



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 291 OF 2013

DR. DAVID OKIOGA.....CLAIMANT

VERSUS

PERMANENT SECRETARY, MINISTRY OF

ENVIRONMENT AND MINERAL RESOURCES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 1.3.2013 contending that his employments was unfairly and unlawfully terminated by the first respondent on 11.10.2011 and prayed for the following reliefs:-

- (i) The unconditional restoration of the claimant to the position of the Co-ordinator National Ozone Unit
- (ii) The payment of the withheld salary from October 2012 to date.
- (iii) A declaration that the termination of the claimant's services was unfair and unlawful.
- (iv) A declaration that the 1st Respondent violated the principles of natural justice by failing to afford the claimant a right to be heard and defend himself.
- (v) Any other or further relief this Honourable Court may grant.

2. The respondents filed defence on 24.4.2013 denying the alleged unfair termination and averred that the termination of the claimant and the appointment of is replacement was done within the ambits of the law. They therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 13.4.2017 and 18.9.2018 when the claimant testified as Cw1 and the respondent called Mr. Marindany Kirui who testified as Rw1. Thereafter both parties filed written submissions which I have carefully considered herein.

Claimant's Case

4. Cw1 testified that he was employed by the Government of Kenya as coordinator of the Ozone Depleting substances (ODS), a project under the Ministry of Environment and Natural Resources on 16.5.1995. That the appointment was done in consultation between the Ministry and the UNDP and it was for 3 years but renewable for 2 years. His salary was USD 1,166.7 per month.

5. Cw1 further testified that after serving the first 3 years, the contract was renewed for another 2 years after which he served continuously without signing any renewal. He however stated that the project funding cycle was for every 2 years.

6. Cw1 further testified that on 16.2.2012, the first respondent (PS) wrote to the main donor, GIZ stating that the claimant had been appointed as the Acting Advisor of the project while his assistant, Rw1, had been appointed the new Project Co-ordinator. The letter was copied to the claimant via email. He was not given any appointment letter to the said post, which according to Cw1 was not in existent in the project's establishment as it comprised only the coordinator, Assistant Co-ordinator, Secretary and Messenger. He however handed over

office of Co-ordinator 24.2.2012.

7. Cw1 went on to say that, the said email was never responded to and on 11.10.2012 he received another letter from the PS terminating his appointment, and stopping his salary and he responded on 19.10.2012 protesting the withholding of his salary.

8. Cw1 contended that the termination was unfair because there was no valid reason cited and he was not accorded any hearing before the termination. He further contended that the termination was not done after consulting other agencies and the letter was never copied to them.

9. On cross examination, Cw1 denied knowledge of what prompted his termination. He however admitted that he had communication with Dr. James Curlin. He denied that he had undertaken duties without consultation but admitted that his contract was renewable for 2 years and that the appointment letter never indicated that his position was permanent. He also admitted that this employer was Ministry of Environment but contended that his salary was paid by UNEP. He further admitted that he was terminated at the age of 70 years. Finally he admitted that Neeta Sharma was a Consultant for GIZ which was an implementing Agency for the project.

Defence Case

10. Rw confirmed that the claimant was the Project Co-ordinator of the ODS, a project supported by donor mainly GIZ under a Bilateral Agreement.

11. Rw1 testified that M/s Neeta Sharma, the Project Manager GIZ visited Kenya to meet key stakeholders, KRA and NEMA following a discrepancy in the data of Ozone Depleting Products. That when she went back the claimant wrote the letter dated 22.9.2011 to her about the implementation of the project. The letter was written on behalf of the PS and did not please GIZ and M/s Neeta Sharma wrote to the PS on 30.9.2011 a protest letter and sought a clarification of the implementation of Phase out Management Plan (HPMP).

