



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1805 OF 2016

BABATUNDE A. TAIWO.....CLAIMANT

VERSUS

SAHAN AFRICA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent as a Senior Investigator and the Team Leader on Transnational Security Threats from 01/12/2014 starting with a monthly salary of USD 9,000 exclusive of house allowance which was later increased to USD14,000. He filed this suit on 18th October 2016 alleging that his employment was wrongfully and unfairly terminated by the respondent on 20.8.2016. He therefore prayed for the following reliefs:

(i) Salary for the month of August 2016 14,000USD

(ii) One month's pay in lieu of notice 14,000USD

(a) House Allowance:

2014 (December) - 9,000USD x 15% x 1month 1,350USD

2015 (Jan – Sept) – 9,000USD x 15% x 9months 12,150USD

2015 (Oct – Dec) – 10,000USD x 15% x 3months 4,500USD

2016 (Jan – May) – 10,000USD x 15% x 5months 7,500USD

2016 (June – August)– 4,000USD x 15% x 3months 6,300USD

TOTAL 31,800USD

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(iii) Payment in lieu of annual leave accrued for the year 2016 at the rate of 21 days per year – 10,000USD

- (iv) Severance pay at the rate of 15 days' pay for every completed year of service – 6,990USD
- (v) Operational expenses deducted from January to March 2016 – 15,000USD
- (vi) Taxi expenses – 2,000USD
- (vii) HK mission to Uganda expenses – 800USD
- (viii) Maximum compensation for wrongful dismissal and unfair termination of the employment contract as per section 49 and 50 of the Employment Act – 168,000USD
- (ix) Certificate of Service
- (x) Damages for breach of promise to be made a shareholder in the Respondent company, a member of Sahan Research (an NGO) and a partner in Sahan Foundation - 500,000USD.
- (xi) An order of specific performance compelling the Respondent to return to the Complainant his personal effects held by the Respondent.
- (xii) Costs of the Cause
- (xiii) Interest on prayer 1, 2, 3, 4 and 5 above from the date of filing this cause till payment in full.
- (xiv) Any further entitlement and/or order that the Honourable Court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the Claimant submits on his final filed submissions.

2. In her defence, the respondent admitted that the claimant was her employee until 20.8.2016 when she dismissed him for gross misconduct but denied that the dismissal was unfair and wrongful. She averred that the dismissal was done after following a fair procedure considering the fact that he was dismissed during the probation period. She further averred that the only dues payable to the claimant is USD 3351 which she is ready to pay to him. She therefore prayed for the suit to be dismissed with costs.

3. The main issues for determination are whether the claimant was dismissed during the probation period, whether the dismissal was wrongful and unfair, and finally whether he is entitled to the reliefs sought. To answer the said questions, both parties tendered evidence and filed written submissions.

Claimant's case

4. The claimant testified as CW1 and basically adopted his written statement filed in court on 6.9.2016 and produced a bundle of documents as exhibits in support of his case. He stated that on 3.8.2016, he reported back from leave and called for a meeting of the Finance and Administration team to establish why one Premdeep had picked money from the respondent's Dahabshiil account. He further stated that during the meeting he had an altercation with Miss Premdeep and he seized her office Laptop. He however denied any physical attack on Miss Premdeep during the said altercation. Two hours later he apologised to Miss Premdeep personally and further to all the staff through email.

5. He further stated that on 4.8.2016, he received a call from his Line Manager, Mr. Matt Bryden informing him that he had been suspended for criminally assaulting Miss Premdeep. On the same day he was summoned to Spring Valley police Station where he was told that Miss Premdeep had reported assault case and recorded a statement. On 9.8.2016, he received a call from Miss Terry who had been appointed by the respondent as an independent investigator on the incidence of 3.8.2016 and he gave his side of the story. On 20.8.2016 he was arrested at Yaya Centre and taken to Kilimani Police Station. On the same day, he was served with a termination letter by Mr. Matt while still talking to the OCS Kilimani Police Station.

6. In cross-examination, the claimant admitted that he had no work permit to work in Kenya between 27.2.2016 and 20.5.2016 when he was issued with for 2 years. He further admitted that he signed a contract of employment with the respondent dated 1.3.2016 for 2 years effective 2.5.2016, of which 3 months was probation period. He however denied that as at the time of his dismissal, he was serving under probationary contract.

