) a year for the seven (7) years worked a total of 105 days and you said you are not aware who fired me. Now confirm my status and that of my outstanding service payment and also give the date when the full settlement will be made. Without prejudice”.

The Claimant subsequently reported a labour dispute to the District Labour office at Nyayo House in Nairobi. The District Labour Officer wrote to the Respondent the letter dated 18.03.2009 and the Respondent replied by the letter dated 7th April 2009. The letter stated as follows:

***“April 7, 2009
The District Labour Office***

Ministry of Labour and Human Resource Development

Nyayo House

Attn: Mr. Karanja

Dear Sir,

Ref: Labour Complaint – Peter Muteru

Further to your meeting with the above mention and our Finance Manager Mr. Otudeh held on 30th March 2009 at your Nyayo House office regarding termination of the above mentioned person contract.

Kindly note we wish to reaffirm that we are sticking to our grounds of dismissal which were a clear breach of the letter of appointment on the part of the above mentioned.

For the record the grounds are as follows:

- 1. Breach of the confidentiality clause (b) in the appointment letter by engaging in a business by the Kaskazini in Buru Buru without express notice in writing or otherwise.***
- 2. Non performance – the above mentioned had a sales target being the Sales Manager and failed to meet the same in the last quarter of the year.***
- 3. Gross misconduct. Proceeding on unauthorized leave. In the past the above always gave adequate notice and got approval before he went on leave. In this situation procedure was not followed.***

Disrespect and unbecoming behavior – the above mentioned walked out on meeting with the MD and proceeded to utter derogatory and unsavory remarks to members of staff about the MD.

On our end we have complied with the 30 days notice and all that is due to him as stipulated in the appointment letter.

Should the above grounds not be satisfactory then we are willing to proceed to court to determine an

outcome.

Yours faithfully,

SIGNED
Antony Cordeiro
Managing Director”

The Respondents had written an earlier letter dated 30.3.2008 to Labour Officer substantially raising the same issues. The Claimant decided to file this cause.

The issues for determination are as follows:

- (a) Whether the 1st Respondent terminated the Claimant’s contract of employment, and, if yes, whether the termination was unfair.
- (b) Whether the Claimant is entitled to any of the remedies prayed for.

On the issue of whether the 1st Respondent terminated the contract of employment, the 1st Respondent pleaded that at the meeting of 8/12/2008 the 2nd Respondent requested the Claimant to proceed on his leave. That at no time did it terminate the Claimant’s employment by way of dismissal as alleged or at all and that there was no written termination addressed to the Claimant at all material times. The Employment Act, 2007 does not prescribe that a termination must be in writing. Termination is a fact which is to be proved or rebutted by way of evidence. It is largely an issue of fact and not law.

In the present case, the Respondents did not call any witness to rebut the account given by the Claimant about the proceedings of the meeting held on 8/12/2008 between the Claimant and the 2nd Respondent. On a balance of probability, the court finds that the account as given by the Claimant during his oral testimony is true. This position is confirmed by the subsequent letters by the Respondents addressed to the District Labour Officer and referred to in this judgment. Accordingly, the court finds that the Claimant’s contract of employment was verbally terminated by the Respondents at the meeting held on 8/12/2008 between the Claimant and the 2nd Respondent.

The second issue for determination is whether the termination was fair or unfair. Under Section 41 of the Employment Act, 2007, the Claimant was entitled to be notified the reasons for which the Respondents were considering to terminate his contract of employment. Having failed to do so, the Respondents failed to pass the tests for fair termination as contemplated in Section 45 of the Act. The court finds that the verbal termination was without any notice and therefore due process for termination was breached and the reason for termination was not valid as the same cannot be said to have been verified and true.

The final issue for determination is whether the Claimant is entitled to the remedies prayed for.

First the Claimant is praying for three months salary in lieu of notice. Under the letter of appointment he was only entitled to one month’s pay in lieu of notice. The court awards him Ksh.250,000/= in accordance with the provisions of the contract. The court agrees as submitted by Counsel for the Respondents that the award is indeed what the Claimant was entitled to under the contractual provisions.

Secondly the Claimant has prayed for seven years service gratuity. As submitted by Counsel for the Respondents, under Section 35 (g) of the Employment Act, 2007 “**an employee is not entitled to service pay if he is a member of the Social Security Fund**”. The Claimant admitted in his evidence that he was a member of the fund and his pay slip filed in the Cause showed that the Respondent had made the relevant deductions. Thus, the court finds that the Claimant is not entitled to the service pay as prayed for in the statement of claim.

Thirdly, the Claimant has made a claim of Ksh.959,504/= being commissions earned, due and payable. For this claim the Claimant testified that he was entitled to commissions at a rate of 2% of the total group gross profit and 3% in the profits that overshoot the stipulated targets. The court finds the rates as claimed are correct and that is where the case of the Claimant on this claim ends. The rest is a vacuum; a claim without evidential matter. As submitted by Counsel for the Respondents, the documents that the Claimant relies upon show that percentage rates for the payment of the commissions were to be paid on the basis of gross profits. However, in paragraph B. 4(b) in the statement of claim the Claimant pleaded that it was fairly obvious that the economic recession had negatively impacted on sales projections. That pleading clearly suggested that there were no profits. The other documents relied on and annexed on the Claimant's supplementary list of documents did not disclose the author and did not aid the Claimant's prayer in any manner. The prayer for commissions must therefore fail.

Finally the Claimant has specifically prayed for 12 months salary compensation for unlawful dismissal. The court has found the termination to have been unfair. As rightly submitted by Counsel for the Respondent, such compensation is at the discretion of the court. Counsel further submitted that compensation on the basis of two month's pay would have been reasonable in the circumstance of unfair termination. Taking into account all the circumstances of this case including the seven years service the Claimant had served the Respondent, the court awards the Claimant a sum of Kshs.2,000,000/= for unfair dismissal being eight months gross salary.

Accordingly judgment is entered for the Claimant against the 1st Respondent for:-

- (a) A declaration that the termination of the Claimant's contract of employment by the 1st Respondent was unfair;
- (b) The Respondent to pay the Claimant a sum of Ksh.2,250,000/= for unfair termination and one month salary in lieu of notice;
- (c) The Respondent to pay interest on (b) above at court rates from the date of the judgment till the date of full payment; and
- (d) The Respondent to pay the costs of this cause.

DELIVERED at Nairobi this 5th day of October, 2012 in an open court in absence of both parties.

Byram Ongaya
JUDGE