



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 42 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOHN HAWALA OGOLA.....CLAIMANT

VERSUS

ST. MARYS HOSPITAL.....RESPONDENT

JUDGMENT

1. The suit was filed on 22nd April 2016 by the claimant seeking for the following reliefs:
 - (a) Payment of his pending overtime and emergency call allowances of Kshs. 6,630,192 for service rendered from 2011 to 2015.
 - (b) Payment of salary arrears of Kshs. 1,650,000 for a total of 33 months.
 - (c) Payment of Kshs. 7,859,160 for lost pay from the time the contract was prematurely terminated.
 - (d) Costs and interest
2. The respondent filed a response to the statement of claim and counter claim on 17th November 2016 in which the claim is denied in its totality and the respondent counter claims Kshs. 826,850 being house allowance paid to the claimant whilst he was still housed by the respondent and was supposed to pay rent.
3. CW1, the claimant testified that he was a Doctor Surgeon by profession and worked for the respondent from the year 2011 to 2015. The claimant produced a contract of Employment marked exhibit 1'.
4. In terms of the employment letter emailed to the respondent following a successful interview on 29th January 2011, the claimant was employed as a surgeon in job group R for a contract period of three years. The claimant accepted the contract via email to the respondent on 3rd March 2011 stating that he was ready to start work latest on 18th March 2011 to give him time to leave his current employer at the time.
5. In terms of the contract, the basic salary of the claimant was Kshs. 98,947 and was entitled to various allowances as follows:
 - (a) Non private practice allowance (NPPA) Kshs. 125,000.
 - (b) Risk allowance Kshs. 20,000.
 - (c) Comprehensive allowance Kshs. 6,675.
 - (d) House allowance at 15% of the basic salary should the respondent be unable to house the claimant.
 - (e) 25% of the basic salary being gratuity on completion of the contract.
 - (f) Free medical treatment within the hospital for the claimant, spouse and children below 18 years of age.

6. The contract also provided:

“you will also be allowed to charge consultation fee on corporate patients and those able to pay should they be admitted and managed in the hospital”

7. CW1 testified that the actual contract is dated 5th May 2011 and was to end on 30th April 2014. That CW1 served the contract to the end and was paid gratuity.

8. That CW1 renewed the contract, continued working on same terms but the new contract was not reduced into writing. The claimant served up to May 2015. As per the discussions held by the Board on 8th April 2015, a copy of which the claimant produced as exhibit ‘2’, the claimant was supposed to serve a further term of three years. However, the contract of employment was terminated for the reason that there was a pay roll burden at the hospital that the respondent was not prepared to continue shouldering. The Board therefore discontinued the work of the claimant for no fault done.

9. CW1 testified that he got a letter terminating his employment dated 8th April 2015 which he produced as exhibit ‘3’.

10. In terms of the contract of employment exhibit ‘1’ clause 7, it was provided that:

“Not later than three (3) months before the expiration of this agreement the employer and employee will both give notice in writing of intent to renew or discontinue this agreement”.

11. CW1 testified that this termination clause was implied in the continued verbal contract. CW1 testified that he was not given any notice of termination. CW1 said that he was thanked for exemplary service and was to be paid gratuity and in lieu of leave days not served. The claimant states that he is owed salary for the unserved term. That at the time of termination, the claimant earned a gross salary of Kshs. 349,556 which included Basic Salary, House allowance, Non-practice allowance, Risk allowance and Call allowance. CW1 produced a pay slip marked exhibit ‘4’.

12. CW1 stated that he prayed to be paid as set out in the statement of claim. CW1 testified that the Board had requested the claimant to stop charging surgeon’s fees and instead the respondent would pay the claimant an allowance of Kshs. 50,000 in lieu thereof. The claimant testified that despite several reminders, the Kshs. 50,000 surgical allowance was not paid for a period of 33 months. The claimant produced a letter of demand dated 29th May 2015 for payment of Kshs. 1,650,000 being unpaid allowance at Kshs. 50,000 for 33 months.

13. CW1 relied on the letter of offer dated 28th February 2011 which he duly accepted; invitation letter to a Board meeting dated 9th August 2012 in which the issue was dismissed; minutes of the Board meeting held on 9th August 2012 and in particular minute no. BOD. EG/02/08/12 and a letter of reminder addressed by the claimant to the Chairman of the Board Rev. Father Hamisi on 3rd September 2013. CW1 testified that he was allowed to charge consultation fee from May 2011 to August 2012 and he earned between Kshs. 80,000 to Kshs. 120,000 a month as consultation fees. The Board agreed to replace the consultation fee with a surgeon fees of Kshs. 50,000 per month which is now claimed.

