



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO.272 OF 2015

MANUEL ANIDOS.....CLAIMANT

VERSUS

KINANGOP WIND PARK LIMITED

(IN RECEIVERSHIP).....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant was employed by the Respondent as Chief Technical Officer (CTO) under a fixed term contract running from 2nd December 2013 to 31st May 2016. The contract was contained the Agreement dated 27th November 2013 which set out the terms and conditions of the employment including a termination clause providing for a notice period of three months. On 24th October 2014 the Claimant was served with a letter giving him three months' termination notice and informing him that his last day of employment would be 31st January 2015. Aggrieved by the premature termination of his contract of service, he filed this suit against the respondent on 3rd March 2015 contending that he was unfairly terminated because he was neither given a reason for termination nor an opportunity to respond to the non-existent allegations. He therefore sought the following reliefs against the Respondent:

- a) A declaration that the Claimant's employment services with the
- b) Salary for the unexpired period of time from February 2015 to May 2016 calculated at the rate of (16 months * USD 17,696.25 = USD 283, 140.00);
- c) Facility Commissioning Bonus in the sum USD 62,600.00;
- d) Discretionary Performance Bonus in the sum of USD 31,300.00;
- e) Costs of this suit;
- f) Interest on b), c) and (d) above at court rates; and
- g) Any further relief that this Honourable Court may deem fit and just to grant.

2. The Respondent filed defence on 19th March 2015 denying the alleged unfair termination and averred that the Claimant's termination was done in accordance with the procedure under the contract of service and the existing labour laws. She further averred that after the termination the claimant was paid all his lawful benefits and denied the claim for bonuses contending that the same were not only conditional but also discretionary. She prays that the suit to be dismissed with costs.

3. The main issues arising from the pleadings are whether the claimant's contract was unfairly terminated and whether he is entitled to the reliefs sought. The Claimant testified during the hearing but the respondent never tendered any evidence. However, after the hearing both parties filed written submissions.

Claimant's case

4. The Claimant told the court that he is a retired Engineer currently living in Madrid Spain. He adopted his written Statement filed on 5th

March 2019 as his testimony and produced as exhibits the documents annexed to his Memorandum of Claim. He testified that he was offered employment by the respondent by the letter dated 6.11.2013 and signed a formal contract dated 27.11.2013. That the contract was for a fixed term running from 2.12.2013 to 31.5.2016 and his gross monthly salary was USD 17,696.25. That he was to work 40 hours per week but he was entitled to pay for any overtime worked. That he was also entitled to 21 days' annual leave, Facility Commissioning Bonus of USD62000 less statutory deductions and a Discretionary Performance Bonus of a Maximum USD 31300. Finally, he was entitled to 3 months' notice prior to termination of his contract or salary in lieu of the notice.

5. The Claimant further testified that on 24.10.2014, he was served with a 3 months' termination notice citing no reason for the termination or according him any hearing. That upon enquiry for the reasons of his termination, he was informed that the decision for termination against him had already been made. He contended that before the said termination he neither received any complaint regarding his performance nor was he served with any warning letter by the Respondent.

6. As regards the reliefs sought, he testified that the termination was done abruptly before the scheduled time and it dented his good career. He therefore urged the court to award him his salary from 2015 to 31st May 2015 in addition to bonus as promised and costs of the suit.

7. In cross-examination he testified that he never applied for the position but he was head hunted by the Respondent. He admitted that Clause 17 of his contract provided for termination notice of 3 months and that the Respondent served him with the said 3 months' notice before the termination. He however contended that the right to terminate the contract by the employer was not to be exercised arbitrarily. He testified that the project was to end in February 2016 and admitted that Clause 14 of the Employment Agreement provided for Commissioning Bonus after successful commissioning and issuance of a Taking Over Certificate to the respondent. He further admitted that the Letter of Offer at Clause 6.2.2 provided for Discretionary Performance Bonus at the end of the contract. He also admitted that the project never begun because the local community objected to the same and he did not know whether the Respondent's Remuneration Committee had approved his bonuses to be paid.

