



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 923 OF 2014

WAKOLI FREDRICK KASEMBELI.....CLAIMANT

JOSEPHAT AYODI LUSENO.....2ND CLAIMANT

VS

INTERNATIONAL COMMITTEE OF THE RED CROSS.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Wakoli Fredrick Kasembeli and Josephat Ayodi Luseno against the International Committee of the Red Cross. The claim is contained in a Memorandum of Claim dated 26th May 2014 and filed in court on 3rd June 2014. The Respondent filed a Memorandum of Response on 24th June 2014.

2. When the matter came up for hearing, the Claimants testified on their own behalf and the Respondent called Sylvia N. Lokong and Paul Rungu Murwithania.

The Claimants' case

3. The Claimants were employed by the Respondent on diverse dates. The 1st Claimant, Wakoli Fredrick Kasembeli served as Head of Security and the 2nd Claimant, Josephat Ayodi Luseno worked as Security Officer.

4. The Claimants aver that sometime in July 2012, allegations were made against them to the effect that they had acquired bank loans using forged documents. The Claimants denied the allegations which they termed as an excuse by the Respondent to dismiss them from employment. The Claimants' employment was eventually terminated on 29th October 2012.

5. The Claimants maintain that the termination of their employment was unjustifiable and unfair. They therefore claim 12 months' salary in compensation.

The Respondent's Case

6. In its Memorandum of Response dated 23rd June 2014 and filed in court on even date, the Respondent admits the Claimants' employment history as pleaded in the Memorandum of Claim save that the 1st Claimant's employment commenced on 11th January 2008.

7. The Respondent states that the subject of the Claimants' dismissal was thoroughly investigated. The Claimants were taken through due disciplinary process but their explanations were found inadequate by the Disciplinary Committee.

8. The Respondent further states that the termination of the Claimants' employment was in accordance with their respective contracts of employment. The Respondent adds that the termination was lawful and fair.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimants' employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The termination letters issued to the Claimants did not specify the reasons for the termination. The 2nd Claimant's termination letter dated 29th October 2012 states as follows:

"RE: TERMINATION OF CONTRACT

Reference is made to the meeting held on the 31st of October 2012, between you, and the Deputy Head of Delegation, the Administrative Coordinator and the HR Assistant.

The International Committee of the Red Cross wishes to exercise its rights to terminate your contract, in accordance with the ICRC Staff Rules and Regulations with effect from 31st of October, 2012.

Your final dues will be paid as detailed below, less the statutory deductions and any liabilities:-

- i) One Month's salary in lieu of notice;*
- ii) Your leave days due up to end of October, 2012;*
- iii) 13th salary (2012) on prorata basis;*
- iv) Severance pay (One Months salary for every completed year).*

We acknowledge your contribution towards the Red Cross Movement over the period you have been with ICRC and wish you all the best in all future endeavors.

Yours faithfully,

Jean-Luc Jacquier

Christoph Luedi

Administrative Coordinator

Head of Regional Delegation"

11. While the termination letters did not disclose any reasons for the termination of the Claimants' employment, it emerged in the course of the trial that the Claimants, alongside other employees of the Respondent, had been the subject of investigations into allegations of forgery of employee loan application documents, orchestrated by one Gideon Omunyini.

12. The 1st Claimant, Fredrick Wakoli Kasembeli told the Court that he was not involved in the investigations in any way. In his words, he got to know about the issue through rumours. In reaction to these rumours, the Claimants, together with other employees of the Respondent, raised their concerns via a letter dated 25th October 2012, addressed to the Head of Delegation, Administration Coordinator and Head of Human Resources.

13. The letter of 25th October 2012 prompted a meeting with the Deputy Head of Delegation and the Head of Security. Kasembeli testified that he was summoned by the two officers and asked whether he had applied for a loan. It was then that he was informed that Gideon Omunyini had been arrested for impersonating the Human Resource Manager. The 1st Claimant recorded his statement on the issue and on 30th October 2012, he was issued with a letter of termination of employment.

14. The 2nd Claimant, Josephat Ayodi Luseno testified that on 25th October 2016, he was summoned by the Deputy Head of Delegation, François Mounis, Head of Security, Paul Rungu and Security Officer for Logistics to explain the procedure he had used to apply for a loan. He was also asked to record a statement.

15. Luseno acknowledged being part of the group that had written the letter dated 25th October 2012 but stated that the concerns raised were not addressed. On 31st October 2012, he was called by the Deputy Head of Delegation, Head of Human Resource and the Administration Coordinator and handed a termination letter.

16. Like the 1st Claimant, the 2nd Claimant stated that he was not part of the investigations into allegations of forgery of employee loan application forms.

17. What then was the reason for the termination of the Claimants' employment? The Respondent's 1st witness, Sylvia N. Lokong testified that the Claimants had failed in their duties by omitting to investigate a visit by two ladies from Barclays Bank of Kenya. Lokong however admitted that the report dated 24th June 2012 had not implicated the Claimants.

18. The Respondent's 2nd witness, Paul Rungu Murwithania, who served as Head of Security told the Court that the Claimants were invited to give their version after the investigation report dated 25th October 2012 had been prepared.

19. The question before the Court is whether the Respondent has a demonstrated a valid reason for terminating the Claimants' employment as required by Section 43 of the Employment Act, 2007. It is now settled that in determining whether an employer has discharged its burden under this provision, the Court is to be guided by the principle of reasonableness (see *Paul Waigiri Muriuki v Nairobi Water and Sewerage Company Ltd [2015] eKLR* and *Rashid Jeneby v Prime Bank Limited [2015] eKLR*).

20. From the evidence on record, there appears to be no connection between the issue of forged loan application documents, which was the subject of investigations by the Respondent, and what eventually led to the termination of the Claimants' employment.

21. Additionally, even assuming that the termination was triggered by a security lapse on the part of the Claimants, as alleged by the Respondent's witnesses, the Claimants had a right to be subjected to the mandatory disciplinary procedure set out under Section 41 of the Employment Act. This did not happen and the Court ultimately finds that the termination of the Claimants' employment was substantively and procedurally unfair.

Remedies

22. Before making a final award in this matter, I need to dispense with an issue of a preliminary nature raised by the Respondent in final submissions, to the effect that this Court has no jurisdiction to entertain the Claimants' claim on account of diplomatic immunity enjoyed by the Respondent. The only thing I will say on this score is that this issue was neither pleaded nor canvassed at the hearing and to raise it at this stage amounts to pleading and testifying in final submissions. The Court will therefore not consider this issue in making its final judgment.

23. In light of the foregoing, I enter judgment in favour of the Claimants as follows:

a) 1st Claimant: Wakoli Fredrick Kasembeli- Kshs.1,629,616 being eight (8) months' salary in compensation for unfair termination of employment;

b) 2nd Claimant: Josephat Ayodi Luseno – Kshs. 986,400 being twelve(12) months' salary in compensation for unfair termination of employment

24. In arriving at these awards, I have taken into account the respective lengths of service alongside the Respondent's conduct in the termination transaction.

25. These amounts will attract interest at court rates from the date of delivery of this judgment until payment in full.

26. The Claimants will have the costs of the case.

27. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF APRIL 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF APRIL 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Wathome for the Claimants

Mr. Abidha for the Respondent