



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 358 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

ANDREW MWANIKI GACHUBA.....CLAIMANT

VERSUS

NATIONAL OIL CORPORATION OF KENYA...RESPONDENT

JUDGMENT

The claimant was employed by the respondent, a state owned limited liability company, as Procurement Manager on 2nd February 2009. The appointment was on a fixed term contract of three years renewable. His gross salary was Kshs.187,000. The contract was subject to a probation period of six months. The claimant's probation period was extended for a further six months from 17th September 2010 to 13th March 2011.

The claimant's contract was terminated letter dated 4th November 2010 on grounds of poor performance. Prior to the termination of employment the claimant underwent performance evaluation by the respondent's Managing Director on 1st and 2nd September 2010. The said evaluation report recommended the termination of the claimant's employment contract. However the board resolved that his probation be extended for six months instead.

The claimant was aggrieved by the termination of his employment contract and filed the instant suit in which he prays for the following remedies –

1. That the Respondent be ordered by the court to his job. The Claimant's claim is therefore for reinstatement and in lieu thereof he be paid dues as hereunder –

- (a) One months' salary in lieu of notice.....Kshs.192,000
- (b) Service or severance pay for year ($\frac{1}{2}$ x 19,200)..... Kshs.192,000
- (c) Unpaid salary (1st - 4th November 2010)..... Kshs.25,600
- (d) Golf Club membership fee..... Kshs.250,000
- (e) 12 months salaries compensation.....Kshs.2,304,000
- (f) Gratuity for 21 months at 31%.....Kshs.715,930
- (g) Unpaid leave.....Kshs.192,000
- (h) Unpaid leave allowance..... Kshs.24,000
- (i) Balance of contract period up to 1st February 2012
being 15 months at 192,000.....Kshs.2,880,000

(j) Gratuity on balance of contract period and

31% of salary..... Kshs.564,975

Total Kshs.6,775,530

2. That the respondent be ordered to issue the claimant with a certificate of service.

3. That the respondent pays to the claimant the costs of this cause and interest.

Claimant's Case

In both the memorandum of claim and in his testimony the claimant states that he was competitively recruited by the respondent from his previous engagement as Supplies Officer II (SOII) at Kenya Pipeline Company Limited from where he resigned to join the respondent. He states that during probation he performed his duties diligently but the Managing Director and Human Resources Manager did not issue him with a job description or performance targets within two months from the start of his contract. He states that in the absence of the performance contract and job description he relied on the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal Regulations 2006, the Supplies Practitioners Management Act, 2007, the Public Officers Ethics Act, 2003 and the general guidelines of the Public Procurement Oversight Authority in the performance of his duties.

The claimant testified that due to his strict adherence to law and regulations he earned the wrath of the Managing Director, the Deputy Managing Director and some of his senior colleagues because he opposed illegal and irregular procurements as follows –

(i) Procurement of multi-million petroleum transport services. In March 2009, the claimant refused to draft service contract because the procurement had not been approved by the respondent's tender committee as required under the law.

(ii) Procurement of conference materials worth Ksh.6 million for East Africa Petroleum Conference (EAPC). In April 2009 the claimant refused to issue purchase orders to vendors because the materials were irregularly and illegally single-sourced by the Deputy Managing Director (later Acting Managing Director) without any competitive bids at all and without approval by the respondent's tender committee as required under the law.

(iii) Procurement of petroleum products. Between February 2009 and November 2010, the claimant opposed the lack of transparency in the procurement of diesel and liquefied petroleum gas (LPG) worth billions of shillings and refused to issue Purchase Orders or Good Receipt Notes (GRN) illegally procured.

(iv) Variations to contract for construction of AGO tank at the Respondent's Nairobi National Terminal (NNT). In April 2009, the Claimant refused to issue Purchase Orders because the variation was illegal as it was more than 15% of the original contract sum allowed by law and the variation had not been approved by the Respondent's Tender Committee as required in law.

(v) Procurement of fencing works at Tassia plot. In January 2010, the Claimant refused to issue Purchase Order because the procurement had not been approved by the Tender Committee as required in law.

(vi) Procurement of Total Kenya petrol stations worth Ksh.500 million. In October 2010, the claimant refused to table before Tender Committee the acquisition of the petrol stations, retrospectively. Further, he refused to issue Purchase Orders because there was no tendering, valuation and approval of the same by the Tender Committee as required in law.

(vii) Management of maintenance and works contracts. Between February 2009 and November 2010, the claimant insisted that procurement department be included in the implementation, management and monitoring of maintenance and works contracts as required in law.

(viii) Acquisition or leasing of land and/or petrol stations. Between February 2009 and November 2010, the Claimant opposed acquisition or leasing of land or petrol stations before conducting valuations and following due diligence.

The claimant testified that as a result of his strict position on compliance with procurement regulations he was frustrated by not being issued with a job description until April 2010, was not evaluated for mid and end of probation or at the end of fiscal year 2008/2009 and therefore had no targets for three quarters of the 2009/2010 fiscal year; was not confirmed at the end of his probation period as required under the respondent's ISO Procedure Manual, the Managing Director refused to sign his performance targets for the financial year 2009/2010 until 12th April 2010 in contravention of the respondent's ISO Procedure Manual.

The claimant states that the Managing Director further refused to approve the annual procurement plans for financial year 2009/2010 as required by law making it impossible for the claimant to be objectively evaluated, and then sent the claimant a warning letter on 24th June 2010 for delay in procurement of goods and services, which he protested against.

The claimant testified that the Managing Director evaluated him on 1st and 2nd September 2010 for purposes of confirmation days after the Board declined to renew the Managing Director's contract. He testified that the Human Resources Manager refused to appoint an Appeals Committee to address his documented protests against what he considered as an unfair evaluation report which was tabled before the respondent's Human Resources Committee of the Board of Directors on 14th September 2010, recommending the termination of his contract. The Committee resolved to extend his probation instead, notwithstanding that the probation period had lapsed on or about 1st

August 2009, six months after commencement of his contract. The claimant protested against the extension of his probation by letter dated 1st October 2009 but received no response.

He testified that the Acting Managing Director signed his performance targets for the year 2010/2011 on 6th October 2010, some three months into the financial year and on 4th November 2010, the Acting Managing Director terminated his employment. His appeal against termination on 5th November 2010 was not responded to. On 8th November 2010, the respondent published his name, photograph and identity card number to notify the public that he had ceased being its employee, a move the claimant avers, depicted him as a dishonest person and which led to him being shunned by the public.

It is the claimant's averment that he was discriminated in violation of Section 5 of the Employment Act by the respondent's refusal to pay his club membership while the respondent paid for club membership for the Operations Manager, the Human Resources Manager, the ICT Manager, the Internal Audit Manager, the Sales and Marketing Manager and the Exploration Team Leader, all of whom had applied for club membership at the same time as the claimant. The claimant stated he was forced to pay for his club membership from his own funds which he seeks to be reimbursed by the respondent.

The claimant avers that the Human Resources Committee of the Board heard and considered his case without inviting him to defend himself or make representations to the committee thus violating his rights to a fair and procedural hearing under Sections 41, 43, 44 and 45 of the Employment Act. It is further the averment of the claimant that the extension of his probation was in violation of Section 42(2) and (3) of the Employment Act.

The claimant further testified that he believes the termination of his employment was triggered by an adverse report in the Standard Newspaper of 2nd November 2010, which questioned the performance, and capabilities of the immediate former Managing Director and his Deputy who was the Acting Managing Director at the time of the termination of the claimant's employment. The expose in the Standard Newspaper questioned the irregular employment of the two, that is the immediate past Managing Director and the Acting Managing Director way back in 2003.

Respondent's Case

It is the respondent's submission that in view of the fact that the claimant's employment was terminated during probation period it was under no obligation to give reasons for the termination.

Determination

I have considered the pleadings, the evidence on record and the submissions by the parties. I have further considered the authorities cited. The issues arising for determination are the following –

1. Whether or not the claimant was on probation at the time of termination.
2. Whether the termination of the claimant's contract was fair.
3. Whether the claimant is entitled to the prayers sought.

Probation

Section 42 of the Employment Act provides for probation in employment as follows –

42. Termination of probationary contracts

(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

The claimant's contract provided under "*Terms of Service*" as follows –

"Terms of Service

This appointment is on contract for a period of three (3) years. During the first six months you will be on probation. During this period, your performance will be assessed. Should your performance be unsatisfactory as determined by the employer, the employer may terminate the employment, notwithstanding any conditions stated herein."

Both the claimant's contract and Section 42 of the Act state that probation is six months. The claimant was supposed to be assessed during the six months' probation period for purposes of confirmation. The letter does not provide for extension of the probation but states that should the claimant's performance not be satisfactory the respondent may terminate the same.

The implication of the letter of appointment as read with Section 42(3) is that the probationary contract would be automatically confirmed at the end of six months if the contract is not either terminated or the probation period is not extended. This therefore means that the claimant's probation period expired at the end of six months, the respondent's failure to assess him notwithstanding.

It is instructive that the claimant complained about ill motive of his performance assessment on 1st and 2nd September 2010 purportedly for confirmation of his employment, twelve months after his probationary contract period expired in August 2009, having reported in February 2009.

I find that the claimant's probation period expired at the end of August 2009, six months after he reported for duty in February 2009. He was therefore not on probation when the respondent purported to extend his probationary period on 21st September 2010 or on 4th November 2010 when the respondent purported to terminate his probationary contract.

2. Whether the termination of the claimant's employment was unfair

The termination of the claimant's employment had been mooted right from the time he was assessed on 1st and 2nd September 2010, more than a year after his probation period of six months expired. The minutes of the respondent's special Human Resource Board Committee meeting held on 14th September 2010 state as follows –

3.1. "The HRM presented the 2009/2010 performance appraisal report for the Procurement Manager. From the appraisal report, the supervisor recommended termination of his employment contract due to below average performance.

3.2. It was noted that end of probation appraisal was not conducted as per procedure. This was the first appraisal held between the supervisor and the employee.

3.3. It was mentioned there may have been notable differences between the supervisor(Former MD/CEO) and the Procurement Manager

3.4. Recommendations: The committee deliberated the matter at length and agreed as follows going forward:

3.5. The Acting Managing director to sign performance targets with the procurement manager and agree on clear and specific deliverables.

3.6. The probation period be extended by a further six (6) months

3.7. The performance to be evaluated after six (6) months effective 14th September 2010.

3.8. The procurement Manager indicated in the appraisal that he was working on the report highlighting his concerns as far as the appraisal was concerned. It was agreed that he submits the report to the management."

It is evident from the minutes that the committee noted the bad blood between the claimant and the immediate past Managing Director who carried out the performance appraisal.

The claimant has complained in his memorandum of claim and in his testimony that there was bad blood between him and the Managing Director, the Deputy Managing Director and some of his colleagues because of his insistence on compliance with procurement procedures as provided by law, regulations and guidelines.

It is further noted that although the claimant was supposed to be evaluated after six months from the date of the purported extension of his probation letter dated 1st October 2010, his employment was terminated by another special meeting of the HR Board Committee held on 3rd November 2010, handing six weeks after the decision to extend his probation. The minutes of the meeting does not contain an agenda, but the agenda appears to have been some negative news that had been published in the media. The minutes are reproduced below –

"MINUTES OF THE SPECIAL HR BOARD COMMITTEE MEETING HELD ON 3RD NOVEMBER 2010 AT AON MINET HOUSE, NAIROBI AT 10.30 PM

PRESENT

1. Ms. Fatuma Hassan – Director Signature SIGNED (Chairperson)

2. Ms. Gaciku Kngari – Director Signature SIGNED

3. Eng. Stanley Kamau – Director Signature SIGNED

4. Mrs. Sumayya Athmani – Acting Director Signature SIGNED

The meeting started at 10.30 am.

MIN/01/03/11/2010: STAFF ISSUES

1.1.1. The Directors held discussions on various staff issues touching on performance and compliance with regulations and policies among others. The directors also noted the increasing instances of leakage of company information to un-authorized persons. Following detailed deliberations it was resolved that:

1.1.1.1. The Procurement Manager, Mwaniki Gachuba, whom the directors noted was still on probation, and who had still not been confirmed 19 months from his appointment, be dismissed on the basis of lack of performance:

1.1.1.2. The Systems Administrator, Cox Kibunga, be terminated on the basis of lack of performance:

1.1.1.3. The SHEQ Officer, Samuel Odumba, be terminated on the basis of gross negligence in performance of his duties.

1.1.1.4. The directors resolved that each of the above three be terminated forthwith and payment given to them in lieu of notice.

1.1.1.5. The Operations Manager who was also acting as the Supply Planning Manager be issued with a warning letter with respect to the recent stock out situation at the petrol stations.

There being no further business the meeting ended at 6.00 p.m. The date of the next meeting will be circulated accordingly.

Minutes confirmed as a true record on the 3rd day of November 2010.

SIGNATURES

Ms. Fatuma Hassan – Director Signature SIGNED (Chairperson)

Ms. Gaciku Kngari – Director Signature SIGNED

Eng. Stanley Kamau – Director Signature SIGNED

Mrs. Sumayya Athmani – Acting Director Signature SIGNED”

The minutes express the reason for termination of the claimant’s employment as lack of performance although the claimant had not been assessed after extension of his performance. This reason was however not stated in his letter of termination.

