



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2015 OF 2017

ROBERT WILLIAMSON.....CLAIMANT

- VERSUS -

FOOTBALL KENYA FEDERATION (SUED THROUGH ITS PRESIDENT

NICK MWENDWA AND ITS SECRETARY GENERAL AND

C.E.O ROBERT MUTHOMI).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

JUDGMENT

The claimant filed the statement of claim on 09.10.2017 through Wanjiku & Wanjiku Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination was unfair and contrary to the Employment Act.
- b) Salary Arrears for 12 months Kshs.30, 000, 000.00.
- c) House rent arrears for 15 months Kshs.2, 250, 000.00.
- d) Terminal dues per clause 5.7 (vi) of the agreement Kshs.10, 000, 000.00.
- e) Compensation for residue of the term of 6 months Kshs. 10, 000, 000.00 under clause 5.7(vi).
- f) Compensation for residue of term of 6 months Kshs.900, 000.00.
- g) Cost of return air ticket to the United Kingdom (Economy class) Kshs.80, 000.00 per year Kshs.160, 000.00.
- h) 2 months' salary in lieu of notice Kshs. 5, 000, 000.00.
- i) Costs of the suit and interest on (b) to (h).

In alternative the claimant prayed for:

- a) A declaration that the respondent breached the contract between the parties.
- b) Salary arrears for 12 months Kshs. 30, 000, 000.00.
- c) House rent arrears for 15 months Kshs. 2, 250, 000.00.
- d) Terminal dues as per clause 5.7 (vi) of the agreement Kshs.10, 000, 000.00.
- e) Compensation for residue of the term of 6 months Kshs.15, 000, 000.00 under clause 5.7 (vi).

- f) Compensation for housing allowance for residue of term of 6 months Kshs. 900, 000.00.
- g) Cost of return air ticket to the United Kingdom (Economy class) Kshs.80, 000.00 per year Kshs.160, 000.00.
- h) General damages for pain and suffering.
- i) Punitive damages.
- j) Costs of the suit and interest on (b) to (i) above.

The claimant's case is that he was employed by the respondent as the Head Coach for the National Football Team (Harambee Stars) for a term of 2 years from 25.08.2014 at a monthly salary of Kshs. 2, 500, 000.00 less tax. The claimant relies on the copy of the agreement signed between himself and the respondent's National Chairman at the time one Sam Nyamweya. The claimant's case is that under the agreement he was entitled to a fully serviced apartment in a comfortable location and for that purpose the respondent by its Chairman Nyamweya concluded a tenancy agreement with Michelle Mbaire (represented by Stop Properties Co.) over apartment B1-3, the Gateway for Kshs. 150, 000.00 per month in rent. The claimant's case is that the respondent paid the rent for only 3 months. The respondent's further case is that he performed his duties diligently until sometimes in February 2016 when he learnt from the local print media that the respondent had appointed Stanley Okumbi as the National Team Head Coach in effect terminating the claimant's employment. Prior to the termination, the claimant's case is that the respondent had paid the claimant 6 months' salary despite the claimant having worked for one year and six months.

The respondent filed the response to the statement of claim on 07.11.2017 through Sila Munyao & Company Advocates. The respondent admitted that it employed the claimant but it was not under the copy of contract filed for the claimant. Further the claimant absconded duty in January 2016. That the claimant had filed Sports Tribunal Cause No.28 of 2016 and in response to that claim the respondent's C.E.O filed an affidavit stating that the claimant had not been formally terminated but he had absconded duty – and despite that evidence the claimant had not bothered to report back on duty. Further clause 11 of the agreement specifically provided that in event of a dispute unresolved between the parties amicably then the dispute would be referred to arbitration before the Centre for Arbitration & Dispute Resolution and FIFA. Accordingly the Court did not have jurisdiction to hear and determine the suit. The respondent prayed that the suit be dismissed with costs.

The claimant filed a reply to the response on 23.11.2017. The claimant denied absconding duty as was alleged for the respondent and urged that the Court had jurisdiction to hear and determine the suit. On 03.07.2018 the claimant changed his advocates to Wanjiku Maina & Company Advocates.

The respondent filed an amended response to statement of claim on 18.06.2019. The respondent denied that it had ever employed the claimant as Head Coach for National Team and if at all he was such Head Coach, then he was an employee of National Government of Kenya which was liable to pay him because all National Team Coaches are contracted to the respondent but actually paid by the Government through the Ministry responsible. The respondent alleged that the claimant had relied on more than one version of the alleged contracts of service towards fraudulent claims and prayers in the suit. The claimant replied to the amended response on 09.07.2017.

