



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

ELRC NO. 9 OF 2018

MBARAK ABDULQADIR ABDALLA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF LAMU.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD, LAMU COUNTY.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant has filed this cause to challenge the decision by the Respondents to terminate his contract of service with the 1st Respondent. It is the Claimant's case that the termination was in total disregard of the law and the contract between the parties. Thus, he seeks to be compensated for unlawful termination.

2. The Respondents dispute the claim. They argue that the Claimant's term of service was tied to that of the Governor under whom he was serving. Consequently, when the Governor's term came to an end, the Claimant's contract of service concurrently terminated. That the contract therefore terminated lawfully.

An overview of the Pleadings and Evidence

3. The Claimant's case is set out in detail in the Memorandum of Claim filed on 7th March 2018. He avers that by a letter dated 25th September 2014, he was engaged by the 2nd Respondent as a Chief of Staff of the Governor of the 1st Respondent. That the letter of appointment sets out the terms of his engagement. These include that: his contract was to run for four (4) years from 1st September 2014; his position was that of Chief of Staff; and his monthly gross salary was Ksh. 275,464/=.

4. The Claimant avers further that around 7th November 2017, he learned that he had been terminated from employment by the Respondents. That this discovery was made when he was handed a letter titled "end of contract" and dated 17th August 2017. The Claimant avers that he had no knowledge of this letter prior to 7th November 2017.

5. It is the Claimant's contention that the termination aforesaid was done without notice to him and without lawful reason. That at the time of termination, he still had until the 31st of August 2018 to serve under the now terminated contract. Consequently, the Claimant seeks that the termination be declared unlawful and that he be compensated as more particularly set out in the statement of claim.

6. The Respondents' case is fairly straight forward. In their statement of response, the Respondents acknowledge that the Claimant was engaged by the 2nd Respondent as one of the personal staffs of the 1st Respondent's Governor as asserted by the Claimant. That the parties signed a letter of appointment dated 25th September 2014.

7. That the Respondents have in force a human resource manual which requires that personal staff of specified state officers serve during the term of such state officers. That the Claimant's contract was one such contract. Therefore, when the Governor the Claimant was serving failed to secure re-election in August 2017, the Claimant's contract necessarily terminated at that time in terms of the human resource manual.

8. The Respondents aver that the 1st Respondent notified the Claimant of this position through the end of contract letter dated 17th August 2017. That since the Claimant could not be given the 28 days' notice to terminate his contract as stipulated in law, he was paid salary in lieu

of notice. As such, the separation of the parties was done lawfully.

9. Both the Claimant and the Respondents' witnesses gave oral evidence in addition to adopting their written statements. They also relied on the documents they filed as exhibits. The oral evidence reiterates the positions taken by the parties in their pleadings.

Analysis of the Issues

10. At the close of the case, both parties filed submissions. In this judgment, I have considered the pleadings by the parties, their oral and written evidence and as well the submissions on record.

11. From the pleadings and evidence, two issues present for determination. These are: -

a) Whether the Respondents' termination of the Claimant's contract of employment was lawful in the circumstances.

b) What remedies, if at all, is the Claimant entitled to?

12. Apart from specific pieces of legislation regulating contracts of employment, these contracts are also subject to the general law of contract in so far as its application has not been varied by legislation (see **National Bank of Kenya Limited v Hamida Bana & 103 others [2017] eKLR**). Importantly, the Constitution also guarantees those engaged in any form of labour relations the right to fair labour practices.

13. A key component of the law of contract is that parties to a contract are bound by the terms of their contract. A party to a contract may not unilaterally change the terms of such contract. Any variation to a sealed contract must be by agreement between the parties (see **County Government of Migori v Hope Self Help Group [2020] eKLR**).

14. This principle applies to contracts of service in much the same way as it does any other contract. Indeed, it is now incorporated under section 10 of the Employment Act. This section requires a written contract of employment to set out particulars of the contract to include: the names and particulars of the employer and employee; the age and sex of the employee; the job description; the commencement of the contract; the duration of the contract; the hours and place of work; the remuneration; and other benefits.

15. Under section 10 (5) of the Act, the employer can only alter these particulars in consultation with the affected employee. And where this happens, the employer must incorporate the new changes into the contract in writing and as well notify the employee of the changes in writing (see also **James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR**).

16. Where there is an attempt at varying a written contract by a subsequent instrument, there must be evidence that the parties to the contract intended that such variation be introduced into the contract. This point is made in **Nairobi Civil Appeal 155 of 1992 Kukul Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR** when the court observed as follows: -

“.....subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract.”

17. It is also a general principle of the law of contract that no extrinsic material is admissible to vary a written contract except where it is clear that the parties intended so. This principle also comes out clearly in the above decision of **Kukul Properties Development Ltd v Tafazzal H. Maloo & 3 others**. In the cause the court said as follows of this aspect of contract: -

“Mrs Dias contended that all the evidence including correspondence between the parties prior to or after the agreement are admissible. I think that this contention is sweeping. As I understand it where the contract is in writing and its terms are clear and unambiguous, no extrinsic evidence may be called to add or detract from it.”

18. The contract of employment between the Claimant and the Respondents is captured in the letter of appointment dated 25th September 2014 (see document number two (2) on the Claimant's list of documents). As is apparent, this letter of appointment sets out the terms of engagement between the parties in a fairly plain and straight language.

19. Pertinent to the current dispute, the letter specifically mentions that the employment contract between the parties was for a term of four (4) years commencing 1st September 2014. It is to be noted that the letter was signed by the Claimant and a representative of the Respondents. None of the parties has contested the contractual efficacy of the instrument. Therefore, that is not an issue that I am entitled to interrogate.

20. Nowhere in the letter of appointment is it mentioned that the contract was to incorporate additional terms contained in addendum instruments outside the letter itself. More particularly, the letter of appointment did not refer to a human resource manual whose terms were to form part of the contract. If the terms of the human resource manual 2017 were to affect the contract, it would have been desirable that this be expressed in writing either in the human resource manual itself or through an additional document executed by the parties. This is the least that section 10(5) of the Employment Act demands.

21. To my mind, the letter dated 25th September 2014 is clear and unambiguous in relation to the duration of the contract of service between the parties. It was a four (4) year term commencing 1st September 2014. In his evidence, although the Claimant acknowledges the existence of the human resource manual, he states that it came into force in 2017 long after he had been employed in 2014. And that the Respondents

never sought to alter the Claimant's contract to align it to the said manual. In the premises, I do not think that it was open to the Respondents to import into the contract the contents of the manual. And neither can they rely on the 2017 instrument to interpret the terms of the contract concluded between them on 25th September 2014 as this in effect would be an attempt at introducing extrinsic material to interpret the terms of an otherwise plain document.

22. Further, the Respondents rely on clause B 20 of the 2017 manual (see page 21 of the manual) to urge the case that the term of the contracts of service for personal staff of all state officers serving the 1st Respondent is necessarily determined by reference to the tenure of such state officers. Proceeding on this premise, it is the Respondents' case that since the Claimant was appointed as a personal staff of the Governor of the 1st Respondent, his term ended when the Governor failed to be re-elected in August 2017.

23. With respect, this argument cannot be of general application. The relevant provision of the manual is couched in the following terms: -

“Personal staff of specified state officers as determined by the Board from time to time.... shall serve during the tenure of the state officer.” Emphasis added.

My understanding of this clause is that it only applies to personal staff of state officers who have been specified by the 2nd Respondent and not generally. In other words, it does not automatically limit the term of personal staff of all state officers serving within the rank and file of the 1st Respondent to the term of such state officers.

24. As stated above, the duty to specify the state officers to be covered by the provision under the manual lies with the 2nd Respondent if the provisions of the manual are anything to go by. Yet, there was no evidence placed before the court to demonstrate that the 2nd Respondent had discharged this mandate in respect of the office of Governor or indeed that of any other state officer in service of the 1st Respondent.

25. Further, even if the Governor had been specified as one of the state officers affected by the provision, it is my view that in the spirit of protecting the right to fair labour practise, this development ought to have been brought to the attention of the affected personal staff including the Claimant. There was no evidence that the 2nd Respondent had ever drawn the attention of the Claimant to the fact that his contract would be part of the contracts to be affected by the provision in the manual.

26. Another critical matter in the dispute relates to the date of the manual that the Respondents' case is hinged on. It is said to have been drawn in April of 2017. Consequently, it can only have become operative in April 2017. Documents occupying the place of the manual before it came into force were not presented in evidence. It is therefore not possible to ascertain whether such documents, if they exist, contained a provision similar to clause B 20 of the 2017 manual.

27. It is inconceivable that a document authored in 2017 would, without express provision in the instrument, operate retroactively so as to adversely affect the terms and conditions of service of staff hired in 2014 when the document was not in existence. In the case of ***James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR***, the court shades light on this when it points out that an alteration cannot be introduced into a contract through a subsequent instrument or otherwise so as to adversely affect the accrued rights of the parties to the contract without prior consultation with such parties. Such action would be unlawful and would amount to repudiation of the affected contract (see also ***Churchill Ongalo v K. K. Security Limited [2014] eKLR***).