The claimant was never called to the meeting of 14th September 2010 or the meeting of 3rd November 2010 where his performance was discussed and decisions made to extend his probation and to terminate his employment respectively.

The claimant testified that the termination of his employment was triggered by the adverse reports appearing in the Standard Newspaper of 2nd November 2010. In his memorandum of claim the claimant stated that –

“Termination of Claimant’s employment was not valid or procedurally fair or in accordance with justice.

The Claimant believes that termination of his employment was triggered by the adverse press reports in The Standard Newspaper on 2nd November 2010 which report questioned the performance capabilities of both the Respondent’s former Managing Director and the Acting Managing Director giving their irregular appointment way back in 2003.

On 2nd November, 2010, the Respondent's Acting Managing Director compelled all managers including the Claimant to write to her in confidence and indicate who they suspected to have leaked the information to the newspaper and also to propose the appropriate disciplinary action to be taken against the suspect.”

Section 41 requires that an employee is given a hearing. He was not asked to show cause why his employment should not be terminated for reasons given. No fresh evaluation report was presented to the Human Resource Committee other than the one the Committee noted was appeared by the outgoing Managing Director who had differences with the claimant. The termination of the claimant’s contract employment was thus procedurally unfair for lack of a fair hearing.

Section 43 provides that an employer proves the reason(s) for termination. The minutes of the respondent’s Human Resource Committee of the Board held on 2nd November 2010 gives the reasons for termination as performance yet the claimant had not been assessed as resolved in the meeting held on 14th September 2010.

The termination of the claimant’s employment was thus also unfair because the reasons as given in the meeting of the Human Resource

Committee held on 3rd November 2010 had not been verified by giving the claimant an opportunity to respond thereto and further without assessing him as agreed at the meeting on 14th September 2010. The termination was further in violation of Section 42(1) as read with 45(3) of the Employment Act, which provides as follows –

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

The termination of the claimant's employment having been wanting both procedurally and without valid reasons, was unfair in terms of Section 45(2) of the Employment Act.

I therefore find the termination of the claimant's employment unfair both procedurally and substantively.

Remedies

The claimant prayed that several documents be expunged from his employment records. It is a legal requirement that employers keep employment records and expunging documents from employment records would violate the provisions of Section 74(1) of the Employment Act. The court cannot make an order whose execution would violate the law.

In any event, these are not the claimant's records and he cannot demand that they be expunged. Expunging the documents from the records of the respondent would further not add value to the claimant who is no longer working with the respondent and is unlikely to be adversely affected by the said records. For these reasons the prayer is declined.

The claimant further prayed for one month's salary in lieu of notice in the sum of Kshs.192,000. The claimant confirmed in court on 22nd January 2013 that he had been paid Kshs.187,000 in lieu of notice and would only pursue the balance of Kshs.5,000 under this head. He however did not raise this either in his testimony or submissions. I find that the claimant was paid one month's salary in lieu of notice and dismiss the claim.

The claimant also prayed for severance or service pay at the rate of ½ month's salary for two years. Having not been declared redundant and having been both a member of NSSF and entitled to gratuity at 31% of salary, the claimant is not entitled to severance pay under Section 40(1)(g) or service pay under Section 35(5) of the Employment Act. The prayer is dismissed.

The claimant confirmed that he was paid for four days worked in November 2010. He further confirmed payment of gratuity and unpaid leave.

The claimant further prayed for payment of the balance of his contract term. The contract having provided for a termination clause, the claimant is not entitled to payment of the unexpired term. The Employment Act does not provide for the same but instead provides for compensation for unfair termination. The prayer for salary, allowances and gratuity for the unexpired term of contract are thus dismissed.

The prayer for unpaid leave allowance was not proved and is dismissed. So is the prayer for club membership which was not proved as the claimant did not either prove that his terms of contract provided for the same. All he proved was that he was discriminated by his club membership not being paid while payment was made for other officers at his level. The prayers for days worked and leave are thus dismissed.

The prayer for reinstatement is also rejected in view of the fact that the term of the claimant's contract lapsed upon expiry thereof on 1st February 2012. In lieu thereof and taking into account all the circumstances under which the claimant's employment was terminated including the callous attitude of the respondent towards the claimant and his discrimination, I award him compensation equivalent to 12 months' salary in the sum of Kshs.2,304,000.

The claimant prayed for costs. The claim was filed by counsel but the claimant later on appeared in person. The can therefore not get costs under the Advocates Remuneration Order. However in recognition that he was initially represented by counsel and also incurred expenses such as filing and service fees, I award the claimant a sum of Kshs.100,000 to cover his expense for the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE