



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1984 OF 2013

JOAB MEHTA OUDIA.....CLAIMANT

VERSUS

AGRICULTURE, FISHERIES & FOOD AUTHORITY

(COMMODITIES FUND).....RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 10th December 2013 and amended on 1st April 2016, the Claimant sued the Respondent for unlawful termination of employment.

2. The Respondent entered appearance on 19th December 2013 and subsequently filed a Reply on 21st January 2014. The Respondent did not however respond to the amended Statement of Claim nor did it attend the hearing on 23rd May 2017. I therefore took the Claimant's testimony *ex parte*. At 11.30 am on the same day, Counsel by the name Miss Mumbi appeared and told the Court that an officer in her law firm, who had received the hearing notice, had inadvertently failed to diarize the matter. She added that the Respondent did not have any witnesses.

3. Counsel asked for an opportunity to cross examine the Claimant who had already given his evidence in chief. With the concurrence of Mr. Gachuba for the Claimant, the matter was adjourned to 31st October 2017, for cross examination of the Claimant. When the parties appeared before me on this day, it turned out that Counsel for the Claimant had been served with a Reply to the amended Statement of Claim the previous day.

4. Noting that the Claimant had already given his testimony in chief, the Court declined to admit the Respondent's Reply to the amended Statement of Claim dated 16th October 2017 and expunged it from the record. Counsel for the Respondent proceeded to cross examine the Claimant and parties were directed to file final submissions. Only the Claimant complied.

The Claimant's Case

5. The Claimant states that he was employed by the Respondent's successor, Coffee Development Fund Trustees as a Procurement Assistant, effective 15th January 2013. He adds that the Respondent neither evaluated his performance during the probation period nor was the period expressly extended as required under Clause 2.8.3 of the Respondent's Terms and Conditions of Service.

6. The Claimant avers that the Respondent's Acting Managing Trustee, Nancy Chelangat unilaterally extended his probation period, an action he termed unconstitutional and unlawful. He states that he is a stranger to the said extension of probation period as he learnt of it upon reading the Respondent's Reply to the Statement of Claim.

7. The Claimant pleads that his tribulations began on 14th August 2013, when he invited three firms; *Ongata Works Limited*, *Atlas Plumbers & Builders Limited* and *Flooring & Interiors Limited* to submit tenders for construction services for internal fit-out of office space, under restricted tendering. He alleges that the Respondent's Acting Managing Trustee, Nancy Chelangat openly favoured *Atlas Plumbers & Builders Limited* and did all she could to influence the tender award to the said firm.

8. The Claimant avers that during the tender opening on 27th August 2013, the tender prices were read out as follows:

Item	Bidder	Tender Price (Kshs)
1.	Ongata Works Limited	27,774,345.00
2.	Atlas Plumbers & Builders Limited	23,935,780.00
3.	Flooring & Interiors Limited	24,844,890.00

9. During tender evaluation, the Tender Processing Committee corrected arithmetic errors in the said tenders pursuant to Section 63(1) of the Public Procurement and Disposal Act, 2005 and the corrected tender prices were as follows:

Item	Bidder	Tender Price (Kshs)
1	Ongata Works Limited	27,774,345.00
2.	Atlas Plumbers & Builders Limited	25,075,180.00
3.	Flooring & Interiors Limited	23,946,235.00

10. The Claimant avers that after evaluation, the Tender Processing Committee determined that the bid by Flooring & Interiors Limited was the lowest and recommended that the tender be awarded to them.

11. The Claimant further avers that upon learning that the bid by Atlas Plumbers & Builders Limited was the 2nd lowest after correction of arithmetic errors, Nancy Chelangat summoned the Chairman of the Tender Processing Committee and asked him to collude with other members to allow Atlas Plumbers & Builders Limited to amend and reduce its tender amount. The Claimant refused to cooperate and informed other members of staff of the bizarre request by the Acting Managing Trustee.

12. The Claimant states that contrary to the Public Procurement and Disposal Act, 2005 which expressly bars the Accounting Officer from evaluating tenders, the Acting Managing Trustee demanded that the tender documents be handed over to her, although the evaluation report had not been submitted to the Tender Committee as required under Regulation 11 as read together with Regulation 16(9) of the Public Procurement and Disposal Regulations, 2006.

13. The Claimant alleges that by this time, the Acting Managing Trustee was visibly uncomfortable with him as Head of Procurement Department as she was unable to manipulate him.

14. On 6th September 2013, the Tender Committee approved the evaluation report but deferred the award of the tender pending re-allocation and commitment of funds by the Acting Managing Trustee, as the lowest evaluated bid was above budget.

15. The Acting Managing Trustee refused to sign the letter of award and wrote to the Public Procurement Oversight Authority stating that the tender process had been tampered with and seeking advice on the way forward. She accused the Procurement Department of doing the tampering, an allegation the Claimant denies.

