



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 613 of 1999

SIMON KIBUNGA KIMANI
.....PLAINTIFF

VERSUS

INTERNATIONAL FEDERATION OF
RED CROSS AND RED CRESCENT SOCIETIES (KENYA)
.....DEFENDANT

J U D G M E N T

(1) By an Employment Contract dated the 19th July 1997 between the International Federation of Red Cross and Red Crescent Societies Regional Delegation for Eastern Africa (“**the Red Cross**”) and Simon Kibunja Kimani (“**the Plaintiff**”), the Red Cross employed the Plaintiff as a driver for eight months from the 1st May 1997 to the 31st December 1997 at a gross monthly salary of K.Shs.14,070/= . By clause 5 of the Agreement, it was provided that during the trial period, each of the parties could terminate the contract by seven days notice. For the remainder of the contract, one month’s notice was required by either side. The trial period was the first three months of the initial contract.

(2) On the 1st January 1998, the Plaintiff’s contract was renewed for another year to the 31st December 1998. Over and above his salary, the Plaintiff was entitled to *per diem* and other allowances under Regulations For Local Personnel whenever he traveled outside his base on duty.

(3) On the 12th October 1998, Mr. Al Panico, the Head of Regional Delegation, wrote to the Plaintiff and suspended him from work with full pay for failing to account for Outstanding Working Advance of USD 2,900 and K.Shs.56,480/=. The Plaintiff was required to refund this amount otherwise the Federation would decide what action to take against him.

(4) The Plaintiff did not refund the advance and on the 16th November 1998, Mr. John Sparrow, the Acting Head of Regional Delegation, wrote to him saying (so far as material) —

“Dear Mr. Kimani

End of Contract

As you are aware, your current contract of employment with the Federation expires on 31 December 1998.

Please therefore taken note that this letter serves as a notice of non renewal of contract in your case. The International Federation of Red Cross and Red Crescent Societies, Regional Delegation,

Nairobi, takes this opportunity to wish you all the best for the future.

Should there be an opportunity in the future requiring the Federation to hire more staff, this delegation may consider your candidacy.

Yours faithfully

JOHN SPARROW

(5) In the meantime on the 9th December 1998, the Head of Regional Delegation wrote to the Plaintiff informing him that the Federation had lifted his suspension after carrying out investigations into the Working Advance received by the Plaintiff:

“having established that documentation received from you through Mr. Simon Nzioka confirm that the money advanced was fully accounted for.”

After lifting the suspension, the Plaintiff was ordered to proceed on leave from the 10th to the 31st December 1998, which would coincide with the end of his contract.

(6) On the 23rd March 1999, the Plaintiff filed a suit against the Red Cross alleging breach of contract and claiming:

(a) Special damages – USD 12,480.

(b) Issuance of Certificate of Service.

(c) General damages.

(d) Costs and interest.

The claim for special damages was made on the basis that the Plaintiff had been deprived of reimbursements, allowances and costs he would otherwise have earned during his employment.

(7) The Red Cross filed a Defence on the 14th May 1999 denying the Plaintiff’s claim in its entirety. This Defence was subsequently amended on the 25th September 2000 to incorporate a Counterclaim in the sum of USD1,203. It was alleged that on diverse dates between the 16th May 1997 and the 23rd June 1997, the Plaintiff was overpaid *per diem* to the extent of USD420; and between the 4th September 1997 and the 2nd December 1997, it was alleged the Plaintiff exceeded his entitlement by some USD 783. The alleged overpayments were alleged to have occurred while the Plaintiff was based in Mbarara in Uganda.

(8) The defence by the Red Cross to the Plaintiff’s claim was that the employment contract was for a fixed term and expired according to its terms. That in May 1997, the Plaintiff was sent to Uganda and for the period he remained there, Mbarara became his base of work. While he was in Uganda on mission/project, the Plaintiff’s salary was adjusted to K.Shs.25,000/= and he was also paid USD 25 per night for trips outside Mbarara. And the Plaintiff was accordingly not entitled to the allowances pleaded in the Plaintiff.

(9) The Plaintiff filed a Reply to Amended Defence and Defence to Counterclaim on the 13th October 2000. He denied being indebted to the Red Cross for the sum claimed or at all. He said he was entitled to be paid USD 66 per day for employment outside Kenya. He admitted being sent to Uganda on duty but claimed that that assignment did not change his base as claimed by the Red Cross.

(10) The Plaintiff gave evidence on his own behalf. He said he was employed by the Red Cross as a driver under a one year contract renewable. The first contract was from May to December 1997.

It was renewed on the 1st January 1998 upto the 31st December, 1998. He said he left the Red Cross because of a problem over Working Advance issued to him. The Plaintiff further testified that when he was sent to Uganda, he was entitled to travel allowance; accommodation; overtime and salary increase. He said that although he was entitled to be paid a salary of K.Shs.25,000/= per month on re-location, this was never paid to him. As for the claim for USD 12,840, he said this was in respect of allowances for the trip he undertook in May 1997 at the rate of USD 66 per day. As regards the claim by the Red Cross for double payments, the Plaintiff pointed out that they relate to the Working Advance for which he had already been cleared. He denied receiving them.

(11) Mr. Emmerich Pregetter was the first witness called by the Red Cross. He is the Defendant's Field Manager in Nairobi. In 1997, he was the Federation's Regional Field Manager in charge of the Defendant's entire fleet of trucks and staff. The Plaintiff was employed as a truck driver and Mr. Pregetter was his boss. He said in his evidence that before the Plaintiff was sent on mission to Uganda, he had a discussion with him and explained to the Plaintiff the reasons for the mission and that his salary would be raised to K.Shs.25,000/= per month. He made it clear to the Plaintiff that while in Uganda, he would not receive any money from Nairobi other than his salary. The Red Cross in Uganda would be responsible for his allowances and accommodation.

(12) After the witness left Nairobi in 2004, he heard that the Plaintiff was saying that he had discussed his *per diem* claim with him. He denied having had any such discussion with the Plaintiff.

(13) The second witness called by the Red Cross was Ms. Winnie Mwendapole Maganda. She joined the organization in June 1997, and is now the Human Resources Manager. She is responsible for settling the contracts of local staff. She told the court that the Plaintiff did not raise the issue of *per diem* before his second mission to Uganda in September 1997. He raised the issue with her in August 1998 or thereabouts. She referred the Plaintiff to Mr. Jonathan Baker, the Regional Fleet (Transport) Manager. At a meeting held on the 14th August 1998 and attended by the Plaintiff, the witness, the Regional Transport Manager, and the Workshop Manager, among others, it was explained to the Plaintiff that the Federation did not owe him USD 10,864 as *per diem* which he claimed in Mbarara, Uganda. It was made clear to the Plaintiff that he was not entitled to any payment beyond the enhanced salary of K.Shs.,25,000/= per month. At the same meeting, the Plaintiff was also reminded that he owed the Federation USD 2,900 and K.Shs.56,480/= being Outstanding Working Advance which he was asked to pay. The Plaintiff was suspended on full pay while investigations were being conducted into the claims the Red Cross was making against him. As the Defendant could not trace all the receipts to support its claim against the Plaintiff, the complaint was dropped and the Plaintiff's suspension lifted.

(14) As regards the Plaintiff's claim that his appointment was wrongly terminated, the witness explained that the Plaintiff's appointment was for a fixed term of one year from the 1st January 1998 to the 31st December 1998 and came to an end in accordance with its terms. And the Plaintiff was informed in advance that his contract would not be renewed. According to her, the Plaintiff was paid all his entitlements before he left the Red Cross.

This witness also attempted to explain how the Defendant's Counterclaim was arrived at. She admitted that the letter to the Plaintiff dated the 9th December 1998 stated that it had been established that the money advanced to him had been fully accounted for. She also said that the issue of double payments surfaced when the records were being checked after the Plaintiff had filed suit against the Red Cross.

(15) The last witness called by the Defendant was Mrs. Valente Oyukutu. He is now working for UNICEF at Lokichogio on secondment from Oxfarm. At the material time, he was working for the Red Cross in Uganda and was responsible for the coordination of its operations there. He covered four refugee camps. He said that Uganda Red Cross provided accommodation which everyone else accepted but the Plaintiff rejected claiming it was unsuitable to him. He also confirmed that he approved all the *per diems* and allowances paid to staff under him including the Plaintiff but he was not involved in the investigation of the alleged double payments alleged by the Defendant.

(16) The contract which the Plaintiff claims was unlawfully terminated was for a period of one year from the 1st January 1998 to the 31st December 1998. It was a contract for a fixed term. Before it came to an end, the Defendant wrote to the Plaintiff on the 16th November 1998, and informed him that his contract was coming to an end on the 31st December 1998, and that it would not be renewed. There is no allegation nor any evidence that this contract was terminated otherwise than in accordance with its terms. That was also the evidence of both Mr. Pregetter and Ms. Maganda. I am unable to see in the face of this evidence how failure on refusal to renew the Plaintiff's contract can constitute wrongful dismissal. In the circumstances, the claim for wrongful dismissal cannot succeed.

(17) The Plaintiff also claims USD12,480 as special damages. This claim, though inadequately particularized, is made on the basis that the Plaintiff was sent on mission to Uganda for a period of one hundred and sixty-four days during which he was not paid *per diem*. According to him, he was entitled to USD 66 per day. At that rate, the claim ought to have been made for USD 10,824, and not USD 12,480 as claimed in the Plaintiff. The evidence given in this case by the Defendant's witnesses established that the Plaintiff was a local employee as opposed to a delegate employee recruited from the Defendant's Head Office in Geneva. His entitlement was therefore only USD 25 per day and not as he erroneously thought USD 66 per day. Mr. Oyukutu's evidence was that while the Plaintiff was in Uganda, he was paid all his allowances every time he was sent out to the camps on duty. This evidence was not contradicted and I accept it as the truth. This part of the Plaintiff's claim therefore also fails.

(18) The claim for general damages does not really lie in light of what is stated hereinbefore with regard to the Plaintiff's claim for wrongful dismissal. In any case, no evidence was adduced in support of it. As for the Certificate of Service, I cannot see what the Plaintiff requires beyond the letter of the 16th November 1998. All in all, the Plaintiff's claim against the Defendant fails and is dismissed.

(19) I now turn to the Defendants' Counterclaim against the Plaintiff for USD 1,203 in respect of alleged double payments of *per diem* on diverse dates between the 16th May 1997 and the 2nd December 1997. There was a feeble attempt by the Defendant's witnesses to suggest that this claim is not related to the USD 2,900 and K.Shs.56,480/= which the Defendant alleged the Plaintiff had taken as Working Advance and had failed to pay back or account for. This claim was investigated and the Head of Regional Delegation confirmed, in his letter to the Plaintiff dated the 9th December 1998, that the money advanced to the Plaintiff had been fully accounted for.

(20) The calculations placed before the court in support of the Defendant's Counterclaim fell far short of the amount actually claimed. Mr. Oyukutu who authorized the payments gave evidence but since he was no longer working for the Defendant, he was compelled to rely on figures prepared by someone else. The documents submitted in evidence in support of this claim were not compiled by Mr. Oyukutu. He was honest enough to admit that he was not involved in the investigation of the claim for double payments of *per diem*. If the overpayments took place in 1997 as alleged in the Counterclaim, I am at a loss to understand why this was not detected until long after the Plaintiff had ceased to be an employee of the Red Cross. I get the impression that this claim was an afterthought raised simply to job off the Plaintiff. The Counterclaim accordingly fails and is dismissed.

(21) In the final analysis and for the reasons which I have given, the Plaintiff's claim against the Defendant fails and is hereby dismissed. The Defendant's counterclaim against the Plaintiff also fails and is also hereby dismissed. And I make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this Twenty Sixth day of June 2006.

P. Kihara Kariuki

Judge.