



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 195 OF 2015

ELIAS BENEDICT MAHAGA.....CLAIMANT

- VERSUS -

NORTHERN NOMADIC DISABLED PERSONS ORGANISATION....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th May, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 17.02.2015 in person. The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs. 320,000.00 being Kshs.20,000.00 salary in lieu of notice, Kshs. 60,000.00 being pay for the 3 months of unexpired contract of service, and 240,000.00 being 12 months' pay for unfair termination.
- b) Costs and interest.
- c) Any other relief as the court may deem just.

The respondent filed the statement of response on 14.03.2017 through Ibrahim, Issack & Company Advocates. The respondent prayed that the suit be dismissed with costs.

It is not disputed between the parties that on or about 01.04.2014 the respondent employed the claimant at a monthly salary of Kshs. 20,000.00. It is further not disputed that the claimant served the respondent with loyalty and diligence until 09.09.2014 when the contract of employment was terminated.

The first dispute between the parties is whether the termination was unfair.

The respondent's case is that the claimant was engaged as a voluntary worker effective 01.04.2014 with a monthly allowance of Kshs.20,000.00. Further, the engagement was on probationary service and liable to confirmation subject to positive appraisal.

The Court has perused the volunteer contract dated 01.04.2014. It provides for 3 months probationary period. The contract states that it was effective 01.04.2014 to 31.12.2014. The organisational policy also applied to the volunteer contract. The monthly allowance was Kshs.20,000.00.

By the letter dated 07.08.2014 the respondent warned the claimant about reporting at work late; underperformance of duties; failure to collect relevant information required for the project work and failure to write reports; failure to report to work after the due payments as was agreed; and habitual absence from work. The letter stated that the claimant's probationary service would be appraised on 02.09.2014 towards a decision for or against confirmation in appointment. The claimant was appraised and in the meantime a meeting was held on 12.09.2014 at which the claimant was heard about alleged dishonesty in printing respondent's T-shirts and whereby the claimant was accused of persistently seeking to solicit a bribe of Kshs.10,000.00 from the supplier. At that meeting it was concluded that the claimant could not be trusted in dealings on behalf of the organisation. The respondent proceeded to terminate the claimant's employment by the letter dated 15.09.2014. The termination letter addressed to the claimant stated as follows:

“Following a management meeting of the organisation on your recent conduct with a supplier, the decision has been reached to terminate your contract with effect from 15th September 2014. Reference is made to the organizations financial and operations policies and procedures manual section 8.3.4.1 subsection (b) ‘behaviour likely to bring the organization into disrepute’.

Your salary of KES 20, 000/- for the month of September 2014 will be used to offset your loan which stands at a balance of KES 30,000/-. The organization will write off the remaining balance of KES 10, 000/-.

Yours sincerely,

Signed

Harun M Hassan

Executive Director”

The claimant does not dispute that he owed the respondent the loan as set out in the letter of termination.

The Court has considered the material on record. The Court observes that the disciplinary procedure and the appraisal procedure towards the confirmation of claimant’s appointment were underway concurrently. The appraisal dated 02.09.2014 shows that the claimant was to improve in written communication in terms of style and contents; he had to improve in creativity; and was to stop reporting at work late and leaving late so that he had to adhere to office hours except where it was very necessary not to do so. It was also stated that he had to develop a sense of responsibility and team relationship. In the meantime the meeting of 12.09.2014 was held and the claimant was found to have involved himself in the dishonesty in the purchase of the T-shirts as had been alleged against him. Compulsory leave had issued on 09.08.2013 (but which date the respondent’s witness stated was actually 09.08.2014) on account of the T- shirts’ case. The Court has considered the flow of events and finds that the termination was with a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Further, the reasons for termination appear valid as per section 43 of the Act. While making that finding, the Court has considered that the claimant’s letter dated 10.09.2014 addressed to the respondent shows that the claimant disputed the bribery allegations but did not doubt that the supplier in issue had made the allegation to the respondent. Further, on a balance of probability, the Court finds that the claimant was culpable or the respondent had a valid reason in that regard because, while denying the allegations, the claimant at the same time apologised by stating in that letter thus, **“Founded on my humble submission, I wish to register my apologies for the most unfortunate and embarrassing situation to the organisation. However, I reiterate my innocence and would wish to continue offering my professional services with due trust that has been bestowed on me.”**

Further, the Court has re-examined the terms of the contract. The probationary service was for 3 months starting 01.04.2014. The 3 months of probation were ending on or about 01.07.2014. The confirmation in appointment was subject to an appraisal which was underway but a decision had not been made in that regard. The Court has considered all those emerging issues including the allegations about bribery and returns that the findings by the respondent in that respect amounted to adverse appraisal. In any event section 42(1) of the Act provides that the provisions of section 41 of the Act on notice and hearing did not apply to termination of a probationary service. Thus, though the Court has found that section 41 of the Act had been complied with, the Court further returns that the termination in anyway amounted to a termination of the probationary service on account of the adverse appraisal including the bribery allegations that had emerged against the claimant. Hence the Court returns that the claimant was not entitled to a claim that the termination had been unfair.

The court has considered all circumstances of the case and there will be no order as to costs.

In conclusion, the claimant’s memorandum of claim filed herein on 17.02.2015 is hereby dismissed with no orders on costs.

Signed, dated and delivered in court at Nairobi this Friday 11th May, 2018.

BYRAM ONGAYA

JUDGE