



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 3 OF 2019

TOM ACHOLA AUMA.....CLAIMANT

VERSUS

ALICE VISIONARY FOUNDATION PROJECT.....RESPONDENT

JUDGMENT

1. Tom Achola Auma (the Claimant) was offered employment as a Monitoring and Evaluation Officer on 5 January 2015 by Alice Visionary Foundation Project (the Respondent).
2. On 21 December 2015, the Respondent informed the Claimant of the renewal of the contract in the new position of Senior Program Manager up to 31 December 2016.
3. When the contract lapsed, it was renewed in 2017. On 3 January 2018, the Respondent again renewed the contract up to 29 December 2018.
4. On 28 September 2018, the Respondent wrote to the Claimant to inform him of his summary dismissal.
5. The Claimant was aggrieved, and on 16 January 2019, he sued the Respondent, alleging unlawful termination of employment and breach of contract.
6. The Respondent filed a Response on 8 March 2019, and the Cause was heard on 9 November 2020 and on 25 January 2021.
7. The Claimant filed his submissions on 4 March 2021 (should have been filed/served by 25 February 2021) in which he identified the Issues for determination as:
 - (i) Whether the Respondent had valid reasons to terminate the Claimant's employment?
 - (ii) Whether the termination of the Claimant's service was unlawful?
 - (iii) Whether the Claimant is entitled to the reliefs sought?
 - (iv) Who should bear the costs of this suit?
8. The Respondent filed its submissions on 29 March 2021, and it set out the Issues for adjudication as:
 - (i) Whether the Claimant was lawfully and procedurally summarily dismissed by the Respondent?
 - (ii) Whether the Claimant is entitled to compensation following the summary dismissal?
 - (iii) Who should bear the costs of this suit?
9. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

10. Section 35(1) of the Employment Act, 2007 envisages the giving of written notice of termination of employment. On the other hand, section 41 of the Act requires the employer to afford the employee an opportunity to make representations before making the decision to terminate the contract. The employee is entitled to be accompanied by a colleague or trade union official during the hearing.
11. In case of summary dismissal, the written notice will not apply.
12. The Respondent issued to the Claimant a summary dismissal letter dated 28 September 2018, and therefore the written notice was not necessary.
13. However, in cases of summary dismissal, section 41(2) of the Employment Act, 2007 demands an oral hearing.
14. The Claimant testified that there was no disciplinary hearing on 26 September 2018, but he admitted attending the meeting in the Boardroom, and the agenda was performance and that he was given a termination letter on 29 September 2018, after the meeting.
15. The Respondent asserted that the Claimant was afforded an oral hearing on 26 September 2018, and it produced minutes to buttress the fact.
16. The Court has looked at the minutes. They are referenced: AVEP – SPECIAL STAFF MEETING MINUTES WITH THE BOARD PRESIDENT, and the Agenda was stated as Meeting to have Senior Program Manager Tom Achola show cause why disciplinary action should not be undertaken.
17. The minutes show that the Claimant was present, but there is no indication that he was alerted of the right to be accompanied by a colleague or that a colleague was present on his behalf.
18. The Court is satisfied that the disciplinary hearing was tainted for lack of affording the Claimant an opportunity to be accompanied by a colleague.

Substantive fairness

19. By dint of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to not only prove but prove as valid and fair the reasons for the summary dismissal of the Claimant.
20. The ground for the dismissal of the Claimant was gross misconduct. The particulars of the misconduct were given (in brief) as *abuse of power and position as a supervisor by damaging staff reputations outside the organisation (involvement in extra-marital relationships; damaging the reputation of the Respondent by sharing misleading information with its beneficiaries and breaching privacy and computer policy manual.*
21. The minutes produced in Court indicate that the Claimant had admitted that he had made allegations against some of his colleagues (named in the minutes) without any evidence or basis.
22. The Claimant did not attempt to discredit the contents or veracity of the minutes.
23. The Court can therefore conclude that the Respondent proved the first allegation against the Claimant.
24. The Respondent did not prove the allegations of sharing misleading information with its beneficiaries or that the Claimant breached the privacy/computer policy.

Compensation

25. The Respondent proved a valid and fair reason to dismiss the Claimant, but it got the process wrong.
26. The Claimant served the Respondent cumulatively for about 3-years (fixed-term contracts), and in consideration of the nature and length of the contract(s) and that there was at least one valid reason to dismiss him, the Court is of the view of the equivalent of 1-months' salary as compensation would be appropriate (the gross salary was Kshs 218,080/-).

Breach of contract

27. The Claimant sought Kshs 218,080/- on account of accrued leave. Records produced by the Respondent show that the Claimant had 27 outstanding leave days.
28. Section 28 of the Employment Act, 2007 provides for at least 21 days annual leave with full pay. In the case of the Claimant, the outstanding leave ought to have been commuted.
29. Since the Respondent did not question the Claimant's computation on this head of the claim, the Court will allow it.

Conclusion and Orders

30. The Court finds and declares that although the Respondent has proved a valid and fair reason to dismiss the Claimant, it did not comply with the statutory requirements of procedural fairness.

31. The Claimant is awarded:

(i) Compensation Kshs 218,080/-

(ii) Accrued leave Kshs 218,080/-

TOTAL Kshs 436,160/-

32. Claimant to have costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 28th day of April 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ms Imbaya instructed by Bruce Odeny & Co. Advocates

For Respondent Ms Osewe instructed by Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo Aura