



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1115 OF 2014

WILSON SHIVACHI MMAITSI.....CLAIMANT

VS

THE MANAGING DIRECTOR SCHOOL

EQUIPMENT PRODUCTION UNIT (SEPU).....RESPONDENT

JUDGMENT

Introduction

1. Wilson Shivachi Mmaitsi, the Claimant in this case was an employee of the Respondent from 1998 until 2010 when his employment was terminated. He brought this claim seeking compensation for unlawful termination of employment.
2. The Respondent filed a Reply on 4th August 2014 and the matter proceeded to hearing. The Claimant testified on his own behalf and the Respondent called Perpetua Sidi Wanaswa.

The Claimant’s Case

The Claimant states that he was employed by the Respondent from September 1998 at an initial daily rate of Kshs. 180 which was later increased to Kshs 350. His employment was terminated on 14th January 2010 without notice. He now claims the following:

- a) 3 months’ salary in lieu of notice.....Kshs. 23,100
- b)15 days’ salary for each year worked (12 years).....46,200
- c) 21 days leave for 12 years.....115,500
- d) House allowance for 12 years.....374,400
- e) Lost employment from January 2010 to 2014.....462,000

The Respondent’s Case

4. In the Reply filed on 4th August 2014, the Respondent admits having employed the Claimant as a

casual and clerk but states that the employment was contractual and renewable every six months. The Respondent further states that the said employment expired in December 2009 as per letter dated 1st July 2009.

5. The Respondent goes on to state that the Claimant was summarily dismissed on 14th January 2010 after being charged with criminal offences relating to willful failure to comply with procurement regulations and making fraudulent payments. The Claimant was subsequently convicted of the offence of fraudulent payment from public revenue for goods not supplied contrary to Section 45(2)(a)(ii) as read with Section 48 of the Anti-Corruption and Economic Crimes Act.

6. The Respondent asserts that the Claimant's dismissal was lawful on account of gross misconduct and that the Employment Act had been complied with. The Claimant's entire claim is denied.

Findings and Determination

7. There are three (3) issues for determination in this case:

- a) the nature and status of the Claimant's employment;
- b) Whether the Claimant's dismissal was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

Nature and Status of the Claimant's Employment

8. It is the Respondent's case that the Claimant was a casual employee retained on a six monthly renewable contract and that at the time of dismissal, there was no running contract.

Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose engagement provide for payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”

10. From the evidence on record, the Claimant was first employed by the Respondent as a casual labourer from 12th October 1998 to 30th October 1998 at a daily rate of Kshs. 180. It would however appear that in the course of time, the Claimant's employment was converted to a term contract of six months each. Letter dated 1st July 2009 which renewed the Claimant's contract for six months confirms this position.

11. It is therefore clear that at the time of leaving employment, the Claimant was no longer a casual employee. He was a regular employee working on renewable contract.

The Dismissal

12. The Respondent's defence to the Claimant's claim is that the Claimant was lawfully dismissed pursuant to conviction of a criminal offence. The Claimant maintains that he was never issued with a dismissal letter.

13. On 23rd January 2010, the Respondent wrote to the Claimant as follows:

“RE: SUSPENSION

This is to inform you that it has been decided that you be suspended from employment of SEPU w.e.f 14th January 2010. The reason for this suspension is that you were charged in a Court of Law on 14th January 2010 for “willful failure to comply with procurement regulations while procuring laboratory equipment worth Kshs. 226,772,450 from Managing Director Vulcan Lab Equipments

Limited and fraudulently making a payment worth Kshs. 75,086,880 to the same supplier for goods not supplied.”

Your contract has not been renewed and therefore terminated (sic). (Signed)

PERPETUA S WANASWA (MRS)

ACTING MANAGING DIRECTOR”

14. Although this letter is referenced ‘*suspension*’ it appears that it also served as a termination letter. The Court was unable to understand why the Respondent chose to take this route because suspension is ordinarily an interlocutory action taken to allow for investigations. It cannot therefore be possible that the letter sending an employee on suspension also serves as a termination letter.

15. Moreover, having been charged under the Anti-Corruption and Economic Crimes Act, the Claimant ought to have been subjected to the disciplinary procedure set out under that Act. Section 62 of the Act provides as follows:

(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case provided that the case shall be determined within twenty four months

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

16. Section 63 of the Act further provides:

(1) A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of conviction pending the outcome of any appeals.

(2) The public officer ceases to be suspended if the conviction is overturned on appeal.

(3) The public officer shall be dismissed if-

(a) the time period for appealing against the conviction expires without the conviction being appealed; or

(b) the conviction is upheld on appeal.

17. It is on record that from the time of suspension, the Claimant was not paid any salary. More significantly, he was suspended and terminated in the same breath. On this account, the Court finds that in handling the Claimant’s case, the Respondent totally ignored the procedure set out in law and as held by **Onyango J** in ***Wilson KC Shollei v Independent Electoral and Boundaries Commission [2014] eKLR*** the termination of employment of a public officer under the Anti-Corruption and Economic Crimes Act must comply with the procedure set out in that Act.

18. The Respondent’s witness, Perpetua Sidi Wanaswa told the Court that the Claimant was not paid any salary after suspension because he was a casual employee. I have already ruled that the Claimant was a regular employee working on renewable contract.

19. Further, although the last contract had expired in December 2009, Wanaswa testified that the Claimant continued working and was at work when he was arrested and charged. The logical conclusion is that the Claimant’s contract had been renewed by conduct of the parties and the line taken by the

Respondent in letter dated 23rd January 2010 that the contract had not been renewed failed to convince the Court.

Remedies

20. Overall, and in light of the foregoing I find that the termination of the Claimant's employment was substantively unlawful and procedurally unfair within the meaning of Section 45 of the Employment Act, 2007. I therefore award him twelve (12) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

21. In the absence of any evidence that the Claimant took his leave or that he was a contributing member of the National Social Security Fund (NSSF), the claims for leave pay and service pay succeed and are allowed.

Regarding the claim for house allowance, the only thing I will say is that since the Claimant's pay was calculated on the basis of a daily wage which does not ordinarily carry an element for house allowance, this claim was not proved and is therefore dismissed. However, in light of the finding that the Claimant was not a casual employee, the Court has adopted 30 days as the multiplier for determining his monthly salary for purposes of this claim.

22. Ultimately I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary as

compensation.....Kshs.126,000

b) 1 month's salary in lieu

of notice.....10,500

c) Leave pay for 11 years &

3 months $(350 \times 21 \times 11 + 350 \times 1.75 \times 3)$82,688

d) Service pay for 11 years of service

$(10,500 / 30 \times 15 \times 11)$57,750

Total.....276,938

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant will have the costs of this case.

25. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF JANUARY 2017

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JUDGE

Appearance:

Wilson Shivachi Mmaitisi (the Claimant in person)

Mr. Juma for the Respondent