



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 715 OF 2016

JOSEPH MURIUNGI RUKIOYA.....CLAIMANT

VERSUS

THE METHODIST CHURCH OF KENYA.....RESPONDENT

JUDGEMENT

1. The claimant vide a statement of claim filed before this Court on 26th April, 2016 sued the respondent for the sum of Kshs 4,309,557.00 being;

- i. unpaid salary from January to August, 2015;
- ii. 3 months' salary in lieu of notice;
- iii. unpaid leave days;
- iv. compensation for unfair termination;
- v. unremitted provident funds;
- vi. accrued loan penalties;
- vii. general damages;
- viii. punitive damages; and
- ix. interests and costs of the suit.

2. The respondent did not file any response to the memorandum of claim but instead, filed a Replying Affidavit in response to the claimant's Notice of Motion dated 26th April, 2016. There was no indication on the part of the respondent that the Replying Affidavit will serve as a response to the memorandum of claim. In the circumstances, I take it that there is no response to the memorandum of claim.

3. In his statement of claim, the claimant avers that he was employed by the respondent as an assistant internal auditor on or about 9th January, 2009 up to 28th July, 2015 when his services were terminated.

4. The matter was set down for hearing on 11th August, 2021 but there was no appearance on the part of the respondents despite being served with the hearing notice to that effect. The court being satisfied with the return of service, proceeded to hear the claimant's case in absence of the respondent.

Claimant's case

5. The claimant testified that he was employed by the respondent on or about 9th January, 2009 as an assistant internal auditor and placed on a gross salary of Kshs 105,800/=. Thereafter, he was promoted to the position of Project Manager at Marimati Rural Training Center. He testified that all was well until January, 2015 when the respondent stopped remitting his salary. He was informed by the respondent that his salary was to be paid by the said Marimati Rural Training Centre. He stated that his salary remained unpaid until August, 2015 when he

received a letter terminating his employment. It was his testimony that he was neither given notice prior to the said termination nor was he paid 3 months' salary in lieu of notice as stipulated in his contract of employment and the respondent's Human Resource Management and policy Manual (HRM Manual).

6. The claimant further told Court that upon his termination, he attempted to follow up payment of his outstanding dues through his lawyers to no avail. That the only payment he received from the respondent was reimbursement of the provident funds he had contributed while in employment. He produced a pay slip for December, 2014 to confirm that at the time of exit, he was earning a gross salary of Kshs 164,700/=. He further averred that he had attempted to settle the matter out of court with the respondent but the same did not materialize. He thus prayed for the court to allow his claim as pleaded.

7. In view of the fact that the respondent did not appear in Court for the hearing, the evidence in chief by the claimant was not challenged in cross examination.

8. The claimant produced a letter of appointment confirming his employment with the respondent. The said letter of appointment contains the terms and conditions that governed the employment relationship between the claimant and the respondent. The terms and conditions stipulated in the letter of appointment include salary and allowances, probation period, leave, medical benefits, conduct at work, working hours, tenure of appointment, termination, standing order and reporting date. The claimant appended his signature at the tail end of the letter of appointment thus signifying acceptance of the terms and conditions thereunder.

9. Essentially, the said letter of Appointment constituted the employment contract between the parties and will be the reference point in interpreting the contractual relationship that is the subject to this dispute.

Submissions

10. The claimant filed written submissions through which he reiterated the averments contained in his claim. He submitted that he was unfairly terminated and was not accorded a fair hearing as required by section 41 of the Employment Act and the respondent's HRM Manual.

11. It was the claimant's submission that his termination on grounds that the respondent could no longer afford his salary is not one of the lawful reasons for terminating an employment contract. It was also his submission that the respondent did not provide a valid reason for terminating his employment.

12. The claimant cited amongst others, the following authorities in support of his case; **Postal Corporation of Kenya vs Andrew K. Tanui, Ol Pejeta Ranching Limited vs David Wanjau Muhoro, Kenfreight (EA) limited vs Benson K. Nguti and Christopher Kinama Mutunga vs Neno Evangelism Centre through its registered Trustees.**

Analysis and Determination

13. Based on the claim before Court, the evidence on record and the oral testimony of the claimant, this Court is being called to determine the following issues;

- i. Was the claimant subjected to unfair labour practice?
- ii. Whether the claimant's termination was unlawful and unfair?
- iii. Whether the claimant is entitled to the reliefs sought?

Was the Claimant subjected to unfair labour practice?

14. The claimant averred that prior to his termination, the respondent withheld his salary for close to 8 months that is, from January, 2015 until sometimes in August, 2015 when his services were terminated. He stated that he continued rendering services to the respondent despite the stoppage of salary. This position was not contested by the respondent and no evidence was tendered to the contrary.

15. The claimant's salary was provided for in the letter of appointment alongside other terms and conditions of service. The salary and allowances were to be paid by the respondent in consideration of the claimant's services. It was therefore expressly agreed between the parties that the claimant's salary would be paid as and when the same fell due and subject to the claimant rendering his services to the respondent.

16. The termination letter issued to the claimant has alluded to the fact that following the claimant's transfer, his salary was to be paid by Marimati Rural Training Centre. I have carefully perused the claimant's transfer letter dated 29th November, 2013 to Marimati Rural Training Centre and the same does not make any mention of the fact that the center would cater for the claimant's salary. The transfer letter merely mentioned that the claimant would be accountable to the presiding Bishop through the Board of Management of the Centre.

17. Indeed, the transfer of the claimant to Marimati Rural Training Centre did not extinguish the employment relationship between the parties and neither did it diminish any right accruing to the claimant and that includes payment of salary and allowances. From the onset, the claimant's salary was to be paid by the respondent. As a matter of fact, the transfer letter did not in any way alter the terms of the contract between the claimant and the respondent. In any event, it was the respondent which terminated the claimant's services. This further confirms that the claimant was still an employee of the respondent despite his transfer to the center hence was entitled to rights accruing under the employment contract. This included the right to remuneration. The totality of the foregoing is that the respondent breached the employment contract when it withheld the claimant's salary.

18. The duty of the employer to compensate an employee for services rendered is a cardinal rule in any employment relationship. This position is aptly captured under **Section 17(1)** of the Employment Act (Act) and reads as follows;

“Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...”

19. Further and to confirm the significance of this provision, Section 17 (10) of the Act provides for a penalty in the event an employer fails to make payment of or to tender wages earned or payable to an employee in accordance with section 17 (1).

20. In this regard, the respondent not only breached the employment contract when it withheld the claimant’s salary, but it also breached a mandatory statutory provision.

21. In light of the foregoing legal provisions and considering the circumstances appertaining this case, it is perceptible that the act of withholding the claimant’s salary without any justifiable cause constituted an unfair labour practice on the part of the respondent. This is also considering the fact that the actions and omissions of the respondent exposed the claimant to pecuniary embarrassment and other attendant consequences.

22. Article 41(1) of the Constitution guarantees every person right to fair labour practices. In as much as this provision appear brief and succinct, it is heavily loaded and underpins most of the provisions contained in the Employment Act.

23. The concept of unfair labour practice was extensively discussed in the case of **Elizabeth Washeke & 62 Others vs Airtel Networks (K) Ltd & another [2013] eKLR** where the Court held that;

“Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice.”

24. I fully adopt the position espoused by the learned Judge and in the circumstances, find that the respondent subjected the claimant to unfair labour practices.

Whether the termination of the Claimant was unlawful and unfair?

25. The claimant averred that his services were terminated with effect from 4th August, 2015 vide a letter dated 28th July, 2015. According to the said letter, the reason for termination was that Marimati Rural Training Centre Could no longer afford to pay his salary.

26. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. On the other hand, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove-

- a) that the reason for the termination is valid;
- b) that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
- c) that the employer was terminated in accordance with fair procedure.

27. Further, it is worth noting that the respondent customized the foregoing legal provisions and incorporated the same into its HRM Manual. In particular, Policy N0. 047 titled: **“Termination of Employment”** stipulates as follows;

“An employer shall be required to prove the reason or reasons for termination of employment. The termination of service can only be effected for offences which are not categorized as gross misconduct. Where the employer fails to do so, the termination shall be deemed to have been unfair. In order to achieve fairness principle, at all times, the employee shall be given opportunity to defend him/herself prior to terminating employment.”

28. In view of the provisions of section 43(1), 45 (2) of the Act and the HRM Manual, the respondent had the burden of proving that there was reason for terminating the claimant’s services. The question is, whether the reason fits the test set out under section 45 (2) that is to say, is the reason valid, fair and related to the employees conduct and compatibility?

29. The reason advanced by the respondent in terminating the services of the claimant is that the center could not afford his salary. This reason cannot be said to fair and valid in that the claimant was not employed by the center. Despite his transfer to the center, the employment relationship between the claimant and the respondent was sustained. The employment relationship subsisted and so did all other rights and obligations under the employment contract.

30. Section 45(2) (c) of the Act further stipulates that the termination ought to be in line with fair procedure. On its part, section 41(1) requires an employer to accord an employee a hearing prior to termination. This procedure entails the steps undertaken by the employer leading to the claimant's termination. Such steps include notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations.

31. In the instant case, the claimant was issued with a termination letter dated 28th July, 2015 which stated that the termination was to take effect from 4th August, 2015. This constituted 7 days' notice or thereabout. Clause 8 of the employment contract provided that notice for termination was 3 months and in lieu thereof, payment of salary equivalent to 3 months. As I have indicated herein, these provisions have been replicated under the respondent's HRM Manual.

32. Subsequently, the claimant was entitled to 3 months' notice prior to termination and in lieu thereof, payment of salary equivalent to 3 months. This was not done and thus, the respondent failed to follow its own procedure in effecting the termination of the claimant.

33. Besides not issuing the claimant with the requisite 3 months' notice, the respondent also failed to prove that it accorded the claimant fair hearing prior to his termination. This was also contrary to the respondent's own HRM Manual.

34. In the case of **Kenfreight (E.A.) Limited v Benson K.Nguti, Civil Appeal No. 31 of 2015**, the Court of Appeal held that;

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.

35. It was therefore not enough to merely issue the claimant with a letter terminating his services. The respondent was required to go a step further and explain to the claimant the reasons for the termination in the presence of another employee or a union official in a language that he understands.

36. The total sum of the foregoing is that I find that the termination of the claimant was unlawful and unfair.

Available remedies

37. Having found that the respondent subjected the claimant to unfair labour practices and unlawfully terminated his services, the question that now falls for determination is what reliefs obtain to the claimant. The answer to this question can be found in the pleadings, the evidence on record and the law applicable and I proceed to award as follows;

Salary in lieu of notice

38. The contract governing the relationship between the parties stipulated that the notice period was 3 months. The termination letter gave the claimant 7 days' notice. This was not in compliance with the stipulated procedure hence the claimant is entitled to 3 months' gross salary as prayed.

Unpaid salary

39. The claimant also prayed for unpaid salary. This position was not controverted by the respondent. In any event, the respondent confirmed this position in the termination letter by stating that the center could not afford the claimant's services after December, 2014. I will therefore award salary for 7 months 4 days and not the 8 months pleaded as I note that the last day of the claimant's service was 4th August and not the end of August.

Compensation for wrongful and unfair termination

40. Having found that the claimant's services were unlawfully and unfairly terminated, I will award him damages equivalent to 9 months gross salary. This is taking into consideration the fact that the claimant's services were terminated on no fault of his own. Further, the claimant was subjected to unfair labour practice as his salary was withheld for about 7 months prior to his termination and this compounded his distress.

Unpaid leave

41. The claimant has prayed for accumulated leave days and leave allowance for 2014 and 2015. As per the terms of the employment contract, the claimant was entitled to 30 days leave and leave travelling allowance at the rate of 50% of the basic salary per annum. The claimant also annexed a leave application form in respect of leave for the year 2014. It shows that he carried forward 10 days leave into 2015. The claimant is therefore entitled to unpaid leave on a prorated basis. He has however not adduced any evidence to show that he was not paid leave allowance for 2014 hence I will make any award in that regard.

Provident fund

42. The claimant has prayed for unremitted provident fund in respect of the year 2014 and 2015. As per the terms governing the claimant's contract, he was a member of a contributory pension scheme. He has also admitted that the contributions he had made towards the provident

fund were reimbursed to him after exit. Accordingly, I will not make any award under this head.

43. Accrued loan penalties

The claimant has prayed for accumulated loan penalties in the sum of Kshs 42,574/=. I decline to make any award under this head as I find that the compensatory damages awarded to the claimant on account of unlawful termination would make good his loss.

Orders

44. In conclusion, I enter Judgment in favour of the claimant against the respondent as follows;

3 months' gross salary in lieu of notice	494,100.00
Compensation equivalent to 9 months' gross salary	1,482,300.00
Unpaid salary for 7 months 4 days	1,174, 860.00
Leave allowance for 2015	37,850.00
Accrued leave days for 2014 and 2015 (27.5 days)	150,975.00
Total	<u>3,340,085.00</u>

45. The award shall also be subjected to interest at court rates from the date of judgment until payment in full.

46. The award shall be subject to statutory deductions.

47. Costs follow the event and hence the respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Oduk for the Claimant

No appearance for the Respondent

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE