



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 24 OF 2015

KIMATHI MITHIKACLAIMANT

VERSUS

COASTAL BOTTLERS LIMITED..... RESPONDENT

JUDGMENT

Introduction

1. This is a Claim for terminal dues plus compensation for unfair termination of the Claimant's employment contract by the Respondent on 4.11.2014. The Respondent has however denied liability for the alleged unfair termination and avers that the Claimant was terminated through fair procedure for poor performance of his duties.

2. The suit was heard on 11.2.2016 and 22.2.2016 when the Claimant testified as Cw1 and the Respondent called Ibrahim Elkhoury as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

3. Cw1 testified that he was employed by the Respondent on 9.12.2013 as the General Sales Manager at a monthly salary of kshs. 650,000 plus house Allowance of kshs.50,000. His appointment was confirmed by the letter dated 9.7.2014 after the employer was satisfied with his service. He worked as such until 6,11.2014 when he was terminated on ground of poor performance and the employer offered to pay three months salary in lieu of notice plus all accrued employment dues.

4. He denied the alleged poor performance and maintained that no warning letter was ever served on her complaining of underperformance. That comparing the period from 2010 to 2013 and 2014, Cw1 contended that the business registered a growth from 95.3% to 96.8% of the market share. He denied ever manipulating the sales records to misrepresent that there were good sales. He further denied that he was responsible for generating the sales figures as that was the duty of the Business Analyst Mr. James Wekesa. He contended that he gave a lot of business ideas to the employer on how to improve the sales including provision of fridges but the ideas were never heeded to by the management.

5. Cw1 contended that he was also never served with any prior notice of the termination or any show cause letter or given any hearing before the termination and as such he contended that his termination was unfair. He therefore prayed for compensation and terminal dues as pleaded in his claim.

6. On cross examination, Cw1 maintained that he was only answerable to the CEO (Rw1). He admitted

that his position was the nerve Centre of the company. Referring to a production Target Report filed by the defence, he further admitted that the sales reported to Coca cola were higher than the actual sales for 2013 – 2014 and that the targets were never achieved. He however clarified that he was only employed by the respondent from November 2013 to November 2014 and that he never served the whole two years.

7. He further explained that the said variance in the reports was because the KO sales reported by the Business Analyst Coca cola at the close of business daily was based on the booked orders, while the Tally CBL area report done in the morning of the next day was based on the actual orders loaded and invoiced. Thus if the orders were not invoiced or paid for after invoicing the reported order would remain higher than the report of the actual supplies delivered.

8. He contended that the Implementation Status Report of 2014 by Coca cola and which was cited by the respondent as the basis of his dismissal, was not about the failure by him alone. He further contended that the report showed that there was drop in the general performance by the respondent and not him alone. That the targets to be achieved were agreed upon by the respondent and Coca cola but the respondent had a duty to provide him with support to enable him achieve the targets. He explained that the Report from Coca cola that was used to fire him indicated that there was insufficient glass (bottles), coolers and lack of a team to manage quality, all of which were matters within the prerogative of the respondent's CEO (Rw1)

9. Cw1 admitted that after termination, he was paid Kshs. 1,516,281 and acknowledged the same as full settlement. He however contended that the termination was unfair and had prematurely ended his contract by 13 months and as such he was entitled to claim a further kshs, 18.Million.

Defence case

10. Rw1 is the respondent's CEO since 28.1.2013. He confirmed that Cw1 was the Operations Manager of the Coca cola which owns the respondent before joining the respondent in December 2013 as the General Sales Manager. In the said capacity Cw1 was the Head of the respondent's sales docket including auditing of all the sales. That he was put under probation for six months and thereafter he was confirmed after performing well according to the results scored.

11. Rw1 however, stated that after the confirmation, Cw1 started to perform poorly and misrepresented the sales reports through inflated figures. That CW1 never achieved the sales targets which he personally set. Rw1 referred to the KO report to show that there was a variance between the reported sales and the actual sales made. He identified the month of January, February and March 2014 as some of the months when Cw1 misreported his sales. That by misreporting the sales, the claimant lied that he had achieved his targets and in order to earn commission.

