



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1686 OF 2013

(Before Hon. Justice Mathews N. Nduma)

EDWARD MACHUKA NYAMORA.....CLAIMANT

VERSUS

THE KENYA ANIMAL GENETIC RESOURCE CENTRE

Formerly (CENTRAL ARTIFICIAL

INSEMINATION STATION).....RESPONDENT

J U D G M E N T

1. The suit commenced by a Memorandum of Claim on 23rd October, 2013 and a Supplementary Memorandum of Claim dated 9th December, 2015. The court notes at the outset that there is no provision in law for a Supplementary Memorandum of Claim. A Claimant who wishes to supplement original Memorandum of Claim must do so vide an amendment to the original Memorandum of Claim. This was a mis-step in procedure, the Supplementary Memorandum of Claim is struck off as it is an abuse of court process.

2. In the original Memorandum of Claim, the Claimant seeks compensation for unlawful termination of employment and payment of terminal benefits set out in paragraph 15 of the Memorandum as follows:-

- a. Two months salary in lieu of notice – Kshs. 81,670.00
- b. Severance pay for 15 years of service Kshs.306,262.50
- c. House Allowance arrears at 15% of basic
salary for 187 months Kshs.145,421.70.
- d. Gratuity at 31% of the Basic Salary Kshs.2,367,204.95
- e. Unserved term of Service Kshs.13,894,320.00
- f. Certificate of Service
- g. Interest and Costs.

Facts of the Case

3. From the pleadings and oral testimony by the Claimant, the Claimant was employed by the Respondent as Accountant I on 12th March, 1997. The Claimant was promoted variously to jobs Group 'K', 'L' and eventually to job group 'M'. By the time the Claimant wrote a letter of resignation dated 4th October, 2012, the Claimant earned a basic salary of Kshs.40,835.00 , House allowance of Kshs.24,000, Commuter

allowance of Kshs.8,000 as per the pay slip of November, 2012.

4. By a letter dated 17th September 2012, the Chairman of the Respondent wrote to the Claimant a show cause letter regarding undisclosed fraudulent cases discovered by Accounts Inspection Report. He was to appeal before the Board on 27th September, 2012.

5. The Claimant testified that he appeared before the board as scheduled and explained himself however, he was presented with an option to resign or his employment would be terminated.

6. The Claimant wrote a letter of resignation dated 4th October, 2012 effective 31st December, 2012. The letter is silent on the reason(s) for resignation.

7. The Respondent wrote to the Claimant on 24th October, 2012 accepting his resignation but brought forward the resignation date to 31st November, 2012.

8. The Claimant wrote a letter demanding payment of terminal benefits dated 20th March, 2013. In this letter he stated for the first time that he resigned under duress and that the separation be treated as a termination.

9. The Claimant gave notice to go to court if his dues were not paid.

10. The letter was responded to by the Chairman on 3rd April, 2013, in which he denied that the Claimant was forced to resign and he voluntarily resigned from service.

Response

11. The Respondent filed a Memorandum of reply dated 21st November, 2013, in which the particulars of employment were admitted.

12. The disciplinary process commenced against the Claimant for fraud was also admitted. That the Claimant explained his conduct vide a letter dated 8th August, 2011. The Respondent transferred the Claimant to Ngong vet. Farm by a letter dated 29th August, 2011. The Respondent thereafter discovered that the Claimant was absenting himself from work without cause.

13. The Claimant was summoned to appear before the Board to explain himself on 27th September, 2012 on the fraud allegations and absenteeism. That he appeared before the Board and thereafter presented to the Board a letter of resignation dated 4th October, 12. That this pre-empted any decision by the Board on the disciplinary case. The Respondent denied that it forced the Claimant to resign.

14. That the Claimant is not entitled to the reliefs sought including notice pay, severance pay, gratuity or compensation.

15. That the suit be dismissed in its entirety.

Determination

16. The issues for determination are as follows:-

(i) Did the Claimant resign voluntarily or his employment was terminated by the Respondent?

(ii) Is the Claimant entitled to the reliefs sought?

Issue 1

17. Section 107 of the Evidence Act, Cap 80 Laws of Kenya titled 'Burden of Proof' reads –

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

18. Section 108, titled :Incidence of burden” reads –

“the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

19. In the present case, the Claimant wishes the court to believe that he was forced to resign from his employment and therefore his separation with the Respondent was unlawful termination and not a voluntary resignation.

20. The Claimant testified under oath and produced documentary evidence in support of his claim. The letter of resignation the Claimant wrote is the most important document on this issue.

21. If the resignation was not voluntary as claimed by the Respondent, a reasonable employee in a Senior position as was held by the

Claimant would tender the resignation under protest and state that the resignation was not voluntary but was forced. To the contrary the letter of resignation produced by the Claimant was not under protest and did not state the reasons for the resignation and whether the action was forced.

22. The Respondent did not call any witness in support of its case. However, the burden of proving the incident of forced resignation was squarely on the Claimant. The Claimant failed to present any credible evidence to warrant the Respondent to rebut the same.

23. Accordingly, the Claimant has failed to prove on a balance of probabilities that he was forced to resign. The Claim for unlawful termination has not been proved therefore and is dismissed.

24. In terms of regulation 11:21.1 of the Human Resource Manual of the Respondent, produced by the Claimant himself, an employee is obliged to give one (1) month notice of resignation or he shall pay one month's salary in lieu of such notice. The Claimant wrote letter of resignation on 4th October, 2012, giving effective date to be 31st December, 2012. However, the Respondent reduced the effective date to 31st November, 2012 which was about two (2) months notice. The Claimant served the notice period and is not entitled to payment in lieu of notice as claimed or at all.

Severance Pay

25. The Claimant was not retrenched or declared redundant and is therefore not entitled to severance pay. This claim is equally dismissed.

House Allowance

26. The Claimant was paid a gross pay which included house allowance until he resigned from employment. The Claim for payment of house allowance is misconceived and is also dismissed.

Gratuity

27. The Claimant was employed on permanent and pensionable basis. He has not demonstrated that he was entitled to payment of gratuity at 31% of the served term as is applicable to public officers employed on fixed term contracts. This claim has not been proved and is also dismissed.

Serve to Retirement Date

28. The Claimant having voluntarily resigned is not entitled to any compensation for the unserved term of the contract or at all.

29. The suit is dismissed in its entirety with costs.

Dated and Signed in Kisumu this 2nd day of May, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 30th day of May, 2018

Maureen Onyango

Judge

Appearances

Mr. Omboga for Claimant

Attorney General's Office for Respondent

Anne Njung'e – Court Clerk