



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 844 of 2005

ANDREW ALEX WANYANDEH.....PLAINTIFF

VERSUS

1. ATTORNEY GENERAL

2. KENYA RAILWAYS CORPORATION..... DEFENDANTS

J U D G M E N T

1. The Plaintiff sought by **plaint dated 8th July, 2005** against the Defendants a declaration that the Plaintiff's dismissal from service was un-procedural and unlawful. He also sought general and special damages, costs of the suit and interest.
2. He pleaded that he was appointed as the Managing Director of the 2nd Defendant vide a **letter dated 19th September 2001** by the **Permanent Secretary** in the **Ministry of Transport and Communication** (hereinafter called the **Permanent Secretary**) with effect from **12th September 2001** with terms of the appointment to be communicated to him in due course.
3. The Plaintiff pleaded further that on the faith of the letter by the Permanent Secretary, he took up the appointment and worked diligently, and as a result of his efforts the 2nd Defendant recorded under his management the highest improvement in operations, business and financial performance.
4. The Plaintiff further stated his case as follows. On **15th December 2004**, the Permanent Secretary wrote to the Chairman of the Board of Directors of the 2nd Defendant a letter copied to the Plaintiff stating that the Plaintiff's service contract had expired on 1st September 2004; that the Chairman of the Board subsequently wrote a letter to the Plaintiff demanding that he hands over office to the Corporation Secretary of the 2nd Defendant with immediate effect; that he was further notified that his terminal dues would be computed and paid as per the terms and conditions of his contract; that in response to the Permanent Secretary's letter, he objected to the assertion that his services had expired as he had not been issued with any terms and conditions of his contract of employment, which he had on several occasions sought to have finalized; and that he had earlier on written a letter to the Permanent Secretary on 6th March 2002 seeking to address the issue of his salary level based on his previous remuneration at the **UNDP** which amounted to KShs 1,000,000/00 as the custom of the Government was to use the previous remuneration level of its appointees to determine the salary packages for new appointees
5. The Plaintiff pleaded that in response to his letter he was informed that he would be paid a basic salary of KShs 60,000/00 per month which he plainly rejected as being openly discriminatory.
6. He claims that due to the frequent changes of Permanent Secretaries at the Ministry of Transport

his terms and conditions were not finalized and he was advised to wait for the outcome of the harmonization of salaries within parastatals.

7. The Plaintiff further claimed that the guidelines on terms and conditions of service for state corporation chief executive officers, chairmen and board members, management and unionisable staff was released on **23rd November 2004** when he was still serving the 2nd Defendant. According to him, because he had been hired prior to the date of the circular and he was yet to get terms of service, a contract was to be negotiated within the guidelines.

8. The 1st Defendant's defence, set off and counterclaim dated **3rd April 2006** denied the claims levelled against it and stated that the Plaintiff assumed office under the terms and conditions that were applicable to the previous office holder. It avers that the Plaintiff's contract expired in September, 2004 in accordance with **clause 24** of the ***Guidelines on Review of salaries and other terms of services for State Corporations of 12th July 1987*** which stated that a Chief Executive Officer of a parastatal was to be appointed on contract not exceeding 36 months.

9. The 1st Defendant further pleaded that the Plaintiff took and/or received loans/advances from the 2nd Defendant amounting to **KShs 9,649,429/00** irregularly and illegally, the same not having been approved by the 2nd Defendant's board, which amounted to abuse of office. His case in this regard was that he had suffered loss and claimed **KShs 889,134/45** from the Plaintiff. The 1st Defendant also asserted that the departure of the Plaintiff was occasioned by the lapse of his three-year contract.

10. The Plaintiff in his reply to defence, set-off and counterclaim reiterated the contents of the plaint and prayed that the 1st Defendant's set-off and counterclaim be dismissed with costs.

