



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2168 OF 2015

(Originally Machakos High Court Civil Case No. 69 of 2006)

PETER MUTUNGWA NGALU

CLAIMANT

v

CENTRE FOR WILDLIFE MANAGEMENT STUDIES LTD RESPONDENT

JUDGMENT

1. Peter Mutungwa Ngalu (Claimant) instituted these proceedings against Centre for Wildlife Management Studies Ltd (Respondent) before the High Court on 20 July 2006 alleging wrongful dismissal and breach of contract.
2. The Respondent filed a *Defence* on 3 October 2006, and on 18 October 2006, the Claimant filed an *Amended Plaintiff*.
3. The Claimant filed his proposed Issues for trial on 1 February 2007 while the Respondent filed its proposed Issues for trial on 27 November 2007, and hearing commenced before the High Court on 28 November 2007.
4. On 23 April 2012, the Claimant applied to the High Court to transfer the suit to this Court and the order was given on 17 July 2015.
5. Upon the transfer, the parties filed witness statements and hearing commenced afresh on 28 May 2019 and continued on 11 July 2019 and 4 December 2019. The Claimant and his former colleague, and the Respondent's Centre Director testified.
6. The Claimant filed his submissions on 31 January 2020 (should have been filed/served before 4 January 2020) while the Respondent filed its submissions on 17 February 2020.
7. The Court has considered the pleadings, evidence and the submissions, and identified the Issues for determination as examined hereinafter.

Commencement of employment relationship

8. The Claimant contended that he was employed by the Respondent in 1987 and to demonstrate the relationship, he produced a *To Whom It May Concern* letter dated 5 April 1986 and issued by *School for Field Studies* confirming that he had served as a Program Director; a letter dated 30 April 1986 by an Instructor at the *School for Field Studies* confirming he had worked with the Claimant and an appreciation letter from the Respondent's Centre Director dated 14 December 2000 acknowledging that the Claimant had extended assistance him. The Claimant also produced a letter from the Respondent dated 15 March 2006 sending him on leave.
9. The Claimant also produced an employment contract signed on 2 October 2000 by the Vice President of the *School for Field Studies*.
10. The Claimant testified that the Respondent was previously known as *School for Field Studies* until it changed or assumed the name *Centre for Wildlife Management Studies* in 1996.
11. The witness called by the Claimant to confirm the employment relationship and status of the Respondent testified that he was employed by the *School for Field Studies* in 1992 as a Camp Assistant and that the School assumed the name *Centre for Wildlife Management Studies* in 1996.
12. The Respondent's witness denied that the Claimant was employed in 1986 as it had no records of such employment. He also testified that the *School for Field Studies* was registered in the United States of America and that the Respondent was one of its centres (but only

registered in 1996). He stated that according to the records, the Claimant was employed in 2000.

13. It is ordinarily the responsibility of the employer to prepare and issue an employment contract.

14. The parties herein were not able to produce any formal contract prior to 2000. The Claimant sought to rely on secondary evidence to demonstrate a relationship with the Respondent prior to 2000.

15. The Respondent admitted a relationship between the Respondent and *School for Field Studies*.

16. The Claimant produced secondary records from as early as 5 April 1986 to demonstrate that he had a contractual relationship with the *School for Field Studies* prior to 2000.

17. In light of the secondary records and the Claimant's testimony under oath, the Court is satisfied that the Respondent was an agent/factor of the *School for Field Studies* and that the Claimant was engaged in 1986, and the Respondent being a successor/factor of *School for Field Studies* would be liable to the Claimant.

Wrongful dismissal

18. The Claimant was sent on compulsory leave on 15 March 2006. He was informed of his summary dismissal through a letter dated 1 April 2006. The reason given was fraudulent financial transactions.

19. The Claimant, however, contended that the real reason for his dismissal was because of a travel advisory issued by the United States Government in May 2003 leading to reduced operations. He produced a copy of a Memo dated 27 March 2006 from the Respondent's Centre Director to all staff.

20. Under the law in 2006, an employer could dismiss an employee for no reason, a bad reason or for lawful cause provided that notice in terms of the contract was given, or pay in lieu thereof was paid. A hearing was not necessary unless expressly provided for.

21. The copy of the contract (at least from 2000) produced in Court did not have a termination clause.

22. The Claimant was not given any notice of termination but he was paid twice in a month.

23. Prior to the dismissal, he had been sent on compulsory leave on 15 March 2006 after a financial audit had established questionable financial transactions.

24. Considering the circumstances leading to the Claimant being sent on leave (audit report), it is the finding of the Court that the separation between the Claimant and Respondent was not for *operational reasons* but due to alleged financial fraud.

25. In the circumstances, the Court is of the view and finds that the Claimant should have been given 1-month notice or 1-month pay in lieu of notice. The monthly pay of the Claimant as of 1 September 2004 was US \$ 1,404 (annual salary was US \$ 16,853).

26. The Claimant is entitled to the same as salary in lieu of notice.

27. General damages for wrongful dismissal was also not a remedy available in 2006. All that a wrongfully dismissed employee was entitled to was damages equivalent to the notice period, and if there was no notice period, a reasonable notice period.

28. Having concluded that this was not a case of redundancy, the plea for *severance pay* is not sustainable.

Breach of contract

Annual leave

29. Annual leave with full pay was and is still a statutory entitlement of every employee.

30. The Claimant asserted that he never went on leave during the tenure of the employment and he sought the equivalent of 2,280,000/-.

31. Explaining why he did not take leave for nearly two decades, the Claimant stated that despite applying for leave, he was not permitted to go on the leave unless the Centre Director was present/available and that the Centre Director was frequently out of the country, in the United States.

32. In other words, the Claimant was saying that there was nobody except himself to hold the fort.

33. The Respondent in resisting the head of the claim for accrued leave made reference to a letter dated 19 April 2006 in which the Claimant demanded for the balance of 3 months out of 4 months pending leave.

34. If indeed the Claimant had accumulated leave as pleaded, he did not tender any explanation why he did not state so in the aforesaid letter.

35. Based on the material placed before Court and more so the Claimant's letter of 19 April 2006, the Court finds that the Claimant had accrued leave of 3 months by the time of separation and that in lieu thereof, he would be entitled to the equivalent of 3 months' salary.

Lost earning

36. The Claimant claimed Kshs 14,400,000/- being the income he would have earned had he served the Respondent up to date of retirement. He disclosed that he was 45 years old at the time of dismissal.

37. The Court can do no better than to endorse the legal proposition by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 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.

Accrued/accumulated pension

38. On account of pension, the Claimant sought unquantified accrued and/or accumulated retirement/pension (contributions).

39. The employment agreement provided for a retirement program under 403b. The particulars of the program were not revealed in Court.

40. However, since the contract provided for a retirement program, the Respondent should facilitate the Claimant to get his retirement benefits as soon as practicable under the program.

Conclusion and Orders

41. From the foregoing, the Court finds and declares that the summary dismissal of the Claimant was wrongful.

42. The Claimant is awarded

(a) 1-month pay in lieu of notice US \$ 1,404

(b) Accrued leave US \$ 4,212

TOTAL US \$ 5,616.

43. The Claimant to have costs on a half-scale, having only succeeded partially and not filing submissions within agreed timelines.

Delivered, dated and signed in Nairobi on this 28th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Nzei instructed by Nzei & Co. Advocates

For Respondent Mr. Muoki instructed by Muoki & Co. Advocates

Court Assistant Lindsey/Judy Maina