



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 681 of 2012

SIMON MUGUKU GICHIGI.....CLAIMANT

VS

TAIFA SACCO SOCIETY LIMITED.....RESPONDENT

AWARD

The Claimant's claim in this case is for unfair termination of his employment by the Respondent. At the hearing, Mr. Kiingati appeared for the Claimant while Ms. Nderitu appeared for the Respondent. The Claimant and the Respondent's witness, James Kinyua Kimata gave sworn evidence. The facts of the case are that the Claimant was employed by the Respondent in 1998, initially in the position of Branch Manager and rising through the ranks to the position of Chief Executive Officer until 6th January 2012 when the Respondent terminated the Claimant's services. At the time of termination of the Claimant's employment, he was earning a gross monthly salary of Kshs. 107,000 made up of 75,000 basic salary, 12,000 house allowance and 20,000 commuter allowance. In addition, the Respondent contributed Kshs. 15,000 being the equivalent of 20% of the Claimant's basic salary to a Provident Fund scheme for the benefit of the Claimant.

The letter terminating the Claimant's employment dated 6th January 2012 and marked "SMG1" in the Claimant's documents and Annexure 2 in the Respondent's documents made reference to the Claimant's "performance in various matters" as the reason for the termination. Upon receipt of the said letter, the Claimant on 11th January 2012, wrote to the Respondent (letter marked "SMG2") stating that the letter of termination aforementioned carried several omissions and specifically that there was no attached schedule of computed terminal dues. On 6th February 2012, the Respondent wrote to the Claimant (letter marked "SMG 3" in the Claimant's documents and Annexure 6 in the Respondent's documents) forwarding a cheque for Kshs. 795,500 in settlement of the Claimant's terminal dues. The Claimant wrote to the Respondent again on 15th February 2012 (letter marked "SMG4") stating that the he had not understood the reason for the termination of his employment. In the said letter, the Claimant also took issue with the schedule of tabulated terminal dues (schedule marked "SMG8" in the Claimant's documents) which though dated 27th October 2011 was received by him on 27th January 2012. The Respondent wrote to the Claimant on 21st February 2012 (letter marked "SMG5" in the Claimant's documents and Annexure 11 in the Respondent's documents) explaining that the date 27th October 2011 was a typographical error. In spite of the discrepancy with regard to the date on the schedule of tabulated terminal dues, the Claimant had on 28th January 2012 written to the Respondent (letter marked Annexure 7 of the Respondent's documents) agreeing to the calculation of his terminal dues. The Claimant further wrote to the Respondent on 31st December 2012 (letter marked Annexure 8 of the Respondent's documents) confirming receipt of the said terminal dues and confirming that he "wont have any other claim against the SACCO on all my dues."

In his viva voce evidence, the Claimant told the Court that he was not satisfied with the termination of his employment because he was not given an opportunity to be heard by the Board. He added that when he was summoned to meet with the Chairman of the Respondent on 9th January 2012, he did not know the reason for the meeting and that he was not accompanied by any person at the said meeting. The Claimant further stated that he had not been issued with a Certificate of Service and that since leaving the Respondent's employment he had not secured another job.

The Claimant sought the following reliefs:

- a) A declaration that the termination of employment was unfair and unlawful
- b) An order for reinstatement
- c) 12 months' salary as compensation for unfair termination of employment
- d) An order that the Respondent issues the Claimant with a Certificate of Service
- e) Costs of the suit
- f) Any other relief the Court may deem just to grant

The Respondent called James Kinyua Kimata, the Human Resource Manager and the Acting Deputy Chief Executive Officer (RW1) as its only witness. Mr. Kimata told the Court that as at the time the Claimant left employment his gross monthly salary was Kshs. 107,000 and referred the Court to Annexure 1 in the Respondent's documents, being the Claimant's payslips for the month of December 2011. RW1 further told the Court that according to the employment contract (Annexure 3) either party could terminate the contract by giving 3 months' notice or by paying 1 month's salary in lieu thereof pointing out that the Claimant was in fact paid 3 months' salary in lieu of notice.

