



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 594 OF 2019

MARK AGOYA.....CLAIMANT

VERSUS DEPARTMENT FOR INTERNATIONAL

DEVELOPMENT (DFID).....RESPONDENT

JUDGMENT

1. Mark Agoya (Claimant) was offered employment as a Humanitarian Adviser, Somalia through a letter dated 26 September 2016 by the Department for International Development (Respondent).
2. In the course of employment, the Respondent received complaints of sexual misconduct against the Claimant and it commissioned investigations to be conducted. The Claimant was suspended pending investigations on 4 September 2018.
3. The investigations were conducted and a recommendation was made to dismiss the Claimant.
4. On 20 November 2018, the Respondent's Head, Somalia wrote to the Claimant to notify him of dismissal on account of gross misconduct. This was after a disciplinary hearing held on 13 November 2018.
5. The Claimant appealed against the dismissal and an appeal hearing was held on 9 January 2019. On 1 February 2019, the Appeal's Manager informed the Claimant that the appeal was not successful.
6. The Claimant was dissatisfied and he caused his legal advisers to issue a demand notice to the Respondent on 19 February 2019 alleging unfair termination of employment and breach of contract.
7. The Respondent's advocates replied to the demand on 29 February 2019 asserting that the dismissal of the Claimant was lawful.
8. The response prompted the Claimant to institute these legal proceedings on 6 September 2019 wherein he stated the Issues in Dispute as
 - (i) Unfair and unlawful dismissal from employment.
 - (ii) Unfair administrative action.
9. According to an affidavit of service filed in Court on 25 September 2019, Notice of Summons and copy of the Statement of Claim were served upon the Respondent and acknowledged by one Yvonne Rukunga of Human Resource Department on 16 September 2019.
10. In terms of the Rules of this Court, the Respondent should have entered Appearance/filed a Response within 21 days.
11. When the Cause came up for directions on 28 November 2019, the Court being satisfied that there was no Appearance or Response on record certified that the Cause proceeds to formal proof.
12. The Cause was heard on 3 March 2020. The Claimant testified under oath and produced exhibits.
13. The Claimant's submissions were not on record by 24 April 2020 as agreed nor by the extended deadline of 30 April 2020.
14. The Court has considered the pleadings and evidence on record and identified the Issues for determination as

- (i) Jurisdiction.
- (ii) Whether the dismissal of the Claimant was unfair.
- (iii) Appropriate remedies.

Jurisdiction

15. The Court raised the question of jurisdiction *suo moto* and directed the Claimant to address it.
16. In responding to the Court's concern, the Claimant asserted that under Article 11(1) of the *United Nations Convention on Jurisdictional Immunities of States and their Properties*, the Respondent was not immune from the instant action. The Claimant stated that the United Kingdom ratified the Convention on 30 April 2005.
17. The said provision provides Article 11(1) Contracts of employment
- 1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
18. The Court also finds Article 11(2)(d) relevant. It is in the following terms 2. Paragraph 1 does not apply if:
- (a) ...
 - (b) ...
 - (c) ...
 - (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
19. Since the Respondent did not participate in the proceedings to demonstrate that these proceedings fall within Article 11(2)(d), the Court will say no more.

Unfair termination of employment

Procedural fairness

20. The statutory minimums in this jurisdiction on the procedural protections assured to employees are found in sections 35(1), 36 and 41 of the Employment Act, 2007.
21. If an individual contract has addition protections, the employer should also consider them before deciding to dismiss an employee.
22. The Claimant was placed under suspension through a letter dated 4 September 2018. The letter informed him that investigations on allegations of sexual misconduct made against him would be carried.
23. The Claimant was invited to appear and did appear before the Investigator on 5 October 2018. The disciplinary hearing was held on 13 November 2018.
24. Despite the steps, the Claimant challenged the process on the grounds that he was not served with the allegations or details thereof prior to the investigatory process; he was not provided with particulars of his accusers; he was only provided with heavily redacted witness statements and investigations report; that the process went beyond the 40 days provided for under the Respondent's Guidelines; that his responses and those of his witness were not considered and that the venue of the disciplinary hearing was stressful/not conducive forcing him to only respond through email.
25. According to the Claimant, the process did not only fail the test of the Respondent's internal standards but also fell short of the requirements of fair administrative action and of the right to access information.
26. Right from the outset, the Court must indicate that it finds no merit in the complaint by the Claimant that the process was delayed. The complaints of sexual misconduct against him were received from May October 2018. He was suspended on 4 September 2018 and by 20 November 2018, a decision was made to dismiss him.
27. On the contention that he was not served with allegations prior to the investigative process, it is regrettable that the Claimant did not exhibit a copy of the suspension letter dated 4 September 2018 to enable the Court to determine whether he was made aware of the details of the suspension and/or investigations.

28. In respect to the disciplinary hearing, the Claimant was served with a copy of the investigation report, however, redacted. He was also furnished with redacted witness statements.

29. It is true that as a general rule, the employer should furnish or disclose to the employee facing disciplinary proceedings with all requisite information to prepare a defence, but due to confidentiality, an employer may redact or anonymise identity of witnesses. It is also true that a disciplinary hearing should not be turned into a mini-court with the strictures of a criminal trial.

30. In this case, the Claimant made a detailed response through email on 12 November 2018. In the response, the Claimant responded to each allegation.

31. In the view of the Court, the Claimant's response shows that he knew the particulars of the allegations to confront during the disciplinary hearing including the time frames and that he was not prejudiced by the mere fact that names were redacted.

Substantive fairness

32. Pursuant to 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 dismissing the Claimant.

33. The Respondent, despite service, failed to enter Appearance and/or file a Response. It, therefore, failed to discharge the statutory burden placed upon it and the Court has no option but to conclude that the dismissal of the Claimant was not for valid or fair reasons.

Compensation/Reinstatement

34. The Claimant sought compensation and/or reinstatement but did not lead any evidential foundation as to the appropriateness of reinstatement. Reinstatement is declined.

35. The Claimant had served the Respondent for about 3 years on the contract (he had served previous contracts) and had a legitimate expectation to continue serving until retirement.

36. Considering these factors, the Court is of the view that the equivalent of 3-months' salary would be fair and appropriate (gross salary was Kshs 710,026/-).

Breach of contract

Leave

37. Annual leave is a statutory entitlement.

38. Although seeking *pro-rata* leave, the Claimant did not set out or the particulars of the leave, but in light of section 10(3) of the Employment Act, 2007, the Court will allow this head of the claim.

Appropriate remedies

Severance pay

39. The Claimant's position was not declared redundant and because he did not lay any other foundation for this relief, the Court declines to award severance pay.

Damages for lost income to retirement

40. The Claimant made a plea for damages in respect of the income he would have earned up to retirement age at 62 years.

41. The Court will reject this head of relief and endorses the position by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (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.

Damages for loss of reputation

42. In seeking damages for loss of reputation, the Claimant was advancing a claim for defamation. He did not plead defamation expressly nor prove defamation to the requisite standard.

Conclusion and Orders

43. The Court finds and declares that the dismissal of the Claimant was unfair and awards him

(a) Compensation **Kshs 2,130,078/-**

44. The Respondent to compute the Claimant's *pro-rata* leave and pay as part of this judgment.

45. The Claimant is denied costs for failing to file submissions even within the extended timelines.

Dated, signed and delivered through video/email in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyaribo instructed by Muthaura Mugambi Ayugi & Njonjo Advocates

Respondent did not participate

Court Assistant Judy Maina