



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2104 OF 2015

KASSIM WERE ALI.....CLAIMANT

v

EXPORT PROMOTION COUNCIL.....RESPONDENT

JUDGMENT

1. Kassim Were Ali (Claimant) was offered employment as a Manager, Monitoring and Evaluation by the Export Promotion Council (Respondent) through a letter dated 6 December 2011. The Claimant was subsequently confirmed.
2. On 16 July 2013, the University of Nairobi offered the Claimant admission for a PhD in Economics during the 2013/2014 academic year.
3. Upon receiving the offer letter, the Claimant applied to the Respondent for partial funding towards the cost of the PhD studies.
4. A note on the copy of the request advised the Claimant that the request could only be considered once a policy on staff training and development was in place.
5. On 19 September 2013, the Principal Secretary, National Treasury and the Executive Director of the *African Economic Research Consortium* wrote to the Claimant informing him that he had been awarded a scholarship to pursue the PhD studies.
6. A month later, on 25 October 2013 the Claimant applied to the Respondent for annual leave to enable him complete the registration process at the University of Dar es Salaam where he was to undertake part of the study.
7. On the same day, the Claimant requested for course approval in line with the government's *Code of Regulations, 2006*. The Claimant indicated in the letter that the course was in tandem with his appraisal for that financial year.
8. In a Memo dated 30 October 2013, the Respondent's Assistant Manager – Human Resource wrote to the Chief Executive recommending that the Claimant's request for *course approval* be forwarded to the Directorate of Public Service Management for consideration, despite the Respondent's *Human Resource Manual* not providing guidelines for long term courses such as the Claimant intended to undertake.
9. On 4 November 2013, the Respondent wrote to inform the Claimant that his request for *unpaid study leave* had been declined because the *Human Resource Manual* only allowed for a maximum of 60 days study leave, and because the Directorate of Public Service Management had advised it that *unpaid study leave* had been stopped.
10. The Claimant appear to have been taken aback and on 5 November 2013, he wrote to the Chief Executive, indicating that he had requested for *course approval* and not *unpaid study leave*. He also indicated that the request had been based on the *Code of Regulations* for the government and not the Respondent's Human Resource Manual.
11. In a reply dated 29 November 2013, the Respondent informed the Claimant that it could only grant him 60 days maximum *unpaid study leave*, and that *course approval* did not apply in his case.
12. The Claimant was not satisfied and on 30 November 2013, he appealed to the Respondent's Board of Directors for *course approval*.
13. On 17 December 2013, the Respondent wrote to the Claimant informing him that he had been removed from the payroll on account of *desertion/repudiation of contract*. The letter also asked the Claimant to handover. The Claimant handed over on 23 December 2013.
14. The Claimant pursued the studies until 6 March 2015 when he wrote to the Respondent requesting to be allowed to resume duty with effect from 1 April 2015.

15. In an email response of 26 May 2015, the Respondent advised the Claimant that he had been notified of the status of his employment through the letter of 17 December 2013.

16. The Claimant then sought legal advice and a demand letter alleging wrongful and unfair termination of employment was sent to the Respondent around 30 July 2015.

17. The demand was followed with the present proceedings.

18. The Respondent filed a *Memorandum of Reply* on 22 December 2015, and the Cause was heard on 23 January 2019 and on 21 March 2019.

19. The Claimant and the Respondent's Principal Officer, Human Resource testified (both of them also adopted their written witness statements).

20. The Claimant filed his submissions on 25 April 2019 (should have been filed/served before 20 April 2019) while the Respondent filed its submissions on 23 May 2019.

21. The Court has considered the pleadings, evidence and submissions.

22. The Claimant did not set out clearly in the *Memorandum of Claim* the gravamen of his claim(s), but they appear to be *breach of contract* and *unfair termination of employment*.

Breach of contract

Salary and benefits during 17 months of study

23. The Claimant contended that he was entitled to 80% of his salary for the 17 months he pursued the first phase of his studies at the University of Dar es Salaam and he anchored this head of claim on the *Code of Regulations*.

24. It is not in dispute that the Respondent's *Human Resource Manual* did not make provision for the type of studies the Claimant was undertaking, hence the reliance on the *Code of Regulations*.

