



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 266 OF 2018

(Formerly Kisumu ELRC 101 OF 2018)

JONATHAN KIPCHOGE.....CLAIMANT

VERSUS

PROF. SLYVESTER KIMAIYO.....1ST RESPONDENT

PROF. WINSTONE NYANDIKO2ND RESPONDENT

AMPATH PLUS.....3RD RESPONDENT

J U D G E M E N T

1. By an amended statement of claim filed on 3rd October, 2019 the claimant pleaded that:

- a) The respondents advertised for the position of Human Resource Manager in the year 2016 which the plaintiff applied for since the terms offered were attractive.
- b) The claimant was then employed as the Director of Human Resource Management at Vihiga County on permanent and pensionable terms. He was then aged 39 years.
- c) Following an interview conducted by the respondents for the position, the claimant emerged top and was issued with a letter of offer dated 26th August 2016. The claimant resigned from his employment with the County Government of Vihiga to take up the new appointment with the respondents.
- d) According to the advertisement, the initial contract term offered was two years. However, upon plaintiff reporting, the letter of appointment stated the term to be three months which the respondents acknowledged to be an error and was corrected to fifteen months and later to three years as per the data base record which specifically provided that the claimant's term would run to 30th April, 2019.
- e) The claimant was given job description which placed him in the position of the Overall in charge of Human Resource Management reporting to the 1st Respondent who was the Chief of Party.
- f) The claimant went about discharging his duties with optimum diligence with one of his landmark achievements being the formulation of Human Resource Management Manual providing for terms and conditions of service for the respondent's staff which was in use with the approval of the respondent.
- g) In or about May 2017, by a show cause letter dated 30th May 2017, the respondents originated a complainant against the claimant accusing him of fraudulent allowances claim, inefficiency in the discharge of duties and unauthorized disclosure of information to staff.
- h) The alleged fraudulent allowance claim was in respect of per diem of Kshs.14,000.00 which the claimant had been paid with the approval of the respondents, to attend a seminar in Mombasa which according to the respondent should have been Ksh.8,000.00
- i) The confusion surrounding the scales of allowances due to the claimant was created by the respondent who erroneously engaged the claimant as Human Resource Manager with an entry salary of Ksh.70,000.00 applicable Job Group R.14 and not R.11 as claimed by the respondents. Similar errors had been made in respect of other officers and corrected without any drama.

- j) The claimant had until then never received any complaint or verbal warning from the respondents regarding his performance of duty.
- k) The respondents rejected the plaintiff's explanation of innocence against the allegations that had been leveled against him and proceeded to reprimand him in writing and further demoted him to the position of Senior Human Resource Officer at Job Group RS.11 through the letter dated 12th July 2017 which position the plaintiff did not accept and promptly appealed.
- l) The respondents never addressed the plaintiff's appeal but proceed to appoint one Jane Agusi Nyandiko, the 2nd respondent's spouse to the position of Human Resource Manager.
- m) By a letter dated 19th January 2018, addressed to the claimant, the respondent's defendants made reference to the contract that ended 31st April 2018.
- n) On 20th March 2018, the respondents served the claimant with End of Contract notice dated 7th March 2017 purporting to terminate the claimant's employment contract by 30th April 2018 which was contrary to the two months' notice provided under the subject contract as there was no contract of four months signed with the respondents.
- o) In the foregoing circumstances, the respondents' have subjected the claimant to unfair labour practices in total violation of the Labour Laws and the Constitution of Kenya.

2. The respondent in its amended response to the claim pleaded thus:

- a) The respondent admits the contents of paragraph 4 and 5 of the statement of claim. The respondent further avers that the claimant voluntarily applied for the advertised position by AMPATH plus and hence voluntarily gave up on his permanent and pensionable status at the Vihiga County.
- b) The contents of paragraph 7 is denied in toto since even though the advert had referred to two years contract with a possibility of extension the same was changed to fifteen months to enable payment to fit the funding period. The claimant voluntarily accepted and signed his letter dated 22nd August 2016.
- c) The contents of paragraph 8 are denied since though the claimant was given job description which placed him in the position of the overall in charge of Human Resource Manager who is to report to the 1st respondent who is the Chief of party. That was correct when he was initially hired in August 2016. However, when he proved unreliable and subsequently redesignated to Senior Human Resource Officer after committing several irregularities including changing his grade without the necessary approvals. A new HRM was requested from the Hospital and has since gone back to the Hospital and the overall HRM position for the two RSPO's has since ceased to exist and with each section running independently under each of the two 1st and 2nd Respondents' Executive Directors (Care and Research)
- d) The contents of paragraph 9 are denied since the Human Resource policy had to be completed by another office this depicts the claimant's inability to take instructions at the managerial level. The claimant also disclosed a draft of the tentative salary structure in a monthly staff meeting before the discussions had been finalized this caused unrest amongst the staff.
- e) The contents of paragraph 11 are admitted save that the per diem approval was not done by the respondents. The claimant himself admitted in his response to the Notice to show cause letter dated 2nd June 2017 that he had received two different per diems based on different job grading. He was paid Ksh.14,000 when he travelled to Mombasa instead of Ksh. 8,000/=. In his letter he requested to be pardoned for this intentional conduct.
- f) That further to the above the claimant was appointed as an RS 11 and not as an RS 14. He was appointed prior to the signing of the Human Resource Manual which was approved on 25th May 2018. He paid himself as an RS 14 between 17th and 19th May 2017. This payment was done well even before the approval of the Human Resource Manual.
- g) The contents of paragraph 12 of the claim are denied in toto since there is no confusion that was created since the employment contract dated 22nd of August 2016 that the claimant signed clearly stated that the job grade is Rs 11 and not Rs 14. Again, the new HRM manual was approved on 25th May 2017. This confirms that the claimant overpaid himself per diem prior to the approval and implementation of the Human Resource Manual.
- h) The contents of paragraph 13 and 14 are denied since the claimant's salary before and after redesignation remained unchanged. The claimant personally made changes to the computerized ATP Human Resource Manual Management System without approval from the management. This questioned his integrity, accountability and transparency which are institutional and fundamental principles expected to be adhered to by any law-abiding citizen holding such a position in an organization.
- i) That in response to paragraph 15 of the claimant's claim which is denied the respondents never appointed Jane Agusi Nyandiko. It is the Chief Executive Officer, Moi Teaching and Referral Hospital who deployed Jane Agusi Nyandiko from Moi Teaching and Referral Hospital to AMPATH for one year fixed term contract with effect from 6th July 2017. As such the claimant's allegations that the respondent appointed her are false, misleading, baseless and malicious.
- j) That in response to paragraph 16 which is denied the respondents affirm that the claimant's initial contract expired. He refused to

sign an extension even though he has been reporting on duty this has placed the respondents in a precarious situation since they have had to continue paying him for four months without a written contract.

k) That the contents of paragraph 17 and 18 are denied since the initial contract ended on 31st of December 2017 and even assuming that it had automatically renewed as the claimant is pleading then the respondents response is as follows.

i) That the same would still be terminated by issuance of two months in lieu of notice which notice has been issued vide letter dated 7th March 2018 though erroneously indicated by the respondents as 7th March 2017. Any notice in a fixed term contract is issued if one intends to prematurely terminate it before its automatic expiration period. The respondent never terminated the claimant's contract prematurely since the first contract ran for 15 months and the second one ran for 4 months. In both instances the salary remained the same.

3. At the trial, the claimant informed the court inter alia that he was a consultant Human Resource Practitioner and that he filed an amended statement of claim on 3rd October, 2019 and witness statement on 11th January, 2019 which he adopted as his evidence in Chief. He also adopted as his exhibits the documents filed on 11th January, 2019. He further relied on his further witness statement filed with the amended claim.

4. It was his evidence that the job he applied for was at annexure 4 of his bundle of documents and it was for two years renewable and that he relied on the advert while going for the interview.

5. His letter of appointment was found at annexure 5 of his bundle of documents, he was appointed on six months' probation and that his contract was stated to expire on 16th March, 2017 and this was in tandem with the interview he attended and that professor Kimaiyo endorsed the contract for two years and signed the same on behalf of Ampath. The endorsement was done after he complained about the terms. He got another letter thereafter (annexure 6) which said he would be confirmed upon 31st December, 2017. This was for fifteen months. This according to the claimant was once again not in terms of the advertisement. He once again raised concern with professor Kimaiyo and he told him he should not worry because everything had been captured in the payroll data. This was shown in annexure 11. The contract was captured as running up to 31st March, 2019. This was done by payroll manager. It was his evidence that he was satisfied after he confirmed the data. He however did not work until 31st March, 2019 as captured. It was his evidence that his service was terminated on 30th April, 2018. He was issued with notice of termination in January, 2018.

