



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2289 OF 2012

CHRISTINE MARTHA WANJIRU MWANGI CLAIMANT

VERSUS

HON. ATTORNEY GENERAL RESPONDENT

JUDGEMENT

1. The claimant is an adult female resident in Nairobi. The respondent is the Attorney General, Republic of Kenya and sued in the capacity of representative of the Ministry of East African Community.

2. The claimant was a civil servant and employee off the Ministry of East African Community in the position of Chief Finance Officer. In the year March 2009, the claimant was engaged in the initiation of the Ministry programme with the British Department for International Development (DFID) and the drafting of the Ministry strategic plan. At the end of March, 2009 when the claimant was due to retire the Ministry through the Permanent Secretary offered her a short term contract with effect from the date of retirement and vide letter dated 3rd April, 2009. The claimant was to continue with her on-going duties as she waited for the signing of the contract. This contract was never issued to the claimant.

3. On 28th January, 2010 while the claimant was undertaking her duties at the ministry, the permanent secretary sent a representative Mr Nyaga Muchunu directing the claimant to vacate the office she was occupying. The claimant's car park sticker was removed and was subsequently denied parking space. Such effectively terminated her employment with the ministry without notice or good cause.

4. The claim is for damages for the unlawful termination of employment, embarrassment and humiliation suffered as a result. The termination of employment was unlawful as the claimant was carrying out her duties under the short term contract for which she was rated as excellent performer at 97% in the staff appraisal.

5. The claimant was not paid for the period of ten (10) months worked under the short term contract. Such pay is due and owing together with pro-rated leave days due.

6. The claimant has made demand from the ministry and asked to resolve the matter amicably to which the permanent secretary initiated a meeting in July, 2010 for negotiations and it was resolved by agreement that a payment of Kshs.400,000.00 per month be made. Despite such resolution and agreement, the respondent has failed to pay.

7. The claimant testified in support of her claim. The claimant was employed by the Ministry in August, 1975 and was due to retire in March, 2009 when the permanent secretary called and offered her a short term contract under the DFID programme. A letter to this effect was issued to the claimant dated 3rd April, 2009. At the time the claimant had been appraised and the permanent secretary had found her to be of excellent performance.

8. The details with regard to the claimant's short term contract as to the payment; duration and conditions were not agreed though she was to continue with her duties as held before. The claimant continued with her duties as she waited for her contract which was not issued.

9. By 13th November, 2009 the claimant had no contract and was not paid her due salary. She discussed the matter with the permanent secretary and was promised that her contract terms would be resolved. In December, 2009 the claimant wrote to the permanent secretary about her financial constraints noting she had not been paid for over a long period while she remained at work. There was no reply.

10. On 7th January, 2010 the respondent ministry wrote and directed the claimant to issue her fee note. By the end of January, 2010 the claimant was evicted from her office at the ministry. Her parking sticker was removed. She was denied parking space. Despite doing a memo seeking the permanent secretary to give directions, there was no response. There had been no notice or good cause for the turn of events. Her due salary was not paid.

11. The respondent ministry sent the claimant a draft contract and the claimant indicated that she needed to negotiate the terms but there was no response.

12. In July, 2010 the respondent constituted a committee to help negotiate contract terms with the claimant with the facilitation from Treasury. It was agreed that she should be paid Kshs.400, 000.00 per month less taxes due. As the claimant had worked for 10 months she was supposed to be paid for her time. There has been no payment since.

13. The claimant is seeking for compensation for unfair termination of employment and salaries unpaid for 10 months at kshs.400, 000.00 per month and the prorated leave days.

14. In cross-examination, the claimant testified that she was offered a short term contract by the respondent upon her retirement. The terms were not agreed and these were to be negotiated. A draft contract was issued noting she would be paid \$1,700 per month but she did a counter-proposal of 5,000 British Pounds and thus the matter was not settled. The claimant also declined the counter-offer of \$2,000 for being too low. The permanent secretary constituted a committee to help with negotiations and it was agreed the gross payment should be Kshs.400, 000.00 per month.

Defence

15. In response, the respondent's case is that there was no contract between the parties as alleged by the claimant and where there was such contract, the same was not signed so as to bind the parties in an employment relationship. Where a contract was anticipated this was delayed due to delays in signing of a memorandum of understanding (MOU) between the ministry and DFID. Such MOU was later signed in March, 2010. The ministry prepared a contract to be signed but the claimant declined to sign on the reason that she was not accorded an opportunity to negotiate its terms especially the duration and rate of payment.

16. The claim that the claimant was evicted from her office is denied. Her parking ticket was not taken away and there was no unfair termination of employment since no letter to this effect was ever issued to the claimant. Where the parties agreed to a salary of kshs.400, 000.00 then this was to be subject to 30% tax deduction. For the

10 months which the claimant was at the respondent service, where any monies are due to her such should be at Kshs.2,800,000.00.

17. The respondent did not call any witness.

18. At the close of the hearing, both parties filed written submissions.

19. The claimant submits that her claims are not challenged by the respondent whose defence is made of mere denials. The claimant relied on the case of **Kenya Commercial Bank versus KCB Uganda and Suntra Investment HCCC No.547 of 2012** where the court struck off the defence which comprised mere denials and offered no substance in response. In **Mercy Karimi Njeru and Polly Kari Njeru & another versus Kisii Real Estate HCCC No.402 of 2014** the court issued summary judgement where the defence failed to raise any triable issues.

20. The claimant also submitted that the claims made by the claimant for payment of Kshs.400, 000.00 per months as agreed should be confirmed as for salary due and compensation for unfair termination of employment.

21. The respondent also submits that there was no written contract of employment between the parties as alleged and the basis for the retention of the claimant in the ministry was by letter dated 3rd April, 2009 issued awaiting the signing of the contract. By letter dated 13th November, 2009 the claimant was informed that she had been retained on short term basis and to enable the completion of the DFID project and thus the claimant was to submit a report to facilitate her payments. The port under which the claimant was retained was between the government and DFID and the payments due to the claimant was to be approved. The draft contract dated 10th February, 2010 stipulated that the salary would be \$1,700 per month but the claimant declined the same on the grounds that it was too low. This was enhanced to \$2,000 which the claimant declined.

22. The respondent also submits that the respondent constituted a committee to negotiate with the claimant and among the resolution was to pay a salary of Kshs.400, 000.00 per month less 30% taxes and this is in accordance with minutes

dated 19th July, 2010. The DFID offered to pay 5,500 British Pounds for the entire service by the claimant. The claimant should thus only be paid the rate of \$2,000 for the 10 months less taxes due at the going rate as at 2010. There are no general damages due to the claimant. Where the court makes a finding that there was unfair termination of employment, a month one (1) pay in compensation is due as held in the case of **carole Nyambura Thiga versus Oxfam [2013] eKLR**.

Determination

23. It is common cause that upon the claimant retirement with the respondent Ministry of East African Community (Ministry) she was issued with letter dated 3rd April, 2009 instructing her to continue with her duties in the ministry under the project run with DFID. This was pending arrangements to prepare a contract for the claimant's signature. Such contract was not prepared and after ten (10) months and despite the claimant indicating her financial position and constraints, there was no contract agreed upon by the parties.

24. It is also common ground that the claimant was issued with letter dated 13th November, 2009 setting out that she had been retained on short term basis to enable the ministry complete the project with DFID. The claimant was also directed to submit a detailed report to facilitate her payments. S

25. The payments due to the claimant for her services with the respondent as retained were not resolved and on 19th July, 2010 a meeting was convened under the Ministry and with the attendance of a representative from Treasury to negotiate the terms and salary due to the claimant. A resolution was agreed to the effect that the claimant be paid a gross salary of kshs.400, 000.00 per month. This position was communicated to the DFID who reverted and offered to pay 5,500 British Pounds.

26. By letter dated 3rd April, 2009 the Ministry was clear in its engagement of the claimant on short-term contract. The claimant was to be retained under the Ministry's programme with DFID in drafting the Ministry's Strategic Plan and to assist on matters of financial procedures in the Ministry. As a result of this engagement, the claimant was to be issued with a contract under the programme.

27. From this letter, the claimant was at work until 13th November, 2009 when the ministry issued another communication to the effect that;

RE: RETENTION ON SHORT TERM CONTRACT – DFID

My letter to you ref No. ... Dated 3rd April, 2009 on the above subject refers.

The spirit of the above letter was to retain your services on short term basis to enable us compete the following:

(i) ...

(ii) ...

(iii) ...

The purpose of this letter is to request you to submit a detailed report on the accomplishments in the above mentioned areas to enable this office notify DFID to facilitate your payment. ...

27. Further to the above communication from the Ministry, the claimant did a detailed reply to the same vide a letter dated 8th December, 2009. The gist of the letter is that the claimant felt frustrated for not having been issued with a contract and had not been paid over the months of tedious duties. On 7th January, 2010 the respondent Ministry replied and asked the claimant to submit her fee note so that she could be paid for the tasks she had accomplished. She was also required to submit a short report.

28. By memo dated 28th January, 2010 the claimant reported to the ministry and permanent secretary that she had been removed from her office. This letter and memo is received on equal date.

29. Effectively, the claimant was not able to access her office for continued duties as of 28th January, 2010. Her access to the car park was also removed.

30. There is no response to the memo dated 28th January, 2010. The claimant followed up with several other letters and emails.

31. This was followed by a meeting held on 19th July, 2010 between the claimant and representatives from the Ministry and Treasury. The agenda related to the claimants employment contract. It was noted that the claimant remained in the employment of the ministry upon retirement from 1st April, 2009 until 29th January, 2010 when she was verbally directed to vacate her office. The terms of engagement had not been defined. The meeting resolved that the claimant should be paid a gross salary of Kshs.400, 000.00 for the 10 months in service less taxes due and that the permanent secretary in the respondent ministry would receive these resolutions for consideration.

32. On 15th September, 2010 the permanent secretary wrote to DFID in affirmation of the resolutions passed on 19th July, 2010 and that the claimant should be paid Kshs.400,000.00 for 10 months.

33. On 7th March, 2011 DFID replied and agreed to pay £5,500 to the claimant for the accomplished work. The DFID also acknowledged that the claimant had not been issued with a written contract for the duration of her work under the project.

34. On 22nd March, 2011 the ministry and permanent secretary wrote to the claimant on the offer to pay £5,500 only as compensation for her work. Further by letter dated 4th May, 2011 the respondent permanent secretary informed the claimant that the offer by the DFID to pay £5,500 lapsed end of April, 2011.

35. There was thus no agreement with regard to the claimant's payment.

36. The commencement of the claimant's employment with the respondent ministry upon her retirement was vide letter of 3rd April, 2009. The conditions were that a short term contract would issue to the claimant.

37. Section 8 of the Employment Act, 2007 allow an employer to offer an employee employment by oral or written contract. However, under section 9 of the Act, where a contract of service is for a period exceeding three (3) months or more, it should be in writing. Section 9 (1) (b) and (2) provides as follows;

(b) Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months?

Shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3). [Underline added].

38. It cannot therefore be upon the claimant as the employee to draw her own contract of employment. Rather the law vests the duty upon the employer to draw the employment contract with its particulars and issue the same to the employee for the employee to give her consent. This was not the case herein.

39. The claimant continued in the service of the respondent and its partners the DFID following letter dated 3rd April, 2009. For 10 months she remained without a written contract setting out her terms and conditions of employment. For the entire duration the claimant was not paid a salary, allowance or any form of remuneration in compensation for her labours. The legal duty vested upon the respondent as the employer was not executed. This can only be defined as engaging in servitude a conduct specifically prohibited under the Constitution, 2010. Though not specifically pleaded, the fact of engaging the claimant under the promise to issue and short term contract setting out the terms is regulated under section 8, 9 and 10 of the Employment Act, 2007. The oral agreements between the parties having gone beyond the allowed threshold, the respondent had the duty to draw and issue a written contract to the claimant which they failed to do. The continued engagement of the claimant under oral terms and the failure to pay the due salaries and allowances, by application of section 37 of the Employment Act, 2007 the claimant became protected.

40. The respondent initiated the meeting held on 19th July, 2010. It was to negotiate on the terms of the claimant's engagement. What is clear is that these negotiations were being undertaken after the fact of employment. Injury upon the claimant had already been occasioned. Employment without payment of dues and termination without payment of owing dues.

41. The resolution to therefore pay the claimant kshs.400,000.00 per month for the 10 months of service I find to be fair and reasonable and based on the provisions of section 9(2) of the Employment Act, 2007. The counteroffer by DFID to pay £5,500 is without the claimants consent as by law required.

42. For the duration of 10 months in the service of the respondent, the claimant is entitled to the resolved payment of kshs.400, 000.00 per month. All adds up to Kshs.4, 000,000.00. Such an amount is subject to the provisions of section 49(2) of the Employment Act, 2007.

43. The claimant with approval of the respondent amended cause 6 of the Memorandum of claim and is seeking compensation for unfair termination of employment. As set out above, where an employer fails to abide clear provisions of the law and such is without justification, there being no genuine reason(s) advanced as to why a written contract did not issue to the claimant as required in law, such conduct amounted to unfairness.

44. The protection granted under section 37 of the Employment Act, 2007 to an employee who is engaged under an oral contract is to the effect that all rights under the Act are due to such an employee. Such includes the provisions of section 45 of the Act where termination of employment occurs due to no fault of the employee.

45. For the unfair termination of employment that lacked in substance and due procedure, the claimant having served for 10 months, a compensation of one (1) months equivalent salary awarded above at kshs.400,000.00 is hereby found appropriate and in accordance with the provisions of section 49 of the Employment Act, 2007.

Accordingly, judgement is hereby entered for the claimant against the respondent with an award of kshs.4, 000,000.00 due salaries and kshs.400, 000.00 compensation. The amounts awarded shall be subject to section 49(2) of the Employment Act, 2007. Costs to the claimant.

Delivered in open court at Nairobi this 18th day of May, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:

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