Claimant's submissions

8. The Claimant submitted that he was wrongfully and unfairly terminated *vis a vis* section 45 of the Employment Act in that no valid reason for his termination was cited in the termination letter dated 24th October 2014. He relied *on Okello v Rift Valley Railways (U) Ltd HCCS No. 195/2009, Abigael Jepkosgei Yaot v China Hanan International Co. Ltd [2018]eKLR, Elizabeth Kioko v Beyene Haire Warde & Another [2018]eKLR* to fortify his submissions that termination of employment is unfair unless there is a justifiable reason payment of salary in lieu of notice notwithstanding.

9. In respect of his reliefs he submitted that he was entitled to the reliefs sought. He relied on the said precedents to urge the Court to award the reliefs sought by his suit.

Respondent's submissions

10. The Respondent submitted that she invoked her right to terminate the employment contract of the Claimant by serving 3 months' notice as provided under clause 17 of the Employment Agreement. She submitted that the employment contract contained the entire substratum of the rights and obligations of the parties and the court's duty is only to enforce the same unless there is evidence of vitiating factors like fraud and coercion. In respect of this she relied on *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another (2002) EA 503* which was cited in *Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014]eKLR* where the court held that a court of law cannot rewrite a contract between parties.

11. She further submitted that the Claimant's termination was not based on disciplinary issues but by the invocation of a contractual right. She contended that a party to contract of service does not need to rely on misconduct to terminate the contract but can do so by serving a notice as contemplated in the contract. For emphasis, he relied on *Kenya Revenue Authority v Menginya Salim Murgani [2010] e KLR* where the Court of Appeal held that contract of service is not a contract of servitude and for that reason either party, employer or the employee has a right to terminate it by serving the notice stipulated in the contract or by paying the other salary in lieu of notice.

12. As regards the reliefs sought by the claimant, she argued that the terms of the Claimant's employment contract were clear that the Discretionary Performance Bonus and the Facility Commissioning Bonus were both conditional and discretionary and as such, they could not form part of the Claimant's entitlement. She contended that the claimant never met the conditions precedent for qualifying for the said bonuses and maintained that he was not be entitled to the same.

13. Finally, she submitted that the claimant is not entitled to compensation because the termination of his contract of service was fair and lawful. She therefore prayed for the suit to be dismissed with costs.

Analysis and determination

14. After careful consideration of the pleadings and evidence, there is no dispute that the Claimant was employed by the Respondent as Chief Technical Officer under a fixed term from 2.12.2013 to 31.5.2016. There is further no dispute that the respondent terminated the contract prematurely by serving the claimant with 3 months' notice vide the letter dated 24th October 2014. The main issues for termination are:

- a) Whether the Claimant's contract was unfairly terminated.
- b) Whether the Claimant is entitled to the reliefs sought.

a. Whether the Claimant was unfairly terminated

15. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests with the employee who alleges that he was so terminated, while the burden of justifying the reason for the termination rests with the employer. The said burden of proof does not shift unless the employee can prove on a balance of probability that the termination was not in accordance with section 45 of the Act. Under the said provision, termination of an employee's contract of service is unfair if it was not grounded on valid and fair reason(s) related to the employee's conduct, capacity and compatibility or based on the employer's operational requirement; and that a fair procedure was not followed by granting the employee a fair hearing in accordance with section 41 of the Act.

16. The question that begs for answer is whether in the claimant has discharged his burden of proving unfair termination of his contract of service. The claimant's case herein is that his contract of service was unfairly terminated by the respondent because the letter dated 24.10.2014 did not cite any reason for the termination, and he was not accorded any opportunity to respond to the reason for the termination. However, the respondent's case is that the termination was lawfully done by exercising her right to terminate the contract by 3 months' notice as agreed by the parties in their written contract.

