



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1446'B' OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 22nd May, 2018)

PATRICK OMUTIA OTULIA.....1st CLAIMANT

PETER GACHIE KAROGI as legal representative

of GRACE NZOMO (Deceased).....2ND CLAIMANT

VERSUS

NAIROBI CITY WATER &

SEWERAGE COMPANY LIMITED.....RESPONDEDNT

JUDGEMENT

1. This Claim was filed by the Claimants herein on 23/8/2012 by P.K. Mtange & Company Advocates and later change of Advocates was filed by Nyabena and Company Advocates by the Claimant on 13.11.2013. The Claimants claim is that they were employed by the Respondent vide employment contracts dated 19.6.2007. That they diligently, faithfully and with all honesty served the Respondent throughout their employment and were ready, able and willing to continue with such service.
2. The 1st Claimant's case is that he was charged with the duties of handling Human Capital and Administration in addition to Finance, ICT, ISO and Planning while the 2nd Claimant held the position of Director of Legal, Company Secretary and Security Services in the Company and was also charged with the duty of advising the Board of the Respondent on all legal matters.
3. The 2nd Claimant died interstate on 31.1.2016 and one Peter Gachie Karogi was appointed the legal representative of the deceased's estate. This Court allowed him to proceed with this suit on behalf of the 2nd Claimant.
4. The Claimants' case is that following an arbitrary action undertaken by the Respondent in May 2010, the Respondents sometime in July 2011 terminated the services of both Claimants under Cause 8 of their respective employment contracts without giving any reasons whatsoever as envisaged under Article 47 of the Constitution of Kenya.
5. They contend that the Board of Directors subsequently met on 5/7/2011 and ratified the recommendation of the Finance, Administration and Communication Committee whilst being improperly constituted and therefore lacking the mandate to pass a resolution terminating the services of the Claimants.
6. The Claimants aver that the Respondents proceeded to pay them termination benefits in an irregular manner wherein each Claimant was paid 501,373.90/= supposedly as full and final settlement of their termination dues. The Claimants aver that they are still owed 12,685,159 and 7,704,690.27 respectively by the Respondent.
7. The Claimants aver that 1st Claimant being Finance Director was earning a salary of 634,374.35 per month excluding fringe benefits. That he was entitled to a monthly acting allowance of Kshs.96,735.25 for serving as Acting Director Human Resource and Administration.
8. The 2nd Claimant on the other hand was Company Secretary earning a salary of Kshs.565,826 per month excluding other fringe benefits.
9. The Claimants aver that in addition to their monthly salaries, they were each entitled to a gratuity equivalent of 31% of basic mostly salary

of Kshs.386,953/= upon successful expiration of each year's service which was to be received by the employee during the preceding year for every month of service completed. Each was also entitled to 30 days annual leave and annual leave allowance equivalent to the basic monthly salary.

10. The Claimant aver that as a result of the Respondent's action, they have suffered loss of earnings and dented careers and reputation and it is only just and fair that they are compelled by this Court to pay up the balance of terminal dues.

11. The Claimants pray for judgment against the Respondents for special damages. They also seek payment of the balances of their terminal benefits, general damages for denting their careers and reputation costs and interest and any other or further relief this Court may deem just to grant.

12. The Respondents opposed this claim. They filed their Reply to the Memorandum of Claim on 18/10/2012 through the firm of Kibatia & Company Advocates. The Respondents also made a counter claim for what they term as excess payments to Claimants.

13. The Respondents position is that the Claimants were sent on compulsory leave on 19th May 2010 and 26th May 2010 by the Athi Water Services Board. That the Claimants were paid their full salaries during this period of leave.

14. The Respondents aver that on 6.7.2011, they terminated the Claimants' contracts pursuant to Clause 8 and 9 of their respective contracts and paid them their full terminal dues according to their respective contracts.

15. They deny that the Claimants are entitled to the prayers sought.

16. The parties also filed their respective submissions in support of their case.

17. The Respondents called a witness who gave oral evidence and on cross-examination stated that the contract could be terminated by giving 6 months notice. He stated that under Clause 9 the Claimants were also entitled to gross salary for the remainder of the contract term.

18. I have considered the evidence and submissions of the parties. The issues for determination are:-

1. *Whether the termination of the contract of the Claimants by the Respondents was fair and justified.*
2. *Whether the Respondents paid the Claimants their full terminal benefits under their respective contracts.*
3. *Whether there are any reliefs this Court can grant.*

19. In considering issue No. 1, I am aware that the Claimants were terminated vide letter issued on 6.7.2011 which stated as follows:-

"....following the meeting between yourself and Finance, Administration and Communication Committee at Red Court Hotel on 17th May 2011, the Board of Directors met on 5th July 2011 and resolved to terminate your contract of employment as provided for under Clause 8 and 9 therein. The termination is effective immediately. You are entitled to all your dues as provided for under your contract upon clearance with the Acting Managing Director".