7. He prayed for salary for August 2016 being USD 14000. He however admitted that the agreement filed by the respondent indicated that his gross salary was USD 4000 per month. He further admitted that on 10.8.2016, he was paid USD 3500 net of KRA deduction. He further contended that under the law he was entitled to house Allowance of USD 31000 plus accrued leave of USD 10000. He further prayed for USD 15000 being operation costs plus USD 500000 as damages for breach of promise to make him a shareholder in the respondent company.

Defence Case

8. Mathew Bryden, a director of the Respondent stated that he was informed by one of the employees, Ms. Erica Marsh that the Claimant had assaulted and used abusive language towards a fellow employee. That he went to the office to find out what had happened and found an email written by the Claimant addressed to all members of staff of the Respondent acknowledging his violent outbursts and apologizing for the incident. That he listened to an audio recording of the incident recorded by Ms. Serah Oluoch and it was clear to him that the incident was serious.

9. Rw1 referred to the Respondent's Certificate of Incorporation and documents of incorporation for the other organizations affiliated to them at *pages 1-3 of the Respondent's bundle of documents dated 03/11/2016* to show they are separate companies. Finally, Rw1 contended that he is aware the Claimant is now engaged as the Head of Political Affairs at the AU Mission in Somalia.

10. In cross examination, Rw1 testified that from May 2016, the claimant's salary was USD 4000 gross per month. He contended that the other amounts reflected on the claimant's bank statements were payments from sister companies and not salary from the respondent herein.

11. Terry Chebet Maina, testified as Rw2. She stated that she is a HR Consultant with over 25 years of experience in HR Practice. She further stated that the Respondent contacted her to investigate the incident of 03/08/2016 and make appropriate recommendations on the next cause of action. That in her investigations, she interviewed various staff including the Claimant and that she was given an audio recording of the incident including a transcription of the same, whose contents were confirmed by those she interviewed. That she thereafter prepared and submitted a report to the Respondent as shown at *pages 43-47 of the Respondent's bundle of documents dated 03/11/2016* and contends that the use of abusive/ insulting language and assaulting a fellow employee constitute gross misconduct that can justify summary dismissal under the law.

12. Premdeep Bahra testified as Rw3 and stated that the Claimant summoned her to a meeting with the head of Administration, Finance Officer and Head of finance. That in the meeting, the Claimant stated he had emailed finance to hold all payments due to her but the same had already been processed and disbursed. That on hearing that, the Claimant shouted that she had been fired from her position and became more visibly agitated threatening her using foul language while demanding that she be removed from the office compound.

13. Rw3 further stated that during the altercation the Claimant snatched her laptop from the desk, flung it and it hit her on her right shoulder severally called her "a fucking idiot". Fearing for her life, she left the office with only her personal belongings and reported the matter to the police and thereafter went for treatment of the injured shoulder at the MP Shah Hospital. She referred the documents in relation to incidence at *pages 48-53 of the Respondent's bundle of documents dated 03/11/2016* including a copy of the Claimant's email apologising to his colleagues is at *page 36 of the said bundle*.

Analysis and determination

14. There is no dispute that the parties herein related as employer-employee until 20.8.2016 when the claimant was summarily dismissed for misconduct. The main issues in dispute arising from the pleadings, evidence and submissions are:

(a) Whether the copy of the claimant's contract dated 1.3.2016 is genuine or forged.

(b) Whether the claimant was dismissed during the probation period of his contract dated 1.3.2016.

(c) Whether the dismissal was wrongful and unfair.

(d) Whether the claimant is entitled to the reliefs sought.

(a) Whether the copy of the claimant's contract dated 1.3.2016 is genuine or forged.

15. Rw1 produced a copy of contract of employment signed by himself and the claimant on 1.3.2016 and the same was not objected to. It is therefore a fact that the claimant signed a fresh contract of employment with the respondent on 1.3.2016 for 2 years effective 2.5.2016 to serve as Chief Analyst. The claimant confirmed in during cross examination that he was without Work Permit between from 27.2.2016 to 20.5.2016 when he was given 2 years permit to work as Chief Analyst. The said Work permit corroborates the respondent's case that the claimant signed his new contract as a Chief Analyst on 1.3.2016 and it was effective from May 2016.

(b) Whether the claimant was dismissed during the probation period of his contract dated 1.3.2016.

