



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 53 OF 2014

DR KENNEDY AMUHAYA.....CLAIMANT

VERSUS

AFRICAN MEDICAL AND RESEARCH FOUNDATION.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the respondent as Chief of Party APHIA plus IMARISHA project under a two year fixed term contract running from 10.4.2012 to 9.4.2014. However the contract was prematurely terminated by the respondent on 1.7.2013 on ground of poor performance. Aggrieved by the said termination, the Claimant brought this suit on 22.1.2014 seeking declaration that the termination was unfair and prayed for :-

(a) 2 month's salary in lieu of notice ...USD 16200

(b) 25 leave days ... USD 9204.50.

(c) 17 off days and public holidays worked ... USD 6259.06.

(d) 12 months salary compensation for unfair termination ...USD 97200. TOTAL USD. 1196569.00

(e) Pension dues

(f) Costs and interest

2. The respondent denied the alleged unjust termination and averred that the termination was done on the basis of poor performance by the Claimant and after giving him a chance to defend himself. She prayed for the suit to be dismissed with costs save for the claim for:

(a) 2 months salary in lieu of notice.

(b) Salary upto 1.7.2013.

(c) Accrued leave

(d) Pension due in accordance with the Trust Deed and Rules.

3. The suit was heard on 20.4.2018 and 10.5.2018 when the Claimant testified as CW1 and the respondent Human Resource Manager Mr. Shadrack Kiptoo Kirui testified as RW1. Thereafter both parties filed written submission which have carefully considered herein alongside the evidence tendered

4. CW1 testified that he was employed by the respondent as the Chief of Party under a 2 years fixed term contract running from 10.4.2012 to 9.4.2014. He contended that the contract did not allow variation except with mutual agreement. His salary was **USD 8100** per month.

5. CW1 further testified that on 24.5.2013 he received a letter redeploying him from position to that of Project Manager in another project

but he declined the redeployment. Thereafter he was served with a show cause letter dated 6.6.2013 asking him to show cause why he should not be terminated for poor performance. Subsequently he was invited to a hearing but again he declined to attend because an email had already been circulated stating that he was no longer the Chief of Party. On 2.7.2013 he received a termination stating that he was to be paid outstanding salary in lieu of notice.

6. CW1 also contended that the termination was unfair because the alleged poor performance was not founded on any performance appraisal. That since appraisal in 2012 which scored him excellent, no other appraisal was done in 2013 before the termination. He concluded by stating that he was never served with any prior written warning or placed under any performance improvement plan. He therefore prayed for reliefs pleaded in his claim.

7. On cross examination CW1 admitted that during the October 2012 appraisal, some concerns were highlighted for improvement including relationship between the project and donors. He further admitted that there were some issues which dampened relationships at the workplace. He also admitted that on 20.3.2013 he attended a meeting after their project's Work Plan was rejected where performance relationship with donors and his listening ability were discussed. He further admitted that he received email dated 25.4.2012 from USAID complaining about failure to achieve some targets and another one dated 16.5.2013 from the County Director complaining about his failure to attend Chiefs Breakfast covered by donors despite his earlier confirmation that he was to attend.. He also admitted that he wrote emails admitting his under performance and including apologized for the same including a long delay in sending a programme. Finally he admitted that the respondent was justified to take action to save the APHIA plus project from being stopped by donors but maintained that his dismissal was not justified and the procedure followed was not fair.

Defence Case

8. RW1 complained that Claimant was employed by the respondent for a fixed term contract of 2 years starting 10.4.2012 to 9.4.2014. He further testified that the contract was terminated on 1.2.2013 for under performance. That before that the Claimant was invited to a meeting on 20.3.2013 where his performance was discussed including donors' rejection of project Work Plan, his failure to consult on project matters, his poor external relations with partners and the government, his laxity towards compliance related issues and his failure to bring his team together. That the Claimant took full responsibility for the rejected Workplan.

9. RW1 further testified that the Claimant failed to improve on his performance and on 25.4.2013 USAID Representative M/s. Ruth Tiampati complained about failure to achieve targets of the program and the Claimant wrote admitting errors on his side. That again on 8.5.2013, M/s. Tiampati wrote email complaining about failure to reach him by phone or email.

Thereafter the Claimant failed to attend Chiefs Breakfast hosted by USAID on 15.5.2013 which was a very important monthly meeting to plan and strategize on ongoing projects. That on 15.5.2013 the respondents Company Director wrote to the Claimant about the delay of the programme for donor visit and on 17.5.2013 the Claimant acknowledged the delay and apologized for the long delay.

10. RW1 further testified that due to the challenges in performance it was decided that instead of termination the Claimant services, he be redeployed to the position of Programme Manager – HIV/AIDS TB & Malaria effective 1.6.2013. All the terms of his contract were to remain the same. However the Claimant declined on 3.6.2013 leaving the respondent with no other alternative but to terminate his services.