20. Clause 8 and 9 of the Claimants' contracts stated as follows:-

8) *"Notwithstanding anything hereinbefore contained and subject to Clause 9 hereinafter, either party may terminate this Agreement at any time by giving to the other not less than 6(six) months' notice in writing of their or her intention in that behalf of such notice to expire on any day of the month whereupon the contract of employment and service created hereunder shall determine accordingly.*

9) *With effect from the date of this agreement, if the contract is terminated by the Board under the provisions of Clause 8 of the Board shall subject to statutory deductions and as compensation for loss of employment pay to the Employee an amount equivalent to the salary for the period not served under this Agreement, all leave earned and accrued due but not taken by her at the date of such termination".*

21. These agreements were made on 19.6.2007 and they were terminated on 17.5.2011. Before this termination, there is no indication that the Claimants were informed of the reasons for the termination as envisaged under Section 43 of Employment Act. This is also envisaged under Article 47 of the Constitution which provides as follows:-

- 1) *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- 2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- 3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-*
 - a) *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal;*
 - and*

b) promote efficient administration.

22. Whereas the contract between the Claimants and Respondent did not provide for issuance of reasons, the law had progressed in 2011 and the Respondents were duty bound to observe the same and give reasons to the Claimants before terminating the contracts.
23. Under Section 41 of Employment Act, other than reasons expected, a fair hearing process is also envisaged. Section 41 of Employment Act 2007 states as follows:-
- (1). “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.**
24. The Respondents never subjected the Claimants to any disciplinary process. This is buttressed by the Minutes of the meeting held on 2/6/2010 Min No. 33/55/2010 in Miscellaneous Application No. 195 of 2010 which exonerated the Claimants from any wrong doing. There are also no minutes produced by the Respondent which show that the Claimants were subjected to any disciplinary hearing.
25. In view of the provisions of Section 45 (2) of Employment Act 2007, the termination of the Claimants was unfair and unjustified.
26. The next issue concerns payment of Claimants’ terminal dues. The Claimants have averred that they were not paid all their dues. The Respondents on their part have contended that they paid the Claimants all the dues and even in excess hence the counter claim.
27. The contract of service provided for what was payable in event of termination by either party. This included 6 months notice and salary and allowances to the end of the contract. The Respondent have submitted that even this should not be paid yet have admitted paying the same.
28. In this Court’s view, the contract was explicit that the payments were to be made in case of termination and this Court cannot vary the terms of the said contract.
29. The Respondent stated in their counter claim that the 1st Claimant was entitled to terminal dues of 7,036,092.76/= and they paid him 9,461,901.56/= which amount is admitted as having being paid as at page 114 to 117 of Respondent’s bundle filed in Court on 22.8.2012.
30. As to the 2nd Claimant’s dues, the Respondent averred that it amounted to 6,218,001.58 but she was paid 9,207,745.00 as admitted at 118 of Respondent’s bundle filed in Court on 22.8.2012.
31. The Respondents contention is that having been terminated the Claimant should not be paid allowances they pleaded which allowances were not payable while on suspension. The Respondent cited **Kenya Ports Authority vs Silas Obengele (2008) eKLR**, where the Court of Appeal held as follows:-
- “But before dealing with that issue, we think we should first consider whether in a case where a person has been wrongly retired or dismissed, the measure of damages should include loss of house allowance, telephone facility, travelling allowance and other related benefits normally enjoyed by staff while still in employment. These benefits are paid to serving employees not as payment to services rendered or to be rendered but to enable the officer concerned perform his work more conveniently and therefore more efficiently. It is a facilitation payment. That being the case, there is or there would be no basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remunerative”.**
32. The Respondents have submitted that the Claimant should not be paid gratuity, house allowance, fuel and telephone, entertainment, security, airtime, security tax refund, leave allowance, acting allowance, club subscription and professional subscription after termination.
33. I agree with the Respondents to a certain extent as per the holding of the Court of Appeal. I do not think the Claimant should be entitled to non-remunerative allowances such as entertainment club subscription, professional subscriptions, acting allowance, airtime allowance, fuel allowance, security entitlement and security tax refund.
34. However from the Agreement between the Respondent and Claimant house allowance, entertainment and telephone allowance under paragraph 4(1) of the contract was part and parcel of the monthly salary and was therefore considered remunerative.
35. Gratuity on the other hand was provided for under paragraph 4(viii) of the contract and was payable at 31% of the monthly salary received by the employee during the preceding year for every month of service completed.
36. In this Court’s view, gratuity goes hand in hand with monthly salary payable or received by the employee. The Claimants had a legitimate expectation to serve the exact contract period of 5 years, which was to expire on 18/6/2012. Gratuity is therefore payable upto the 18/6/2012 on prorata basis for each month served.

37. The Respondent having already paid salary to the expiry of the contract cannot renege on payment of gratuity and submit that it is not payable.

38. In the circumstances, it is this Court's finding that given the amounts already paid for 1st Claimant excluding house allowance, telephone allowance and entertainment allowance and gratuity, the same should now be paid. I therefore find that the Claimants are entitled to the following orders:-

1. 6 months salary in lieu of notice:-

1st Claimant – 515,000 x 6 = 3,090,000/=

2nd claimant = 515,000 x 6 = 3,090,000/=

2. Gratuity payment of 2 years = 31% of 24 x 515,000 = 3,831,600 for each Claimant.

3. 8 months salary as damages for unlawful termination = 515,000 x 8 = 4,120,000/= for each Claimant.

TOTAL = 11,041,600 for each Claimant

Less what has been paid

1st Claimant = 11,041,600-9,461,901.56 = 1,579,698.44

2nd Claimant = 11,041,600-6,218,001.50 = 4,823,598.5

These amounts are subject to statutory deductions.

4. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 22nd day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabena for Claimant – Present

No appearance for Respondent