



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 507 OF 2017

GILBERT MICHAEL MAIGACHO.....CLAIMANT

VERSUS

COAST DEVELOPMENT AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. *'One man one job'* is a principle of general application in employment law and practice. It is however also true that many general rules have exceptions. In addition, the confines and contours of general principles are not always well defined.
2. The present case before me concerns an employee employed in a substantive position, who in the course of time, is assigned special duties, in a programme run by his employer. That employee is Gilbert Michael Maigacho, the Claimant in this case and the employer is Coast Development Authority, the Respondent herein.
3. Apart from the question whether the Claimant's interdiction and subsequent termination were lawful and fair, a significant issue before the Court is whether the Claimant held two different positions, attracting separate remuneration.
4. The Claimant's claim is contained in a Memorandum of Claim dated 22nd June 2017 and amended on 11th September 2017. The Respondent filed a Memorandum of Response to the amended claim on 6th March 2018.
5. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called its Human Resource and Administration Manager, Ahmed Abdi Bashir.

The Claimant's Case

6. The Claimant was initially employed by the Respondent as a Management Trainee on 16th November 2012. He was appointed to the position of Environment Officer in 2013. On 19th January 2015, the Claimant was appointed as a Programme Manager for the Respondent's Climate Change Adaptation Programme.
7. The Claimant claims to have held the two positions simultaneously for which he was entitled to a monthly salary of Kshs. 66,882 for the position of Environment Officer and a monthly allowance of USD 1,382 plus a per diem allowance of Kshs. 11,200 for the position of Programme Manager.
8. The Claimant held the position of Programme Manager for a period of seven (7) months, running from May 2016 to November 2016. He accuses the Respondent of failing to pay him his allowances over the said period.
9. On 15th February 2017, the Claimant was interdicted on half pay, for alleged misconduct. He states that the interdiction was to last until 14th May 2017 but the Respondent failed to reinstate him back to work.
10. The Claimant remained on interdiction until 28th June 2017, when his employment was terminated.
11. The Claimant claims that his employment was terminated immediately after he served the Respondent with court summons and claim.

12. The Claimant's case is that his interdiction was unlawful and that his removal from the position of Programme Manager was unjustifiable and unfair. The Claimant takes issue with the fact that the removal was effected by the Respondent's Management rather than by the Board.

13. It is the Claimant's further case that the termination of his employment was without valid reason. The Claimant therefore links the termination to the filing of his case in court.

14. The Claimant avers that his woes started after May 2016, upon the appointment of Mohammed Keinnan as the Respondent's Managing Director. The Claimant accuses Keinnan of attempting to involve him in office malpractices.

15. The Claimant states that the Managing Director systematically prevented him from performing designated activities in the course of his employment, hence frustrating the Claimant's performance and causing the Claimant emotional distress at work.

16. The Claimant accuses the Respondent of keeping him in Job Group 'CDA7' while the Human Resource Manual provided that his Job Group ought to have been 'CDA6'. The Claimant claims that he was underpaid as the salary for Job Group 'CDA6' was not disclosed to him by the Respondent.

17. The Claimant avers that the Respondent had guaranteed his loan with Standard Chartered Bank, based on the Claimant's good conduct and that arising from the Respondent's illegal administrative action of interdiction and termination, the Respondent was liable to clear the outstanding loan balance of Kshs. 563,936 plus interest of Kshs. 6,463, which continued to accrue.

18. The Claimant seeks reinstatement to the position of Environment Officer and the concurrent position of Programme Manager, with full pay and benefits for each position or in the alternative:

- a) Unpaid half salary during the interdiction period.....Kshs. 162,840
- b) Unpaid extraneous/responsibility allowances.....3,283,480
- c) Damages for psychological harm and injury
- d) Airtime/communication allowance for Programme Manager.....48,000
- e) Unremitted PAYE, penalties and interest (December 2012-2014)
- f) Unremitted PAYE, penalties and interest (2014-2017).....464,156
- g) Annual salary increments (June 2014-28.6.2017)
- h) Unpaid salary, allowances and benefits for Job Group 'CDA6'
- i) Unpaid medical allowances (August 2013-July 2014 & May 2015- 28.6.2017)
- j) Outstanding bank loan balance, interest & penalties.....579,031.79
- k) Loss of future employment (28 years to retirement).....22,472,352
- l) Outstanding pension benefits (3.12.2012-28.6.2017).....320,649
- m) Outstanding rent for June, July, August & September 2017.....59,150
- n) 12 months' salary in compensation for unlawful termination
from position of Environment Officer.....802,584
- o) 12 months' salary in compensation for unlawful termination
from position of Programme Manager.....1,713,120
- p) Costs plus interest

The Respondent's Case

19. In its Memorandum of Response to the amended claim dated 1st March 2018 and filed in court on 6th March 2018, the Respondent denies the Claimant's claims on unlawful interdiction and removal from office.

20. The Respondent accuses the Claimant of unprofessional conduct and blatant refusal to follow laid down procedures, which led to

disciplinary action being taken against the Claimant. The Respondent states that all this was done in accordance with the Employment Act and the Human Resource Manual.

21. The Respondent states that the Claimant was employed as a Management Trainee on 6th November 2012 and was later employed as an Environment Officer on 5th December 2013.

22. The Respondent further states that on 19th January 2015, the Claimant was nominated by the Respondent's Management as Programme Manager for the Respondent's project implementing team for the Kenya Climate Change Adaptation Programme. The Respondent adds that the nomination letter *CDA/1-9.2017* clearly stated that the nomination was in addition to the Claimant's obtaining duties and his terms of service would remain the same. No objection was received from the Claimant.

23. On the issue of interdiction, the Respondent states that the Claimant was only entitled to half salary during the interdiction period and he would be entitled to full salary only upon reinstatement, a decision that lay with the Board.

24. The Respondent further states that there were warning letters issued to the Claimant and the proper process for interdiction was followed. The Respondent adds that the Claimant's removal was fair and procedural. The Respondent denies any wrongdoing on the part of the Managing Director, as alleged by the Claimant.

25. The Respondent maintains that the Claimant was employed as an Environment Officer and was placed in the right job group and paid the applicable remuneration. The Respondent further maintains that the Claimant's nomination as Programme Manager for the Respondent's Programme on Climate Change Adaptation was in addition to the Claimant's duties and not a change in job group, and the Claimant did not object to this arrangement.

26. The Respondent states that there was no policy on guaranteeing loans for employees.

27. The Respondent concludes that the Claimant is not entitled to any of the remedies sought.

Findings and Determination

28. There are three (3) issues for determination in this case:

- a) Whether the Claimant's interdiction was lawful and fair;
- b) Whether the termination of the Claimant's employment was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

The Interdiction

29. On 15th February 2017, the Respondent wrote to the Claimant thus:

"Dear Mr. Maigacho,

RE: INTERDICTION

This is in reference to the above subject. It has been reported to this office as follows:

- 1. Unprocedural communication to Board of Directors via letters, emails, phone calls and sms.*
- 2. Unprocedural communication to stakeholders of Kenya Climate Change Adaptation Programme (KCCAP).*
- 3. Assuming Role of Supervisor of Kenya Climate Change Adaptation Programme (KCCAP) activities for CDA after your replacement as Programme Manager.*
- 4. Making false allegations against CDA staff members.*
- 5. Holding unprocedural meeting with CDA staff on various dates.*
- 6. Not able to reform despite warning given to you on various dates.*

To facilitate investigations on the alleged misconduct, it has been decided that you be and are hereby interdicted from exercising the duties of your office from the date of this letter pending finalization of your case. While on interdiction, you will be paid half salary and full house allowance.

Further, you should not leave your duty station without the express permission of your immediate supervisor.

Yours faithfully,

(signed)

Joyce Ochako

FOR: MANAGING DIRECTOR”

30. In defending its decision to interdict the Claimant, the Respondent relied on Clause 5.7 of its Human Resource Manual which provides as follows:

“Interdiction will be for offences of a serious nature. On interdiction, employees will be entitled to payment of half of the basic salary. An employee on interdiction will not appear at his duty station without the express written permission of the MD. Where the Authority fails to establish a case against the employee within three (3) months, he/she shall be reinstated and the withheld salary paid to him/her.”

31. From the evidence on record, the Claimant stayed on interdiction for a cumulative period of four (4) months and eleven (11) days, running from 15th February 2017 to 28th June 2017, when his employment was terminated.

32. The interdiction period was therefore overshot by over one month. The question to ask is whether this lapse translated into an unlawful interdiction. In adjudicating disputes emanating from employment, each case ought to be considered on the basis of its own unique facts.

33. The Respondent submits that the Claimant was a difficult employee, whose actions compromised the disciplinary process at the shop floor.

34. There is evidence that the Claimant’s issues with his employer arose out of his appointment as Programme Manager for the Climate Change Adaptation Programme. The Claimant told the Court that the Respondent denied him remuneration attached to this position.

35. On its part, the Respondent states that the assignment as Programme Manager for the Climate Change Adaptation Programme did not attract any additional remuneration to the Claimant. The letter assigning the Claimant this responsibility was availed to the Court by the Respondent. It is dated 19th January 2015 and states as follows:

“Dear Maigacho,

RE: NOMINATION AS THE PROGRAMME MANAGER FOR THE KENYA CLIMATE CHANGE ADAPTATION PROGRAMME – COAST REGION

I am glad to nominate you as the Programme Manager for the Kenya Climate Change Adaptation Programme – Coast Region. You will be required to manage the Integrated Programme to build Resilience to Climate Change and Adaptive Capacity of Vulnerable Communities in Kenya, Coast Region. This is a three year programme financed by the Adaptation Fund that will be implemented in various counties in Kenya by different institutions in partnership with the relevant stakeholders.

The National Implementing Entity (NIE) is the National Environment Management Authority (NEMA) whereas the Executing Entities (EEs) are KEFRI, TARDA and CDA. There also have (sic) sub-executing entities (sub-EEs) implementing different components in different areas. The sub-EEs are Kenya Red Cross, World Vision, VIREN International, ADRA – Kenya, Nasaru Women Group, Kenyatta University, Caritas – Nyeri and Horn Aid – Kenya. The Programme is divided into three regions – Eastern, Western and Coast. CDA is the Executing Entity for the Coast Region. For the Coast Region we shall be having a component on Water Management and another on Coastal Management. The Water Management component will entail water harvesting whereas the Coastal Management component will encompass integrated shoreline and mangrove ecosystem management.

Please note that this responsibility is in addition to your current duties and your terms of service remain the same. I take this opportunity to wish you and the entire CDA Implementation Team success in the implementation of this Programme.

Yours faithfully,

(signed)

James Kahindi Mangi

MANAGING DIRECTOR”

36. On the face of it, this letter did not give the Claimant any additional remuneration, on account of his nomination as Programme Manager for the Claimant Change Adaptation Programme.

37. The Claimant however relied on what he referred to as ‘Programme Documents’ to support his claim for remuneration for his role as Programme Manager.

38. According to the evidence on record, the Claimant had a written employment contract. It seems to me therefore that it was the intention of the parties that any agreement on remuneration, whether by way of salary or allowances, would be in writing.

39. It would appear that the Claimant was dissatisfied with the fact that he would not earn any additional remuneration, from the Climate Change Adaptation Programme, right from commencement. This is evidenced by his numerous letters to the Respondent's Board, the Parent Ministry, other state agencies and non-governmental entities. The Respondent's caution to the Claimant to desist from communicating to third parties, in breach of institutional protocol, appears to have done nothing to deter the Claimant, who persisted on this path.

40. My reading of this communication paints a picture of a disgruntled employee who, rather than concentrating on the work assigned to him, spent all his time and effort agitating for remuneration that was not part of his written contract.

41. Flowing from these conclusions, I find and hold that the Respondent's action in interdicting the Claimant was justifiable. I further find that in view of the Claimant's conduct, with particular focus on his continuous defiance of his employer's caution to cease communicating with third parties, the one-month lapse in time of interdiction was excusable.

The Termination

42. I now turn to the eventual termination of the Claimant's employment. This was communicated by letter dated 28th June 2017 stating as follows:

"Dear Maigacho,

TERMINATION OF YOUR EMPLOYMENT

I am writing to you about the termination of your employment with Coast Development Authority.

I refer to disciplinary committee meeting held on 16th May, 2017 which was also attended by you. During the meeting we discussed the gross-misconduct leveled against you that occurred at (sic) diverse dates within and outside the Authority premises. The same findings of Disciplinary- Committee were subsequently adopted by the Human Resource Advisory Committee held on 16th June 2017 at the Authority Headquarters Boardroom.

As discussed during the meetings, it was noted that:

- Your conduct was deliberate behaviour which is inconsistent with the continuation of your employment with Authority.*
- Your conduct caused a serious and imminent risk to the reputation, and trust of the Authority core mandate and business by communicating with third parties without lawful authority contrary to Chapter 6, Section 6.11 and 6.15 of the Authority HR manual.*
- You engaged in inciting other employees of the authority contrary to section. 6.19 of the Authority HR policy.*
- You engaged in defamatory allegations against your employer.*
- You refused to carry out a lawful and reasonable instruction that was consistent with your contract of employment hence your continued employment is untenable as per HR Manual section. 6.6.*

We consider that your actions constitute serious misconduct warranting summary dismissal as per the Employment Act. 2007, Sub-section. 3 and 4.

You will be paid your accrued entitlements and any outstanding pay up to and including your last day of employment. You are required to hand over any assets of the Authority in your possession to the undersigned.

If you have been paid advance, Sacco Loan/welfare any amount still owing will be deducted from your final pay.

Yours sincerely,

(signed)

A.B. Abdi

FOR: MANAGING DIRECTOR"

43. According to Section 47(5) of the Employment Act, an employee alleging unfair termination of employment bears the burden of proving the ingredients of unfairness, while the employer has the burden of justifying the grounds of termination.

44. Regarding the employer's burden, Section 43 provides the following:

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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

45. The burden placed on an employer under Section 43 of the Employment Act is to demonstrate a valid reason that would cause a reasonable employer to terminate employment. This is what is commonly referred to as the 'band of reasonable responses test' where the Court does not ask what action it would have taken had it been in the shoes of the employer but rather, whether in the circumstances of the case, the employer acted reasonably.

46. This position was affirmed by the Court of Appeal in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** where the following except, from the Halsburys Laws of England, 4th Edition was cited with approval:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses within which one employer might take one view and another quite reasonably take another, the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

47. Applying the 'reasonable responses test' to the present case, it seems to me that the Respondent had a valid reason for terminating the Claimant's employment.

48. The succeeding question is whether in effecting the termination, the Respondent paid attention to the procedural fairness edicts of Section 41 of the Employment Act.

49. In his testimony, the Claimant confirmed that he was issued with a show cause letter to which he responded and was further invited to a disciplinary hearing, which he duly attended. The Court did not see any formal objection by the Claimant regarding any aspect of the disciplinary process. I therefore find and hold that in bringing the Claimant's employment to an end, the Respondent observed due procedure.

50. As a result, the Claimant's claim for compensation is without basis and is dismissed.

51. Having upheld the Claimant's interdiction as lawful and fair, the claim for half salary withheld during the interdiction period collapses.

52. Having disagreed with the Claimant's assertion that he was entitled to additional remuneration on account of his nomination as Programme Manager for the Climate Change Adaptation Programme, the claims for extraneous/responsibility allowance and airtime/communication allowance must also fail.

53. The claim for damages for psychological harm and injury was not proved and is dismissed.

54. No basis was laid for the claims for outstanding bank loan balance, outstanding rent and loss of future employment, which are therefore disallowed.

55. The claim for unpaid salary, allowances and benefits was not proved and is thus dismissed.

56. The claims for unremitted PAYE, penalties and interest, medical allowances and pension benefits were abandoned in the course of trial.

57. The claim for annual salary increments was settled in the course of trial.

58. In the end, the Claimant's entire claim fails and is dismissed.

59. Each party will bear their own costs.

60. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF APRIL 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Ms. Chala for the Claimant

Ms. Abdi for the Respondent