11. The 2nd Defendant in its statement of defence dated **11th October, 2005** denied the Plaintiff's claims. It averred that if the Plaintiff did take up the position of Managing Director with effect from **12th September 2001**, his period of employment was to last **36 (thirty-six) months** and as he had served for more than the stipulated period, the 2nd Defendant's Board of Directors in consultation with the Permanent Secretary terminated the Plaintiff's services in accordance with ***Guidelines on Terms and Conditions of Service for State Corporations' Chief Executive Officers***.

12. The 2nd Defendant maintained that through a letter dated **8th July 2002**, its Directorate of Personnel Management fixed the Plaintiff's remuneration with effect from 12th September 2001. The terms were formally communicated to the Plaintiff. However, the Plaintiff requested for an adjustment of the basic salary, which was done. The terms were thus concluded by the Permanent Secretary's **letter dated 18th December 2002**.

13. The 2nd Defendant's case is thus that the Plaintiff's services were lawfully terminated and urged the court to dismiss the suit with costs.

14. The Plaintiff (**PW1**) testified as follows. He served as the Managing Director of the 2nd Defendant **from 21st September 2001 to 15th December 2004** vide an **appointment letter dated 19th September 2001** which stated that his terms of service would be communicated shortly thereafter. He took up the appointment but regarding his terms and conditions of service, he stated that the Permanent Secretary (author of the letter) urged him to wait for the harmonization of salaries in the parastatals.

15. Shortly after, he further testified, though Mr Kyungu replaced Mr. Muthaura as Permanent Secretary, he continued the discussion on salary with Mr. Kyungu who asked for evidence of his remuneration prior to joining the 2nd Defendant which he supplied. After about 10 months he received a **letter of offer dated 11th July 2002** which he promptly rejected vide his **letter dated 24th July 2002** after having a discussion with the Permanent Secretary before delivering the letter. However, he did not receive any response.

16. The Plaintiff also stated that he received an internal memo dated 12th June 2003 from the Permanent secretary which offered much better terms. He was advised to wait for input from the Director of Personnel. The offer was never officially communicated to him and just then a new Permanent Secretary was appointed with whom he carried on discussions. The Plaintiff wrote a letter dated 3rd December 2003 where he agreed to draw a salary of Kshs. 420,000/- per month pending harmonization of his terms. The permanent secretary endorsed on the letter that he should wait harmonization of state corporation salaries.

17. In the meantime, he was drawing advances from the 2nd Defendant and was not earning a salary. Despite this, he progressed exceptionally well and was able to resuscitate the 2nd Defendant's branch lines which had collapsed. Notably, he was issued with the **Order of Grand Warrior** by the President in December 2003 in recognition of his efforts.

18. The harmonization of salaries eventually took place in November 2004. This was never applied to him as on 15th December 2004 he received communication that his service contract had expired on 1st September 2004. He appropriately responded and stated that he did not have a contract of employment. He added that the 1987 guidelines could not have applied to him because they had long expired. After receiving the letter prompting termination of his employment, he stated that he left office on 16th December 2004.

19. The Plaintiff testified that he subsequently received a letter dated 4th January 2005 asking him to explain the advances he had taken, and another dated 11th May 2005 purporting to calculate his terminal benefits, which calculations he did not agree with as they were all jumbled up. His employment was contractual and according to the 2004 guidelines the monthly salary of the managing director of a corporation like the 2nd Defendant should have been between KShs 500,000/00 and KShs. 740,000/00 while he earned only KShs 420,000/00.

20. According to the Plaintiff, the reason he worked for so long without a contract was because he was discussing the matter with the Permanent Secretary all along, which discussions were never concluded due to the many changes of Permanent Secretaries. The appointing authority was the Minister for Transport through the Permanent Secretary. He added that the figures pleaded in the plaint are based on the 2004 guidelines and he claimed the maximum as he went into service as a highly experienced person.