6. The claimant further testified that he never asked for extension of his contract for four months and this was never discussed with him.

7. Regarding his position he stated that HRM was under RS-14 in the respondent's structure but he was placed at RS-11 which according to him was not the correct job ranking for HRM. He denied doctoring the job ranking to favour him. According to him, the changes in job description and ranking was done by Benjamin Boindet. He was issued with a show cause letter and went through a disciplinary hearing but was not terminated. It was the claimant's evidence that he was not issued with a show cause letter on the issue.

8. The claimant further stated that he was subsequently redesignated to Senior Human Resource Officer which was a lower position than that one he previously held. It was further his evidence that one Jane Agusi Nyandiko was appointed to take over his previous post. He knew Jane, she was the Deputy Human Resource at Moi Teaching and Referral Hospital where he used to work and further that she was the wife to the 2nd respondent.

9. The claimant further stated that paragraph 5 of his amended claim contains his claims. According to him, he left his post as Director Human Resource at Vihiga County which was permanent and pensionable job for Ampath because he thought the job was better.

10. In cross – examination he stated that he looked at the advert when he was applying and that it did not have a job group. It was a two year contract renewable. He further stated that annexure 5 which was a letter of appointment was not signed by professor Kimaiyo and that the second letter annexure 6 was signed and it stated the contract was to run from 31st December, 2017 and the appointment level was RS-11. He accepted the terms of the letter and worked for the full term of the contract.

11. Regarding his performance he stated that he was served with a notice to show cause during the running of his contract. This was exhibited as annexure 2 of the respondent's bundle of documents. He was accused of lack of attention in preparation of the Human Resource Policy, Procedure and Manual. The Manual had errors.

12. The claimant further stated that there was a complaint about lack of professional conduct and that he was accused of implementing salary for AVI Project without approval. He was further accused of drawing per diem as RS-14 yet he was RS – 11 He further admitted that he had only one appointment letter for RS-11.

13. Regarding opportunity to respond to the accusations, he stated that he was given opportunity to respond through correspondence. He further stated that the executive Board allowed his contract to run to the end but there would be no renewal. He further stated that his salary never changed when he was redesignated.

14. Concerning contract extension he stated that he was issued with a contract extension and that he never asked for one and never signed it but stayed in office pursuant to a court order and worked until September, 2017. He further stated that he was notified when his contract was about to end.

15. The respondents 1st witness professor Sylvester Kimaiyo informed the court that he worked for Ampath and that Ampath was with Moi Teaching and Referral Hospital. It was his evidence that the claimant joined Ampath in 22nd August, 2016 as a Human Resource Manager

on a two-year contract. The contract had two months termination notice from either side or payment in lieu.

16. It was his evidence that the claimant had discipline issues during the first contract and was issued with a show cause letter. The complaint was that the Human Resource Manual which the claimant was responsible for developing had errors and lacked detail. For example, pages 74 and 94 of the same were contradictory yet the manual was approved with these errors.

17. The other issue was per diem. The claimant's per diem to Nairobi or Mombasa was Ksh.8,000/= but he paid himself Ksh.14,000/=. He further changed his job grade from RS-11 to RS -14 and paid himself per diem for RS-14.

18. Professor Kimaiyo informed the court that the respondent deliberated on these issues twice and a decision was reached to retain the claimant for the extra three months with no option for renewal. Someone Senior was hired by CEO MTRH to oversee the claimant's since he was manipulating records.

19. Regarding payment of terminal dues, it was his evidence that the claimant never cleared with Ampath to be paid his terminal dues and further that the claimant was never dismissed but rather his contract expired.

20. In cross -examination he stated that Ampath and Ampath plus were registered and that he signed letters on behalf of Ampath as the Chief of Party.