The **1st issue** for determination is whether the parties were in a contract of service. The respondent denies that it employed the claimant as a Head Coach and if the claimant ever served as the Head Coach for the National Team, then the employer was the Government which paid the claimant's remuneration. The respondent's counsel in his opening remarks at the hearing emphasised that there was no record showing that the respondent employed the claimant. The respondent's witness (RW) was its current President one Nick Mwendwa and his testimony was as follows. He was voted to office on 10.02.2016 and assumed office on 07.03.2016. The new officials had problems because relevant documents on suppliers and employees were lacking. Thus the respondent wrote to suppliers to avail records and employees had to undergo head count in a verification exercise. In that process nobody came up to allege that he was employed as a Head Coach for Harambee Stars. Subsequently the claimant's lawyer made demands but there were no documents such as on payment of the claimant's salary, NHIF, NSSF, tax and other employee records such as work permit. RW further testified that the respondent concluded the contract of service with a potential Head Coach for National Team and the Government paid the remuneration. It was unbelievable that the respondent had paid the claimant Kshs.15, 000, 000.00 in cash and it was the Government which paid. RW stated that the procedure was that the contract of service was taken to the Government for payment. It was on 09.02.2016 that Sam Nyamweya wrote to the Ministry asking that the claimant is paid outstanding remuneration attaching a document the claimant had signed. RW further testified that the claimant coached Harambee Stars and RW did not know the arrangement between the parties to the suit and the Government because the original contract had not been provided and evidence, even of a single payment to the claimant, had not been provided.

The claimant's evidence is that he came to Kenya in 2013 to work as Head Coach for Gor Mahia FC. Prior to that, he had served as Uganda's National Head Coach. In August 2014 he signed contract as Head Coach for Harambee Stars. The salary was Kshs. 2, 500, 000.00 net per month (the respondent was to pay taxes) and he was to be provided the housing accommodation. Gor Mahia FC allowed the claimant to continue staying in the house he had occupied and later the respondent signed a tenancy for a furnished apartment at Kshs. 150, 000.00 per month. He signed one contract and the contract was drafted by a person he did not know because the respondent was in charge of drafting the contract of service. He was not given an original contract but a photocopy was provided and he kept it as exhibited in Court. He was given a car at some point by the President Sam Nyamweya but it broke down after 3 weeks and he was thereafter dropped and picked from work. His further evidence is that he worked for one year six months and was paid Kshs. 15, 000, 000.00 only being salary for 6 months only. His problems started when the new President RW was voted into office. He read in the print media that he had been replaced. He tried to follow up the issue but nobody gave him an answer. He filed a case at Sports Tribunal but withdrew it later because the respondent said it would pay 1.5 years he had served and not the full contractual term of 2 years. The claimant testified that by the copy of the letter dated 28.11.2016 the respondent's General Secretary and C.E.O wrote to Dr. Arero Wario, PhD, Cabinet Secretary, the Ministry of sports, thus,

“Dear Sir,

RE: ROBERT WILLIAMSON

Following discussions with the FKF President on Wednesday, November 23rd 2016, where the matter of the pending salary of the former Harambee Stars team coach Robert Williamson was discussed, please find enclosed a letter from Gradus Oluoch & Co. Advocates in regards to the same.

In the past the Ministry has taken care of the coach's salary and allowances and is familiar with his case. We are therefore requesting you to pay him the sum total Kshs.55, 900, 000.00 as indicated in the letter as he is under financial strain and is really in need. This will allow FKF to settle this issue and put it behind us.

We thank you for your understanding and consideration of this matter.

Sincerely,

Signed

Robert Muthomi

General Secretary/CEO

Cc. Gradus Oluoch Adis"

The letter by Gradus Oluoch Adis Advocate dated 27.11.2016 addressed to the Cabinet Secretary and the respondent's President summarised the basis of the Kshs. 55, 900, 000 as follows:

- a) Settlement of salary arrears of 18 months amounting to Kshs. 45, 000, 000.00.
- b) Settlement of House rent arrears up to February 2016, amounting to Kshs.900, 000.00.
- c) Settlement of terminal dues amounting to Kshs.10, 000, 000.00 in accordance with the Article 5.7(vi) of the Football Kenya Federation National Team Head Coach Agreement.

As submitted for the claimant, it was the duty of the respondent to keep the claimant's records on the contract of service and failing, it was the respondent's burden to prove or disprove an alleged terms of employment stipulated in the contract of service as per section 10(6) and (7) of the Employment Act, 2007. The Court finds that the respondent failed to discharge its statutory obligation and cannot be trusted when it says that there are three sets of the agreement. The Court further finds that despite the contested agreements on record, on 9.02.2016 the respondent's President wrote to the Principal Secretary confirming that the Government had paid to the claimant sometimes in September 2015 the sum covering the months of August, September, October, November and December 2014 and January 2015 and the request was that the Government considers paying the claimant outstanding salaries arrears for February 2015 to January 2016 a total amount of Kshs. 30 million. By that letter the Court finds that it is confirmed that the respondent employed the claimant and under arrangements between the respondent and the Government (but which the claimant was not privy to) that the Government would pay the claimant's remuneration. That employment relationship was acknowledged in the letter by the respondent's General Secretary and C.E.O dated 28.11.2016. Thus the Court finds that the claimant was employed by the respondent upon the terms alleged for the claimant and more particularly as acknowledged in the letter by the General Secretary dated 28.11.2016.

To answer the **2nd issue** for determination, in view of the letter by the respondent's General Secretary and C.E.O dated 28.11.2016, the Court returns that by that letter the respondent acknowledged that it owed the claimant **Kshs. 55, 900, 000.00** and upon the headings in the letter by Gradus Oluoch Adis Advocate dated 27.11.2016. The Claimant is awarded accordingly as the sum the respondent acknowledged as owing to the claimant and as was demanded for the claimant. In particular, the Court returns that the acknowledgment letter when read together with the demand by the claimant's advocate constituted the agreed terms of separation. The Court finds that the parties are bound accordingly. In view of that finding, the Court further returns that it will not delve into the validity of the various versions of the contracts of service that were exhibited by the parties. The respondent had submitted that the contract of service was frustrated for want of a work permit but that will collapse as there was no evidence by the respondent to show that the claimant did not have the requisite work permit as alleged, and further, RW confirmed in his evidence that the claimant had served as the Head Coach for the National Team, Harambee Stars - only that he was not aware of the arrangements that governed that contract of service.

To answer the **3rd issue** for determination, the Court returns that the claimant is not entitled to any of the other prayers as made (except costs) because the same are not justified at all. In particular, the Court finds that the contract of service ended when the respondent employed another Head Coach for the National Team. That eventuality had been contemplated by the parties and the contract as relied upon by the claimant provided in clause 5.7 (iv) thus, **"If the Federation terminates the services of the coach, except due to misbehaviour or ill health, they shall be liable to pay the head coach the sum of Kshs. 10, 000, 000.00(Kenya shillings ten million).**" The Court finds that the Kshs.10, 000, 000.00 has already been awarded as acknowledged by the respondent. Further the court has found that the demand letter by the Gradus Oluoch Adis Advocate and as acknowledged for payment in the letter by the respondent's General Secretary constituted a binding agreement on the terms of the separation and both parties are bound accordingly as the letters were not made on without prejudice basis. The claimant has therefore failed to establish a case for compensation for unfair termination because he has already been compensated in terms of the separation pay as was agreed upon and the separation being within the terms of that separation payment clause.

To answer the **3rd issue** for determination the Court returns that in view of the binding terms of the identified separation agreement, it cannot be said that parties had a dispute that would go to arbitration as per the alleged arbitration clause. Clause 11 of the contract on resolution of disputes as exhibited by the claimant and which the respondent appears not to dispute (by invoking the same arbitration clause) stated as follows:

“Football Kenya Federation and The Head Coach shall make effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with this agreement.

If, after thirty (30) days from the commencement of such informal negotiation Football Kenya Federation and the Head Coach have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution and arbitration at the Centre for Arbitration & Dispute resolution in accordance with the Arbitration Act of Laws of Kenya and if no settlement is reached to FIFA.”

The Court has found that the dispute must have been resolved amicably in view of the demand and acknowledgment to pay and the Court therefore had jurisdiction to determine the suit in view of provisions of Article 162(2) of the Constitution of Kenya, 2010 as read with section 12 of the Employment and Labour Relations Court Act, 2011. In any event, there was no evidence of the dispute being referred to arbitration as contemplated in clause 11 of the agreement and no such application for referring the dispute to arbitration was made before the Court. The Court finds that the parties are deemed to have waived the agreement to refer the dispute to arbitration. While making that finding, the Court further finds that the claimant was entitled to move the Court in circumstances whereby the respondent pleaded denying that it had employed the claimant. The Court considers that the claimant could not have waited for his rights and claims to be defeated by an employer who in the amended statement of response has denied the fact of employment and existence of the agreement which the employer now seeks to rely upon. In particular the Court finds that the respondent having denied the existence of the contract of service and its respective terms and conditions of service, the respondent is thereby estopped and precluded from turning around and alleging reliance on the otherwise non-existent contractual clause on arbitration to defeat the claimant’s case. The Court cannot entertain such contradictory pleading as is trite law that to approbate and reprobate will not be entertained under the maxim *quod approbo non reprobo - that which I approve, I cannot disapprove*. The respondent rejected existence of the contract of service in his case and pleadings and is bound accordingly and the Court had full jurisdiction to hear and determine the suit. The Court finds accordingly.

As the claimant has substantially succeeded in his claims and prayers, the respondent will pay costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs. 55, 900, 000.00** by 01.12.2019 failing interest to run thereon at Court rates from the date of this judgment till the date of full payment.
- 2) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 25th October, 2019.

BYRAM ONGAYA

JUDGE