



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2159 OF 2016

DICKSON OCHIENG'OUMA.....CLAIMANT

VERSUS

KENYA RED CROSS SOCIETY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 19.10.2016 in person. The respondent appointed Edwine Okuta Advocate to act in the matter. The respondent filed the statement of response on 05.04.2017 and prayed that the claimant's suit be dismissed with costs and interest. The claimant filed a reply to the response on 08.05.2017. The respondent subsequently filed amended statement of claim on 25.06.2018 through Ombachi Morasia & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Review of termination
- b) Terminal benefits Kshs.1,152,000.00.
- c) Compensation for unlawful loss of income
- d) General and exemplary damages.
- e) Costs of the suit.
- f) Interest.
- g) Other relief the Honourable court deems fit to grant.

The claimant testified to support his case. The respondent did not call a witness and despite service did not attend the hearing. The claimant filed final submissions. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service. The claimant was employed on short term contract as a food monitor from 20.09.2011 to 31.12.2011 in East Pokot. He was transferred to Daadab Refugee Camp as Data Assistant effective 01.12.2011. On 01.01.2012 his contract was extended to 30.06.2012 and on 22.06.2012 it was further extended until 31.10.2012. The claimant was appointed as Administrative Assistant from 01.11.2012 to 30.04.2013 and was further renewed for 8 months from 01.05.2013 to 31.12.2013.

To answer the **2nd issue** for determination the Court returns that the respondent terminated the contract of service by the letter of summary dismissal dated 07.11.2013. The summary dismissal was on account of the claimant's repeated and unlawful withholding of part of payments meant for employees; and repeated negligence in discharge of duties. The final dues included salary up to 08.11.2013, leave earned but not utilized, and pension invested with the fund manager.

The **3rd issue** for determination is whether the summary dismissal was unfair. The claimant alleges the termination was based on unfair procedure, the reasons were not valid and it was actuated with malice. He says he was not given prior notice. However, the evidence is that he was given a letter to show cause dated 27.10.2013 and he attended a disciplinary hearing on 28.10.2013. The allegations were that he had not paid security guards in full despite receiving the full amount from finance and he paid them only after intervention from other staff. He

was also alleged to have raised a false working advance as per diem on behalf of two colleagues despite their having not gone on a referral on the date in question. He had also been absent from duty for two days until he was contacted by his manager. The record of disciplinary hearing shows that the claimant denied paying the guards late. In his evidence before Court he narrated how he belatedly paid the guards Kshs. 2,000.00 at a time he was travelling to Nairobi. The Court finds that by his own evidence, the claimant admitted the late payment although with an excuse he did not pay the guards full salary because he was travelling and had no money on his M-Pesa account yet he had received the full money to pay the guards. The record of disciplinary hearing shows that the claimant acknowledged that there was administrative lapse in his administrative responsibilities with regards to raising advances for other staff as per diem. The claimant admitted that on 22nd and 23rd October he was not at work as was alleged until his supervisor contacted him on 23rd October. The claimant explained that on the two days he had been unwell but he failed to notify his manager yet he had written emails to other staff. The Court has considered the evidence and returns that the claimant was accorded due process of a notice and hearing and as at the time of dismissal, the respondent had valid reasons to dismiss. Thus the Court finds that the respondent followed due procedure and the reasons were valid as per sections 41, 43 and 45 of the Employment Act, 2007. The termination was not unfair. In the circumstances the claimant is not entitled to compensation for alleged unlawful termination and pay in lieu of termination notice as prayed for.

The Court further finds that the claimant is not entitled to the other remedies as prayed for. In particular, the Court finds as follows:

- a) The claimant has not provided a statutory or contractual basis for the claim of Kshs. 150,000.00 for severance pay.
- b) The statement of claim was filed on 19.10.2016. It is submitted that leave claims are for period of 2 years in 2012 and 2013. The Court considers that the injury was of a continuing nature and the time of limitation was 12 months as per section 90 of the Employment Act, 2007. Thus the claim will fail as time barred.
- c) The claimant prays for per diem allowance of Kshs. 22,000.00 when he went to border town of Galmagala for 4 nights. The claimant testified he received a telephone call on the assignment and on a date he did not recall. He further testified that the rate of per diem was Kshs. 5,500.00 per night but it was not stipulated in his letter of appointment but was provided in the HR manual he had not exhibited. In such circumstances and evidence the Court returns that the claimant has failed to provide sufficient evidence to justify the claim.
- d) The claimant also prayed for rest and recuperation which he testified was given to staff in hardship areas to facilitate reunion with family every 6 months. He claimed for 2013 1st and 2nd six months at Kshs.20,000.00. He testified that it was provided for in the UNHCR document but which he never exhibited and never explained how the alleged document came to apply to his contract of service. The Court therefore returns that the prayer will fail as not justified.
- e) The respondent failed to participate at the hearing and each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

Signed, dated and delivered by the court at **Nairobi** this **Friday, 10th July, 2020.**

BYRAM ONGAYA

JUDGE