12. Rw1 further stated that as a result of the said protest by GIZ, the PS convened a meeting , Multilateral Environment Agreements (MEAs), the claimant Rw1 and GIZ Representative IN Nairobi where the PS gave instructions that no letters regarding implementing projects shall be send to Bilateral Agencies without his knowledge. Thereafter the PS wrote to M/s Neeta Sharma on 19.10.2011 notifying her of the said instruction as the Ministry position.

13. Rw1 further testified that on 11.1.2012, the claimant breached the said clear instructions from the PS by writing an email to Dr. Jim Curlin of UNEP regarding the implementation of Kenya HPMP project. In response M/s Neeta Sharma wrote to the PS complaining about the claimant's communication to UNEP. As a result, the PS wrote to Mr. Bernard Sigale, GIZ Project Manager on 16.2.2012 informing him that the claimant had been appointed acting Advisor of the National Ozone Unit (NOU) and his position as the coordinator of the Project had been given to Rw1. That the letter was copied to the relevant implementing Agencies, claimant and Rw1.

14. Rw1 went on to say that, everything went quiet until 10.9.2012 when the claimant wrote an email and copied to other people including UNEP and GIZ and M/s Neeta Sharma wrote to the PS on 14.9.2012 complaining about the claimant's continued communication with internal Agencies on Ozone related issues. As a result the services of the claimant were terminated. Rw1 stated that the claimant's employment contract was renewable with the approval from donors.

He concluded by admitting that the claimant was entitled to write correspondences directly until the PS stopped him.

15. On cross examination, Rw1 admitted that the claimant's duties included corresponding with internal and external donors. Rw1 further admitted that there was no written evidence to prove that the claimant was barred from corresponding with implementing Agencies but contended that the ban was verbal and it applied to all the staff. He denied that the PS changed the claimant's terms of contract.

16. Rw1 admitted that there was no position of Interim Advisor in the project establishment and corresponding salary budget. He admitted claimant was never issued with any appointment letter to the position. He also admitted that the claimant was not served with a show cause letter before the termination and suspension of his salary from 11.10.2012. He concluded by admitting that the claimant's contract provided for salary in US dollars but it was paid in Kenya shillings.

Analysis and Determination

17. There is no dispute that the claimant was employed by the Ministry of Environment and National Resources from 1995 to 11.10.2012 when his services were terminated. The issues for determination are:

(a) Whether the termination was unfair and therefore unlawful.

(b) Whether the relief sought should be granted.

Unfair termination

18. Under section 45(2) of the Employer Act, termination of employees' contract is unfair if the employer fails to prove that it was grounded on valid and fair reason and that a fair procedure was followed.

19. Valid and fair reason is one which relates to the employee's conduct capacity and compatibility or based on the employer's operational capacity. Fair procedure on the other hand refers to, according the employee a fair hearing before the termination and also on appeal, paying his/her accrued benefits and issuing him/her with a certificate of service after the termination is made.

Reason for termination

20. The reason for the termination was not candidly captured by the termination letter. The letter stated thus:

“RE: TERMINATION

It has been noted with concern that you are still carrying out duties of the National Ozone Unit Co-ordinator.

As you are aware you were supposed to hand over those duties to the Project Co-ordinator Mr. Marindany L. Kirui with effect from February 2012.

This is to inform you to desist from this and handover those duties to Mr. Kirui with immediate effect.

Meanwhile, all payments to you have been stopped with immediate effect.

Please take the necessary action accordingly.

Wilfred F.O. Amolo

For: PERMANENT SECRETARY

CC. PAC”

21. In my view, the foregoing letter solidified the termination process, which had started in February 2012 when the claimant was removed from his office of Project Coordinator through a letter written to the donor and copied to the claimant and other people. Going by the letter dated 16.2.2012, the removal of the claimant from office was due to complaint by donors especially GIZ that the claimant was causing confusion in his correspondences on the implementation of the Ozone Depleting Substances Phase out activities.

22. In order to forestall donor confidence, the PS met the claimant, Rw1 and GIZ Representative and instructed all the staff including the claimant that all correspondences on implementation of the project shall not be sent to the Bilateral agencies without knowledge of the PS. The instructions were verbal and as a follow up, the PS wrote the letter dated 16.2.2012 and the claimant acknowledged receipt of a copy thereof on 24.2.2012. Despite the said instructions, the claimant wrote email to Rw1 on 10.9.2012 on the ODS data in relation to implementation of the suit project and copied to Multilateral Agencies including UNEP and GIZ.

23. The letter angered GIZ again who responded the same day stating that the failure to throw away the claimant was jeopardizing funding. Based on the said threat, the PS formally terminated the services of the claimant as project coordinator on 11.9.2012 and stopped his salary.

24. Considering the circumstances of this case, I find on a balance of probability that there was a valid and fair reason for terminating the services of the claimant. First he was to represent the interest of Kenya in the project. Second he was to maintain donor confidence in the project. Finally as an employee answerable to the PS he was to obey lawful command from the PS. Although under the contract of employment the claimant had the right to correspond directly with the donor agencies within and without Kenya, due to complaint from the main donor and implementator of the Project, about his correspondences with Multilateral Agencies about implementation of the project put the Kenya's interests at a risk. As a result, the PS issued directive about the procedure of sending correspondences on the project to International Agencies.

25. The said directives in my view were reasonable and they did not necessarily amend the terms of the contract of service for the claimant. As such, failure to comply with the said directive was tantamount to insubordination within the meaning of section 44(4) of the Employment Act. Consequently, I return that the respondent has discharged the burden of proving the reason for the termination as required by section 43(1) and 45(2) of the Act.

Procedure followed

26. Under section 41 of the Act, before terminating the services of an employee on a ground of misconduct, the employer is required in mandatory terms to first explain the reason to the employee, in a language he understands and in the presence of another employee or shop floor union official of his choice, and thereafter invite the two to make their representation for consideration before the termination is decided.

27. In this case, the foregoing mandatory procedure was not followed before the termination. According to Rw1, even a show cause letter was never served on the claimant as an opportunity to defend himself. Consequently, I return that the respondent has failed to prove on a balance of probability that the services of the claimant were terminated after following a fair procedure as provided by section 45(2)(c) and 41 of the Act and that rendered the said termination unfair within the meaning of section 45 of the Act.

Reliefs

28. The claimant prayed for reinstatement to his employment without any condition. However the said relief is not tenable now because under section 12(3) of the ELRC Act, reinstatement cannot be ordered if 3 years have lapsed after the separation.

29. The claim for October 2012 to date is also dismissed because it lacks merits. Salary is only payable for work done unless otherwise expressly stipulated under the contract. I however award him damages under section 49 of the Employment Act being salary in lieu of notice plus 10 months salary as compensation for unfair termination. In making the award, I have considered the length of the service period, and the fact that at 70 years, he may not secure another job. I have also considered the fact that the claimant contributed to the termination through misconduct.

30. In view of the finding that the procedure followed before the termination was unfair, I make declaration that the termination of the claimant's service was unfair and unlawful. I further make declaration that the principles of natural justice were violated by the failure to accord the claimant a right to be heard and defend himself.

Conclusion and Disposition

31. I have found that the claimant disobeyed a lawful command from the PS and that constituted a valid and fair reason for his discharge. I have however found that the termination was rendered unfair by the fact that a fair procedure as provided by section 41 of the Employment Act and the rules of natural justice was not followed. Consequently I enter judgement for the claimant in the following terms:

(a) Notice of one month.....USD. 1,166.7

(b) Compensation.....USD. 11,667

USD.12,833.7

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The award shall be subject to statutory deduction and can be paid in Kenya shillings at the current CBK exchange rate. The claimant will also have costs and interest at court rate from the date hereof,

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019

ONESMUS N. MAKAU

JUDGE