11. To begin with he was served with a show cause letter dated 6..6.2013 followed by an invitation to a hearing on 18.6.2013 with a fellow employee of his choice. However on 14.6.2013 the Claimant wrote to the respondent indicating his inability to attend the hearing prompting the respondent to write another invitation by letter dated 24.6.2013. Again the Claimant declined the invitation and his services were terminated effective 1.7.2013 with an offer for payment of salary upto 1.7.2013, two months salary in lieu of notice plus accrued leave.

12. RW1, therefore contended that the termination of the Claimant's employment was justified in the circumstances. That the Claimant's poor performance in leadership, communication and management skills were serious that would have jeopardized the projects. He therefore denied the claim for the dues sought and maintained that the Claimant was paid all his entitlement under the contract being 2 months salary in lieu of notice.

13. On cross examination RW1 admitted that under clause 8.3.2 and the respondents policy manual, page 55, before dismissing an employee on ground of poor performance, he must first be served with a warning letter followed by a final warning. He admitted that the Claimant was never given any written warning letter and as such the policy was not followed. He denied that as at 6.6.2013 when the show cause letter was given to the Claimant a decision to dismiss him had to be made.

Analysis and Determination

13. The issues for determination are:-

(a) Whether the termination of the Claimant's contract was unfair.

(b) Whether the reliefs sought should be granted.

Unfair termination

15. Under Section 45(2) of the Employment Act, termination of 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 reason is valid and fair if it relates to employee's conduct, capacity and compatibility or employers operational requirements. Fair procedure on the other had mainly refers to the whole aspect of according the employee a fair hearing before terminating his services.

Reason for the Dismissal

16. In this case, the reason for termination was lack of capacity, that is, poor performance. Although there was no performance appraisal just before his termination, he had failed to improve on certain arrears highlighted by his appraiser in the October 2012 appraisal including leadership, communication and management skills with his team, donors, his supervisors and the Government of Kenya. In particular, he failed to attend crucial meetings with donors, failed to improve quality of his work, delayed in executing his duties like sending programs to visiting donors and failed in improving his communication skills with his team and the external agencies. The Claimant admitted in writing some of the said performance failures and even apologized for the same in writing. Consequently I find on a balance of probability that the respondent has proved on a balance of probability that, the Claimant was guilty of poor performance of his duty and as such the termination was justified by the said valid and fair reasons.

Procedure Followed

17. It is not in dispute that the Claimant was appraised in October 2012 and some areas of concern highlighted for him to improve. There is further no dispute that on 20.3.2013, the Claimant was invited to a meeting where his under performance was discussed followed by a show cause letter on 6.6.2013 where he was asked to show cause why his services should not be terminated for his underperformance. Finally there is no dispute that the Claimant was invited to a hearing in the company of a fellow employee of choice to defend himself on the said under performance but he deliberately declined to attend contending that his fate had already been sealed.

18. Under **Section 41** of the Employment Act, before employer dismisses his employee on account misconduct, poor performance or physical incapacity he must explain to the employee, in a language he understands and in the presence of a fellow employee or Shop Floor union official of his choice, the reason for which the termination of his services is considered and thereafter accord the employee and his chosen companion a chance to air their representations, for consideration before termination is decided. I am in no doubt that the foregoing procedure was complied through the respondent's letters dated 11.6.2013, and 19.6.2013 inviting the Claimant to a hearing but declined the same. In view of the said fair procedure followed and the existence of a valid and fair reason for termination, I do not hesitate to find and hold that the premature termination of the Claimant's contract of service was not unfair as challenged by the Claimant. CW1 alleged that he ought to have been served with warning letter first before the termination. However I find no merits in that argument.

Reliefs

19. In view of the foregoing finding, I decline to make declaration that the termination of the Claimants contract of service was unfair. In addition I decline to award compensation for unfair termination as prayed on the basis of the said finding. I however award the prayer for two months salary in lieu of notice being **USD 16200** and leave days being **USD 7788.461** as prayed totaling to **USD.23988.461**. The claim for pension was admitted and it shall be paid subject to the Trust Deed and Rules of the Pension Scheme. The said awards were not disputed from the start and they were indeed offered by the termination letter. The respondent has alleged that the same has since been paid. I doubt whether evidence of such payment was shown to the court. Nevertheless the sum awarded is now due and payable unless of course if the alleged payment is confirmed before any execution is levied.

Conclusion and Disposition

20. I have found that the premature termination of the Claimant's fixed term contract was substantively and procedurally fair. I have however awarded him the claim for 2 months salary in lieu of notice plus 25 days leave. I therefore enter judgment for the claim in the sum of **USD 23988.461** plus interest from the date hereof. I decline to award costs because the awarded claims were not disputed by the respondent even before the suit was filed.-

Dated, Signed and Delivered in Open Court at Nairobi this 2nd day of November, 2018

ONESMUS N. MAKAU

JUDGE