



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 2036 OF 2014

EMMANUEL ODHIAMBO OYUGI.....CLAIMANT

VERSUS

AFRICAN INSTITUTE FOR HEALTH

AND DEVELOPMENT.....RESPONDENT

JUDGEMENT

1. The claimant pleaded that he was employed by the respondent on 1st February, 2011 on a two year contract at a salary of Kshs 35,000/= which was reviewed to Kshs 40,000/= upon confirmation. The claimant contract was on 2nd October, 2013 renewed for a further period of two years at a basic salary of Kshs 63,250. The contract was scheduled to lapse on 1st October, 2015.

2. The claimant averred that on 4th September, 2014 the respondents' executive director terminated his services on allegations of several misconduct on the claimant's part. According to the claimant the termination was unprocedural because it did not follow the respondent's human resource policy manual and the law.

3. The respondent on the other hand averred that the claimant's services were lawfully terminated on grounds of misconduct. According to the respondent, the claimant during the course of his employment engaged in activities that were in breach of his employment contract and as a result failed to perform his duties diligently. The respondent pleaded that the claimant among others wilfully engaged in procurement procedures that led to loss of organizational resources. The claimant according to the respondent failed to improve his performance and frequently absconded work.

4. The respondent further pleaded that in a meeting with the procurement manager and executive director on 28th June, 2014 the issue of claimant's misconduct was discussed in his presence and was accorded an opportunity to respond but failed to make any representations in his defence and instead voluntarily offered to terminate his services and as a consequence the claimant was given two months termination notice which he fully served.

5. During oral hearing the claimant stated that on 4th September, 2014 he was dismissed on grounds of misconduct. He was accused of impropriety in procurement of office assets. According to him, he was initially asked to resign but refused because he felt he was innocent. It was further his evidence that he expected to be given an opportunity to explain himself in accordance with the Human Resource Manual but this did not happen. It was his evidence that he helped the respondent save money and that the procurement was participatory. He further stated that he was not paid for September and October.

6. In cross-examination he stated that he issued recommendation on procurement and further that finance always participated in procurement. It was further his evidence that he was the one who called Interscope and Laurels Macro and that the contract was awarded to Interscope however there were issues raised regarding Interscope's workmanship. He stated that there were some things Interscope did not do right. It was his evidence that the management never warned him over involvement in procurement. He further stated that he promised management to reform on areas of complaint however according to him procurement was not the area of complaint. He further conceded that he participated on the second procurement and stated that the finance department had been warned about involvement in procurement. He admitted receiving quotations but denied he had any specific people in mind to do the branding.

7. The respondent's witness Mr Sammy Tonui testified among other things that in 2013 the claimant's work started to change. He started absenting himself from work and involving himself in procurement issues. According to Mr Tonui, the claimant was warned severally but never changed. He further stated that the claimant was called to a meeting where his conduct was discussed and was furnished with written communication. According to him, the respondent decided to give the claimant time to change his attitude towards work but never reformed. He was called for a second meeting and the issue was still absenteeism and involvement in procurement. At the second meeting the claimant requested to be dismissed and the respondent decided to give him two months termination notice which he fully served and was paid salary during the period.

8. In cross-examination he stated that the claimant was not issued with a show cause letter and that the allegations against him were discussed verbally. Mr Tonui further stated that the termination letter did not disclose the misconduct against the claimant. Under section 47(5) of the Employment Act, for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that unfair termination or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination or wrongful dismissal shall rest on the employer.

9. In his memorandum of claim, the claimant averred that he was terminated over allegations of several misconduct incidents. He further alleged that the termination was unprocedural and contrary to the respondent's human resource policy. In his oral testimony the claimant stated that he was accused of involvement in procurement issues and unauthorized and unexplained workplace. The claimant did not deny that he was involved in procurement matters and in fact conceded that the respondent had informed him to keep off procurement issues. The claimant further conceded that in more than one occasion he participated in procuring bids he however justified his action saying that once he received the bids the final procurement process was participatory and that other members of staff were involved.

10. The string of email attached to the memorandum of claim especially from page 10 to 15 exhibit correspondence between the claimant and one of her bosses Mary Nyamongo who complained about the claimants approach to work and frequent unexplained absence and restlessness. In the said email the claimant was informed of the respondent's reluctance to invest on him because of his behavior. At page 15 of the claimant's bundle Mr Tonui complained about issues touching on the claimant and recent procurement process where a list of analyzed suppliers were brought to him by the claimant and on the same day the claimant requisitioned for services after approval by Mr Tono. The suppliers stepped in immediately and started to work as if they were just waiting somewhere along the corridors of the respondent's premises. The document referred above were attached as document in support of the claimants claim for unfair termination of service.

11. It is common work ethics that an employee must not put himself in a position of conflict of interest with the employer. In this particular case one meets a clear case of conflict of interest in procurement process which the claimant had been asked to keep-off but he persisted on being involved.

12. On the question of frequent absenteeism, section 44(4) (a) permits summary dismissal on account of absence from workplace without leave or other lawful cause. From the foregoing it is reasonable to conclude that there existed justifiable reasons to terminate the claimant's services and the claimant has on his part failed to discharge the burden cast upon him by law to show that termination of his employment was unfair in order to shift the burden for proving reasons for termination to the respondent.

13. Concerning the process the claimant's own documents show he was properly informed of the allegations against him and his responses are properly documented and attached to his memorandum of claim. In the circumstances it would have been superfluous to call a physical meeting to go over an issue which the parties had extensively corresponded on through electronic media. Besides the claimant was issued with a two months' notice of termination and served the notice period without complaint. It should there fore be curious that he chose to dispute the termination after serving the notice period.

14. In conclusion the court finds and holds that there existed justifiable reasons for terminating the claimant's services and that the procedure followed in terminating his services were satisfactory.

15. The claim is therefore found without merit and is hereby dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 25th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge