



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1933 OF 2015

EPHANTUS WAMBUA MACHARIA

CLAIMANT

v

PRESBYTERIAN CHURCH OF EAST AFRICA 1st RESPONDENT

PRESBYTERIAN FOUNDATION

2nd RESPONDENT

JUDGMENT

1. On 8 September 2008, the Presbyterian Church of East Africa (Kikuyu Hospital)(Respondent) offered Ephantus Wambua Macharia (Claimant) employment as an Ophthalmic Clinical Officer for a period of 2 years.
2. Around 2 September 2011, the Claimant opted to terminate the contract, but on 29 February 2012, the Respondents offered the Claimant a new 3 year renewable contract. The contract was to lapse on 31 March 2015.
3. On 5 January 2015, the Claimant sought for a renewal of the contract, and the Respondents acceded to the request on 16 March 2015.
4. The renewed contract was to run for 5 years.
5. Barely 2 months after the renewal, on 8 May 2015, the Respondents' Hospital Administrator wrote to the Claimant asking him to submit an incident report before 11 May 2015 responding to an allegation that he had referred a patient elsewhere for medical services. The letter was a follow up of meetings held on 5 May 2015 and 8 May 2015.
6. The Claimant responded on 11 May 2015, and on 29 June 2015, he was informed through a letter of even date of the termination of his contract.
7. The Claimant was dissatisfied, and after seeking legal advice instituted the instant legal proceedings alleging unfair termination of employment and breach of contract.
8. The Respondents filed a *Response to the Statement of Claim* on 1 March 2016 and the Cause was heard on 30 May 2019.
9. According to an affidavit of service filed in Court on 23 May 2019, Amuga & Co. Advocates, on record for the Respondents were served and acknowledged service on 4 April 2019.
10. Despite acknowledging service, the Respondents and their advocates did not attend the hearing on the scheduled date (the Court also notes that the Respondent did not bother to attend the registry to fix the hearing date despite being invited by the Claimant).
11. The Claimant gave sworn testimony and produced exhibits. He filed submissions on 14 June 2019.
12. The Court has considered the pleadings, evidence on record and submissions.
13. The Court will adopt the proposed Issues which were filed by the Claimant on 18 March 2019.

Whether Claimant was an employee of the Respondents

14. Although the Claimant identified the question of employment as an Issue for determination, it was a moot issue as the Respondents had admitted in paragraph 2 of the Response that the Claimant was an employee.

Whether the Respondent unfairly terminated the Claimant's contract

Procedural fairness

15. Section 35(1)(c) of the Employment Act, 2007 envisage *written notice of termination of employment* of at least 28 days in advance where the employee is paid by the month (unless it is a case of summary dismissal).

16. Clause 9 of the contract dated 29 February 2012, which was incorporated in the renewed contract of 2015 provided for the giving of 1 month notice, or pay in lieu thereof. The option of summary dismissal was also incorporated into the contract.

17. There was no evidence that a *written notice* of 1 month was given to the Claimant. The schedule of terminal dues filed in Court did not have an element of *pay in lieu of notice*, despite the Respondents indicating in the letter of termination that it was with *immediate effect*.

18. The Court therefore concludes that the termination of the Claimant's contract was procedurally unfair for want of written notice/pay in lieu of notice.

Substantive fairness

19. If the Court were wrong in the conclusion on procedural fairness, it would still have found that the termination was substantively unfair because the Respondents failed to discharge the burden placed upon them by sections 43 and 45 of the Employment Act, 2007 (that there were valid and fair reasons to terminate the contract).

20. With the conclusion, the Court holds that the Claimant is entitled to the equivalent of 1 month salary in lieu of notice, and considering that the Claimant served the Respondent for about 6 years cumulative service, compensation of 6 months gross salary would be appropriate.

Breach of contract

21. The Claimant sought Kshs 4,844,658/- on account of *lost income* for the balance of contract (57 months).

22. The contract document did not provide for payment of *lost income* in case of premature termination.

23. On whether there is a legal anchor to the head of claim for *lost income*, this Court will endorse as sound in our jurisdiction the principle set out in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 where the Supreme Court of Uganda held 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.

24. The Claimant, considering his professional status should have in any case moved to mitigate any income losses after the decision by the Respondents to bring the contractual relationship to an end.

25. The Claimant did not disclose during testimony what attempts, if any he took to mitigate the potential income losses.

Conclusion and Orders

26. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(i) Pay in lieu of notice Kshs 84,994/-

(ii) Compensation Kshs 509,964/-

TOTAL **Kshs 594,958/-**

27. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 21st day of June 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Warui instructed by Warui & Co. Advocates

For Respondent Amuga & Co. Advocates

Court Assistant Lindsey