14. CW1 produced pay slips marked exhibit 7 (a) to (e) which do not reflect the consultation fees and also produced pay slips marked exhibit 8(a) and (b) which previously reflected payment of consultation fees. The charges according to CW1 were introduced by a new hospital administrator Dr. Japheth Robera.

Overtime

15. CW1 testified further that he was the only surgeon at the hospital from 2011 to 2015. That he only had medical and clinical officers to assist him. He was the only consultant. The other officers could not perform surgery. CW1 testified that he had to be present for 24 hours yet he was supposed to do 8 hours a day. That he worked also during Saturdays and Sundays yet normal working hours were Monday to Friday from 8 a.m to 5 p.m with a break. CW1 testified that he did not make this claim in writing whilst he worked. That overtime was not paid. That one Dr. Ligeyo, a surgeon stepped in to help from time to time but he was employed elsewhere on private practice. He assisted the claimant once in a while while the claimant was away.

16. CW1 also admitted that Dr. Alisula is a surgeon but only came to the respondent hospital to see his patient but not to cover the claimant. CW1 also stated that when he required more than one surgeon, he requested for friendly support. This is why there is a list showing other doctors performing surgery. That most did Sicilian section to mothers. That all medical doctors do that and this was not the claimant’s duty as a surgeon. CW1 said that he performed major surgeries. CW1 stated there was a duty roster made by CW1 to bring clarity to work schedules for the few doctors. CW1 covered the doctors who had no one else to cover them since they were few, they had to constantly cover each other.

17. CW1 denied working in other hospitals whilst he served the respondent. He prays the suit be allowed with costs. CW1 stated that the counterclaim was baseless. He admitted that he was paid house allowance and at the same time the respondent housed him within the hospital so as to be present for all the extra hours he was supposed to work. CW1 stated that the respondent never raised this issue at all whilst he worked for the respondent. That no demand to refund house allowance paid was ever made on him.

18. RW1 Steve Walele Khaemba testified for the respondent. RW1 testified that the claimant was paid overtime and produced exhibits ‘I’ to ‘5’ in support of the respondent’s case. RW1 stated that overtime was catered for by comprehensive allowance which the claimant was paid as per the pay slips produced. RW1 said that the claimant was a resident surgeon and that is why he was housed at the hospital to be available for 24 hours. That the claimant was not supposed to work elsewhere but he offered services at Siaya County hospital at the same

time. That CW1 was not the only surgeon at the hospital. Other visiting surgeons included Dr. Daniel Oluoch ,and Dr. Managwe. RW1 added that the duty roster shows that other doctors supported the claimant. RW1 stated that there was no agreement to pay the claimant Kshs. 50,000 over and above his agreed salary.

19. RW1 said that this decision was communicated to the claimant. That the claimant was given one month notice of termination. He was paid in lieu of one month notice and did not object to the payment. RW1 stated that the respondent claims Kshs. 826,850 being house allowance paid when the claimant was also housed by the respondent for the period of 50 months.

20. Under cross examination, RW1 admitted that comprehensive allowance was not stated to cover overtime in the contract of employment. RW1 said that the company manual explained this but it was not before court. RW1 said that he did not see the letter of termination but saw the minutes of the Board when it made the decision to terminate.

21. RW1 added that the claimant was paid gratuity for the period served i.e one year and in lieu of 40 leave days not taken. That the claimant's contract was not terminated for any misconduct but the respondent did not renew his contract due to the heavy payroll. That the claimant was to take terminal leave immediately.

22. That there was no disciplinary process against the claimant. The Board did not discuss that the claimant owed any money to the respondent. RW1 admitted that the issue of Kshs. 50,000 payment was discussed in the Board meeting of 9th August 2012 in the presence of the claimant. RW1 admitted that the meeting noted that the surgeon (the claimant) had been allowed to charge consultancy fees but he was to stop charging the consultancy fees and he would be paid surgeon's fee of Kshs. 50,000 per month from September 2012. RW1 admitted that the surgeon's fee was not paid. RW1 denied that the claimant was overworked stating that he was assisted by other doctors. RW1 prays the suit be dismissed with costs.

Determination

23. Upon a careful analysis of the evidence adduced, the court is satisfied that the claimant served the respondent from the year 2011 up to the year 2015. For the first three years of service, the claimant was on a written contract specifying his terms and conditions of service. Upon completion of those three years, the claimant was paid all terminal benefits in terms of that contract. Upon termination of the first contract of service on 30th April 2014, the claimant continued to work for the respondent on the same terms but without any written contract. The claimant served the respondent until when his employment was terminated by a letter dated 8th April 2015.

24. According to RW1, the termination was on account of inability to pay the excessive payroll. In other words, the claimant was retrenched for operational reasons. That the claimant did not face any allegations of misconduct nor was he subjected to any disciplinary hearing. The claimant states that the termination of his employment was wrongful and he be paid salary for the remainder of the three year contract.