12. Rw1 however, admitted that the said misreporting of sales in the company started before Cw1 joined the respondent. That the misreporting was done by the Systems Analysts, Mr. James Wekesa who was working under the Cw1. According to him, the claimant bore the blame for the fictitious reporting by his junior because Mr. Wekesa could not send the fictitious reports without the authority from the claimant. That he never asked Mr Wekesa about the false reporting because he was only entering the data in the system under the supervision of the claimant.

13. Rw1 explained that the Coca cola Operations Marketing Manager who is the company representative in the respondent went for a promotion tour at Mtwapa and found lack of awareness. She then wrote an email to him complaining about the poor execution of the promotion exercise. Rw1 then wrote to Cw1 asking him to come up with a plan with a Kshs 5 discount per park to which Cw1 wrote back accepting. However, Cw1 never came up with the said plan prompting Rw1 to write to him about his poor performance and asked him for explanation. That Cw1 acknowledged the said request and promised to give feedback but he never did so and he was dismissed him by the Executive Director.

14. Rw1 contended that he provided the claimant with all the tools of work to assist in achieving his sales targets and dismissed the reasons for the dismal performance given by Cw1 as incorrect. He further

maintained that by January 2014 he imported 2121 coolers which exceeded the required 1700. He concluded by stating that the dismissal of the claimant was fair and that he was paid all his terminal benefits and discharged the respondent from any other claims.

15. On cross examination, Rw1 explained that he discovered that Cw1 was making fictitious reports of inflated figures in April 2014 while still on probation. He confirmed that no disciplinary action was taken against Cw1 for the offence of misreporting sales. He also admitted that the said offence was serious but he still confirmed Cw1 to the position in July 2014 by a letter stating that Cw1 deserved the confirmation

16. Rw1 further admitted that Mr. James Wekesa, the Systems Analyst was responsible for generating sales reports but he never queried him because he was not directly answerable to him. He further admitted that Cw1 wrote to him on 17.4.2014 raising several challenges that were affecting his sales including lack of stock, lack of coolers, lack of glass, and lack of route supervisors. He however contended that the 2014 BBP implementation Status report from Coca cola was instigated by Cw1 and it was false and was intended to cover up his poor performance by implicating him falsely yet all assistance had been availed to him to support his sales.

17. As regards the procedure followed to terminate the claimant's contract of employment, Rw1 admitted that the said 2014 BBP Implementation Report was the basis of the termination of claimant by the respondent's Executive Director Mr. Satish Shah. He further admitted that the termination was done without serving the claimant with prior show cause letter or giving him any disciplinary hearing. He however maintained that before the dismissal the claimant been informed of his poor performance through email correspondences and admitted the same.

Analysis and determination

18. There is no dispute that the claimant was employed as General Sales Manager by the respondent under a two year fixed term contract starting 9.12.2013. There is also no dispute that the claimant performed his duties so well during the six months' probation that he was confirmed to the position on 9.7.2014. There is further no dispute that his services were terminated without notice by the letter dated 4.11.2014 and was paid kshs.2,480,000, inclusive of kshs390,000 for leave earned, as his terminal dues.

19. The issues for determination are:-

- a) Whether the claimant is estopped from bringing this suit after receiving the said kshs.2,480,000 as his full and final dues and discharging the respondent from any further claims.**
- b) Whether the termination of the claimants employment contract was unfair.**
- c) Whether the claimants is entitled to the reliefs sought.**

Estoppel

20. The respondent contends that the claimant was paid all his terminal due as per his contract of service and acknowledged the same in full and final settlement of claims he had against the respondent. In addition the respondent objects to the suit on ground that under section 45(3) of the Employment Act (EA) an employee who is terminated before serving for 13 months, like in this case, is barred from suing for unfair termination. The claimant pleaded that the said dues were underpaid.

21. After considering the rival submission and evidence, I find no merit in the respondent's objection to the suit at this time. Section 87 of the Employment Act (EA) and section 12 of the Employment and Labour Relations Court Act (ELRCA) give this court the exclusive jurisdiction to entertain any dispute between employers and employees in relation to their rights and liabilities under the contract of employment and also any mistreatment, unfairness or injury by either party.

22. The respondent has not cited any legal provision to show that the court lacks jurisdiction to inquire into the fairness of settlement agreements between employer and employee after separation. The settlement involved in this dispute was related to a normal termination without notice. However as I will demonstrate herein below the termination was not a normal one and as such the court has all the jurisdiction to inquire into the fairness of the alleged final settlement. All the court is required to do in every such case under section 49 (4) (m) of the EA is to take into consideration any payments made by the employer to the employee after termination while making any further award above the settlement being challenged.

23. The Court of Appeal has settled this issue whether or not the court can inquire into a settlement agreements between employers and their employees after separation in **Civil Appeal No. 65 of 2012, Thomas De La Rue (K) Ltd –v- David Opondo Omutelema[2013] eKLR** where it held that:

“... a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial court from inquiring into the fairness of the termination.”

24. In view of the foregoing and the fact that the respondent has admitted in paragraph 30 of his defence that the court has jurisdiction over the dispute herein, I find that the claims by the claimant herein are properly before the court and a determination must be made on merits.

25. As regards the bar created by section 45(3) EA, I find that the said provision is nonexistent in our law books after it was declared unconstitutional by the High Court in **Pettion 341 of 2011, Samuel G. Momanyi Vs A.G. and Another [2013]eKLR**. Although I agree with the submissions by the defence that the said decision goes against an ILO convention No. 158, the said convention has not yet been ratified by Kenya and does not form part of our law under article 2 (6) of the Constitution. I therefore do not see any reason as to why I should depart from the said decision by Lenaola J.

Unfair termination

26. The claimant has contended that his termination was not based on any valid and fair reason and the procedure followed was not fair. That the reason for his termination was poor performance and decline in sales and business for the company due to factors beyond his powers and control. That the respondent's CEO was to blame for the general decline of the sales because he failed to invest in the sales department including provision of glass, coolers among others. As regards the procedure followed to terminate his services, Cw1 contended that he was not served with a prior notice as provided under the contract and he was not accorded a chance to defend himself in a hearing as provided by section 41 of EA in the presence of another employee of his choice.

27. Rw1 contended that the termination of the claimant's contract of employment was due to his poor performance and admitted that it done without any prior notice and without according him any hearing.

28. I have perused the termination letter dated 4.11.2014 and duplicated it herein:

4th November 2014

Mr. Kimathi Mithika

C/o Coastal Bottlers Limited

P. O Box 83154 – 80100

Through:

The Chief Executive Officer

Mombasa

Dear Mr. Kimathi

RE: OPERATIONAL AND STRATEGIC RESTRUCTURING OF THE ... BUSINESS

As you are aware, the company's performance over the last year (YTD) is on an unprecedented decline. It is noted with concern that the outlook over the next couple of years does not look particularly promising especially seen against that of our competitors.

This position is well documented in the Coca Cola business performance report availed to the board and management dated October 21 2014. The report has highlighted (inter alia), the following efficiency and performance gaps in your area of jurisdiction as the general sales manager.

- Business performance at CBL in 2014 has been declining in terms of volumes, quality and trade execution.
- Contribution to total country volume declined from an 11% high in 2012 to 9% in 2014 YTD.
- Performance also recorded a decline of -7% versus the bottler's business plan
- Sales team execution performance tracking has been affected by lack of focus and follow up
- Poor trade execution and follow up (MIT and Red).
- Poor RDC execution, follow up and reporting.

The need to expeditiously restructure the operations of the company have been agreed at Board level to protect the company from going into distress, salvage the productivity of the business and safeguard shareholder value. Accordingly, the Board has considered various measures to remedy the situation and improve efficiency while reducing overall operating costs.

The measures include but are not limited to the following:

- Reorganization of the business to achieve a leaner and more efficient operation set up. This may require splitting or amalgamation of some roles to achieve the desired objective.
- Enhancement of IT systems and processes to increase productivity and improve efficiencies while reducing operating costs.

Against the forgoing, I regret to inform you that your services with the company will be terminated with effect from 7th November 2014.

Please note that you will be paid three months' salary in lieu of notice in line with the terms of your employment contract with the company.

You are required to make arrangements to hand over any company assets under your charge to the CEO or any other person as the CEO may instruct by end of the day on 6th November 2014.

You are also advised to make immediate arrangements to clear your liabilities, if any, with the company. Please get in touch with the Human Resource Manager for due clearance process and sign off as necessary. Your terminal dues will be computed and paid via banker's cheque.

Yours Sincerely,

Sachit Shah

Executive Director

29. It is clear from the termination letter above that, the reason for termination was poor performance and declining business for the respondent which prompted her to do organizational restructuring and reduction of staff. In my view the claimant was terminated on redundancy and not for disciplinary reason or his poor performance. Redundancy is defined in section 2 of the EA as:

“... the loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of the employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment.”

30. Flowing from the foregoing finding that the claimant lost his job through redundancy, the question that arises is whether the procedure followed to lay him off was fair and lawful. Section 40 of the EA outlines the mandatory procedure that must be adhered to before declaring the employment of an employee redundant. The said provision bars the employer from declaring employment of his employee redundant before first serving at least one month notice in writing to the employee, or his Union employee if he is a member of any union, and the Labour Officer among other mandatory procedural requirements.

31. In this case Rw1 admitted that no notice was served on the employee and the Labour Officer before the claimant's termination. On ground of that default alone, the termination of the claimant's employment on ground of redundancy became unfair, wrongful and unlawful. It is now trite that default by the employer to comply with the mandatory statutory procedure for terminating employment contract through redundancy renders the termination unfair and my attract compensation by way of damages.

RELIEFS

Declaration

32. In view of the foregoing finding that the procedure followed to lay off the claimant was in breach of the law, I make declaration that the termination of the claimant's employment contract was unfair and unlawful.

Compensation / salary for remainder of the contract term.

33. The claimant was employed to serve for 2 years fixed term from December 2013 but the term was cut short by 13 months following the unfair termination in November 2014. He had the reasonable expectation to continue working for the respondent and to continue earning salary until the expiry of the remaining 13 months of the contract. He did nothing wrong to warrant the premature termination of his employment contract.

34. The contract in issue being a fixed term contract the claimant is only entitled to the salary he lost by reason of the said premature termination. The award for salary for the remaining term of the contract is adequate to compensate for the unfairness caused by the mode of termination and the claimant cannot get salary in lieu of notice and 12 months' salary as compensation for unfair termination.

35. The amount awarded herein will therefore be subject to the amount already paid in form of salary in lieu of notice among others. Based on the gross salary of kshs. 700,000, the total salary the claimant would have received without the unfair termination was kshs 9,100,000. After subtracting the kshs.2, 090,000 already paid, excluding kshs. 390,000 for leave, the claimant is only entitled to kshs. 7,010,000.

36. The foregoing award is a statutory obligation on the part of the respondent which accrued automatically under section 45 of the EA after failing to comply with the mandatory procedural provision of section 40 of the Act. That statutory obligation cannot be extinguished by a mere settlement agreement signed by an employee in favour of an employer.

37. Even if one was to argue that the said agreement was a binding contract, what evidence is there to prove that the employer gave the employee sufficient consideration. In my view the respondent has not proved that she paid to the claimant, any money he was not entitled to, as consideration for him to forego his other entitlements under the law. Consequently, I have interfered with the alleged final settlement agreement because it has no capacity to absolve the respondent from statutory obligation to compensate the claimant for ending his employment unlawfully.

Commission

38. The claimant was entitled to commission on top of salary based on the sales made per month. The said commission was only payable if the claimant met at least 90% of his monthly sales target. In this case the claimant has prayed for kshs.870,000 as the commission he expected to earn had he not been unfairly terminated. The basis of the said claim is that he expected to make sales of 5.8 million cases and earn kshs.0.15 per case as commission. The claimant did not however prove that he met the monthly targets in the 11 months he worked. In fact during cross examination by the defence counsel he admitted on oath that he did not meet his sales targets and blamed the Rw1 for his predicament. Consequently I find that the claim for lost commission has not been proved and I dismiss it.

Refund of unremitted pension contributions

39. No evidence was adduced to prove that the pension deductions for October and November 2014 was never remitted to the pension fund by the respondent. The prayer for refund of the same by the respondent is therefore dismissed. However the claimant is free to pursue the claim after confirming with the pension authority that the remittances were never received by the fund.

Disposition

40. For the reasons stated above I enter judgment for the claimant by declaring the termination of his employment contract unfair and awarding him Kshs. 7,010,000. Plus costs and interests.

Signed, Dated and Delivered at Mombasa this 29th day of July 2016.

ONESMUS MAKAU

JUDGE