21. On cross-examination by counsel for the 1st Defendant, the Plaintiff restated that his letter of appointment stated that his terms would be communicated in due course, which communication came ten (10) months after employment. He rejected what was offered vide his letter dated 11th July 2002. He reiterated that he did not negotiate any contract of employment while in employment. He conceded that the communications through letters did not amount to a contract, but that the amounts pleaded in the plaint were negotiated or agreed upon. He said that the advances he drew were to be recovered from his salary which amounted to **KShs 9,649,429/00** though he was liable to pay income tax in form of PAYE.

22. On cross-examination by the 2nd Defendant's counsel, the Plaintiff stated that **notice to file suit dated 31st May 2005** (Exhibit P2) and the **demand letter dated 11th May 2005** (Exhibit P3) were not copied to the 2nd Defendant. He stated firmly that he did not want the court to rewrite a contract for him and the 2nd Defendant.

23. The Plaintiff also stated that he had suffered the losses he had pleaded in the plaint as he was entitled to them under the guidelines of 2004. He accepted the appointment but his terms of appointment were to be negotiated. He reiterated that before his employment with the 2nd Defendant, he was the **Chief Technical Adviser** for **UNDP**.

24. The Plaintiff further stated that he did not seek through his letter dated 24th July 2002 to get a better pay package but requested that his pay be reviewed and a fair and just reward be approved. He never got a response to that letter. He noted that he did not receive the letter dated 18th December 2002,

which set out his remuneration and benefits package. He testified that the internal memo by the Permanent Secretary recommending a pay increase never resulted in an agreement; that he later broached the subject with the new Permanent Secretary vide his letter dated 28th August 2003 in which he sought a review of his terms, though the Permanent Secretary (Mr. Ikiara) opposed a salary of KShs 420,000/00 per month and advised that they await the report of the inspectorate on harmonization of salaries; and that his predecessor, Mr Kyungu, had approved a salary of KShs 420,000/00 though there was no documentary evidence to that effect.

25. The Plaintiff stated further that even if he had his terms communicated to him through the letter dated 11th July 2002, he rejected them. Thus according to him, the guidelines of 2004 applied to his case as he was hired prior to the date of the circular and he had not been given his terms of service. But he conceded that a contract means terms negotiated and accepted by both parties, and that accordingly he did not have a contract of service.

26. On re-examination, he reiterated that he was never paid any salary based on the terms of service sent to him vide the letter dated 11th July 2002. He had accepted the recommended terms in the internal memo dated 12th June 2003 but they never bore fruit and by the time his employment was terminated. He never received any pay-slip.

27. The Defendants did not lead any evidence.

28. The parties filed written submissions which I have duly considered.

29. The salient points in the Plaintiff's submissions are that during the Plaintiff's employment he was never paid a single coin in salary and that the guidelines suggested by the Defendants were not applicable to him as the terms and conditions of the Plaintiff's employment were to be implied from the correspondences exchanged, conduct of the parties and the guidelines issued in the year 2004. The Plaintiff insists that having been allowed to remain in office for three years the 2nd Defendant should recognise that there was a contract and should therefore not apply the guidelines selectively.

30. On behalf of the 1st Defendant, it was pointed out that there was no formal contract of service, and that the jurisdiction of the Court is to construe and enforce contracts, not rewrite them; and that it is not in contest that the Plaintiff worked with the 2nd Defendant but that he seeks in this suit to enforce terms and conditions of that employment that were never agreed upon.

31. The 2nd Defendant submitted that the nature of the Plaintiff's employment and the terms of such employment are to be drawn from **section 5(1) of the Kenya Railways Corporation Act, Cap 397**. It was contended that the Plaintiff's letter of appointment and the two subsequent letters that communicated to him his terms and conditions constitute the Plaintiff's contract of employment and that the allegations that he rejected the terms is unimportant. It was further asserted that the Court cannot be a salary review board after the Plaintiff's efforts to get a salary review failed. The Plaintiff, having argued that there was no contract of employment, cannot then be heard to claim wrongful termination of employment. The Court cannot imply terms and conditions in a contract of employment that does not exist as it has no jurisdiction to rewrite contracts. Various cases were cited and have been duly considered.