28. That the Claimant's consent was not sought before purporting to retroactively incorporate the terms of the 2017 human resource manual into the already existing contract of service between the parties is clear from the evidence on record. It was the Claimant's testimony that the Respondents never sought to alter his 2014 contract so as to align it to the 2017 human resource manual. The Claimant stated that he was never asked to accede to any other instrument seeking to introduce these changes.

29. In effect, for the Respondents to rely on the April 2017 manual to seek to vary the duration of the Claimant's contract from the initial four (4) years to the balance of the term of the Governor the Claimant was serving under was in real sense an attempt at unilaterally varying the contract of service between the parties. This is not permissible under the general principles on the law of contract and as well the Employment Act. Consequently, the court finds that the attempt by the Respondents in this regard was improper and unlawful.

30. Finally, the general guidelines in relation to the applicability of Human Resource Manuals of an institution to its employees is set out in the publication by George Ogembo titled ***Employment Law Guide for Employers, LawAfrica Ltd, 2016 edition*** (pages 69-71). Whilst these manuals are intended to be general policy documents, they ought to be expressly incorporated into an employee's contract of employment for them to affect the contract. Application of the manuals to individual contracts is neither automatic nor implied. Usually, there will be a clause in a contract of service or some other document incorporating the terms of a Human Resource Manual into the contract of service for the manual to affect the contract (see also ***ELRC cause no 746 of 2009 Kenya Union of Journalists v The Standard Group Limited*** (unreported) cited in ***Mariam Sensalire v African Institute for Capacity Development 2021] eKLR***). There is no evidence that the Respondents undertook this exercise in respect of their 2017 manual vis a vis the Claimant's contract of service.

31. Having so found, it becomes clear that the legal foundation of the purported termination of the Claimant's contract of service is wanting. It is clear from the evidence tendered that outside of the purported justification offered by the Respondents for their action, there was no substantive ground to terminate the Claimant in terms of section 41 of the Employment Act. And neither were the procedural strictures leading to fair release from employment set out under the Act observed by the Respondents.

32. For the reasons set out in the judgment, the Respondents' decision to terminate the Claimant based on the provisions of the 2017 Human Resource Manual constitutes wrongful termination of the Claimant. It is so declared.

33. On the second issue, the court is guided by the provisions of sections 49 and 51 of the Employment Act to grant relief to the Claimant. It

is noteworthy that the court is not bound to award a Claimant all the reliefs mentioned under section 49 of the Act. On my part, I think that since the Claimant had a balance of one (1) year to conclude his contract of service, a global award of damages would suffice.

34. The Claimant asserts that his gross monthly salary was Ksh. 275,464/=. Yet, the letter of engagement dated 25th September 2014 shows that his gross monthly salary was Ksh. 260,660/=.

35. I recognize that the Claimant was treated in an overly inhumane manner particularly considering that not only was his contract terminated unlawfully in August 2017 but that this fact was not immediately brought to his attention until much later in November 2017. All this while, he was left to imagine that he was still in employment of the 1st Respondent when in fact he was not. Nevertheless, I also note that the Claimant substantially mitigated his loss by getting alternative employment in December 2017, almost immediately after he established that he had been terminated. In the premises, I am minded to award the Claimant his salary for a period of five (5) months as compensation for wrongful termination.

36. The law entitles a departing employee to a Certificate of Service on exist. I find that the Respondents ought to have supplied the Claimant with the certificate.

Determination

a) The Respondents' termination of the Claimant's contract of employment is declared unlawful.

b) The Claimant is awarded compensation for wrongful termination that is equivalent to five months gross salary of the Claimant. The total award is therefore Ksh1,303,300/=. This is amount shall be less any applicable taxes as envisaged under section 49 of the Employment Act. It is so ordered.

c) I award the Claimant interest on the amount awarded above at court rates from the date of institution of the case till payment in full.

d) I order the Respondents to issue the Claimant with a Certificate of Service in terms of section 51 of the Employment Act.

e) I also award the Claimant costs of the case.

f)

DATED, SIGNED AND DELIVERED ON THE 31ST DAY OF MARCH, 2022

B. O. M. MANANI

JUDGE

IN THE PRESENCE OF:

BWIKI FOR THE CLAIMANT

MULWA FOR THE 1ST AND 2ND RESPONDENTS

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE