



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 504 OF 2014

ZACKY LEWIS NAMUSONGE.....CLAIMANT

-VERSUS-

CROWN PAINTS KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the statement of claim on 27.03.2014 through Ongaro & Company Advocates. The claimant's case is that the respondent employed him on 01.07.2008 on a five year contract expiring on 30.06.2013 starting at a consolidated monthly pay of Kshs.28, 600.00. His contract was renewed on 04.07.2013 for a further term of five years expiring on 02.06.2018 starting at a consolidated pay of Kshs.41, 200.00. The claimant's employment was terminated by the letter dated 16.01.2014 effective the same date. The alleged reasons for termination were as follows:

- a) On 03.10.2013 at Gemba maps presentation area, the claimant out rightly refused to make a presentation.
- b) On 15.10.2013 the claimant refused to attend the TPM training that had been organised by management.
- c) On 22.10.2013 the claimant declined to do a 5s presentation claiming computer availability challenges and when requested to nevertheless be in attendance, he casually shrugged the idea off saying he would think about whether or not to consider the proposal.

Thus the letter stated that he was liable to summary dismissal under section 44(4) (c) and (e) of the Employment Act, 2007 and provisions of Chapter 8 Section 12(iv) of the respondent's Policy Manual and clause 7 of the contract of service. The letter further stated that the management had decided to be lenient and reduce the summary dismissal to normal termination with the following terminal dues:

- a) Salary up to and including 16.01.2014.
- b) One month salary in lieu of notice.
- c) Accrued 8 days leave.
- d) Payment of pension contribution to CPKL, Staff Provident Fund as per the rules and statutes of the scheme.
- e) Less any liabilities to the respondent and to Staff Savings Co-operative Society if any.

The dismissal letter referred to the show cause letter of 28.11.2013, the claimant's reply of 29.11.2013 and the disciplinary hearing panel held on 11.12.2013.

The claimant's case is that the dismissal was unfair because his explanations were rejected and instead he was terminated from employment. The claimant prayed for:

- a) Salary for 53 months being the lost opportunity to work amounting to some Kshs.41, 200.00 x 53 = Kshs.2, 183, 600.00.
- b) Benefits and gratuity calculated at the time if the claimant were to retire at the end of his second term.
- c) Any other relief that the Honourable Court may deem fit and just to grant in the circumstances.

The respondent filed the statement of response on 16.01.2018 through Obura Mbeche & Company Advocates. The respondent pleaded that the reason for termination was valid, due process was followed, the terminal dues were paid, and the claimant executed the discharge voucher absolving the respondent from further liability so that the claimant's claims and prayers were unjustified. The respondent prayed that the suit be dismissed with costs.

To answer the **1st issue** for determination, there is no dispute that parties were in a contract of service.

To answer the **2nd issue** for determination there is no dispute that the contract of service was terminated by the respondent.

To answer the **3rd issue** for determination the Court returns that the termination was not unfair because the claimant was accorded due process of a notice and a hearing per section 41 and 45 of the Employment Act, 2007 and the respondent has established that the reasons for termination were valid or genuine as at time of termination as per section 43 of the Act. In particular the show-cause notice was served, the claimant replied in writing and he attended the disciplinary hearing panel.

The Court has revisited the evidence on the issue of the reasons for termination. The claimant testified that the 3rd ground of termination related to events of 22.11.2013 and not 22.10.2013. The claimant testified he did not prepare the 5s presentation because the time allowed was short. He missed the training in the 2nd ground of termination because he was attending a funeral up country. He missed the meeting in ground one of dismissal because he had to attend a budget meeting – and he explained that predicament to his supervisor after the event. The Court has evaluated the evidence and finds that the claimant failed to offer the explanation of his several failures as was levelled against him to his supervisor before or after the events in issue. Thus the disciplinary panel was justified when it documented in the minutes on record thus, **“It was established that Zacky did not initiate any communication prior or after missing the trainings. He refused to honour all invitations to attend meetings and even personal invitations by the Kaizen Coordinator himself.”**

In the circumstances the Court finds that the reasons for termination were valid as at the time of the termination and the reduction of the otherwise case of summary dismissal to termination with full terminal dues establishes the respondent's proportionality in the punishment that was imposed. The respondent cannot be faulted in that regard and consideration. The claimant should otherwise count his fortune for the respondent's leniency and soft landing at the end of the disciplinary process.

While making that finding the Court considers that the respondent acted lawfully and fairly to grant a soft landing at the end of the disciplinary process in line with the Court's opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus, **“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in**

determining the genuine cause of the termination.”

To answer the **4th issue** for determination, the Court returns that the termination not having been unfair, the claimant is not entitled to and has not established any of the claims and prayers as pleaded. They will fail. While making that finding the Court further finds that the claimant has not established any matter attributable to the respondent and the termination that made it impossible or diminished his capacity to move on and engage in other gainful employment or activities. Thus, the prayers will fail as unjustified. As submitted for the respondent, the prayers lacked contractual and legal basis – especially in this case where the claimant had signed the discharged voucher that there would be no further liability on the part of the respondent upon the claimant taking Kshs.49, 164.00 as the net final benefits as per the letter of termination.

In conclusion, judgment is hereby entered for the respondent against the claimant for:

- a) Dismissal of the memorandum of claim.
- b) The claimant to pay the respondent’s costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 19th December, 2019.**

BYRAM ONGAYA

JUDGE



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