



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 365 OF 2015

PETER ROESER-OTT.....CLAIMANT

v

DIOCESE OF KAKAMEGA (REGISTERED TRUSTEES).....RESPONDENT

JUDGMENT

1. On or about 15 August 2013, the Diocese of Kakamega (the Respondent) entered into a fixed-term contract with Peter Roeser-Ott (the Claimant) to serve as a Diocesan Medical Coordinator.
2. On the side-lines of the contract, the Claimant signed a rental contract with St Elizabeth Hospital Mukumu, a health entity under the Respondent.
3. Two years into the contract, on 29 July 2015, the Respondent wrote to the Claimant to notify him that it was terminating the contract.
4. On 24 September 2015, St. Elizabeth Hospital Mukumu instructed the Claimant to vacate the rental house and hand it over not later than 2 October 2015.
5. Alarmed with the turn of events, the Claimant lodged these proceedings against the Respondent alleging unfair termination of contract and breach of contract.
6. Filed at the same time was a Motion under a certificate of urgency seeking certain interim reliefs.
7. The Motion was dismissed on 5 July 2018.
8. The Respondent filed a Response on 10 November 2015, and on 23 November 2016, the Court directed the Claimant to file and serve an Amended Memorandum of Claim ahead of hearing on 27 June 2017.
9. The hearing commenced on 7 December 2020, when the Claimant and the Respondent's first witness testified.
10. The Respondent's second witness's testimony was taken on 18 January 2021 (although aware of the hearing, the Claimant's advocate was not present).
11. The Claimant filed his submissions on 12 March 2021 (should have been filed and served before 18 February 2021) in which he identified the Issues for determination as:
 - (i) Whether the Claimant was fairly dismissed?
 - (ii) Whether the Claimant is entitled to a refund for alternative housing and transport?
 - (iii) Whether the Claimant is entitled to payment for 3 years up to the end of the contract?
 - (iv) Whether the Claimant is entitled to costs and interest on the damages?
12. The Respondent filed its submissions on 29 March 2021. It did not explicitly set out the Issues for determination.

13. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as identified by the Claimant.

Unfair termination of employment

Procedural fairness

14. Unless it is a case of summary dismissal, section 35(1) of the Employment Act, 2007 contemplates that the employer will issue a written notice of termination of employment.

15. While the notice may set out the reasons for the termination of employment, section 41 of the Act obligates the employer to afford the employee an opportunity to make representations before the decision to terminate is taken if the grounds for the decision are based on misconduct performance or physical incapacity.

16. These procedural protections form basic entitlements and are in addition to any provisions in a contract.

17. The Claimant was paid by the month. The Respondent should have issued a written notice of at least 28 days, but it did not issue such notice.

18. Further, the Respondent should have afforded the Claimant an opportunity to make representations, either in writing or in a face to face meeting.

19. The Respondent's second witness testified that there was face to face discussions with the Claimant before the termination of employment. The Claimant, however, denied that he was heard before the termination of employment.

20. The letter terminating the Claimant's employment did not refer to any hearing. The Respondent's witnesses did not disclose the venue or the dates of the hearing. The names of the persons who were present were not disclosed. No minutes of the hearing were produced.

21. The Court finds that the termination of the Claimant's contract was procedurally unfair.

Substantive fairness

22. In terms of sections 43 and 45 of the Employment Act, 2007, an employer should prove the existence of valid and fair reasons to terminate an employment contract.

23. The employer must not only prove the reasons but prove that the reasons are valid and fair.

24. The letter informing the Claimant of the termination of his contract gave the reason for the termination as performance-based. The Respondent's first witness gave additional reasons during the oral hearing in Court.

25. The additional reasons were that the Claimant had failed to produce copies of his work permit and academic/professional certificates.

26. The Respondent did not call the author of the termination letter or any other person who had evaluated the Claimant's performance to testify. If any formal performance evaluation was carried, appraisals were not filed in Court.

27. If the Claimant had failed to produce his certificates or work permit, the Respondent should have formally issued a show-cause demanding that he produce the documents or risk employment termination. The Respondent did not produce any formal ultimatum given to the Claimant to produce the documents.

28. In the submissions, the Respondent urged that since the contract in place had a termination clause, that was sufficient reason to terminate the contract.

29. The Respondent's argument is no longer part of the law of the land because sections 43 and 45 of the Employment Act, 2007 expressly requires that there be valid and fair reasons before the employer can terminate an employment contract on the listed grounds.

30. The Court finds that the Respondent did not prove that there were valid and fair grounds to terminate the Claimant's contract.

Compensation

31. The Claimant served the Respondent for about 2 years, and in consideration of the length of service, the Court is of the view that the equivalent of 2 months gross salary as compensation would be appropriate (the monthly salary was Kshs 160,000/-).

Breach of contract

Salary for July and August 2015

32. The Claimant's employment was terminated through a letter dated 29 July 2015, and he cannot validly claim salaries after the date of

separation.

Salary in lieu of notice

33. The Claimant was paid by the month and by dint of section 35(1) of the Employment Act, 2007 should have been given 1-month notice.

34. Since the notice was not given, the Court will allow the equivalent of a 1-month salary in lieu of notice.

Maintenance of vehicle

35. The Claimant sought Kshs 106,110/- on account of maintenance costs for a vehicle. Clause 8(iii) of the contract provided that the Claimant would be entitled to transport.

36. The Respondent's first witness testified that the Claimant was provided with a Suzuki vehicle, but he declined to use it.

37. In the circumstances, the Court declines to allow this head of the claim.

Repair of occupational premises

38. Under section 31 of the Employment Act, 2007, the employer has an obligation to provide housing or pay house allowance.

39. The contract in place provided that the Respondent would provide the Claimant with a house. The Claimant signed a lease with St Elizabeth Hospital Mukumu, and the rent was agreed as Kshs 8,000/- per month.

40. The lease agreement provided that the Claimant would renovate the house by installing a toilet, shower, roof tank and underground water tank.

41. It is the house that the Claimant alleged that he had spent Kshs 1,853,362/50 to repair. The Claimant produced receipts.

42. The lease agreement did not state who would be responsible for the costs of the renovations. The Respondent's second witness testified that the Claimant never paid the monthly rent. The Claimant did not produce any evidence that he paid the agreed rent.

43. Under these circumstances, the Court declines to find that the Claimant was entitled to reimbursements for the renovations he may have carried out.

Lost income

44. The Claimant prayed for the income he would have earned had he served the contract's full term.

45. The contract did not provide for payment of lost income were the contract to be terminated prematurely.

46. The Court, therefore, endorses the legal position stated by the Supreme Court of Uganda in *Bank of Uganda v Tinkimanyire* (2008) UGSC 21 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Conclusion and Orders

47. From the foregoing, the Court finds and declares that the termination of the Claimant's employment was unfair, and the Claimant is awarded:

(i) Compensation	Kshs 320,000/-
(ii) Pay in lieu of notice	Kshs 160,000/-
TOTAL	Kshs 480,000/-

48. The Claimant filed submissions nearly 1 month after the agreed timeline without offering any explanation and is therefore denied costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 14TH DAY OF APRIL 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant	Mr Opondo instructed by Simiyu Opondo Kiranga & Co. Advocates
For Respondent	Mr Fwaya instructed by Gabriel Fwaya, Advocates
Court Assistant	Chrispo Aura