25. In terms of *Section 35 (1) (c) of the Employment Act*, a contract not being a contract to perform specific work without reference to time or where the contract is to pay wages at intervals of one month or more is deemed to be a contract terminable by either party at the end of the period of twenty eight (28) days' notice provided in terms of *Section 35(4)* , the right of an employee to dispute the lawfulness or fairness of the termination in accordance with the provisions of *Section 46* of the Employment Act or the right of the employer to terminate the contract without notice for lawful cause is not affected.

26. In the present case, according to the testimony by RW1, the termination of the employment of the claimant was due to the inability of the respondent to pay the salary of the claimant. It follows that the termination of the Employment of the claimant was a declaration of redundancy in terms of *Section 40 read with Section 2 of the Employment Act, 2007*.

27. Accordingly, the respondent was bound to follow the mandatory requirements under *Section 40(1) (a) to (g) of the Act* by giving the claimant and the ministry of labour at least one (1) month notice of termination; explain to the claimant the reason for selecting him for declaration of redundancy; to pay the claimant in lieu of all leave days not taken; pay the claimant in lieu of one month notice and pay the claimant severance pay at the rate of not less than fifteen days pay for each completed year of service.

28. In the present case, the respondent complied with all the pre-conditions of declaring the redundancy except giving one month notice of declaration of redundancy to the ministry of labour and to the claimant in terms of *Section 40 (1) (b)*. This notice is not satisfied by payment in lieu of one month notice under *subsection 40(1) (g)*. The claimant was the only resident surgeon for the hospital and so there were no other employees to be compared with for selection purposes. The respondent had decided that it could no longer afford the hefty pay earned by the claimant but it did not engage the claimant in any options available to retain him as a resident surgeon, may be on revised terms. Failure to consult the claimant in this respect was a further derogation of the mandatory pre-condition of declaration of redundancy under *subsection 40(1) (c)*.

29. Accordingly, the termination of the employment of the claimant on grounds of redundancy was substantively and procedurally flawed and violated *sections 40, 41, 43 and 45 of the Employment Act, 2007*. The claimant is entitled to damages in terms of *Section 49(1) (c) and (4) of the Act*.

30. In this regard there are mitigating factors in that the claimant was paid in lieu of one month notice. The claimant was paid in lieu of 40 days leave not taken. The claimant was paid gratuity at the rate of 25% of the served term of one year from the date the last contract ended. The claimant however did not contribute to the termination. The claimant was surprised by the sudden termination in violation of the law. The claimant was not compensated for the loss of a very senior professional career. The claimant suffered loss and damage and the court deems this an appropriate case to award the claimant equivalent of one month salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. 399,456.

31. **Terminal benefits**

(a) **Overtime**

The claimant received a comprehensive gross salary as a resident surgeon including payment of housing allowance and at the same time was housed for no extra pay at the hospital. This remuneration was tailored to cater for the 24-hour availability of the resident surgeon on call assisted by other resident medical officers, clinical officers, nurses and visiting surgeons. The claimant did not demand payment of overtime while he served the completed first three years contract and during the extended verbal one year contract. The claimant has failed to prove on a balance of probabilities that he was entitled to any further payment save for the comprehensive consolidated package he received as a monthly salary. This claim lacks merit and is dismissed.

(b) Salary arrears for the unserved 33 months.

The claimant has not proved that he had a written three years contract with the respondent from May 2014. This claim lacks merit and is dismissed.

(c) Kshs. 50,000 per month being surgeon fees from September 2012 until termination of employment.

32. RW1 admitted that the respondent had agreed to substitute the charges by the claimant of consultancy fees per every corporate patient with payment of a flat rate of surgeon's fee of Kshs 50,000 per month. RW1 fully collaborated the testimony by the claimant as supported by the documentary evidence presented in court by the claimant in support of this claim. The court finds that the claimant has proved on a balance of probabilities that he was owed by the respondent Kshs. 50,000 per month from September 2012 until the date of termination in the sum of Kshs. 1,650,000 (33 months). The court awards this sum accordingly.

33. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

(a) Equivalent of one month salary being compensation for the unlawful and unfair termination of employment including the Kshs. 50,000 surgeons fee in the sum of Kshs. 399,456.

(b) Kshs. 1,650,000 being unpaid surgeon's fee for 33 months.

(c) Interest at court rates from date of judgment with respect to (a) above and from date of filing suit with regard to (b) above till payment in full.

(d) Costs to follow the event.

Judgment Dated, Signed and delivered at Nairobi this 13th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Namatsi for claimant.

M/S Khotshi for Respondent

Chrispo – Court Clerk