32. The issues for determination are -

1. What were the terms of engagement of the Plaintiff?

2. Whether the Plaintiff was treated in a discriminatory manner?

3. Whether the Plaintiff is entitled to any of the reliefs sought?

33. It is undisputed that indeed the Plaintiff worked for the 2nd Defendant. He rendered exemplary service. He even caught the eye of the President of the Republic who awarded him the '**Order of the**

Grand Warrior' (OGW) in December 2003.

34. The appointment letter given to the Plaintiff was not a contract of employment though. **Gwyneth P Hin Employment Law, Sweet and Maxwell 7th Edition at 116** states as follows:

***“A written statement is not the same thing as a written contract of employment. A contract creates the rights and duties of the parties; the written statement merely declares they are what they have been agreed and it follows that it is therefore capable of being inaccurate.... It is an important distinction for if a document is held to be a written contract, it will be presumed that it accurately records the terms agreed by the parties and it will be very difficult to persuade a court that the terms are otherwise. If it is a statement then it has no special legal status and could be a mistaken record of what was agreed*”**

35. The appointment letter given to the Plaintiff thus falls below the threshold of what a contract of employment should look like as it stated that **"terms of the appointment will be communicated to you in due course..."**. Surprisingly, he continued to work in the capacity appointed and received salary advances. It is at this point that he should have declined to take up the appointment given that he felt that the terms and conditions befitting the office of the Managing Director were not met. However, he took up his appointment despite the fact that he had not received his terms and conditions of service.

36. After a while, he entered into discussions with various Permanent Secretaries appointed in the parent ministry with a view to getting his terms and conditions reduced into writing. It is during the negotiations that the Plaintiff then received a letter dated **11th July, 2002** outlining his terms of service (the remuneration package) which was below his expectations. He then wrote a letter **'kindly requesting a review of the pay package and approval of a fair and just reward'**. The response to the plea for a better package came on **18th December 2002** and his salary was adjusted upwards and though an internal memo was drawn up by the Permanent Secretary recommending a further increase, it was never taken up by the Minister.

37. Despite all this, the Plaintiff continued serving and receiving salary advances for over three years, only to take up this case to court when he had ceased working for the 2nd Defendant.

38. On the issue of whether the termination was wrongful, the directions contained in the letter dated **15th December 2004** regarding the expiry of the Plaintiff's contract seem to imply that the Board did not have a choice of renewing the contract as the position of the Plaintiff was to be filled in accordance with the **'new guidelines issued by the office of the President which stipulate that the vacant position be filled through competitive sourcing'**.

39. It appears that section 5(1) of the Kenya Railways Act gives the Minister power over hiring and setting the terms and conditions of service for chief executive officers. This then means that after expiry of the 36 months the Plaintiff was meant to serve the 2nd Defendant, it was only the Minister who had the power to renew his contract, which he did not.

40. On the issue of discrimination, the Plaintiff has not tendered evidence to show how he was discriminated against under the Constitution then in place. He alleged that his salary was less than that of his junior officers but did not adduce evidence showing that the previous holder of the position earned a bigger salary than he did. The letter dated 8th July 2002 written by the Personnel Director on his terms clearly shows that he was to **"...draw a salary and benefits package that was applicable to the previous holder"**.

41. The Plaintiff was offered this appointment and he took it up. He never insisted on negotiating his terms of employment up front, as he should have done. He should have declined to take up the appointment at that time or at any other time when he was not satisfied with the terms. Having taken up the appointment and having continued to work as such, the Plaintiff cannot now demand remuneration he had proposed but which was never accepted by his employer.

42. Consequently, the reliefs he seeks are unsustainable. He has not proved his case on a balance of probability. I dismiss his case accordingly. In the special circumstances of this case, parties will bear their own costs of the suit. Those will be the orders of the court.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF
FEBRUARY 2013.**

**H.P.G. WAWERU
JUDGE.**