16. On 1st October 2013, the Respondent's Special Audit and Governance Committee of the Board recommended that the tender be cancelled and the Claimant be barred from acting as Secretary to all procurement committees. The Claimant faults the findings and recommendations of this Committee on the following grounds:

a) The Committee did not give him an opportunity to be heard or to make representations;

b) Under Regulation 8(3)(q) of the Public Procurement and Disposal Regulations, 2006 and Clause 4.3(d), (h),(i) &(q) of the Public Procurement and Disposal General Manual, the Procurement Department is the secretariat to all procurement committees;

c) The Respondent had duly appointed the Claimant as Secretary to its Tender Committee, Pre-qualification Committee, Tender Opening Committee and Tender Processing Committee;

d) Under the Public Procurement and Disposal Act, 2005 the Committee had no role whatsoever in any procurement proceedings;

e) The Committee breached Section 27(3) of the Public Procurement and Disposal Act, 2005 by usurping the role of the Tender Committee prescribed under Regulation 10(2)(a) of the Public Procurement and Disposal Regulations, 2006;

f) The Committee disregarded the minutes of the Tender Opening Committee, Tender Processing Committee and Tender Committee.

17. The Claimant avers that on 7th October 2013, he received two show cause letters dated 2nd and 7th October 2013 accusing him of absenteeism and lateness. He states that the letter dated 2nd October 2013 came as a surprise to him because he had, on the said date, called the Acting Managing Trustee, through her Executive Secretary, informing her that he could not make it to work as he was unwell, which absence the Acting Managing Trustee approved.

18. Regarding the letter dated 7th October 2013, the Claimant states that he responded and explained that he had to take an injection on his way to work, which explanation was duly accepted.

19. On 8th October 2013, the Respondent's Tender Committee terminated the tender for construction services for internal fit-out of office space on the ground that the lowest bid was above budget. The Claimant prepared a termination report to the Public Procurement Oversight Authority which he submitted to the Acting Managing Trustee for signature. The Acting Managing Trustee however amended the report thereby placing blame on the Procurement Department and all committees involved in the tender process.

20. The Claimant alleges that after re-advertisement for the works, the Acting Managing Trustee leaked the budget allocation to Atlas Plumbers & Builders Limited as its new tender amount was the exact budget allocation. The Claimant avers that after evaluation and award of the 2nd tender, the Acting Managing Trustee was furious that Atlas Plumbers & Builders Limited had failed to win for the second time and asked the Claimant to hand over the minutes of the Tender Committee and warned the Claimant that he would not go far.

21. On 1st November 2013, the Respondent's Board resolved to terminate the Claimant's employment without notice or opportunity to be heard. The Claimant's employment was terminated on 4th November 2013 and on 7th November 2013, he appealed. There was no response to his appeal.

22. The Claimant maintains that the termination of his employment was driven by revenge, malice and personal interest. He adds that the termination was therefore unconstitutional, unlawful and un-procedural and he now seeks the following:

- a) A declaration that the termination of his employment was unlawful and unfair;
- b) A declaration that the Respondent grossly violated the Employment Act and the Claimant's labour rights;
- c) An order compelling the Respondent to pay the Claimant in compensation for violation of his rights under Articles 27(1), 41, 47 and 236 of the Constitution of Kenya, 2010;
- d) An order compelling the Respondent to unconditionally reinstate the Claimant to his office without loss of remuneration, benefits and rights;
- e) In the alternative to an order for reinstatement, the Respondent be compelled to pay to the Claimant:
 - i) Kshs. 1,020,000 being 12 months' gross salary at Kshs. 85,000 per month in compensation for unfair termination of employment;
 - ii) Kshs. 85,000 being 1 month's salary in lieu of notice;
 - iii) Kshs. 85,000 for 25 days of accrued leave'
 - iv) Costs plus interest.

The Respondent's Case

23. In its Reply dated 20th January 2014 and filed in court on 21st January 2014, the Respondent denies the Claimant's entire claim. Specifically, the Respondent states that the Claimant was never confirmed to permanent and pensionable terms of employment.

24. The Respondent states that the Claimant's probation was extended from July 2013 to October 2013 pursuant to Subsection 2.8.3 of the Respondent's Terms and Conditions of Service and Section 42(2) of the Employment Act, 2007. The extension of the Claimant's probation period was to allow the Acting Managing Trustee time to review his performance. The Claimant was duly notified of the said extension by letter dated 20th August 2013.

25. The Respondent avers that the Claimant had been severally warned against neglecting his duties by being absent from work without permission and reporting to work late and was given a chance to give reasons as why disciplinary action should not be taken against him.

26. It is the Respondent's case that the termination of the Claimant's employment was in accordance with the provisions of the Employment Act, 2003. The Respondent maintains that having been on probationary appointment, the Claimant does not enjoy the protection of Section 41 of the Employment Act.

27. According to the Respondent, the Claimant's employment was terminated due to his absenteeism from duty without permissions despite several verbal and written warnings, as well as improper handling of a process, leading to termination of a tender. The decision to terminate the Claimant's employment was made by the Respondent's Board of Trustees, contrary to the allegations by the Claimant that it was a unilateral and malicious decision by the Acting Managing Trustee. The decision by the Board was informed by a report tabled by the Respondent's Audit and Governance Committee.

Findings and Determination

28. There are three (3) issues for determination in this case:

- a) The Claimant's employment status at the time of termination;
- b) Whether the Claimant has made out a case for unlawful and unfair termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

Employment Status

29. In its line of defence, the Respondent maintains that as at the time his employment was terminated, the Claimant was on probation. His employment was therefore terminated under Section 42 of the Employment Act and he is not entitled to the procedural fairness requirements set out under Section 41 of the Act.

30. According to the Claimant's letter of appointment dated 13th December 2012, the Claimant was to serve a probation period of six (6) months or such extended period as deemed necessary.

31. The Respondent produced a letter dated 20th August 2013, addressed to the Claimant by the Acting Managing Trustee, informing him that his probation period had been extended by three (3) months to allow time for the Acting Managing Trustee to review the Claimant's performance. The Claimant denied ever receiving this letter from which the Court noted the following:

- a) That by the time the letter was issued, the Claimant's probation period had lapsed;
- b) That the reason given for extension of the probation period, that is to allow time for the Acting Managing Trustee to review the Claimant's performance, is unknown in performance management law and practice. Ordinarily, the decision to extend the probation period of an employee is informed by performance gaps identified in a pre-confirmation review. The employee is expected to close these gaps during the extended probation period.

32. Even assuming that the Claimant was in fact served with letter dated 20th August 2013, I must for the foregoing reasons, find that the decision to extend his probation period was both unlawful and unprocedural. The corollary is that by the time the Respondent wrote its letter dated 20th August 2013, the Claimant had been confirmed by effluxion of time.

33. A related question is whether the Claimant, having worked for the Respondent for less than thirteen months, is entitled to bring a claim for unfair termination in light of the provisions of Section 45(3) of the Employment Act.

34. On this account, I am persuaded by the holding by **Lenaola J** (as he then was) in **Samuel G. Momanyi v Attorney General & another [2013] eKLR** that section 45(3) which appears to lock out a certain category of employees, from laying a claim for unfair termination, is unconstitutional. The result is that the Claimant's claim is properly before the Court and I will now deal with it on its merit.

The Termination

35. The Claimant's employment was terminated by letter dated 4th November 2013 stating as follows:

"Dear Joab,

RE: TERMINATION LETTER

This is to inform you that the Board has terminated your employment on probation with Coffee Development Fund with immediate effect.

Your employment is being terminated because your:

1. Attendance violates company expectations and policies. You have received verbal and written warnings as concerning your attendance and reporting time to work.
2. The unprocedural handling of the procurement process for office partitioning.

In view of this, you are hereby directed to hand over all the Fund's property belongings in your custody to the Human Resource Officer.

You will be paid your dues as follows: Leave accrued as at 4th November 2013, Salary as at 4th November 2013 and One (1) month in lieu of notice.

We wish you the best in your future endeavors.

Yours faithfully,

COFFEE DEVELOPMENT FUND

(Signed)

Nancy Chelangat

Ag. MANAGING TRUSTEE

36. By this letter, the Claimant was accused of acts of misconduct and poor performance, which he denied. In his claim before the Court, the Claimant gave a detailed account of alleged victimization by the Acting Managing Trustee. Apart from the Claimant's word however, these allegations were not supported by independent evidence and the Court will not base its decision on them.

37. What is evident is that the Claimant was not given an opportunity to respond to the charges that led to the termination of his employment. The charges were therefore not tested at the shop floor and the Court finds the ensuing termination both substantively and procedurally unfair.

Remedies

38. In light of the foregoing, I award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct prior to the termination. I further award the Claimant one (1) month's salary in lieu of notice, salary for four (4) days in November 2013 and accrued leave pay.

39. In the end, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....	Kshs. 255,000
b) 1 month's salary in lieu of notice.....	85,000
c) Salary for 4 days in November 2013 (85,000/30x4).....	11,333
d) Leave pay (85,000/30x1.75x9).....	44,625
Total.....	395,958

40. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

41. The Claimant will have the costs of the case.

42. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Gachuba for the Claimant

Miss Mumbi for the Respondent