25. The parties only filed an extract of the *Code of Regulations* but the Court has looked at the complete Code.

26. The *Code of Regulations* applied to the civil service, and *civil servants* are defined therein as means employees of the Public Service Commission of Kenya deployed in Ministries/Departments.

27. The same code defines *public service* as it incorporates the civil service, Disciplined Service, Teaching Service, Judiciary, Armed Forces, Local Authorities, Public Universities, Parliamentary Service Commission, State Corporations and Statutory Bodies.

28. The Claimant was offered employment by the Respondent, a *juristic person* established through Legal Notice No. 4342 of 1992 and was not employed by the *Public Service Commission of Kenya*. He did not suggest that he was deployed by the *Public Service Commission* to the Respondent.

29. In the circumstances, the Court finds that the *Code of Regulations*, 2006 did not directly apply to the Claimant, and therefore it cannot be the anchor for the head of claim alleging breach of contract in respect of remuneration during the study period.

Salary from April 2015

30. The Respondent put the Claimant on notice on 17 December 2013 that the employment relationship had come to an end, principally on account of *desertion* of duty.

31. The Court can therefore find no reason why the Claimant should be paid remuneration from 2015 when he sought to resume duty, the Respondent having indicated to him in its letter of 17 December 2013 that the contractual relationship had come to an end.

Unfair termination of employment

Procedural fairness

32. The Claimant did not explicitly plead in the body of the *Memorandum of Claim* that an unfair termination of employment had occurred.

33. However, in the reliefs sought, *3 months' salary in lieu of notice and 12 months' salary for unfair termination* were pleaded.

34. The Court can infer that unfair termination of employment was part of the cause(s) of action litigated.

35. The Respondent notified the Claimant through a letter dated 17 December 2013 that it considered the relationship had come to an end on

account of *desertion*.

36. In terms of section 35(1)(c) of the Employment Act, 2007, the Respondent should have issued a written notice of termination, of at least 28 days to the Claimant. The Respondent did not.

37. Assuming that the Respondent considered the *desertion* serious enough to warrant *summary dismissal* as contemplated by section 44(4) of the Employment Act, 2007, and thus not subject to giving of a written notice, the Respondent was still under an obligation to comply with the mandatory requirements of section 41(2) of the Employment Act, 2007.

38. The Respondent did not even attempt to show that it informed the Claimant of the reasons it was considering for bringing the relationship to an end or that it afforded the Claimant an opportunity to make representations to explain his failure to report/resume work.

39. The Court therefore finds that in terminating the Claimant's contract before affording him an opportunity to be heard, the Respondent failed the statutory procedural fairness test.

Substantive fairness

40. The Court having come to the view that the Respondent failed the procedural fairness test does not need to consider whether the Respondent discharged the burden placed on employers by sections 43 and 45 of the Employment Act, 2007.

Appropriate remedies

Pay in lieu of notice

41. The Claimant sought the equivalent of 3 months' pay in lieu of notice.

42. The letter of offer provided for 1 month notice or pay in lieu thereof and that is what the Claimant was entitled to (basic salary at point of separation was Kshs 98,093/-).

Compensation

43. The Claimant served the Respondent for about 3 years. At the time of hearing he was serving as County Executive Committee member with the County Government of Kakamega.

44. In consideration of the two factors, the Court is of the view that the equivalent of 5 months' gross salary would be appropriate compensation (gross salary proved was Kshs 164,848/-).

Certificate of Service

45. A certificate of service is a statutory entitlement. The Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

46. The Court finds and declares that there was no breach of contract, but the termination of the Claimant's employment was unfair and awards him

(i) Pay in lieu of notice Kshs 98,093/-

(ii) Compensation Kshs 844,240/-

TOTAL **Kshs 942,333/-**

47. Respondent to issue Claimant with a Certificate of Service within 15 days.

48. Claimant to have costs on half scale for having filed submissions late without offering any explanation.

Delivered, dated and signed in Nairobi on this 5th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kimakia instructed by Wasonga B.O & Associates

For Respondent Mr. Munyua instructed by Rachier Amollo Advocates

Court Assistant Lindsey