17. I have carefully considered the evidence and the submissions presented to the court by the parties. Clause 17.1 of the Contract of service signed on 27.11.2013 provided that:

“Your employment may be terminated by either party giving three months notice in writing to the other. Alternatively, the Employer may make a payment to you in lieu of all or part of your notice period.

During any period of notice or resignation, the Employer has the discretion to direct you not to present yourself for work, do any work or contact

any customers or clients of the Employer. During this period you will continue to be employed by the Employer and must not engage in any business or activity that is the same or similar to the business you were undertaking for the Employer ...”

18. The termination letter dated 24.10.2014 stated as follows in part:

“We hereby give you three months' notice of termination of your employment with Kinangop Wind Park Limited. Your last day of employment will be 31 January 2015. During this notice period, we direct you not to present yourself to work, do any work or contact any customers, clients or stakeholders of the Employer or related companies.

In accordance with your Employment contract signed on 7 November 2013 (Annexure 1) your employment may be terminated by either party giving three months' notice in writing to the other. Alternatively, the employer may make a payment to you in lieu of all or part of your notice period.

During this period of notice... you will continue to be employed by the Employer and must not engage or prepare to engage in any business or activity that is the same or similar to the business you were undertaking for the Employer...

The Employer will pay you three months' notice as well as your accrued leave days as at the end of January 2015...

Signed...”

19. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and another (2002) EA 503* the Court of Appeal held that:

“This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.”

20. In *Kenya Revenue Authority v Menginya Salim Murgani [2010]eKLR*, the Court of Appeal held that:

“It is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a Yoke of slavery or a contract of servitude. This is the reason why either party is allowed to terminate the contract by giving the stipulated notice or reasonable notice if not specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. This applies whether or not the contract is permanent or pensionable and this right vests in both the employee and the employer... Indeed a contracting party does not need to rely on a misconduct in order to terminate a contract of service and a party can terminate such contract without giving any reason.”

21. In my view, although the foregoing decision concerned a contract of service under the repealed Employment Act which did not provide for fair termination of employment contracts, I find it still to be a good law because it underscores the doctrine of freedom of contract and freedom from slavery and servitude. It is also in tune with the public policy that parties are to be bound by the terms of the contract they enter into unless there is evidence that it is vitiated by mistake, fraud, coercion or undue influence. In this case the parties entered into an express contract of service providing for a fixed term ending on 31.5.2016, but allowed for a premature termination of the contract by either party giving three months' notice in writing or paying salary in lieu of notice.

22. Under Clause 28 of the Employment contract, the law applicable to the agreement was the laws of Kenya which included the provisions of the Employment Act. In my view the termination clause in the contract was in consonance with the freedom of contract enacted under section 35 (1) and 36 of the Employment Act 2007. The said provisions states that:

“35(1). A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be-

(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of twenty-eight days next following the giving of notice in writing.”

“36. Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the provisions of that section.”

23. The court has considered the evidence herein and the rival submissions. It is clear that the contract of service provided termination before expiry of the contract term; that the termination did not need to be for reason provided either party gave three months' notice to the other; that the right to terminate by the said notice accrued equally to the employer just as it accrued to the employee; and that the employer served the stipulated notice and also paid the claimant salary for the whole notice period. It is without doubt that the respondent terminated the claimant's contract pursuant to the express stipulation of the contract of service executed between the two parties on 27.11.2013. The said clause was binding on the claimant and in this case he did not plead and prove that the said termination clause was vitiated by mistake, fraud, coercion or undue influence

24. Considering the clear evidence that the termination of the employment contract herein was pursuant to an express and binding term, I find and hold that the claimant has not discharged his burden of proving that the termination of his contract of service was unfair as he alleged. Consequently, I return that the burden of proof has not shifted to the respondent so as to call her to make a rebuttal by evidence by justifying the reason for the termination. As the facts stand, there was no requirement of a reason to be stated by the respondent in the termination notice dated 24.10.2014. A reason would only have been required if the termination was for cause, in which case the respondent would have been required to comply with section 45 of the Employment Act aforesaid. Deciding otherwise would be suggesting that only an employee has the right to terminate a contract by notice under section 35 of the Employment Act or under clause 17.1 of the contract.

b. Whether the Claimant is entitled to the reliefs sought

25. In view of the finding herein above that the claimant has failed to prove the alleged unfair termination, I decline to make declaration that the contract of service was unfairly and wrongfully terminated by the respondent as prayed. Flowing from the foregoing and the fact that the contract provided for premature termination by a notice, I dismiss the claim for Salary for the unexpired period between February 2015 to May 2016.

26. The claim for Facility Commission Bonus of USDD 62,600.00 is also dismissed. Clause 14 of the Employment Agreement provided as follows:

“Unless terminated in accordance with the termination provisions set out by the Employer, on the delivery of the Taking Over Certificate for the final section of the wind farm by KWP (as defined under the EPC Agreement) you will be eligible for a Facility Commissioning Bonus of USD 62,600.00(Sixty Two Thousand Six Hundred United States Dollars) less all statutory deductions...”

527. The foregoing term was clear that the bonus was only payable if the claimant served until the project was commissioned and Taking Over Certificate delivered to the Contractor. The Claimant admitted in his testimony that the locals objected to the project and as such, it never took off but stalled completely. The contract of service never provided for the payment of the bonus in the event of a premature termination and as such, I return that the claimant is not entitled to the same.

28. The foregoing holding is fortified by Nicholas Mbuya & 4 others v Alice Gesare Moninda [2015] eKLR where the Court of Appeal held:

“Our labour laws are silent on the issue of bonus payment. It would then appear that where a bonus dispute arises, such dispute is left exclusively to the province of the agreement between the parties. As such, bonus liability (if any) must be construed within the meaning and intent accorded by the parties under their contract. From the above excerpt of the agreement, it is clear that the bonus was conditional on the respondent's completion of five years of employment and that in the event that she failed to do so, then the same would not be paid... Strictly speaking therefore she was not entitled to the bonus until and unless she had attained five (5) years of service with the appellants... Had the parties been desirous of stating or providing other additional requirements thereto, nothing would have been easier than for the contract to state as much.” [Emphasis Added]

Discretionary Performance Bonus

29. Finally the claim for Discretionary Performance Bonus of USD.31,300.00 is dismissed. Clause 6.2.2 of the Letter of Offer and Clause 14 of the Employment Agreement provided thus:

“Unless terminated in accordance with the termination provisions set out by the Employer, you will be eligible for a Discretionary Performance Bonus of up to a maximum of USD 31,300.00 (Thirty One Thousand Three Hundred United States Dollars) on completion of the Scheduled Term...Any bonus allocations are conditional on you remaining employed on certain dates. No pro-rata bonus payments will be rendered if you voluntarily terminate your services before annual or periodic bonus payment dates or you terminate without notice. The bonuses do not form part of your remuneration and will not be included in the calculation of any termination payments including payments in lieu of notice and payments in lieu of accrued untaken leave.”

30. It is clear that the Discretionary Performance bonus was conditional upon completion of the fixed term which was to lapse on 31st May 2016 and upon the exercise of discretion by the respondent. The Claimant's employment was lawfully terminated before completion of the scheduled term of the contract and on claimant's own admission, the Remuneration Committee of the respondent never approved the payment of the said bonus. He therefore did not qualify for payment of the said bonus pursuant to the contract terms.

Conclusion and disposition

31. I have found that the claimant's contract of service was lawfully terminated within the express termination clause agreed between the parties herein in their written contract dated 27.11.2013. I have also found that the claimant is not entitled to the reliefs sought herein. Consequently, I dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE