



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 233 OF 2017**

**MICHAEL MAKOKHA ODERA.....CLAIMANT**

**VERSUS**

**ATTORNEY GENERAL (sued on behalf of the Ministry of**

**Environment and Mineral Resources).....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 21.2.2013 seeking declaration that his contract of service had been unfairly and unlawfully terminated by the respondent on 17.7.2012. He further sought damages for the unfair termination plus salary for the days worked in July 2012. The respondent denied the alleged unfair and unlawful termination and averred that the termination was on account of gross misconduct and that all terminal benefits were paid to the claimant. She therefore prayed for the suit to be dismissed with costs.

2. The issues for determination herein are whether the termination of the claimant's contract of service was unfair and unlawful and whether the reliefs sought ought to be granted. The suit was heard on 19.3.2018 and 10.4.2018 when the claimant testified as Cw1 and the respondent called her Chief HR Management Officer Mr. Henry Ndeto Nguti who testified as Rw1. Thereafter counsel for both parties filed written submissions.

**Claimants Case**

3. Cw1 testified that is a practicing Consultant and Researcher in Climatic Change and Management. By a contract dated 2.1.2012, he was employed by the respondent as Director of Climatic Change for a period of 12 months. His salary was Kshs.440,000 per month.

4. He further testified that in the middle of his contract, he was invited as a speaker in Italy in his own capacity as a leading Authority in Climatic change and also as part of his work of leading the Kenya Team from his Ministry. All his expenses for the said trip were met by the organizers. Cw1 immediately wrote a letter to the Permanent Secretary (PS) in charge of the respondent Ministry seeking permission to travel.

5. In the meanwhile, Cw1 applied for visa and air ticket in preparation for the travel. He also organized his team to continue when he was abroad. The trip was for only three days. The PS never responded to the request for the permission to travel until the last day at 7.30 p.m. when his Secretary send a text message (sms) to the claimant telling him that PS had declined to grant the permission to travel. However, Cw1 travelled to Italy after considering the amount of money he had spent in the preparation, and which could only be refunded on arrival in Italy. Other officers from other ministries also travelled to Italy with him.

6. While in Italy, Cw1 received a termination letter dated 17.7.2012 via email, which was also circulated to his peers in the Google address. No disciplinary hearing was accorded to him before the said termination nor was he served with any prior warning, or show cause letter. He appealed against the termination but his appeal was dismissed via letter dated 3.9.2012 written by the Director HR Management. He contended that the termination was unfair and prayed for compensation. He further contended that his trip to Italy did not affect his work because he had organized the operations in his office and his juniors.

7. On cross examination, he admitted that he never received any written approval to travel to Italy. He further admitted that clause 6 of his contract of service provided for termination on account of absence from work without permission. He further admitted that he was paid salary for the 17 days worked in July 2012 plus one month's salary in lieu of notice totaling to Kshs.681,290.30. He also admitted that he received letters dated 30.4.2012 and 21.5.2012 complaining about his performance. He however contended that if one fails to meet his

performance targets, he should be given hearing after which disciplinary action can be taken against him. He further contended that he should have been denied pay for the 3 days he was abroad and not terminated. He denied that he did not interact well with his colleagues at work and contended that they held weekly meetings and also interacted via email.

### **Defence Case**

8. Rw1 confirmed that the claimant was appointed by the respondent as Director Climatic Change for one year contract starting 2.1.2012. He however contended that on 30.4.2012 and 21.5.2012, the PS wrote to the claimant complaining about his performance and inviting him for discussion on the matters. Thereafter the claimant travelled abroad without prior written authority and on 17.7.2012 he was terminated under clause 7(1) of his contract which provided for termination by one month notice or payment of salary in lieu of notice. He maintained that the reason for the termination was poor performance and travelling abroad without prior authority. He further maintained that the termination was procedural because the claimant was paid one month salary in lieu of notice.

9. On cross examination, Rw1 admitted that he was not employed by the respondent Ministry when the claimant was terminated. He however contended that his testimony was based on the records at the HR's office. He further contended that the claimant was directly answerable to the PS who wrote letters complaining about his performance and invited him to discuss his roles and give him guidance. He however admitted that the meeting between the two never took place. He further admitted that there cannot be performance evaluation before the roles and responsibilities are known. He admitted that there was no evidence to prove that the claimant's performance review was done in June 2012. He further admitted that the claimant was terminated before being given a chance to defend himself. He finally admitted that the claimant never took any leave during his service.

### **Analysis and Determination Unfair termination**

10. The first issue for determination is whether the claimant's contract of service was unfairly and unlawfully terminated by the respondent. Under section 35 and 36 of the Employment Act, either the employer or the employee has right to terminate the contract of service by serving notice in writing commensurate the interval of payment of salary or as provided under the contract of service. However, if the employer terminates the contract on ground of misconduct, poor performance or physical incapacity, the employee is entitled to be notified of the reason and be accorded a chance to defend himself under section 41 of the Act.

11. In this case, termination letter cited two reasons for termination including absence from work without authority and poor performance for 6 months. The cited reasons placed the termination of the claimant's service under the mandatory provisions of section 41, and 45 of the Act.

12. Under section 45(2) of the Act, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid and fair reason is one which relates to the employee's conduct, capacity and compatibility or the employer's operational requirements. Fair procedure on the other hand refers to compliance with section 41 of the Act which basically refers to explaining the reason for which termination is under consideration and thereafter according the employee a chance to defend himself before the termination is decided.

13. The claimant has admitted that he travelled abroad in July 2012 without prior written approval. Without even considering to the alleged poor performance, the absence from work without prior permission was valid and fair reason to justify the termination of the claimant's contract of service under section 44(4) (a) of the Act.

14. However, as admitted by Rw1, the termination was done without according the claimant a chance to defend himself. Consequently, I find and hold that the respondent has failed to prove on a balance of probability that she followed a fair procedure before terminating the claimant's contract of service and that rendered the said termination unfair within the meaning of section 45 of the Act.

### **Reliefs**

15. The second issue for determination is whether the claimant is entitled to the reliefs sought in his suit. In view of his admission that he was paid salary for 17 days worked in July 2017 plus salary for one month in lieu of notice, the related prayers are dismissed.

16. I however award him 4 months' salary compensation for unfair termination of his contract being  $Kshs.440,000 \times 4 = Kshs.1,760,000$ . In awarding the said compensation, I have considered the fact that he worked for only 7 months and that he contributed to the termination through misconduct. In addition, I have considered that he had reasonable expectation to continue working for the 5 months before the lapse of his contract.

### **Conclusion and Disposition**

17. For the reasons that the claimant's contract of service was unfairly terminated, I enter Judgment for him in the sum of Kshs.1,760,000 plus costs and interest from the date hereof till payment in full. The said sum shall be subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 17th day of August, 2018**

**ONESMUS N. MAKAU**

**JUDGE**