



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1265 OF 2015

AMBROSE IRUNGU MBUTHIA.....CLAIMANT

- VERSUS -

MISSIONS OF HOPE INTERNATIONAL.....1ST RESPONDENT

MARY WACUKA KAMAU.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th October, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 22.07.2015 through Chege Kamau & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondents have contravened the claimant's rights under Articles 27, 28, 30, 41, and 47 of the Constitution.
- b) A declaration the respondent has breached its contract of employment with the claimant dated 01.01.2014.
- c) A declaration that the respondent's actions in June 2015 towards the claimant constituted constructive unlawful dismissal of the claimant.
- d) A declaration that the respondents unlawfully terminated the employment contract of the claimant.
- e) An order the 1st respondent pay the claimant the following:
 - i. Salary for June 2015 Kshs. 60, 000.00.
 - ii. Severance pay Kshs. 270, 000.00.
 - iii. Leave allowance for remainder of the contract Kshs. 180, 000.00.
 - iv. 12 months' salaries compensation for unfair termination Kshs. 720, 000.00.
 - v. One month salary in lieu of notice Kshs. 60, 000.00.
 - vi. Compensation for loss of opportunity to work up to the end of the contract equivalent to 42 months' pay Kshs. 2, 520, 000.00.
 - vii. Outpatient medical cover for 3.5 years Kshs.70, 000.00.
 - viii. In patient medical cover for 3.5 years Kshs.350, 000.00.
 - ix. Pension compensation for period February 2011 to February 2035 at 10% of basic pay Kshs. 1, 265,040.00.
 - x. Pension pay compensation earned for 2009 and 2010 Kshs. 18, 600.00 and interest thereon.

xi. Compensation for loss of opportunity to enjoy the privileged study loan facility of 5% per annum at reducing balance.

f) An order that the 1st respondent pays the claimant general damages.

g) Costs of and incidental to the suit and interest at Court rates.

h) Any other or further relief that the Honourable Court may deem fit to grant.

The respondents filed the answer to the memorandum of claim on 17.08.2015 through K. Itonga & Company Advocates. The respondents prayed that the claimant's suit be dismissed with costs. The claimant filed a reply to defence.

To answer the **1st issue** for determination, there is no dispute that the parties were in a contract of employment. As at termination of the contract, the claimant was serving on a five year fixed term contract commencing on 01.01.2014 and in the position of Project Accountant. The letter of renewal of the contract was dated 01.12.2013 and was commencing on 01.01.2014 for 5 years renewable upon satisfactory performance based on appraisal and availability of funds to continue the project. The gross salary was Kshs. 50, 000.00.

The **2nd issue** for determination is whether the claimant's termination from employment was unfair and unlawful. The claimant's case is that he was unlawfully terminated from employment on 29.06.2015. That sometimes in June 2015 the 2nd respondent in her capacity as the Executive Director of the 1st respondent verbally offered the claimant the position of Internal Auditor and the claimant offered to take up the position if he was paid Kshs. 150, 000.00 per month and was allowed relevant independence to work as an Auditor. The claimant's further case is that by the letter dated 22.06.2015 signed by the 2nd respondent he was offered a new appointment to the position of Internal Auditor of the 1st respondent effective 01.07.2015 at a gross pay of Kshs. 70, 000.00. The offer letter stated that the other terms of service in the letter of 01.12.2013 remained in place and the contract could be renewed based on the claimant's performance and availability of funds to continue with the project. The claimant failed to accept the offer and by his letter dated 26.06.2015 he informed the respondents that he was desirous of continuing in his position and employment as Project Accountant but was willing to take up employment as Internal Auditor subject to fair and reasonable terms to be agreed upon in an environment devoid of pressure. The claimant's further case is that on 25.06.2015 the 2nd respondent had, at a meeting in absence of the claimant, announced to the other accountants that the claimant would be leaving the position of Project Accountant and taking up the position of Internal Auditor. On 26.06.2015 the claimant received the offer letter of new appointment dated 22.06.2015. The claimant replied by his letter of 26.06.2015 and immediately thereafter the 2nd respondent suddenly, without notice, dismissed the claimant from employment on account of alleged non-performance.

The letter of termination of contract is dated 29.06.2015 and it terminated the claimant's contract of employment dated 01.12.2013 with effect from 29.06.2015 and upon the reason attributed as the claimant's unsatisfactory performance in his position as Project Accountant. He was to be paid one month salary in lieu of termination notice as per his contract of service and in compliance with the Employment Act, Cap. 226.

The respondents' case is that the claimant was not coerced to sign the offer for a new appointment as Internal Auditor and he did not accept the offer at all. The 1st respondent's further case is that the claimant was struggling and underperforming in his role as Project Accountant hence the offer of Internal Auditor for redeployment. Further the respondents' case was that the 1st respondent was entitled to dismiss the claimant on grounds of underperformance and refusal to be redeployed.

The evidence is that the 1st respondent alleged the reason for termination was unsatisfactory performance. However, there was no notice and a hearing on the alleged unsatisfactory performance as provided for in section 41 of the Employment Act, 2007. In such circumstances the Court returns that the 1st respondent failed to establish the genuine reason for termination as per section 43 of the Act. The respondents' witness purported to shift the reason for termination to absenteeism but which had not been pleaded. Such contradictory evidence by an employer cannot be trusted. The Court finds that as per the claimant's account, the claimant had all the qualifications of a certified public accountant and the respondents desired to promote him to the position of Internal Auditor but when the respondents failed to negotiate the terms agreeable to the claimant, they decided to terminate the subsisting contract of service without a valid reason. The Court finds that the termination was unfair and the claimant is entitled to a declaration accordingly.

The Court has considered section 49 of the Act on factors to consider in awarding compensation for unfair termination. The claimant had joined the service of the 1st respondent as an intern in November 2008 right from college. He remained in the continuous service of the respondent until termination on 29.06.2015. The claimant had 3.5 years of unexpired contractual term. He was unfairly terminated when he declined the position of Internal Auditor and which position had nothing to do with the on-going contract of service as Project Accountant. The Court returns that the claimant is in the circumstances awarded 12 months compensation at his last and gross monthly pay of 60,000.00 making **Kshs.720, 000.00** as prayed for. The Court has considered the alleged warning letter dated 06.05.2015 produced for the respondent and it is submitted that it serves as the claimant's contribution to his termination. The claimant's evidence was that it was never delivered to him and he saw it in Court so that he had a clean record of service. The respondents provided no evidence of service of the warning letter and the Court returns that on a balance of probability, the letter was never served and it amounted to a mere afterthought. It will not therefore serve to establish a contribution by the claimant to the termination of the contract of service in issue. The claimant's evidence that he had a clean record of service is therefore upheld especially in view of the recommendation letter dated 05.06.2015 which confirms that as a Project Accountant he executed his duties with integrity and dedication for the previous 3 years and 5 months.

As pleaded and submitted for the respondent, the claimant has not established a case for breach of the constitutional rights as claimed and as prayed for. The Court returns that the evidence disclosed a clear case of unfair termination and an award under section 49 of the Act meets ends of justice in the circumstances of the case.

The Court makes the following findings on the other remedies as prayed for by the claimant.

The termination was sudden and the Court awards the claimant the contractual one month pay in lieu of the termination notice making **Kshs. 60, 000.00**.

The Court has considered the respondents' submissions and there appears no rebuttal or opposition to the claimant's submission that **Kshs. 18, 600.00** being 5% basic pay for pension not forwarded by the employer to the pension scheme for 2009 and 2010 was undisputed and the same is awarded accordingly.

The Court further returns that the claimant has not established the basis of claims for unexpired period of the contract including leave, study loan, salaries, allowances, pension, and medical cover as claimed and prayed for. The Court has considered the unexpired term in awarding the 12 months' salaries in compensation and the further prayers in that regard are declined as unjustified. In any event the claimant has urged that he was a certified accountant and he was accordingly expected and in a capacity to mitigate his position by promptly engaging in alternative gainful employment. There is no established ground attributable to the 1st respondent that has been shown to have diminished or eliminated the claimant's opportunity to engage in such alternative profitable activities.

The Court further returns that the claimant did not establish the justification for severance pay as prayed for. The claimant testified that he was paid salary for June 2015 and his prayer in that regard will fail.

In conclusion judgment is hereby entered for the claimant against the 1st respondent for:

- 1) The declaration that the termination of the claimant's employment as the Project Account was unfair.
- 2) The 1st respondent to pay the claimant a sum of **Kshs. 798, 600.00** by 01.12.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.
- 3) The 1st respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 18th October, 2019.

BYRAM ONGAYA

JUDGE