16. The respondent contended that the claimant was dismissed during the probation period. Clause 3 of the contract dated 1.3.2016 states as follows:

“You will serve the probationary period of three (3) months, which you are required to complete satisfactorily before your employment with the Company is confirmed. During the probationary period your employment may be terminated by either party by giving to the other fifteen (15) days written notice.”

17. The contract was effective 2.5.2016 and the dismissal was done on 20.8.2016. The period served after the commencement date was therefore 3 months and 18 days. It follows that as at the time of the dismissal on 20.8.2016, he had successfully completed the probation period.

(c) Whether the dismissal was wrongful and unfair.

18. Section 45(2) of the **Employment Act** provides that termination of an employee's contract of service is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason (s) related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements; and that a fair procedure was followed.

19. In this case the reason for the termination was misconduct namely assaulted and used abusive and insulting language towards a fellow employee Ms Premdeep (Rw3) on 3.8.2016. The claimant acknowledged the said misconduct by apologising to Ms Premdeep and the entire staff via email. Under section 44 (4) (g) of the Employment Act, the employer is entitled to dismiss his employee who commits or is suspected to have committed a criminal offence against the employer or his property. In my view the conduct of the claimant amounted to a criminal offence at the workplace. Consequently, I return that the employer has proved that there existed a valid reason for summarily dismissing the claimant as required by section 45(2)(b) of the Act.

20. As regards the procedure followed before the termination, the claimant contended that he was not heard by the employer. He contended that he was only interviewed by the private investigate Rw2 but he was never invited to any disciplinary hearing. The foregoing evidence was not controverted by the defence witnesses and I therefore find and hold that the dismissal of the claimant was rendered unfair by the failure to accord a fair hearing as required by section 41 of the Employment Act.

21. It is now settled that even where the employee is evidently on the wrong, the employer has an obligation under section 41 of the Employment Act to accord the employee a fair hearing. Section 41 states that:

“41(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 this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...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, make.”

Reliefs

22. Under section 49(1) of the Employment Act, the claimant is awarded one month salary in lieu of notice plus one month salary compensation as compensation for unfair termination of his employment contract. In awarding the said compensation, I have considered the fact that the claimant served for only less than 4 months and that he had also contributed to the termination through misconduct. The said award is based on the salary agreed in the contract dated 1.3.2016 being USD 4000 per month.

23. The claimant prayed for the full salary for the month of August 2016 although he was dismissed on 20.8.2016. Clause 11 of the contract of employment required him to work from Monday to Friday equalling to 5 days per week and translating to 20 days per month. I therefore award him USD 4000 for that heading.

24. The claim for arrears of house allowance is dismissed because clause 7 of the contract provided that the monthly salary of USD 4000 was a consolidated gross pay.

25. The claim for leave for the year 2016 is dismissed because the claimant testified that he reported back from his leave on 3.8.2016. I therefore dismiss the claim for leave for 2016.

26. I further dismiss the claim for severance pay because the claimant never lost the job through redundancy under section 40 of the Employment Act. He had also not served any complete year under the contract dated 1.3.2016.

27. The claim for operational costs of USD 15000 is also dismissed for lack of particulars and basis both in law and the contract. Likewise, the claim for taxi USD 2000 and HK mission USD 800 have not been substantiated and are therefore dismissed.

28. The claim for Certificate of Service is allowed because it is a right under section 51 of the Act.

29. The claim for USD 500,000 for breach of promise of shareholding in the respondent company and membership in Saha Foundation is dismissed for lack of evidence and basis in the contract of employment.

30. The claim for specific performance is not well founded. As regards claim for return of personal effects, the same is overtaken by events because the defence witness confirmed that the same were given to the claimant.

Conclusion and disposition.

31. I have found that the claimant had completed his probationary period as at the time he was dismissed by the respondent. I have further found that although there existed a valid reason for dismissing the claimant from employment, never the less the dismissal was rendered unfair because a fair procedure was not followed as required by section 41 and 45 of the Employment Act. Consequently, I enter judgment for the claimant against the respondent as follows:

Salary in lieu of notice	USD 4000
Compensation	USD 4000
Salary for August 2016	<u>USD 4000</u>
Total	USD12,000

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32. The said award is subject to statutory deductions but in addition to costs plus interest at court rates from the date hereof. He will also be issued with a Certificate of Service.

Dated, signed and delivered this 22nd November, 2019

ONESMUS N. MAKAU

JUDGE



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