



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 653 of 2011

Alex Kihonge Mukoma.....CLAIMANT
v.

Tropical Farm Management Kenya Ltd.....RESPONDENT

AWARD

1. Mr. Alex Kihonge Mukoma (the Claimant) filed a Statement of Claim against Tropical Farm Management Kenya Ltd (the Respondent) on 20 April 2011 and the issue in dispute was stated as the *wrongful, unlawful, unfair and illegal termination and refusal to pay terminal dues of the above named Claimant.*
2. The Respondent filed a Memorandum of Response on 17 May 2011 and this triggered the Claimant to file Reply to Memorandum of Response on 22 June 2011 and a Supplementary List of Documents on 15 August 2012.
3. I heard the parties on 30 July 2012 and 9 October 2012 after which the parties filed their respective written submissions.

Case for the Claimant

4. The Claimant testified under oath and according to him, his employment with the Respondent as a Farm Manager was verbally terminated by the Respondent's Agronomy Manager on 17 January 2011. He was employed by the Respondent sometime in 1986. The termination according to him was unilateral and without reasonable cause and not in compliance with the terms and conditions of his employment contract. He therefore seeks 3 months' pay in lieu of notice of Kshs 200,100/- , severance pay for the 27 years he served the Respondent of Kshs 900,450/- and salary for the 13 years remaining to his retirement of Kshs 10,405,200/-.
5. At the time of termination the Claimant was earning a basic monthly pay of Kshs 62,700/- and Kshs 4000/- for utilities.
6. The termination, the Claimant urged was contrary to applicable statutes and International Labour Organisation convention No. 158. Although the Claimant did not make any further reference to this convention, it is the Termination of Employment Convention, 1982 and its provisions are largely mirrored in the Employment Act, 2007.

Case for the Respondent

7. The Respondent called one witness who gave sworn evidence to buttress the pleadings and according to the Respondent, it terminated the employment of the Claimant vide letter dated 31 January 2011 but which letter the Claimant refused to acknowledge or sign. The termination, so the letter stated, was grounded on section 44(d), [I presume the reference is actually section 44(4)(d) which provides for summary dismissal when an employee uses abusive or insulting language towards an employer or his/her seniors] of the Employment Act.

8. The letter of termination indicated that the Claimant was entitled to January 2011 salary which was paid through the payroll, 3 months' pay in lieu of notice, leave days balance up to January 2011 and crop bonus for 2010, if applicable less any lawful deductions.

9. The Respondent witness testified that the Claimant had been issued with several warning letters prior to the termination of his services and that in case of termination, a termination letter is prepared and thereafter the employee is invited to go through the letter and if in agreement to accept and sign the letter and then be issued with a cheque in settlement of final dues.

10. From the above, the issues emerging for determination are whether the termination was in compliance with the Employment Act, and if not, what would be the appropriate remedies.

Whether the termination was in compliance with the statutory provisions

11. Section 35 of the Employment Act deems a contract where salary is paid periodically at intervals of or exceeding one month to be terminable by either party by giving written notice of at least 28 days. This statutory provision gives only the irreducible minimum.

12. In the instant case, the contract of employment provided that after 3 years service, it could be terminated by giving 3 months notice or payment thereof in lieu of notice. Section 36 of the Employment Act contemplates payment in lieu of notice.

13. Regarding the notice, the Claimant pleaded and testified that he was not given any written notice. For the Respondent, it was urged that the purported termination letter offered the Claimant 3 months pay in lieu of notice and therefore nothing much turns on this aspect of notice. Indeed the Respondent had invoked section 44 of the Employment Act and not section 35. But I must acknowledge that the termination provisions of the Employment Act I will be discussing are all interrelated and complementary to each other and should not be interpreted in isolation.

14. Section 41 of the Employment Act, 2007 has placed a statutory obligation upon an employer, unlike what prevails under the common law, to notify and hear any representations which an employee wishes to make before the decision to terminate is taken, if the grounds for termination relate to the employees ***misconduct, poor performance or physical incapacity***.

15. From the letter of termination it is obvious that the services of the Claimant were being terminated because of his alleged *misconduct*, (the letter mentions disrepute and eventual embarrassment to the employer and those placed in authority).

16. The statutory obligation to notify and hear any representations made by an employee applies even in cases of summary dismissal. It was not suggested either in the pleadings or the testimony that the Claimant was notified or granted an audience to make representations before the decision to terminate his services was taken.

17. Indeed the practice at the Respondent, as testified by Ms Kabogo, is (was) that a termination letter is prepared and the employee is then invited to go through it. To my mind this falls far short of the statutory requirements of section 41 of the Employment Act.

18. The warning letters issued by the Respondent to the Claimant were issued in 2003 and 2004 and there is one which is dated 18 August 2009 and considering that the termination was in 2011 are of historical

relevance. I say so because the practice has been that a warning letter is valid for one year after issue for disciplinary purposes.

19. Under these circumstances there is no other conclusion I can reach except that the Respondent did not comply with the procedural requirements of the Employment Act and therefore the termination of the employment of the Claimant was unprocedurally unfair.

20. And in case I am wrong in the conclusion reached in paragraph 19 above, I now turn to the requirements placed upon an employer by section 43 of the Employment Act. This section has placed a duty upon an employer to prove the reason(s) for the termination of an employment contract. The question which I must therefore now discuss is whether the Respondent discharged this burden. I say so because it has been established that the employment of the Claimant had been terminated.

21. In its efforts to prove the reason(s) for the termination, the Respondent called its Human Resources Manager, Grace Kabogo to testify. The witness, however, apart from reiterating what was pleaded testified that the termination was based on Clause 5(c) of the contract of employment which reserved to the Respondent the right to terminate the contract without giving notice on payment of equivalent salary in lieu of notice. The nearest that the witness came to proving the reason(s) for the termination was when she testified that the *termination was due to a situation where the claimant could not work with the Respondent. The claimant's conduct and behaviour during his work with the Respondent warranted disciplinary action.*

22. In my humble view, this cannot do. Details and particulars should have been given. If the Claimant had used insulting or abusive language or behaved in a belligerent manner, details should have been given of, for example, who was insulted or abused or to whom he behaved in a belligerent manner. In fact, the Respondent could even have called these witnesses if they were available or indicate to the Court their non availability.

23. And if it was the work performance of the Claimant which had deteriorated as pleaded, again details were not brought to the attention of the Court. I take however that the Claimant was awarded bonuses in recognition of his contribution towards the Respondents results in 2009/2010 and 2010.

24. Section 43 should not be applied without keeping in mind the provisions of section 45 of the Employment Act. This latter section has placed a statutory obligation on an employer to prove that the reason(s) for termination are valid and fair. I am afraid that the Respondent has failed to meet the threshold requirements of sections 43 and 45 of the Employment Act and I therefore do find that the termination of the Claimant was substantively unfair. I now turn to discuss appropriate remedies.

Appropriate remedies

Severance pay

25. The Claimant sought Kshs 900,450/- in respect of severance pay. But in the Statement of Claim, it was not pleaded that the Claimant was declared redundant. The Claimant in his evidence testified that he considered his termination as a redundancy. To my mind this was merely an afterthought and the Claimant failed to establish that he was declared redundant. I therefore agree with the Respondent's submission that the Claimant is not entitled to an award under this head of claim and that the claimant cannot take umbrage under section 40(g) of the Employment Act.

Notice pay

26. The Respondent in its termination letter had offered to pay the Claimant three months salary in lieu of notice based on the employment contract clause 5(c). I have also found that the termination was both procedurally and substantively unfair and therefore award him three months salary in lieu of notice in the sum of Kshs 188,100/-.

Salary for remaining 13 years to retirement

27. This head of claim formed the biggest part of the relief sought by the Claimant. He sought Kshs 10,405,200/-. However, I am afraid that the Claimant failed to lay any contractual basis for an award under this head. His employment contract did not make any provision for this type of entitlement. I must therefore turn elsewhere to determine whether the Claimant is entitled to an award under this head.

28. The first port of call then must be the common law. The Claimant did not refer my attention to any principles or doctrines of the common law or indeed any case law to enable me make an award under this head of claim in his favour. At this juncture I need to observe, again that parties need to set and clarify to the Court whether their claims or causes of action are based on the common law breach of contract or statute, because, it has a legal impact on the type of remedies the Court can grant.

29. Having failed to put a case under contract or common law, the remaining window is a consideration whether the Claimant may have a statutory footing to support this particular head of claim. In his submissions the Claimant made reference to sections 49 and 50 of the Employment Act.

30. Section 49(1)(c) of the Employment Act mandates the Court to make an award of a sum not exceeding twelve months gross pay where it has made a determination that the summary dismissal or termination of a contract of employment is unjustified. In the present case I have made such a determination because the Respondent failed to prove that the reasons for termination of the Claimant were valid or fair or indeed to prove the reasons.

31. But I must state that an award under section 49(1) (c) of the Employment Act is discretionary and not automatic and like all judicial discretions must not be exercised arbitrarily or capriciously. Section 49(4) of the Employment Act has set out 13 factors or parameters to be considered. I have weighed some of these factors such as the age of the Claimant and possibility of securing alternative employment, length of Claimants service with the Respondent and come to the conclusion that the maximum damages equivalent to twelve months gross salary would be appropriate. I therefore assess this award in the sum of Kshs 800,400/-.

Unpaid bonus

32. The termination letter of the Claimant was clear that he would be paid a crop bonus for 2010. The bonus for 2010 was to be paid with the December 2010 salary of the Claimant and the Claimant did not establish that it was not paid. I decline to make any award under this head of claim.

Certificate of service

33. The Claimant is entitled to a certificate of service. that is what section 51 of the Employment Act obligates employers to do. There was evidence however that the Claimant has not cleared with the Respondent. It is only fair that he clears with the Respondent before he is issued with a certificate of service.

Conclusion and Orders

34. In the final analysis the Claimants succeeds to the extent indicated in the discussion above and I do find that the termination of his services was both procedurally and substantively unfair and he is awarded less any statutory or lawful deductions:

- | | | |
|------|------------------------------------|----------------|
| (i) | Three months pay in lieu of Notice | Kshs 188,100/- |
| (ii) | Twelve months gross pay in damages | Kshs 800,400/- |

TOTAL **Kshs 988,500/-**

35. There will be no order as to costs.

Dated and signed in Mombasa on this day of December 2012.

Justice Radido Stephen

Judge of the Industrial Court

-

Delivered and signed in open Court in Nairobi on this 14th day of December 2012.

Justice Nzioki wa Makau

Judge of the Industrial Court

-

Appearances

-

Mr. Okenyo Omwanza instructed by Kimani

Richu & Co. Advocates

For Claimant

Mr. Gikonyo instructed by D.V.Kapila

& Co. Advocates

For Respondent