21. It was his evidence that the post advertised for was the position of Human Resource Manager and that the respondent had a job description for their managers and further that RS-14 was in a document to be used in future. At the time of the claimant's employment he was at RS-11. The advertisement was at RS-11. He admitted writing the first letter of appointment and endorsed the same to two years because there was only money for the two years. The contract was initially up to March, 2017 and further that a contract could be terminated any time depending on finding.

22. According to Professor Kimaiyo, the claimant's contract was to end on 16th March, 2017 and not March, 2019. He further stated that it was established that the claimant had all the passwords to the system and used one Irene Choge to alter the passwords.

23. Regarding the appointment of Jane Nyandiko, he stated that this was done by one CEO MTRH and had nothing to do with Professor Nyandiko or himself.

24. Concerning the manual, he stated the same was approved with the errors and that the claimant and one Choge were in charge of approvals and further that the payroll had nothing to do with the per diem.

25. Regarding the claimants contract he stated that it was a fixed term contract and that all contracts had a possibility of renewal but renewal was not automatic. It depended on funds and performance and that the claimants contract expired on 31st December, 2017 but was given an extra three months which expired on 30th April, 2018.

26. Concerning letter of appointment, he stated that the second letter of appointment was a correction of the first one and that the correction was to align the contract with the allocation of funds. The respondent could not commit without money.

27. Regarding redesignation the claimant was redesignated but his salary remained the same and that the claimant did not accept the same. It was a disciplinary issue hence the claimant had no option. It was further his evidence that the claimant stayed for a further three months at his request to enable him get a job in Vihiga. He however did not have before the Court, the letter from the claimant requesting for extension.

28. The respondents second witness Professor Nyandiko stated that he worked as Executive Director of the Respondent. He adopted his statement recorded on 3rd July, 2019 as his evidence in chief.

29. It was his evidence that he knew that claimant and that he worked for the respondent as a Human Resource Manager between 2016 and 2017 and was later designated as Senior Human Resource officer on 12th July, 2017. He was the one who signed the redesignation letter. It never affected the claimants' salary.

30. According to him the redesignation was occasioned by a finding by Ampath that the claimant was not fulfilling his mandate as Human Resource Manager. The executive committee got someone else to take responsibilities as Human Resource Manager. The claimant was to report to the new Human Resource Manager. It was his evidence that the claimant was tasked to refine the existing Human Resource Manual but did not do the work satisfactorily. Low cadre positions were made higher while higher ones were made lower.

31. Regarding the claimant's appointment, it was his testimony that the claimant's letter of offer was at RS 11 and was earning Ksh.341,786/= per month. The claimant accepted the terms. The contract was for 16 months from 22nd August, 2016 to 31st December, 2017.

32. Professor Nyandiko further stated that it was not possible to promote an employee from RS-11 to RS-14 jumping 12 and 13 unless there was an advertisement and the employee competes for the higher job.

33. Regarding disciplinary hearing, the claimant's case was first heard on 4th July, 2017 before the disciplinary committee and that he was present at the committee meeting, however the claimant did not attend because he had responded to all the questions that had been put to him. The committee referred to all documents concerning the claimant's case in line with his response to the show cause letter.

34. It was his evidence that the committee resolved that the claimant's response was not satisfactory and he was to be redesignated to work under a Human Resource Manager. The CEO MTRH was asked to second an officer and one Jane Nyandiko was seconded. He admitted that Jane was his wife. The secondment was by CEO MTRH and had nothing to do with him. When the claimant's contract expired he asked for extension as he awaited the outcome of interviews for some County jobs he had applied for. He was given an extension. This was against Ampath Board resolution but the Chief of Party granted it.
35. In cross-examination he stated that the post advertised by Ampath was for two years renewable and that the job scale was not indicated. He denied knowledge of the claimant having a Masters at the time he applied for the job. It was further his evidence that the claimant was employed for sixteen months in line with the funding cycle. He denied knowledge of the claimant working for three years.
36. Regarding the accusations against the claimant, he stated that these were in public knowledge and was not brought to them by anyone. He further stated that the response to the show cause letter was enough for the board to make a decision. He further stated that the claimant paid himself a higher per diem for Mombasa and Nairobi. He however could not recall if it was him or Professor Kimaiyo who approved the per diem.
37. Professor Nyandusi further stated that the letter stating end of second contract was supposed to be dated 7th March, 2018 not 7th March, 2017 and that the contract was to end on 30th April, 2017.
38. The respondents' third witnesses Mr. Robert Rono stated that he worked for MTRH and was the head of RSPO. He adopted his statement dated 24th July, 2019 as his evidence in chief.
39. Mr. Rono stated that he sat in the meeting where disciplinary issues were discussed. The committee reviewed the documents and discussed the issue. He further stated that the claimant was paid his dues up to 30th April 2018. His gratuity had however not been paid since the respondent still awaited the claimant's clearance.
40. Regarding the Human Resource Manual, he stated that the same had been approved but implementation had been suspended.
41. In cross-examination he stated that he was not a member of Ampath's executive committee and that he sat at the Secretariat. He highlighted the allegations against the claimant in his statement. Mr. Rono denied generating the allegations against the claimant and stated that the same were generated by Professor Kimaiyo.
42. It was further his evidence that as head of Section, claimant was responsible for generation of payrolls and that per diems were approved by HR, Finance and Principal Investigator. No per diems would be paid without approval.
43. It was his evidence that he attended the disciplinary committee hearing and that the claimant was not invited and no witnesses were called. The committee resolved to redesignate the claimant.
44. The Respondent's fourth witness Christine Tonui stated that she worked for the respondents as Director for Health and Administration. She was aware of the email attached by the claimant in the proceedings. According to her the email were policy discussion and made no reference to the claimant but they were copied to him among others. The email are about staff welfare and was not a grievance or complaint.
45. Having reviewed and considered the pleading, documents and oral evidence in the matter, three issues emerge. First whether the claimant was appointed as Human Resource Manager job category RS-11 or RS14, second whether there existed justifiable reasons for redesignating the claimant from Human Resource Manger to Senior Human Resource Officer and whether this amounted to a demotion and thirdly, whether upon expiry of the claimant's fixed term contract and the respondent upon extending the same was bound to do so for the same period as the expired contract.
46. By notice of advertisement dated 25th February, 2016, the respondent advertised for the post of Human Resource Manager. The advertisement detailed the job description, duties and responsibilities. The advertisement further specified the qualifications and experience needed for the post. The advertisement however made no mention of the job grade the post of Human Resource Manager fell. The advertisement further made no mention of the salary attached to the position.
47. The advertisement stated that successful candidate would be employed on a 2-year term with possibility of renewal.
48. According to the claimant's testimony and evidence on record, he was successful after the interview and was on 22nd August, 2016 issued with an offer of appointment which stated that upon successful probation, he would be hired until 16th March, 2017. This was later amended to December, 2017.
49. The letter of offer further stated that the post was at job grade RS-11 and the salary attached to the post was Ksh.341,786/= per month exclusive of allowances. This letter was revised on 22nd August, 2016 to correct the mistake on the period of the contract. The claimant signed the same signifying his acceptance of the contract. To this extent it is clear that the claimant was hired as Human Resource Manager, job grade RS-11.
50. The second question is whether there existed justifiable reasons for redesignating the claimant from Human Resource Manager to Senior Human Resource Officer.
51. The claimant was on 30th May, 2017 issued with a show cause letter which accused him of several offences. First that while tasked to lead in the refining of the Human Resource Policy and Procedure Manual, he did not give the same the necessary attention and detail

required in delivering such an important document. He was accused of failure to implement changes on the document. For instance he ignored the removal of job grade RS to adoption of M scale.

52. The claimant was further accused prematurely discussing at RSPO staff meeting, tentative salary structure to be used across AMPATH which caused staff unrest and further that the claimant went ahead and implemented new salary grading for ABBVie payroll without the approval of the Principal Investigator, a decision that was cancelled.

53. Thirdly, the claimant was accused of drawing per diem for RS-14 staff while his proper grade was RS-11.

The claimant responded to the show cause letter by a letter dated 2nd June, 2017 in which he stated among others that the grading system was discussed and the final conclusion was to adopt MTRH grades. On the issue of discussing the proposed salaries at RsPO meeting he replied that he shared this at the RsPo meeting and encouraged the staff to be patient. On the issue of the per diem he acknowledged receiving the per diem for RS-14 and stated that he was underpaid. According to him his rightful per diem was at RS-14.

The respondent did not consider the claimant's response satisfactory and proceeded to issue the claimant with a warning letter and further relieved him of the responsibilities of overall human resource manager. His service was however retained but work restricted to Human Resource Department-RsPo under supervision of the Head of Human Resource AMPATH.

54. By a letter dated 24th July, 2017 the claimant appealed against the decision to redesignate him but the appeal was rejected by the Chief of Party-AMPATH.

55. In deciding whether there exists a justifiable reason for taking a disciplinary action against an employee the court usually applies the "reasonable" test. That is to say would a reasonable employer in possession of similar facts or faced with similar circumstances consider the disciplinary action meted out as the most reasonable and proportionate. It is not for the court to substitute its view of what it thinks is reasonable with that of the employer. Management are masters of their trade and ought to be given the leeway to exercise managerial discretion provided the exercise of such discretion is lawful and reasonable in the circumstances of the case they are dealing with.

56. The claimant largely did not deny the accusation against him. He instead sought to justify his actions. The court observed earlier that the claimant was hired at job grade RS-11 and he signed the offer letter signifying his acceptance of the offer. He did not exhibit or allege during the trial that he ever sought the amendment of the offer letter to change his job grade from RS-11 to RS-14. The court therefore does not find any basis or justification why the claimant regarded himself as an RS-14 grade staff yet his own letter which he signed in acknowledgement placed him at job grade RS-11. Further disclosure of premature discussion with Executive Board without their approval amounted to misconduct on the part of the claimant.

57. Misappropriation of an employer's funds is gross misconduct and may have as well been a ground for summary dismissal but the respondent instead chose to warn and redesignate the claimant. The court in the circumstances finds and holds that there existed reasonable grounds to take disciplinary action against the claimant and that the action taken against him was proportionate in the circumstances.

58. Concerning due process, the claimant complained that he was not called for a disciplinary hearing however the court is satisfied that the correspondences exchanged from the show cause letter to response by the claimant and eventual appeal against the decision to redesignate the claimant demonstrated that he was fully aware of the charges against him and he adequately responded to them and no prejudice was occasioned to him by not having a physical disciplinary hearing.

59. The final issue is whether the claimant was entitled to extension of his contract for a period similar to the expired one.

60. It is now settled that an employee under a fixed term contract has no guarantee that the contract will be renewed upon expiry. Renewal is usually at the discretion of the employer and subject to performance and other factors contained or surrounding the letter of appointment.

61. The respondent informed the court that contract periods and renewals were subject to available funding. The claimant's first contract expired on 31st December, 2017. He was however issued with a three months extension up to 31st April, 2018. Although he did not sign the contract, he remained in office and earned a salary. His request for extension for a similar period contained in his letter dated 23rd January, 2018 did not seem to have received any positive response.

62. On 7th March, 2017 the claimant was issued with an end of contracts notice informing him that the extended contract would terminate on 30th April, 2018 and would not be renewed. As observed earlier, there is no obligation on the part of an employer to renew a fixed term contract upon expiry. The matter is discretionary and subject to the employee's performance and other circumstances surrounding the contract.

63. The respondent stated that the period of contracts issued by them were subject to among others, funding available. There was therefore no obligation to extend the first contract by a similar period upon expiry if there was no funding to sustain it. In the circumstances the claim by the claimant contesting the expiry and nonrenewal of his initial two-year contract for a similar period, is without merit and hereby rejected.

64. In conclusion the court hereby holds and finds as follows:

a) The claimant was properly appointed as Human Resource Manager job category RS-11.

b) It was wrong for the claimant to draw allowances for RS-14 staff while he was hired as RS-11 staff.

- c) There existed valid reasons to take disciplinary action against the claimant and further that the action taken was proportionate in the circumstances.
- d) The claimant having been hired on a fixed term contract for two years, there was no obligation on the respondent to renew the same and for a similar period.
- e) The claimant is hereby ordered to clear with the respondent and the respondent to pay the claimant his pending terminal dues and gratuity if not paid already.
- f) The claimant being partially successful, there will be no order as to costs.

It is so ordered.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2022

ABUODHA NELSON JORUM

JUDGE