The witness averred that the Claimant was issued with a Certificate of Service (Annexure 9) on the same date as the letter of termination but admitted in cross examination that he did not have documentary proof of receipt of the Certificate of Service by the Claimant. He also admitted that he was not at the Board meeting at which the decision to terminate the Claimant's employment had been taken and that he therefore did not know who had attended the meeting or what had been discussed at the meeting. On the issue of the date when the decision to terminate the Claimant's employment was taken, RW1 told the Court that the decision was taken at the Board meeting of 6th January 2012 and not in October 2011 as alleged by the Claimant.

The first question for determination before me is whether or not the termination of the Claimant's employment by the Respondent was unfair.

Section 43 (1) of the Employment Act, 2007 provides that:

(43)(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45

Section 45 (2) of the Act provides that:

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 employee's 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*

Section 41 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(1) *Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.*

(2) *Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make*

The law clearly requires that an employer who is considering adverse action against an employee must, before taking such action, afford the employee an opportunity to be heard. In the case of **Isaac Matongo Mogoi Vs. Municipal Council of Nakuru and Another (HC Misc Case No. 810 of 2005)** Koome J (as she then was) held that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them.

Specifically in matters of performance, the employer must demonstrate a consistent path towards supporting an employee to improve their performance.

In the case of **Kenya Science Research International Technical and Allied Workers Union (KSROWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** the Court stated thus:

“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”

I agree with this position and add that as a sure way of securing objectivity in assessing the performance of the employee, clear targets upon which subsequent performance appraisals will be undertaken must be set.

The Court in the **Magnate Ventures Case** further stated:

“If one is a bad performer, the employer will usually weed out such employees during the probation period. There is no indication that the grievant was not confirmed after probation. Probation period in many enterprises lasts between two and six months. Since she had worked for more than six months the grievant is deemed to have established her competence during probation.”

The Claimant's termination letter refers to the Claimant's “performance in various matters” as the reason for the termination. The Claimant had worked for the Respondent for close to 14 years. If his performance had somehow dropped, the Respondent was under a duty to specifically point this out to the Claimant. To my mind it is difficult to understand how the performance of an employee holding the position of Chief Executive Officer could have been assessed without some form of documentation.

Labour and employment rights are now anchored in the Bill of Rights and are protected under Article 41 of the Constitution of Kenya, 2010. An employer cannot therefore at the spur of the moment tell an employee “you are a non performer and for that reason you are fired.” Such knee jerk decisions have no place in modern employment law. On this score therefore, I find that the termination of the Claimant's

employment by the Respondent on grounds of poor performance, without affording him an opportunity to be heard, was unfair within the meaning of Section 45 of the Employment Act, 2007.

Before proceeding to address the issue of remedies, I will dispense with the discharge note signed by the Claimant to the effect that he had no further claims to make against the Respondent. I take judicial notice that this is a common requirement by employers for departing employees. It is however expected that parties will act within the law. An employer cannot therefore circumvent their obligation to an employee by producing a form of discharge executed by the employee. If the law is not followed, no form of discharge can cure the irregularity. I have therefore disregarded the discharge note executed by the Claimant in determining this case.

Having found that the termination of the Claimant's employment by the Respondent was unfair, I now turn to the remedies. The Claimant prayed for both reinstatement and compensation. Reinstatement is one of the remedies uniquely available to the Industrial Court by dint of Sections 49 and 50 of the Employment Act, 2007. However, Section 49(4)(d) of the Act enjoins the Court to take into account:

(d) the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

In this respect, I am persuaded by the decision in **Muleya Vs. COMESA and Another (East Africa Law Reports 2003 2 EA 623 (COMESA)** where the Court held that:

the general rule that damages are the generally accepted remedy for redressing breaches of contracts of service is too established to be overthrown by side wind

This of course does not mean that the Court can never order reinstatement. I have however given careful consideration to this case and have come to the conclusion that it does not merit an order for specific performance. I therefore decline to grant the prayer for reinstatement. I however award the Claimant the equivalent of 10 months' salary based on his last gross salary being Kshs. 107,000 as compensation for unfair termination. In granting this award, I have taken into account that at the time of termination of the Claimant's employment, the Respondent paid the Claimant 3 months salary in lieu of notice instead of the contractual 1 month's salary. The figure of Kshs. 15,000 for Provident Fund is a deferred earning whose benefit can only be realised if the Claimant is in actual employment. It cannot therefore be taken into account in calculating compensation for unfair termination of employment.

The Claimant is also entitled to a Certificate of Service.

I award the Claimant the costs of this case.

DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF NOVEMBER 2012

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**